Washington and Lee Journal of Civil Rights and Social Justice

Volume 29 | Issue 1 Article 8

Fall 2022

It Just Makes Sense: An Argument for a Uniform Objective Standard for Incarcerated Individuals Bringing Claims Under 42 U.S.C. § 1983

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Abstract

In July 2020, the New York Times published an article on a Department of Justice report detailing the systematic abuse of incarcerated individuals by prison guards within the State of Alabama's Department of Corrections. This report evidences the challenges faced by incarcerated individuals seeking to vindicate their Eighth Amendment rights. In a legal sense, those individuals who turn to the court system for relief face an almost insurmountable burden of proof. This Note begins by surveying the history of excessive force claims under the Fourth, Eighth, and Fourteenth Amendments, as well as deliberate indifference claims under the Eighth and Fourteenth Amendments. This Note then analyzes the success rates of Fourteenth Amendment deliberate indifference claims depending on whether the circuit applies a purely objective standard or a standard with both an objective and a subjective component. Upon the basis of these findings, this Note concludes by advocating for the adoption of a single pronged, objective standard for all individuals seeking to challenge the conditions of their confinement under 42 U.S.C. § 1983.

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* J.D. Candidate, May 2022, Washington and Lee University School of Law. I would like to thank my Note Advisor, Professor Allison Weiss, as well as Professor Franklin Runge, for their incredible support and feedback during the writing process. I would also like to thank all of my friends and family for their patience and encouragement along the way.

I. Introduction

On July 24, 2020, the *New York Times* published an article discussing a report issued by the Department of Justice ("DOJ") detailing the systematic abuse of inmates by prison guards within the State of Alabama's Department of Corrections ("ADOC").[1] In the report itself, the DOJ uncovered numerous instances in which prison guards used excessive force, with each falling into one of three broad categories.[2]

The first category was the use of excessive force against constrained or compliant prisoners.[3] For example, in December

1. *See* Neil Vigdor, *Routine Beatings of Inmates in Alabama Prisons Go Ignored, U.S. Says*, N.Y. TIMES, July 24, 2020 (recounting various incidents of prisoner abuse perpetrated by officers of the Alabama Department of Corrections uncovered by the Department of Justice) [https://perma.cc/2VKJ-Y4LG].

2. *See* U.S. Dep't of Justice, Opinion Letter on Investigation of Alabama's State Prisons for Men, at 10–16 (July 23, 2020) (enumerating instances in which prison guards used excessive force and dividing those instances into three categories: excessive force on prisoners who are restrained or who are compliant; unlawful force as punishment or retribution; using chemical spray inappropriately).

3. *See id.* at 10 ("Using force on a restrained or compliant prisoner who is no longer resisting or presenting a danger is unconstitutional. Correctional officers' use of this kind of unlawful force is a pattern and happens too frequently in Alabama's prisons."); *see also* Williams v. Burton, 943 F.2d 1572, 1576 (11th

2018, a correctional officer punched, kicked, and beat with an extendable baton a handcuffed prisoner in the facility's medical unit.[4] During the incident, the officer reportedly yelled, "I am the reaper of death, now say my name!"[5] A nurse at the scene saw the prison guard "place his palms against the wall and his foot on the side of the prisoner's face to grind the prisoner's head into the floor."[6] A group of nurses eventually intervened, and the correctional officer, appearing agitated, paced back and forth while covered in the prisoner's blood.[7] After telling witnesses that they "had not seen anything," the prison guard left the medical unit and subsequently lied in his report, alleging that he never hit the inmate.[8]

Additionally, in February 2019, a prison guard caught two inmates jumping one of the external perimeter fences.[9] The guard handcuffed the two prisoners and took them into an observation room located across the hall from an office in which three other correctional officers were working.[10] A sergeant working in the office became enraged upon reviewing the security footage of the two prisoners hopping the fence.[11] The sergeant took the key to the observation room and pulled one of the two handcuffed prisoners

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Cir. 1991) (noting that officers violate the Eighth Amendment if the officers continue to use force after the necessity for the coercive action has ceased).

4. *See* U.S. Dep't of Justice, *supra* note 2, at 11 ("Two nurses saw the officer beat the prisoner, and two other nurses could hear the beating from adjacent rooms. The prisoner did not antagonize the officer before the beating and his hands were handcuffed behind his back.").

5. *Id.*

6. *Id.*

7. *See id.* ("The nurse intervened, and the officer briefly removed his foot from the prisoner's head. When the officer tried to step on the prisoner's head again, the nurse sternly told the officer to calm down.").

8. *See id.* ("The officer filed a false incident report stating that he did not hit the prisoner. The body chart and photographs, however, documented clear swelling and abrasions to the prisoner's back and left arm, a bloody nose, and a gouge to his left shin.").

9. *See id.* at 10 ("[A] correctional officer at Elmore saw two prisoners jump a fence to retrieve contraband . . . .").

10. *See id.* ("A lieutenant in the office handcuffed the two prisoners and took them to an observation room across the hall from the office.").

11. *See id.* (explaining the officer's reaction to security footage of the two prisoners hopping the fence).

out into the hallway.[12] The sergeant then shoved the prisoner against the wall, knocking him to the floor, and then beat the prisoner with a baton nineteen times across his entire body.[13] The prisoner defecated himself during the course of the correctional officer's assault.[14] The sergeant also pulled the second handcuffed prisoner from the observation room and struck him three times with the baton, causing the prisoner to collapse to the floor.[15] Four other correctional officers were in the immediate vicinity of, or directly witnessed, this assault.[16]

The second category was the use of excessive force as punishment or retribution.[17] One notable incident in July 2017 involved a correctional officer witnessing an inmate working in the facility's kitchen give another inmate some leftover chicken to eat.[18] The prison guard took the working inmate to the back of the kitchen and forced him to eat all of the remaining leftover chicken; when the prisoner could not do so, the officer slapped him three times.[19]

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12. *See id.* at 11 (demonstrating the officer's actions after entering the room with the prisoners).

13. *See id.* ("The sergeant punched and kicked the prisoner, and then struck the prisoner with a collapsible baton approximately [nineteen] times on his head, legs, arms, back, and body.").

14. *See id.* (detailing the beating of the prisoner and explaining how the prisoner defecated himself as a result).

15. *See id.* at 10–11 ("When the prisoner slid to the floor, the sergeant continued striking him, landing blows to his arms, legs, and abdomen. He also kicked the prisoner as he lay on the floor.").

16. *See id.* at 11 ("Four other ADOC employees . . . watched or were in the immediate vicinity of the beatings but failed to intervene, either verbally or physically. The sergeant who assaulted the prisoners later filed a false report about the incident.").

17. *See id.* at 14 ("ADOC's correctional officers often use force to punish prisoners when the prisoner's response or behavior may not accord with the officer's commands, even though the prisoner does not physically resist or present a reasonably perceived threat to others.").

18. *See id.* at 15 (describing an occasion in which an officer used unlawful force as punishment or retribution).

19. *See id.* ("When the captain questioned the lieutenant and officer about the incident, they admitted to forcing the prisoner to eat the chicken. It is unclear whether additional force was used on the prisoner.").

The final category was the inappropriate use of chemical spray.[20] The DOJ reported that ADOC officers had a propensity to use chemical spray as a form of retribution, which according to the agency is a *per se* violation of the prisoners' constitutional rights: "[W]here chemical agents are used unnecessarily, without penological justification, or for the very purpose of punishment or harm, that use satisfies the Eighth Amendment's objective harm requirement."[21] The two specific incidents cited in the DOJ's report occurred after prisoners refused to comply with instructions regarding the doors to their own "dormitories."[22] In one instance, the officer sprayed a prisoner with a chemical agent while simultaneously hitting the prisoner on the legs with a baton; in the other, the officer deployed chemical spray onto a noncompliant inmate's underwear and genitals.[23] The DOJ noted that neither officer was disciplined even after both facility captains determined that their officer's use of chemical agents was unjustified.[24]

Although the DOJ readily acknowledges that these instances of excessive force are unconstitutional, relief for these incarcerated individuals is not so easily attainable.[25] Practically speaking, the conditions of confinement in Alabama prisons are unlikely to improve without some sort of external intervention due to the

20. *See id.* ("ADOC's regulation governing the use of chemical agents generally provides that they may be deployed in order to gain control of a situation. But ADOC correctional officers often ignore ADOC's regulation and use chemical spray inappropriately. Prisoners who do not present a danger are frequently sprayed with chemical agents.").

21. *See id.* (quoting Thomas v. Bryant, 614 F.3d 1288, 1311 (11th Cir. 2010)).

22. *See id.* at 15–16 (detailing how an inmate disobeyed a correctional officer's order to close the door to his own dormitory resulting in retaliation).

23. *See id.* at 16 (citing that the officer sprayed the inmate's genitals through the tray door because the prisoner refused to step away from the door after the officer instructed).

24. *See id.* ("It is also common for officers in Alabama's prisons to use chemical spray on prisoners in locked cells. These uses of force often occur when prisoners place their arm in a tray door, even though the prisoners are secure in a cell and pose no danger to others.").

25. *See id.* at 1 ("[T]here is reasonable cause to believe . . . :(1) the conditions throughout Alabama's prisons for men violate the Eighth Amendment of the U.S. Constitution; and (2) these violations are pursuant to a pattern or practice of resistance to the full enjoyment of rights protected by the Eighth Amendment.")

