Kingsley, Unconditioned: Protecting Pretrial Detainees with an Objective Deliberate Indifference Standard in § 1983 Conditions-of-Confinement Claims

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I. INTRODUCTION

In the late hours of October 2, 2009, Jonathan Castro staggered drunkenly through Los Angeles, speaking unintelligibly and bumping into passersby.[1] Concerned for his safety, police officers arrested Castro on a misdemeanor public drunkenness charge and transported him to the West Hollywood police station.[2] He was placed in a sobering cell, which was furnished with only a toilet and mattress pads to protect detainees from injury.[3]

A few hours later, Jonathan Gonzalez was arrested on a felony charge after shattering a glass door with his fist.[4] He, too, was brought to the West Hollywood police station, where his behavior was described as "bizarre" and "combative."[5] Although other cells were available at the station, an officer placed him in the same sobering cell as Castro.[6] The police station's supervising officer assigned a community volunteer to monitor the cell, but he only checked it "sporadically," and there was no audio or video surveillance.[7]

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1. Castro v. County of Los Angeles, 833 F.3d 1060, 1064–65 (9th Cir. 2016) (en banc).
2. *Id.*
3. *Id.* at 1065; *see also* Maura Dolan, *U.S. Appeals Court Upholds $2-Million Verdict Against L.A. County Sheriff's Department*, L.A. TIMES (Aug. 15, 2016; 2:35 PM), https://www.latimes.com/local/lanow/la-me-ln-sheriff-9th-circuit-20160815-snap-story.html [https://perma.cc/LS28-83C5].
4. *Castro*, 833 F.3d at 1065.
5. *Id.*
6. *Id.* at 1065, 1073.
7. *Id.* at 1064–65, 1067.

Shortly after deputies placed Gonzalez in the cell, Castro pounded on the door for a full minute to try to get the attention of police staff.[8] Though the supervising officer was sitting at a nearby desk, he did not respond.[9] Twenty minutes later, the volunteer walked by the cell and saw Gonzalez inappropriately touching Castro's thigh while he appeared to be asleep.[10] The volunteer reported what he saw to the supervising officer, who arrived at the sobering cell six minutes later to find Gonzalez stomping on Castro's head.[11] Castro lay unconscious in respiratory distress with a broken jaw amid a pool of blood.[12] He spent almost a month in the hospital followed by four years in a long-term care facility.[13] Years after the jail-cell beating, Castro still suffered from severe memory loss and other cognitive difficulties.[14]

Castro sued the Los Angeles Sheriff's Department and the officers involved under § 1983, which gives individuals a cause of action against state officials who violate their constitutional rights.[15] Castro alleged that the officers violated his Fourteenth Amendment right to be free from punishment by failing to protect him from harm.[16] The jury found in Castro's favor and awarded him a $2.6 million verdict.[17] When the Ninth Circuit heard the defendants' appeal en banc, it not only affirmed the jury verdict but also loosened the state-of-mind element for cases like Castro's—those in which a pretrial detainee challenges a condition of his confinement.[18] Rather than requiring that an officer *actually be aware* that a pretrial detainee was at risk of substantial harm, which the Ninth Circuit had previously required, the court held that an officer may be liable *if a reasonable officer under the circumstances* would have recognized a high degree of risk.[19] In other words, the Ninth Circuit lowered the state-of-mind requirement from a subjective one to an objective one.

The Ninth Circuit's decision to change the standard for pretrial-detainee conditions-of-confinement claims was derived from the Supreme Court's decision in *Kingsley v. Hendrickson*, which was a use-of-force case as

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8. *Id.* at 1065, 1073; *see* Dolan, *supra* note 3.
9. *Castro*, 833 F.3d at 1073.
10. *Id.* at 1065.
11. *Id.*
12. *Id.*
13. *Id.*; Dolan, *supra* note 3.
14. *Castro*, 833 F.3d at 1065.
15. 42 U.S.C. § 1983; Monroe v. Pape, 365 U.S. 167, 172 (1961).
16. *Castro*, 833 F.3d at 1064.
17. Castro v. County of Los Angeles, 785 F.3d 336, 342 (9th Cir. 2015), *rev'd en banc*, 833 F.3d 1060.
18. *See Castro*, 833 F.3d at 1064, 1070.
19. *Id.* at 1070.

opposed to a conditions-of-confinement case like *Castro*.[20] In *Kingsley*, the Court held that a primarily objective standard is appropriate when a pretrial detainee alleges that an officer used excessive force against him: the detainee need only show that an officer intentionally used force and that the force was objectively unreasonable.[21] By setting this standard, the Court rejected the subjective state-of-mind element previously used by several circuits in pretrial-detainee use-of-force cases, which required detainees to show that an officer used force "maliciously and sadistically to cause harm."[22] Though *Kingsley* settled the *use-of-force* standard, the standard for pretrial-detainee *conditions-of-confinement* claims remains unresolved. In *Castro*, the Ninth Circuit became the first of three circuits to interpret *Kingsley*'s reasoning to require an objective standard in a conditions-of-confinement claim, while the other circuits continue to use some form of subjective standard.[23]

This Comment argues that the Supreme Court should require objective deliberate indifference as the state-of-mind standard for § 1983 conditions-of-confinement claims by pretrial detainees in order to better protect the constitutional right of detainees to be free from punishment. The objective deliberate indifference standard requires a pretrial detainee to prove either that (1) the defendant intentionally imposed an objectively unreasonable condition; or (2) the defendant recklessly failed to act with reasonable care to mitigate the risk of an objectively unreasonable condition even though the defendant knew or should reasonably have known that it posed an excessive risk. The argument in favor of objective deliberate indifference is made not on a normative basis but on a practical one: the objective standard is more aligned with existing Supreme Court precedent and sufficiently addresses concerns the Court has previously raised about inmate litigation.

Part II discusses the constitutional rights of convicted prisoners and pretrial detainees under the Eighth and Fourteenth Amendments, respectively, and the Supreme Court's development of standards for the vindication of those rights under § 1983. Part III describes the *Kingsley* decision and the subsequent circuit split regarding its application to conditions-of-confinement claims. Part IV argues for a uniform state-of-mind element for § 1983 conditions-of-confinement claims by pretrial detainees. Specifically, it argues for the adoption of the objective deliberate indifference standard and explains why that standard accurately reflects Supreme Court

20. Kingsley v. Hendrickson, 576 U.S. 389 (2015); *see Castro*, 833 F.3d at 1068–70.
21. *Kingsley*, 576 U.S. at 396–97.
22. *Id.* at 400–01.
23. *See infra* Part III.B.

precedent on the scope of the Fourteenth Amendment's protection of pretrial detainees. Part V concludes.

II. BACKGROUND

Underlying *Kingsley* and its progeny are the rights of inmates as they developed in the latter half of the twentieth century. Section A briefly explains the constitutional rights of convicted prisoners and pretrial detainees under the Eighth and Fourteenth Amendments, respectively. Section B describes the civil remedy for violations of these rights under § 1983 and the development of legal standards for such claims prior to *Kingsley*.

A. Constitutional Protections of Inmates

Inmates can generally be divided into two classes—pretrial detainees and convicted prisoners[24]—protected separately by the Constitution.[25] This Section begins by discussing the Eighth Amendment rights of prisoners, then proceeds to the Fourteenth Amendment rights of detainees.

1. Eighth Amendment Rights of Convicted Prisoners

Government action or inaction with respect to