ADOC's refusal to hold its officers accountable internally.[26] In a legal sense, individuals turning to the courts face an almost insurmountable burden of proof to be entitled to relief.[27]

This Note suggests that the standard of proof for incarcerated individuals bringing excessive force claims under the Eighth Amendment needs to be reevaluated and proceeds in the following fashion. Part II surveys the history of excessive force claims under the Fourth,[28] Eighth,[29] and Fourteenth[30] Amendments.[31] Part III explains deliberate indifference claims under the Eighth and Fourteenth Amendments.[32] Lastly, Part IV analyzes the success rates of deliberate indifference claims under the Fourteenth Amendment depending on whether the petitioner faces a purely objective standard or a standard with both an objective and a subjective component.[33] This Note concludes by proposing that, on the basis of these findings, the federal judiciary ought to strongly consider adopting a uniform objective standard that would apply to all conditions of confinement claims, whether brought by a pretrial detainee or by an incarcerated individual.[34]

II. Excessive Force Claims Under 42 U.S.C. § 1983

An individual in custody may bring a civil rights action under 42 U.S.C. § 1983 to assert that some aspect of their confinement is

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26. *See id.* at 16–17 ("ADOC does not routinely review uses of force to identify officers who may have a history or pattern of excessive force allegations[,] [n]or does [it] have a centralized system to track officers who are repeatedly investigated for using force.").

27. *See* Hudson v. McMillian, 503 U.S. 1, 8 (1992) (holding that a prisoner bringing an excessive force claim under the Eighth Amendment must show that "the officials act[ed] with a sufficiently culpable state of mind" and that the use of force was objectively unreasonable (quoting Wilson v. Seiter, 501 U.S. 294, 298, 303 (1991) (internal quotation marks omitted)).

28. *See* U.S. CONST. amend. IV (protecting against unreasonable search and seizures).

29. *See* U.S. CONST. amend. VIII (prohibiting cruel and unusual punishments).

30. *See* U.S. CONST. amend. XIV (forbidding the State to deprive any person of life, liberty, or property, without due process of law).

31. *See infra* Part II.

32. *See infra* Part III.

33. *See infra* Part IV.

34. See *infra* Part V.

constitutionally deficient.[35] The text of § 1983 specifically states that "[e]very person who, under the color of any statute . . . 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 . . . ."[36] However, "the conditions of confinement of pretrial detainees are not analyzed under the standard of whether the conditions constitute cruel and unusual punishment because, unlike convicted prisoners, the government has no right to punish pretrial detainees at all."[37] As such, while the conditions of confinement for convicted prisoners are analyzed under the Eighth Amendment, those same conditions for a pretrial detainee are analyzed under the Due Process Clauses of either the Fifth Amendment[38] or the Fourteenth Amendment.[39]

A. Excessive Force Claims Under the Eighth Amendment

The Eighth Amendment to the United States Constitution is comprised of just sixteen words: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[40] The text of the amendment is steeped in Anglo-American history and tradition, originating in the British Declaration of Rights of 1688,[41] and making its first American

35. *See* Jonathan M. Purver & Patricia A. Hageman, *Asserting Claims of Unconstitutional Prison Conditions Under 42 U.S.C.A. § 1983*, 24 AM. JUR. TRIALS 425 § 1 (last updated Apr. 2022) (1997) (articulating that prisoners can use 42 U.S.C. § 1983 to challenge conditions of their confinement).

36. 42 U.S.C. § 1983 (2018).

37. Edward J. Hanlon, *Proof of Unconstitutional Prison Conditions*, 24 AM. JUR. 3D PROOF OF FACTS 467 § 4 (last updated Feb. 2022) (1994) (citing Bell v. Wolfish, 441 U.S. 520, 531–32 (1979)).

38. *See* U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, property, without due process of law.").

39. *See* Hanlon, *supra* note 37, at § 4 (explaining that a pretrial detainee's claim is examined under the Fifth and Fourteenth Amendments).

40. U.S. CONST. amend. VIII.

41. *See* James S. Campbell, Revival of the Eighth Amendment: Development of Cruel-Punishment Doctrine by the Supreme Court, 16 STAN. L. REV. 996, 996 at n. 1 (1964) (quoting Note, The Effectiveness of the Eighth Amendment: An

appearance in 1776 within the Virginian Declaration of Rights.[42] Although the Eighth Amendment seems straightforward at first glance, it has been said that "few constitutional guarantees of individual liberty have so often been relied upon, to so little avail, as has the [E]ighth Amendment."[43]

One of the Supreme Court's first forays into the substance of the Eighth Amendment's prohibition of cruel and unusual punishments took place in *Robinson v. California*.[44] In that case, Lawrence Robinson was charged in the Municipal Court of Los Angeles County for violating a statute making it a misdemeanor for any individual "either to use narcotics, or be addicted to the use of narcotics . . . ."[45] At trial, the judge gave the jury the following instruction:

To be addicted to the use of narcotics is said to be a status or condition and not an act. It is a continuing offense and differs from most other offenses in the fact that (it) is chronic rather than acute; that it continues after it is complete and subjects the offender to arrest at any time before he reforms. The existence of such a chronic condition may be ascertained from a single examination, if the characteristic reactions of that condition be found present.[46]

Robinson was convicted largely based on the testimony provided by two law enforcement officers, in which they described the condition of Robinson's arms, including the existence of scar tissue and numerous needle marks.[47]

The Supreme Court reversed Robinson's conviction, and in an opinion written by Justice Potter Stewart, the Court noted that while the State of California could regulate the trafficking of

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Appraisal of Cruel and Unusual Punishment, 36 N.Y.U.L. REV. 846 (1961) (footnotes omitted)).

42. *See id.* ("It [the terms cruel and unusual] formed a part of the Virginia Declaration of Rights adopted in 1776.").

43. *Id.*

44. *See* Robinson v. California, 370 U.S. 660, 667 (1992) (finding that a California statute which criminalizes the addiction of drugs is cruel and unusual punishment and violates the Fourteenth Amendment).

45. *Id.* at 661–62.

46. *Id.* at 662–63.

47. *See id.* at 662 ("The officer testified that at that time he had observed 'scar tissue and discoloration on the inside' of [Robinson's] right arm, and 'what appeared to be numerous needle marks and a scab which was approximately three inches below the crook of the elbow' on [Robinson's] left arm.").

narcotics within its borders under its state police powers, the California trial court's interpretation of the statute allowing for the conviction of individuals who merely appeared to be addicted to narcotics was not a reasonable application of that power.[48] In a particularly powerful analogy, the Court wrote that "[i]t is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease."[49] From that position, the Supreme Court concluded that Robinson's conviction under the statute was a cruel and unusual punishment requiring reversal.[50]

In 1986, the Supreme Court started to articulate the standard by which incarcerated individuals may bring excessive force claims under the Eighth Amendment.[51] In *Whitley v. Albers*, a prisoner named Gerald Albers was shot in the left knee by correctional officers as they attempted to quell a riot at the Oregon State Penitentiary.[52] Albers suffered severe physical damage to his left leg, as well as severe mental and emotional distress, and he then filed a lawsuit under § 1983.[53] The district court found in favor of

48. *See id.* at 664; 666–67 ("This statute, therefore, is not one which punishes a person for the use of narcotics, for their purchase, sale or possession, or for antisocial or disorderly behavior resulting from their administration.").

49. *Id.* at 666.

50. *See id.* at 667.

> We hold that a state law which imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment . . . To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold.

51. *See, e.g.*, Whitley v. Albers, 475 U.S. 312, 320 (1986) ("The general requirement that an Eighth Amendment claimant alleges and prove the unnecessary and wanton infliction of pain should also be applied with due regard for differences in the kind of conduct against which an Eighth Amendment objections is lodged.").

52. *See id.* at 314–18 (explaining the facts of the case).

53. *See id.* at 317 ("[Albers] subsequently commenced this action pursuant to 42 U.S.C. § 1983, alleging that petitioners deprived him of his rights under the Eighth and Fourteenth Amendments and raising pendent state law claims for assault and battery and negligence.").

the correctional officers, citing the Supreme Court's holding in *Robinson v. California*, but the Ninth Circuit reversed.[54]

Tasked with deciding the proper standard under which Albers could claim that the officers of the Oregon State Penitentiary subjected him to cruel and unusual punishment, the Supreme Court reversed the Ninth Circuit in an opinion authored by Justice Sandra Day O'Connor.[55] At every preceding level of litigation, Albers had maintained that the Fourteenth Amendment acted as a "distinct though overlapping source of substantive protection from state action involving excessive force" from the Eighth Amendment's prohibition on cruel and unusual punishment.[56]

The Supreme Court rejected Albers' argument, finding that the Due Process Clause of the Fourteenth Amendment provided Albers with no greater protections than the Eighth Amendment's prohibition on cruel and unusual punishment.[57] The Court justified its conclusion by saying that "[i]t would indeed be surprising if, in the context of forceful prison security measures, conduct that shocks the conscience . . . and so violates the Fourteenth Amendment, were not also punishment inconsistent with contemporary standards of decency and repugnant to the

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54. *See id.* at 317–18.

The [Ninth Circuit] held that an Eighth Amendment violation would be established "if a prison official deliberately shot Albers under circumstances where the official, with due allowance for the exigency, knew or should have known that it was unnecessary," or "if the emergency plan was adopted or carried out with 'deliberate indifference' to the right of Albers to be free of cruel and unusual punishment."

55. *See id.* at 314 ("This case requires us to decide what standard governs a prison inmate's claim that prison officials subjected him to cruel and unusual punishment by shooting him during the course of their attempt to quell a prison riot.").

56. *See id.* at 326–27 ("The District Court was correct in ruling that respondent did not assert a *procedural* due process claim . . . But we believe respondent did raise a claim that his 'substantive rights under the Due Process Clause of the Fourteenth Amendment,' were infringed by prison officials when he was shot.").

57. *See id.* at 327 ("We think the Eighth Amendment, which is specifically concerned with the unnecessary and wanton infliction of pain in penal institutions, serves as the primary source of substantive protection to convicted prisoners in cases such as this one, where the deliberate use of force is challenge as excessive unjustified.").

conscience of mankind, in violation of the Eighth."[58] Thus, the Court determined that the Due Process Clause of the Fourteenth Amendment was an inappropriate vehicle for Albers' excessive force claim given the duplicative nature of its protection from the use of excessive force in comparison with the Eighth Amendment.[59]

Seven years later, the Court further refined the standard for excessive force claims under the Eighth Amendment in *Hudson v. McMillian*.[60] In that case, the Supreme Court faced the question of "whether the use of excessive physical force against a prisoner may constitute cruel and unusual punishment when the inmate does not suffer a serious injury."[61] Keith Hudson, an individual incarcerated in a Louisiana state facility, got into an argument with a correctional officer named McMillian, with the latter punching and kicking Hudson repeatedly while he was restrained in handcuffs and shackles.[62] Hudson later sued McMillian and others under § 1983 for compensatory damages stemming from the violation of his Eighth Amendment rights.[63] A magistrate judge for the District Court for the Middle District of Louisiana ruled in favor of Hudson, finding that McMillian "used force when there was no need to do so and that Mezo expressly condoned their actions," but the Fifth Circuit reversed the decision.[64]

Justice O'Connor's opinion for the Supreme Court, reversing the Fifth Circuit, held that the use of excessive force could

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58. *Id.* (quoting Rochin v. California, 342 U.S. 165, 172, 173 (1952) (internal quotations omitted)).

59. *See id.* (reasoning "that in these circumstances the Due Process Clause affords no greater protection than does the Cruel and Unusual Punishments Clause").

60. *See* Hudson v. McMillian, 503 U.S. 1, 11 (1992) (concluding that there was no Eighth Amendment violation).

61. *Id.* at 4.

62. *See id.* ("[Hudson] further testified that [Arthur] Mezo, the supervisor on duty, watched the beating but merely told the officers 'not to have too much fun.'").

63. *See id.* ("As a result of this beating, Hudson suffered minor bruises and swelling of his face, mouth and lip. The blows also loosened Hudson's teeth and cracked his partial dental plate, rendering it unusable for several months.").

64. *See id.* at 5.

[The Fifth Circuit] held that inmates alleging use of excessive force in violation of the Eighth Amendment must prove: (1) significant injury; (2) resulting "directly and only from the use of force that was clearly excessive to the need"; (3) the excessiveness of which was objectively unreasonable; and (4) that the action constituted an unnecessary and wanton infliction of pain.

constitute cruel and unusual punishment under the Eighth Amendment, even if the victim did not suffer serious injuries.[65] Noting the "unnecessary and wanton infliction of pain" standard in *Whitley v. Albers*, the Court declared that "[w]hat is necessary to establish an 'unnecessary and wanton infliction of pain' . . . varies according to the nature of the alleged constitutional violation."[66] For example, whenever a petitioner makes an excessive force claim under the Eighth Amendment, an inquiry must be made as to "whether the force was applied in a good faith effort to maintain or restore discipline or maliciously or sadistically for the very purpose of causing harm."[67] Additionally, the Court noted that any malicious and sadistic use of force against an inmate automatically violates the contemporary standards of decency, even if the inmate did not suffer a significant injury.[68] Thus, because Hudson's injuries were not *de minimis*, the Supreme Court held that the Fifth Circuit had improperly determined that his Eighth Amendment claim was unsustainable.[69]

B. Excessive Force Claims Under the Fourth and Fourteenth Amendments

The Fourth Amendment to the Constitution says that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."[70] The Supreme Court has interpreted the Fourth Amendment's prohibition against unreasonable seizures to be the vehicle by which non-incarcerated individuals may bring excessive

65. *Id.* at 4, 12.

66. *Id.* at 5 (citing Whitley v. Albers, 475 U.S. 312, 320 (1986)).

67. *See id.* at 5 ("For example, the appropriate inquiry when an inmate alleges that prison officials failed to attend to serious medical needs is whether the officials exhibited 'deliberate indifference.'").

68. *See id.* at 9 ("Otherwise, the Eighth Amendment would permit any physical punishment, no matter how diabolic or inhuman, inflicting less than some arbitrary quantity of injury.").

69. *See id.* at 10 ("Yet the blows directed at Hudson, which caused bruises, swelling, loosened teeth, and a cracked dental plate, are not *de minimis* for Eighth Amendment purposes. The extent of Hudson's injuries thus provides no basis for dismissal of his § 1983 claim.").

70. U.S. CONST. amend. IV.

force claims against arresting officers.[71] However, as aptly demonstrated by the Second Circuit's opinion in *Johnson v. Glick*,[72] this was not always the case.[73]

Australia Johnson was held in the Manhattan House of Detention for Men while on trial for several felony offenses.[74] One evening, a correctional officer named John Fuller informed Johnson and several other prisoners that the group had failed to follow his instructions while checking back into the facility after spending the day in court.[75] Johnson attempted to explain to Officer Fuller that the inmates had been following the instructions of another officer, but in response, Officer Fuller struck Johnson twice in the head while muttering, "I'll kill you, old man, I'll break you in half."[76] Johnson brought a § 1983 action against Officer Fuller and the warden of the facility, but the District Court for the Southern District of New York dismissed Johnson's complaint.[77]

In an opinion written by Judge Henry Friendly, the Second Circuit reversed the district court's dismissal of Johnson's excessive force claim against Officer Fuller.[78] The court's decision relied heavily on the following proposition, which Judge Friendly attributed to the Supreme Court's opinion in *Rochin v.*

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71. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 626 (6th ed. 2019) (citing Graham v. Connor, 490 U.S. 386 (1989), Tennessee v. Garner, 471 U.S. 1 (1985)).

72. 481 F.2d 1028 (2d Cir. 1973).

73. *See id.* at 1032 ("The solution lies in the proposition that, both before and after sentence, constitutional protection against police brutality is not limited to conduct violating the specific command of the Eighth Amendment or . . . of the Fourth.").

74. *Id.* at 1029.

75. *See id.* ("The complaint was brought against . . . a correction officer, described in the complaint only as Officer John, Badge No. 1765, but now identified as John Fuller . . . .").

76. *Id.* at 1029–30.

77. *See id.* at 1030.

Recognizing that there were numerous decisions in other circuits that would seem to uphold the validity of the complaint as against the officer . . . Judge Knapp nevertheless dismissed the complaint, saying 'So far as I am aware no decision in this circuit requires such a conclusion, and it is one at which I would arrive only under constraint.

78. *See id.* ("Although we realize that upholding this complaint may well lead to considerable further expansion of actions by state prisoners under 42 U.S.C. § 1983 . . . we think the ruling was in error so far as the officer was concerned.").

California[79]: "[A]pplication of undue force by law enforcement officers deprives a suspect of liberty without due process of law . . . [and] [t]he same principle should extend to the acts of brutality by correctional officers, although the notion of what constitutes brutality may not necessarily be the same."[80] The Second Circuit then articulated the following four-factor test for determining whether the constitutional line has been crossed: (1) "[T]he need for the application of force"; (2) "the relationship between the need and amount of force that was used"; (3) "the extent of the injury inflicted"; and (4) "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm."[81]

In the next decade, however, the Supreme Court would use two cases to reign in federal courts that were evaluating excessive force claims under the Due Process Clause of the Fourteenth Amendment.[82] In the first of these cases, *Tennessee v. Garner*,[83] Edward Garner was shot and killed by a Memphis police officer who had ordered Garner to halt, believing that Garner was attempting to flee the scene of a burglary by crossing a six-foot-high chain-link fence.[84] Although the officer had used a flashlight to see Garner's face and hands, he still chose to use deadly force to prevent Garner from eluding capture.[85] At the time, Tennessee

79. *See* Rochin v. California, 342 U.S. 165, 172 (1952) (determining that law enforcement's forced pumping of a suspect's stomach, to obtain evidence for prosecution under California state law, violated the suspect's due process rights under the Fourteenth Amendment).

80. Johnson v. Glick, 481 F.2d 1028,1032–33 (2d Cir. 1973).

81. *Id.* at 1033.

82. *See* Tennessee v. Garner, 471 U.S. 1, 11 (1985) (holding that a law enforcement officer's use of deadly force against a fleeing individual suspected of committing a criminal misdemeanor was an impermissible seizure under the Fourth Amendment); *see also* Graham v. Connor, 490 U.S. 386, 388 (1989) (holding that all excessive force claims brought by individuals not convicted of an offense must be evaluated under a Fourth Amendment objective reasonableness standard).

83. 471 U.S. 1 (1985).

84. *Id.* at 3–4.

85. *See id.* ("[Officer Hymon] saw no sign of a weapon, and, though not certain, was 'reasonably sure' and 'figured' that Garner was unarmed. He thought Garner was 17 or 18 years old and about 5'5" or 5'7" tall.").

state law provided that "[i]f, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all the necessary means to effect the arrest."[86]

The Supreme Court, in an opinion authored by Justice Byron White, held the Tennessee statute unconstitutional as violative of the Fourth Amendment's protection against unreasonable seizures.[87] Obviously, a suspect has a fundamental interest in protecting their own life, and it is hard to imagine a greater intrusion into this interest than a seizure through deadly force.[88] Applying this balancing test, the Court concluded that "[t]he use of deadly force is [not] a sufficiently productive means of accomplishing [the government's stated interest in reducing overall violence] to justify the killing of nonviolent suspects."[89]

Four years later, the Court revisited the issue of excessive force under the Fourth Amendment in *Graham v. Connor*.[90] In that case, a diabetic named Dethorne Graham asked a friend, William Berry, to drive him to a convenience store so that he could purchase orange juice to increase his blood sugar.[91] However, there was a long line at the store, so Graham asked Berry to drive him to a friend's house instead.[92] Officer Connor of the Charlotte Police Department became suspicious when he saw Graham enter and then quickly exit the convenience store, and he followed Graham and Berry for about half a mile before making an investigatory stop.[93] Graham told Connor that he was suffering from a "sugar reaction," and when Connor returned to his vehicle to radio

86. TENN. CODE ANN. § 40-7-108 (1982).

87. *See Garner*, 471 U.S. at 10 ("Without in any way disparaging the importance of these goals, we are not convinced that the use of deadly force is a sufficiently productive means of accomplishing them to justify the killing of nonviolent suspects.").

88. *See id.* at 9 ("The use of deadly force also frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment.").

89. *Id.* at 10.

90. 490 U.S. 386 (1989).

91. *Id.* at 388.

92. *See id.* at 388–89 ("[W]hen Graham entered the store, he saw a number of people ahead of him in the check outline. Concerned about the delay, he hurried out of the store and asked Berry to drive him to a friend's house instead.").

93. *See id.* at 389 ("Respondent Connor . . . saw Graham hastily enter and leave the store. The officer became suspicious that something was amiss and followed Berry's car.").

backup, Graham exited the vehicle and passed out from low blood sugar.[94]

Other officers arrived on scene and helped Connor forcefully detain Graham, ignoring Berry's request that Graham be given sugar while he was locked in the back seat of a patrol vehicle.[95] The officers eventually ascertained that Graham had done nothing wrong at the convenience store, and they drove him home and released him, but the encounter had still left Graham with a broken foot, cuts on his wrists, a bruised forehead, and an injured shoulder.[96]

The District Court for the Western District of North Carolina evaluated Graham's excessive force claim under the four-part substantive due process standard articulated by the Second Circuit in *Johnson v. Glick*.[97] Concluding that Graham had failed to sufficiently demonstrate that his substantive due process rights had been violated, the district court ordered a directed verdict for the City of Charlotte and Officer Connor, and the Fourth Circuit affirmed.[98]

The Supreme Court granted certiorari to decide "what constitutional standard governs a free citizen's claim that law

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94. *See id.* ("[T]he officer ordered Berry and Graham to wait while he found out what, if anything, had happened at the convenience store. . . . Graham got out of the car, ran around it twice, and finally sat down on the curb, where he passed out briefly.").

95. *See id.* ("Four officers grabbed Graham and threw him headfirst into the police car. A friend of Graham's brought some orange juice to the car, but the officers refused to let him have it.").

96. *See id.* at 390 ("[Graham] commenced this action under 42 U.S.C. § 1983 against the individual officers involved in the incident . . . alleging that they had used excessive force in making the investigatory stop . . . .").

97. See *id.* at 390

(1) the need for the application of force; (2) the relationship between that need and the amount of force that was used; (3) the extent of the injury inflicted; and (4) '[w]hether the force was applied in a[n] [. . .] effort to maintain and restore discipline or [. . .] for the purpose of causing harm.'

(quoting Graham v. City of Charlotte, 644 F. Supp. 246, 248 (W.D.N.C. 1986)).

98. *See* Graham v. City of Charlotte, 644 F. Supp. 246, 248 (W.D.N.C. 1986) ("The Court does not find, considering the evidence in the light most favorable to the Plaintiff, that there was excessive force used by the police officers rising to the level of violation of his constitutional rights."); *see also* Graham v. City of Charlotte, 827 F.2d 945, 948–49 (4th Cir. 1987) ("We conclude, therefore, that the district court did not use an erroneous legal standard when deciding whether Graham's case could withstand a motion for a directed verdict.").

enforcement officials used excessive force in the course of making an arrest, investigatory stop, or other 'seizure' of his person."[99] In Chief Justice William Rehnquist's opinion for the majority, the Court determined that excessive force claims brought by free citizens could no longer be evaluated under a substantive due process standard, thereby overruling the Second Circuit in *Johnson v. Glick*,[100] but must instead be assessed under a Fourth Amendment standard of "objective reasonableness."[101]

The Court based its conclusion on the premise that an excessive force claim must "isolate the precise constitutional violation," usually either under the Fourth or the Eighth Amendment, and that the claim must be judged under a standard particular to that amendment, rather than "some generalized 'excessive force' standard."[102] According to the Court, free citizens' claims of excessive force are more aptly characterized as invoking the protections of the Fourth Amendment, rather than the Due Process Clause of the Fourteenth Amendment.[103] After settling on the superiority of the Fourth Amendment analysis, the Court stated that "the 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."[104]

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99. Graham v. Connor, 490 U.S. 386, 388 (1989).

100. *See* Johnson v. Glick, 481 F.2d 1028, 1032 (2d Cir. 1973) ("The solution lies in the proposition that, both before and after sentence, constitutional protection against police brutality is not limited to conduct violating the specific command of the Eighth Amendment . . . The same principle should extend to acts of brutality by correctional officer . . . .").

101. *Graham*, 490 U.S. at 388, 392–93 ("The vast majority of lower federal courts have applied [the] four-part 'substantive due process' test indiscriminately to all excessive force claims . . . . without considering whether the particular application of force might implicate a more specific constitutional right governed by a different standard.").

102. *Id.* at 394 (quoting Baker v. McCollan, 443 U.S. 137, 140 (1979)).

103. *See id.* at 394–95 (determining that excessive force claims brought by free citizens invoke the Fourth Amendment because the *Garner* Court focused its analysis on the petitioner's Fourth Amendment claim, not his substantive due process claim) (citing Tennessee v. Garner, 471 U.S. 1, 5 (1985)).

104. *Id.* at 397.

In 2015, the Supreme Court officially cemented the difference between the excessive force standards applicable to pretrial detainees and to incarcerated individuals.[105] In *Kingsley v. Hendrickson*, Michael Kingsley was arrested and detained in a Wisconsin county jail.[106] During the night, the guard on duty noticed a piece of paper covering the light fixture above Kingsley's bed; the guard told Kingsley to remove the paper, but Kingsley refused.[107] The next morning, following Kingsley's repeated refusals to remove the piece of paper, four officers approached Kingsley's cell and ordered him to stand up and back up to the cell door with his hands behind him.[108] Kingsley refused to comply with this order as well, and so the officers entered the cell, handcuffed Kingsley, forcibly removed him to another cell, and placed him face down on the cot with his hands still handcuffed behind his back.[109]

The parties disputed what happened next, but the Court described the scene as follows:

The officers testified that Kingsley resisted their efforts to remove his handcuffs. Kingsley testified that he did not resist. All agree that Sergeant Hendrickson placed his knee in Kingsley's back[,] and Kingsely told him in impolite language to get off. Kingsley testified that Hendrickson and [Deputy Sheriff Fritz] Degner then slammed his head into a concrete bunk—an allegation the officers deny.[110]

However, what was not in dispute was the fact that Hendrickson told Degner to deploy a taser against Kingsley, and that Degner did so for about five seconds while Kingsley was still in handcuffs.[111]

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105. *See* Kingsley v. Hendrickson, 576 U.S. 389, 402 (2015) (acknowledging that the Court's preference of an objective standard in excessive force claims could raise questions about the use of a subjective standard in excessive force cases but declining to address said questions).

106. *Id.* at 392.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 393.

111. *See id.* ("Degner applied a Taser to Kingsley's back for approximately five seconds; the officers then left the handcuffed Kingsley alone in the receiving cell; and officers returned to the cell 15 minutes later and removed Kingsley's handcuffs.").

Following this ordeal, Kingsley brought a § 1983 action against both Hendrickson and Degner in the Western District of Wisconsin, claiming that the officers' use of excessive force deprived him of due process under the Fourteenth Amendment.[112] The jury found in favor of the officers after receiving the instruction that Kingsley must have proven, by a preponderance of the evidence, that "Defendants knew that using force presented a risk of harm to plaintiff, but they recklessly disregarded plaintiff's safety . . . ."[113] On appeal before the Seventh Circuit, Kingsley argued that the proper standard for an excessive force claim brought by a pretrial detainee ought to be only whether the officer's use of force was objectively reasonable, but the panel disagreed and affirmed the district court's ruling.[114]

In light of an existing circuit split, the Supreme Court granted Kingsley's petition to answer whether "the requirements of a § 1983 excessive force claim brought by a pretrial detainee must satisfy the subjective standard or only the objective standard."[115] In Justice Stephen Breyer's majority opinion, the Court abrogated cases from the Second and Eleventh Circuits by holding that a pretrial detainee need only to show that an officer's conduct was objectively unreasonable when bringing an excessive force claim under § 1983.[116]

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112. *See id.* (summarizing the basis of Kingsley's suit).

113. *See id.* (discussing the other requirements included in the jury instructions: "(1) Defendants used force on plaintiff; (2) Defendants' use of force was unreasonable in light of the facts and circumstances at the time;" and "(4) Defendants' conduct caused some harm to plaintiff.").

114. *See id.* at 394. ("The majority held that the law required a 'subjective inquiry' into the officer's state of mind. There must be 'an actual intent to violate [the plaintiff's] rights or reckless disregard for his rights.'") (internal quotation marks omitted).

115. *Id.* at 395. *Compare, e.g.*, Murray v. Johnson No. 260, 367 F. App'x 196, 198 (2d Cir. 2010) (holding that a pretrial detainee must show both an objective and subjective component in bringing an excessive force claim under § 1983), *and* Bozeman v. Orum, 422 F.3d 1265, 1271 (11th Cir. 2005) (*per curiam*) (same), *with* Aldini v. Johnson, 609 F.3d 858, 865–66 (6th Cir. 2010) (requiring only a showing that the officer's use of force was objectively unreasonable in the context of pretrial detainees) *and* Young v. Wolfe, 478 F. App'x 354, 356 (9th Cir. 2012) (same).

116. *See* Kingsley v. Hendrickson, 576 U.S. 389, 396–97 (2015) (announcing the unreasonable standard and introducing a framework for evaluating unreasonableness).

The Court based its conclusion on several factors.[117] First, the Court held that the application of a singular, objective standard for claims brought by pretrial detainees was consistent with past precedent in *Graham v. Connor*[118] and *Bell v. Wolfish*[119] which, when viewed in tandem, held that the Due Process Clause of the Fourteenth Amendment protected pretrial detainees from applications of force amounting to "punishment," which itself could consist of actions with an "express intent to punish," but also could consist of actions not "rationally related to a legitimate nonpunitive governmental purpose" or "appear excessive in relation to that purpose."[120] Second, the application of a purely objective standard was "workable" because it was "consistent with the pattern jury instructions used in several Circuits," and it "adequately protects an officer who acts in good faith."[121]

III. Deliberate Indifference Claims Under 42 U.S.C. § 1983

A second type of § 1983 action available to both convicted prisoners and pretrial detainees is a deliberate indifference claim.[122] Similar to excessive force § 1983 actions, a deliberate indifference petitioner faces a different standard depending on whether they are a pretrial detainee or a convicted prisoner.[123] To sustain a deliberate indifference claim under the Eighth

117. *See id.* at 397–99 (including consistency with precedent, practical workability, and adequacy of protection for officers acting in good faith).

118. *See* Graham v. Connor, 490 U.S. 387, 397–99 (1989) (holding that an excessive force claim brought by a pretrial detainee against a law enforcement officer must be analyzed under the Fourth Amendment).

119. *See* Bell v. Wolfish, 441 U.S. 520, 535 (1979) (determining that the issue of whether a condition of confinement constitutes a deprivation of due process must be answered by ascertaining whether the condition would constitute as a punishment itself).

120. *Kingsley*, 576 U.S. at 397–98 (quoting Graham v. Connor, 490 U.S. 387, 395 n.10 (1989); Bell v. Wolfish, 441 U.S. 520, 538, 561 (1979)).

121. *Kingsley*, 576 U.S. at 399.

122. *See* Purver & Hageman, *supra* note 35 (defining the contours of the claim and providing sample pattern jury instructions as examples).

123. *See* Heyer v. U.S. Bureau of Prisons, 849 F.3d 202, 209–10 (4th Cir. 2017) (describing the two-prong standard for deliberate indifference claims brought under the Eighth Amendment); *see also* Castro v. Cnty. of Los Angeles, 833 F.3d 1060, 1068 (9th Cir. 2016) ("The standard to find an individual deliberately indifferent under the Fourteenth Amendment, however, is less clear.").

Amendment, an incarcerated individual must show that she "had serious medical needs, which is an objective inquiry, and that the defendant acted with deliberate indifference to those needs, which is a subjective inquiry."[124] However, for pretrial detainees, there is a circuit split as to whether the Supreme Court's holding in *Kingsley* applies to all types of deliberate indifference claims brought under the Fourteenth Amendment.[125]

A. Deliberate Indifference Claims Under the Eighth Amendment

In *Farmer v. Brennan*,[126] a transgender individual named Dee Farmer was transferred for disciplinary reasons from the Federal Correctional Institute in Oxford, Wisconsin ("FCI–Oxford"), to the United States Penitentiary in Terre Haute, Indiana ("USP–Terre Haute").[127] Upon her introduction into the general population at USP–Terre Haute, Farmer was beaten and raped by another prisoner while she was in her cell.[128]

Farmer brought a claim under § 1983, alleging that the respondents "either transferred [her] to USP–Terre Haute or

124. *Heyer*, 849 F.3d at 209–10 (citing Iko v. Shreve, 535 F.3d 225, 241 (4th Cir. 2008)).

125. *Compare* Castro v. Cnty. of Los Angeles, 833 F.3d 1060, 1070 (9th Cir. 2016) (determining that the Court's holding in *Kingsley* mandates that deliberate indifference claims brought by pretrial detainees be evaluated under a purely objective standard), *with* Grochowski v. Clayton Cnty., Ga., 961 F.3d 1311, 1318 n.4 (11th Cir. 2020) (determining that the Court's decision in *Kingsley* does not impact an analysis of a petitioner's deliberate indifference claim under the Fourteenth Amendment). *Compare* Darnell v. Pineiro, 849 F.3d 17, 35 (2d Cir. 2017) (adopting objective standard for deliberate indifference claims under the Fourteenth Amendment), *and* Miranda v. Cnty. of Lake, 900 F.3d 335, 351–52 (7th Cir. 2018) (same), *with* Alderson v. Concordia Parish Corr. Facility, 848 F.3d 415, 419 n.4 (5th Cir. 2017) (deciding not to overturn precedent evaluating Eighth and Fourteenth Amendment the same way), *and* Cameron v. Bouchard, No. 20-1469, 2020 WL 3867393, at *5 (6th Cir. July 9, 2020) (same).

126. Farmer v. Brennan, 511 U.S. 825 (1994).

127. *See id.* at 830 ("Though the record before us is unclear about the security designations of the two prisons in 1989, penitentiaries are typically higher security facilities that house more troublesome prisoners than federal correctional institutes.").

128. *See id.* ("After an initial stay in administrative segregation, [Farmer] was placed in the USP–Terre Haute general population. [Farmer] voiced no objection to any prison official about the transfer to the penitentiary or to placement in its general population.").

placed [her] in its general population despite knowledge that the penitentiary had a violent environment and a history of inmate assaults, and despite knowledge that [Farmer], as a [transgender individual] who 'projects feminine characteristics,' would be particularly vulnerable to sexual attack by some USP–Terre Haute inmates."[129] Thus, according to Farmer, the respondents' actions constituted a "deliberately indifferent failure to protect [her] safety," which violated her Eighth Amendment right to be free from cruel and unusual punishment.[130] The District Court for the Western District of Wisconsin granted summary judgment to the respondents, and the Court of Appeals for the Seventh Circuit "summarily affirmed without opinion."[131]

The Supreme Court granted certiorari because the circuits had adopted conflicting standards for what constitutes "deliberate indifference."[132] In an opinion authored by Justice Souter, the Court held that a prison official is deliberately indifferent to a substantial risk of harm to an incarcerated individual, thereby violating that incarcerated individual's Eighth Amendment rights, whenever that official is subjectively aware of that risk.[133] Beginning with *Estelle v. Gamble*,[134] which established that "deliberate indifference entails something more than mere negligence," but less than "acts or omissions for the very purpose of causing harm or with knowledge that harm will result," the Court traced the history of its use of the term "deliberate indifference."[135] Additionally, the Court pointed out that the term "recklessness" was not particularly "self-defining," making the

129. *Id.* at 830–31.

130. *See id.* at 831 ("[Farmer] sought compensatory and punitive damages, and an injunction barring future confinement in any penitentiary, including USP–Terre Haute.").

131. *Id.* at 832.

132. *Id.* (internal quotations omitted). *Compare* McGill v. Duckworth, 944 F.2d 344, 348 (CA7 1991) (holding that "deliberate indifference" requires a "subjective standard of recklessness"), *with* Young v. Quinlan, 960 F.2d 351, 360–361 (CA3 1992) ("[A] prison official is deliberately indifferent when he knows or should have known of a sufficiently serious danger to an inmate").

133. *See id.* at 828 (summarizing the Court's decision).

134. *See generally*, Estelle v. Gamble, 429 U.S. 97 (1976).

135. Farmer v. Brennan, 511 U.S. 825, 835–36 (1994).

federal circuits' history of equivocating deliberate indifference with recklessness problematic.[136]

Farmer asked the Court to establish a purely objective test for deliberate indifference, but the Court declined to do so, holding instead "that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety."[137] According to the Court, this conclusion was required by both the Constitution and its past precedent; it was not the result of the Court "merely . . . parsing of the phrase 'deliberate indifference.'"[138]

B. Deliberate Indifference Claims Under the Fourteenth Amendment

In *Castro v. County of Los Angeles*,[139] Jonathan Castro was arrested by officers of the Los Angeles Sheriff's Department for public drunkenness and placed into a "sobering cell."[140] Later that evening, another individual arrested on a felony charge, Jonathan Gonzales, was placed in the sobering cell with Castro.[141] Almost immediately afterwards, Castro began banging on the cell door in an attempt to summon help, but no one responded; about twenty minutes later, however, an unpaid community volunteer walked by the cell and saw that "Castro appeared to be asleep and that Gonzales was 'inappropriately' touching Castro's thigh."[142] The volunteer summoned the station supervisor, Christopher Solomon,

136. *See id.* at 836 (discussing how "acting or failing to act with deliberate indifference to a substantial risk of serious harm to a prisoner is the equivalent of recklessly disregarding that risk. That does not, however, fully answer the pending question about the level of culpability deliberate indifference entails . . . .").

137. *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 the inference.").

138. *Id.* at 840.

139. *See generally*, Castro v. Cnty. of Los Angeles, 833 F.3d 1060 (9th Cir. 2015).

140. *Id.* at 1064–65.

141. *See id*. (explaining the events that happened after Castro's arrest).

142. *Id.* at 1065.

and when Solomon reached the cell six minutes later, he found Gonzales stomping on Castro's head, which was surrounded by a pool of blood.[143] By the time the paramedics had reached the station, Castro was unconscious and in respiratory distress.[144]

Castro brought suit against the County of Los Angeles and the Sherriff's Department ("entity defendants"), as well as Solomon and Solomon's supervisor ("individual defendants"), asserting that the defendants had deprived him of his constitutional rights by putting him in a cell with Gonzalez and failing to properly monitor the cell.[145] The defendants filed a motion for judgment as a matter of law on the following grounds: "(1) insufficient evidence that the design of a jail cell constitutes a policy, practice, or custom by the County that resulted in a constitutional violation; (2) insufficient evidence that a reasonable officer would have known that housing Castro and Gonzales together was a violation of Castro's constitutional rights; and (3) insufficient evidence for the jury to award punitive damages."[146] The federal district court denied the motion, and a jury awarded Castro more than two million dollars in damages; on appeal, a three-judge panel affirmed the district court's ruling as to Solomon and Solomon's supervisor, but reversed the judgments against the County of Los Angeles and the Sherriff's Department.[147] However, a majority of active judges in the Ninth Circuit voted to rehear Castro's case *en banc*.[148]

The Ninth Circuit affirmed the district court's denial of the defendant's motion for summary judgment as a matter of law.[149] In Judge Susan Graber's opinion, the court spent a substantial amount of time discussing the potential applicability of the

143. *See id.* (stating what occurred six minutes after the volunteer reported to Solomon).

144. *See id.* ("[Castro] was hospitalized for almost a month, after which he was transferred to a long-term care facility, where he remained for four years. He suffers from severe memory loss and other cognitive difficulties.").

145. *See id.* at 1065 ("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.").

146. *Id.* at 1065–66.

147. *See id.* at 1066 (describing the case's procedural posture) (citing Castro v. Cnty. of Los Angeles, 797 F.3d 654 (9th Cir. 2015)).

148. *See id.* (stating how the case reached the Ninth Circuit).

149. *See id.* at 1078 (reporting the court's decision).

Supreme Court's holding in *Kingsley*[150] to Castro's failure-to-protect claim.[151] The court confirmed that both pretrial detainees and incarcerated individuals may bring a failure-to-protect claim by showing that the facility officials acted with "deliberate indifference."[152] However, the Ninth Circuit pointed out that while the deliberate indifference standard under the Eighth Amendment contains both an objective and a subjective component, the "standard to find an individual deliberately indifferent under the Fourteenth Amendment, however, is less clear."[153]

Previously, in *Clouthier v. County of Contra Costa*,[154] the Ninth Circuit had held that Supreme Court's decisions in *Farmer v. Brennan*[155] and *Bell v. Wolfish*[156] mandated that the deliberate indifference standard have both an objective and a subjective component.[157] Specifically, the court determined that *Bell* "require[d] proof of punitive intent for failure-to-protect claims, whether those claims arise in a pretrial or post-conviction context," and that *Farmer* necessitated that "[a]n official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment."[158]

However, Judge Graber and the majority of the Ninth Circuit used the Supreme Court's *Kingsley*[159] decision to overturn their

150. *See* Kingsley v. Hendrickson, 576 U.S. 389, 396–97 (2015) (holding that within the excessive force context, a pretrial detainee need only demonstrate that the force used against her was objectively unreasonable).

151. *See* Castro v. Cnty. of Los Angeles, 833 F.3d 1060, 1068–73 (9th Cir. 2015) (explaining the opinion's structure).

152. *Id.* at 1067–68.

153. *Id.* at 1068.

154. 591 F.3d 1232 (9th Cir. 2010).

155. 511 U.S. 825 (1994).

156. 441 U.S. 520 (1979).

157. *See* Clouthier v. Cnty. of Contra Costa, 591 F.3d 1232, 1242 (9th Cir. 2010) (providing what the circuit held previously).

158. *Id.* at 1242 (quoting Farmer v. Brennan, 511 U.S. 825, 838 (1994)).

159. *See* Kingsley v. Hendrickson, 576 U.S. 389, 396–97 (2015) (holding that there cannot be a singular, "deliberate indifference" standard for all § 1983 claims, meaning that the evaluative standard for excessive force claims may vary depending on whether the petitioner is a pre-trial detainee or a convicted prisoner).

previous ruling in *Clouthier*.[160] The Ninth Circuit determined the underlying rationale in the Supreme Court's *Kingsley* decision was applicable to Castro's failure-to protect claims.[161] The Ninth Circuit reached this conclusion for several reasons.[162] First, the court noted that the text § 1983 "contains no state-of-mind requirement independent of that necessary to state a violation of the underlying federal right."[163] Second, a pretrial detainee's excessive force claim stems from the same constitutional protection as a pretrial detainee's failure-to-protect claim: the Due Process Clause of the Fourteenth Amendment.[164] Lastly, the court observed that the Supreme Court did not limit its holding in *Kingsley* to excessive force claims, but rather it applied to any "challenged governmental action [that] is not rationally related to a legitimate governmental objective or that is excessive in relation to that purpose."[165]

Considering all these circumstances, the Ninth Circuit affirmed the jury's verdict against the individual defendants, because the record contained sufficient evidence that a "reasonable officer in the circumstances would have appreciated the high

160. *See* Castro v. Cnty. of Los Angeles, 833 F.3d 1060, 1069 (9th Cir. 2015) ("Under *Kingsley*, then, it does not matter whether the defendant understood that the force used was excessive, or intended it to be excessive, because the standard is purely objective. In so holding, the *Kingsley* Court expressly rejected the interpretation of *Bell* on which we had relied in *Clouthier*.") (internal citations omitted).

161. *See id.* at 1070 ("On balance, we are persuaded that *Kingsley* applies, as well, to failure-to-protect claims brought by pretrial detainees against individual defendants under the Fourteenth Amendment. Excessive force applied directly by an individual jailer and force applied by a fellow inmate can cause the same injuries, both physical and constitutional.").

162. *See id.* at 1069–70 ("[T]here are significant reasons to hold that the objective standard [established in *Kingsley*] applies to failure-to-protect claims as well.").

163. *Id.* at 1069 (quoting Bd. of Cnty. Comm'rs v. Brown, 520 U.S. 397, 405 (1997)) (internal quotation marks omitted).

164. *See id.* ("The underlying federal right, as well as the nature of the harm suffered, is the same for pretrial detainees' excessive force and failure-to-protect claims. Both categories of claims arise under the Fourteenth Amendment's Due Process Clause[.]").

165. *Id.* at 1070 (quoting *Kingsley*, 576 U.S. at 398).

degree of risk involved and that the officers' failure to take reasonable measure to protect Castro caused his injuries."[166]

However, not every federal appellate circuit has taken the same position as the Ninth Circuit did in *Castro*.[167] In *Strain v. Regalado*,[168] the Tenth Circuit declined to extend *Kingsley* to a pretrial detainee's deliberate indifference claim.[169] There, on December 11, 2015, Thomas Pratt began showing symptoms of alcohol withdrawal while being held pretrial at the Tulsa County Jail.[170] Upon Pratt's request for detox medication, one of the facility's nurses performed a drug and alcohol withdrawal assessment, showing that Pratt "habitually drank fifteen-to-twenty beers per day for the past decade."[171] The jail subsequently put Pratt on a seizure precaution, requiring that his vital signs be checked every eight hours, and he was also prescribed Librium "to treat his alcohol withdrawal symptoms."[172]

Several days later, on December 14, Nurse Patricia Deane noticed that Pratt was showing the typical symptoms of delirium tremens: "[V]omiting, severe tremors, acute panic states, and disorientation."[173] Despite the severity of Pratt's symptoms, Nurse Dean did not contact a physician or take Pratt's vitals, and she chose to switch Pratt from Librium to Valium. [174] Additionally, the

166. *Id.* at 1072.

167. *Compare* Darnell v. Pineiro, 849 F.3d 17, 35 (2d Cir. 2017) (adopting objective standard for all deliberate indifference claims under the Fourteenth Amendment); Miranda v. Cnty. of Lake, 900 F.3d 335, 351–52 (7th Cir. 2018) (same), *with* Alderson v. Concordia Parish Corr. Facility, 848 F.3d 415, 419 n.4 (5th Cir. 2017) (deciding not to overturn precedent by evaluating claims under the Eighth and Fourteenth Amendments the same way), *and* Cameron v. Bouchard, No. 20-1469, 2020 WL 3867393, at *5 (6th Cir. July 9, 2020) (same).

168. Strain v. Regalado, 977 F.3d 984 (10th Cir. 2020).

169. *See id.* at 993 ("At no point did *Kingsley* pronounce its application to Fourteenth Amendment deliberate indifference claims or otherwise state that we should adopt a purely objective standard for such claims, so we cannot overrule our precedent on this issue.").

170. *See id.* at 987 (noting that Mr. Pratt expressed that he was experiencing alcohol withdrawal the morning after he was booked).

171. *Id.*

172. *Id.* at 987–88.

173. *Id.* at 988.

174. *See id.* ("But someone, presumably a nurse practitioner at the request of Nurse Deane, switched Mr. Pratt from Librium to Valium shortly after Nurse Deane's assessment.").

staff declined to increase Pratt's level of care or move him to a medical facility.[175] A few hours later, Dr. Curtis McElroy examined Pratt, noticing a "two-centimeter" cut on his forehead and a pool of blood on the cell floor.[176] Pratt's level of care remained the same, even after Dr. McElroy and licensed professional counselor, Kathy Loehr, each gave Pratt a mental health examination.[177] On December 16, a correctional officer noticed Pratt lying motionless and called a nurse who "initiated cardiopulmonary resuscitation."[178] Pratt was taken to the hospital after he went into cardiac arrest, and upon his discharge, he was diagnosed with a "seizure disorder and other ailments that left him permanently disabled."[179]

Pratt's guardian, Plaintiff Faye Strain, brought an action under 42 U.S.C. § 1983, arguing that the staff at the Tulsa County Jail acted deliberately indifferent to Pratt's medical needs in violation of the Fourteenth Amendment.[180] The federal district court dismissed the suit and declined to exercise supplemental jurisdiction over any state law claims.[181]

Judge Joel Carson III, writing for the three-member panel, specifically declined to apply *Kingsley* to Pratt's deliberate indifference claims on three separate grounds.[182] First, application

175. *See id*. ("[S]taff did not escalate Mr. Pratt's level or place of care.").

176. *See id*. (explaining what Dr. McElroy observed while examining Pratt and noting that Dr. McElroy was aware of Pratt's earlier symptoms from his medical records).

177. *See id.* ("Mr. Pratt reported that he was detoxing from alcohol and appeared shaky. LPC Loehr observed that Mr. Pratt struggled to answer questions and determined the cut on his forehead appeared unintentional. LPC Loehr declined to seek more care for Mr. Pratt.").

178. *Id*.

179. *Id*.

180. *See id*. (explaining Plaintiff's § 1983 claim and that pretrial detainees have access to that claim under the Fourteenth Amendment).

181. *See* Strain v. Regalado, No. 18-CV-583-TCK-FHM, 2019 WL 3646828, at *7 (N.D. Okla. Aug. 6, 2019) ("[T]he Complaint in this case suffers the same fatal flaw as the Amended Complaint . . . . [A]lthough the allegations arguably state a claim for negligence, they do no[t] establish that [D]efendants *intentionally* denied or delay access to treatment or intentionally interfered with the treatment once prescribed.").

182. *See* Strain v. Regalado, 977 F.3d 984, 991 (10th Cir. 2020)

First, *Kingsley* turned on considerations unique to excessive force claims: whether the use of force amounted to punishment, not on the status of the detainee. Next,

of the *Kinglsey* standard would be inappropriate because excessive force and deliberate indifference claims serve different purposes, even though they are both protected by the Due Process Clause of the Fourteenth Amendment.[183] Second, according to the court, the notion of "deliberate indifference" itself presupposes a subjective component.[184] Lastly, application of the *Kingsley* standard would violate the principle of *stare decisis* in the Tenth Circuit and the Supreme Court's rejection of a purely objective standard in *Farmer v. Brennan*.[185] For these three reasons, the panel affirmed the district court's holding.[186]

Similarly, in *Grochowski v. Clayton County,*[187] the Eleventh Circuit also declined to apply *Kingsley* to a deliberate indifference claim brought by the children of a pretrial detainee who died in custody.[188] On August 14, 2012, Kenneth Grochowski was killed by

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the nature of a deliberate indifference claim infers a subjective component. Finally, principles of *stare decisis* weigh against overruling precedent to extend a Supreme Court holding to a new context or new category of claims.

183. *See id.* ("The excessive force cause of action 'protects a pretrial detainee from the use of excessive force that amounts to punishment.' The deliberate indifference cause of action does not relate to punishment, but rather safeguards a pretrial detainee's access to adequate medical care.") (internal citations omitted).

184. *See id.* at 992 ("[D]eliberate indifference requires an official to subjectively disregard a known or obvious, serious medical need. . . . An excessive force claim, on the other hand, does not consider an official's state of mind with respect to the proper *interpretation* of the force.'") (quoting Kingsley v. Hendrickson, 576 U.S. 389, 396 (2015)) (emphasis in original).

185. *See* Farmer v. Brennan, 511 U.S. 825, 837 (1994) (establishing that the test for deliberate indifference requires an official to subjectively disregard a known or obvious, serious medical need); *see also Strain*, 977 F.3d at 993 ("'We reaffirm that if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other lines of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.'") (quoting Agostini v. Felton, 521 U.S. 203, 237 (1997)).

186. *See id.* at 997 ("Although Plaintiff's claims may smack of negligence, we conclude that they fail to rise to the high level of deliberate indifference against any Defendant. Thus, the district court correctly dismissed Plaintiff's federal claims in full.").

187. Grochowski v. Clayton Cnty., Ga., 961 F.3d 1311 (11th Cir. 2020).

188. *See id.* at 1318 n.4 ("Plaintiffs urge us to dispense with the subjective component, as the Supreme Court did in *Kingsley v. Hendrickson* for excessive force claims arising under the Fourteenth Amendment. We decline to apply

his cellmate, William Brooks, during a fight over a piece of candy; ironically, neither individual had a history of violent felonies or were currently detained for a violent offense.[189] Brooks physically assaulted Grochowski until he was unconscious and then attempted to drown the lifeless man in their cell toilet.[190] Grochowski was unresponsive when officials for the Clayton County Jail attempted to help him, and he "was pronounced dead the following morning."[191]

Grochowski's living relatives brought a civil rights action under § 1983, claiming that Grochowski's due process rights under the Fourteenth Amendment had been violated by the jail officials' and Clayton County's actions.[192] Specifically, Grochowski's estate asserted that the jail officials were liable themselves because both the jail's inmate classification process and its practice of performing rounds only hourly to supervise inmates were inadequate.[193] As to Clayton County itself, the estate argued two additional theories of liability: (1) "the jail's design pose[d] a substantial risk of harm to inmates at the Jail because corrections officers do not have a clear view into each cell from the central control towers"; and (2) "the County failed to fund the Jail adequately . . . caus[ing] the Jail to close one of its housing units

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Kingsley because Grochowski's death occurred in 2012 and *Kingsley* was decided in 2015.").

189. *See id.* at 1314 ("Neither man had a history of violent felonies, and neither reported any mental health issues. Both men were classified as medium-security inmates and were assigned to the same cell."). *But see id.* at 1317 ("Plaintiffs point out, however, that Brooks had been convicted in 2009 for misdemeanor fighting, which was not considered under the security screening protocol.").

190. *See id.* at 1317 ("According to Brooks, Grochowski took a swing at Brooks, and Brooks blocked the swing and hit Grochowski in the throat. Brooks continued to beat Grochowski and then tried to drown Grochowski by placing his head into the cell's toilet.").

191. *Id.*

192. *See id.* ("Plaintiffs argued that the conditions at the jail violated Grochowski's due process rights under the Fourteenth Amendment, and that those conditions caused Grochowski's death.").

193. *See id.* at 1318 ("[T]he Jail's classification process does not adequately identify inmates with violent or assaultive tendencies, which leads to nonviolent inmates being double-celled with violent inmates[,] . . . [and] the Jail's practice of performing hourly rounds is insufficient to ensure the safety of inmates while they are inside their cells.").

. . . pos[ing] a substantial risk of harm to inmates at the Jail."[194] The defendants moved for summary judgment, arguing that the jail officials were not liable on qualified immunity grounds, and that the Supreme Court's holding in *Monell v. Department of Social Services of New York*[195] absolved Clayton County of liability for any potential constitutional violations.[196] The district court granted the motions for summary judgment.[197]

The three-member Eleventh Circuit panel, in an opinion written by Circuit Judge David Ebel, affirmed the district court and held that the actions of the jail officials in Clayton County had not violated Grochowski's due process rights.[198] Regarding the jail officials themselves, the court determined that the officials' implementation of the inmate classification process did not violate Grochowski's Fourteenth Amendment rights, since there was no showing that the classification process neglected to properly contemplate an inmate's capacity for violence.[199] Additionally, the court found that the jail officials' practice of performing hourly rounds did not create an increased risk of serious harm to inmates, as there was no constitutionally-mandated requirement that cells be checked more frequently than every hour.[200]

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194. *Id.* at 1321–22.

195. *See* Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658, 694–95 (1978) ("[A] local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom . . . inflicts the injury that the government as an entity is responsible under § 1983.").

196. *See* Grochowski v. Clayton Cnty., Ga., 961 F.3d 1311, 1314 (11th Cir. 2020) (moving for summary judgement based on qualified immunity grounds).

197. *See id.* (noting that the district court granted summary judgement for the jail supervisors and the county while denying partial summary judgement in favor of the plaintiff).

198. *See id.* at 1319–23 (affirming the district court's order granting the jail supervisors and the county's Motion for Summary Judgment).

199. *See id.* at 1319–20 ("A corrections officer then conducts a security screening based on objective criteria, such as the inmate's current charges, history of violent felony convictions, and any disciplinary records from previous detentions at the Jail.").

200. *See id.* at 1320 ("To the contrary, the Jail Supervisors cite cases to demonstrate that hourly rounds are constitutionally adequate . . . . We recognize that [these cited cases] addressed the subjective component of deliberate indifference rather than the objective component of a substantial risk of serious harm.").

As to the claims against Clayton County itself, the Eleventh Circuit first held that the design of the jail itself was not constitutionally inadequate because its design was consistent with national standards and each cell had an emergency call button.[201] The court also determined that there was no showing that the County's funding and staffing scheme for the jail fell below a minimum constitutional threshold that would create a risk of substantial harm to every inmate housed within the jail.[202]

On November 20, 2020, Grochowski's estate filed a petition for writ of certiorari to the United States Supreme Court.[203] The petition listed three questions for review based on the Eleventh Circuit's decision not to apply the *Kingsley* standard to Grochowski's deliberate indifference claims.[204] The first question was whether the courts below "failed to draw inferences in Grochowski's favor erroneously finding each condition did not present a substantial risk of harm, and by failing to consider the combination of the conditions, erroneously granting the jail supervisors qualified immunity and the County judgment, finding the conditions did not pose a substantial risk."[205] The second question posited was whether "*Kingsley*'s objective reasonableness test apply to the conditions and systems creating an unreasonable risk of harm to detainees, warranting denial of summary judgment."[206] The third and final question was whether "legislative immunity [should] shield a County representative from a deposition."[207] However, on January 25, 2021, the Supreme

201. *See id.* at 1321 ("Plaintiffs' position amounts to an argument that the constitution requires continuous observation of double-celled inmates. As described above, our precedent undermines that suggestion.").

202. *See id*. at 1321–22 (explaining that there was no evidence that the jail was forced to place three prisoners in a single cell due to the housing closure, nor that extra housing would have led to Grochowski being placed in a cell by himself).

203. *See* Petition for Writ of Certiorari to the Eleventh Circuit, Grochowski v. Clayton Cnty., Ga., No. 20-738, 2020 WL 7033465 (Nov. 19, 2020) (petitioning the Supreme Court to overturn the decision of the Eleventh Circuit).

204. *See id.* at i. ("*Kingsley v. Hendrickson* . . . as applied in three other circuits, would apply an objective reasonableness test to remediate the conditions and systems creating a substantial risk of harm to Clayton detainees.").

205. *Id.*

206. *Id.*

207. *Id.*

Court denied certiorari to Grochowski's estate, meaning that the circuit split surrounding the application of the *Kingsley* standard to deliberate indifference claims brought by pretrial detainees will remain unresolved for the immediate future.[208]

IV. Analysis of Fourteenth Amendment Deliberate Indifference Claims

The following section of this Note seeks to create a rudimentary measure of pretrial detainees' varying rates of success in brining deliberate indifference claims. In 2017, Professor Joanna C. Schwartz wrote an article published in the *Yale Law Journal* entitled *How Qualified Immunity Fails*.[209] In that article, Professor Schwartz examined the dockets of cases involving qualified immunity from the Southern District of Texas, the Middle District of Florida, the Northern District of Ohio, the Eastern District of Pennsylvania, and the Northern District of California over the course of a two-year period, from January 1, 2011 to December 31, 2012; she then measured a number of different outcomes, including the frequency of defendants bringing qualified immunity motions, whether the courts would grant those motions, and whether those motions were dispositive of the case either at the Rule 12 or the Rule 56 stage.[210] Upon review of the 1,183 dockets across the five federal districts, Professor Schwartz found that "just thirty-eight (3.9%) of the 979 cases in which qualified immunity could be raised were dismissed on qualified immunity grounds."[211] Additionally, when the data set was expanded to include all § 1983 cases against law enforcement defendants, Professor Schwartz discovered that only seven (0.6%) cases and thirty-one (2.6%) cases were dismissed at the Rule 12 and Rule 56 stages, respectively, on qualified immunity grounds.[212]

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208. *See* Grochowski v. Clayton Cnty., Ga., 2021 WL 231575 at *1 (Jan. 25, 2021) (denying the petition for a writ of certiorari).

209. Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2 (2017).

210. *See id.* at 19 (explaining the article's methodology).

211. *Id.* at 2.

212. *See id* at 10 (summarizing the data reviewed by Professor Schwartz).

In light of Professor Schwartz's article, I thought that it would be interesting to go through a similar empirical process and evaluate the successfulness of pretrial detainees' deliberate indifference claims under § 1983. Realizing the limitations placed on this process by Bloomberg Law, I turned to that service's Litigation Analytics tool, and I looked at the motion outcomes decided in 2020 for every case involving "Prisoners' Rights" in both the Northern District of Alabama and the Northern District of California. I chose these two federal district courts as representatives of each side of the circuit split mentioned above.[213] Within Bloomberg's Litigation Analytics tool, there are three different types of motion outcomes: Granted, Denied, and Granted/Denied in Part. There was a total of twenty-nine motions in the Northern District of Alabama and ninety-one in the Northern District of California.

Out of the twenty-nine total cases involving prisoners' rights in the Northern District of Alabama, only five (17%) dealt with deliberate indifference claims brought by a pretrial detainee. Of those five cases, four were adjudicated at the Rule 12 stage, with only one being determined at the Rule 56 stage. Within these five cases themselves, there were a total of seven individual motions. Three motions were granted (43%), two were denied (29%), and three were granted in part and denied in part (43%).

In the Northern District of California, seventeen out of ninety-one (19%) cases dealt with deliberate indifference claims brought by a pretrial detainee. Out of those seventeen cases, nine were determined at the Rule 12 stage and eight were determined at the Rule 56 stage. Again, within these seventeen cases, there were a total of eighteen individual motions, with six being granted (33%), thirteen being granted in part and denied in part (77%), and only one being flat out denied (6%).

From these rudimentary calculations, pretrial detainees clearly have a better chance of surviving either a motion to dismiss

213. *Compare* Castro v. Cnty. of Los Angeles, 833 F.3d 1060, 1070 (9th Cir. 2016) (determining that Court's holding *Kingsley* mandates that deliberate indifference claims brought by pretrial detainees be evaluated under a purely objective standard), *with* Grochowski v. Clayton Cnty., Ga., 961 F.3d 1311, 1318 n.4 (11th Cir. 2020) (determining that the Court's decision in *Kingsley* does not impact an analysis of a petitioner's deliberate indifference claim under the Fourteenth Amendment).

or a motion for summary judgment when facing a purely objective standard in the Ninth Circuit as compared to a subjective standard in the Eleventh Circuit.[214]

V. Conclusion

Based on the research described in the previous section,[215] pretrial detainees bringing deliberate indifference claims in the Ninth Circuit, when facing a purely objective standard, have a higher chance of successfully making it trial than their counterparts in the Eleventh Circuit. From this position, it is not hard to draw the logical conclusion that incarcerated individuals bringing excessive force or deliberate indifference claims under the Eighth Amendment would be more successful if facing only an objective standard as well. While the Supreme Court has made its case as to why the subjective component is necessary when the Eighth Amendment is implicated,[216] is the basis for this justification, that individuals who have not been convicted in a court of law cannot be subject to "punishment," worth the increased burden on incarcerated individuals? This legal point seems rather esoteric as free citizens, pretrial detainees, and incarcerated individuals alike are "punished" today because of the color of their skin, even though that punishment was not handed down by a court of law.[217] Nevertheless, external interventions into

214. This statistical analysis is subject to a number of limitations. First, neither sample size is large enough to be statistically significant. Second, even if the sample sizes were large enough, the results would have to assume that the parties in these cases always engage in dispositive motion practice. Third, these numbers might not be uniform over the entire circuit. Fourth, "user error" could contribute to percentages reported above. The purpose of the exercise is really to demonstrate that more robust research is needed in this area.

215. *See supra* Part III (analyzing deliberate indifference claims under 42 U.S.C. § 1983).

216. *See, e.g.*, Wilson v. Seiter, 501 U.S. 294, 299 (1991) ("These cases mandate into a prison official's state of mind when it is claimed that the official has inflicted cruel and unusual punishment.").

217. *See, e.g.,* Tim Arango, Nicholas Bogel-Burroughs, & Jay Senter, *Three Former Officers Are Convicted of Violating George Floyd's Civil Rights*, N.Y. TIMES, (Feb. 24, 2022) ("The case was an extraordinarily rare example of the Justice Department prosecuting officers for their inaction while another officer used excessive force.") [https://perma.cc/6GJ9-KFLU].

the treatment of incarcerated individuals might provide some provide some relief in the not-so-distant future.[218]

218. *See* Complaint at 1, United States v. Ala. Dep't of Corr., No. 2:20–cv-01971-JHE (N.D. Ala. Dec. 9, 2020) ("The State of Alabama violates the Eighth and Fourteenth Amendment rights of [ ] prisoners . . . by failing to protect these prisoners from the use of excessive force by security staff . . . .").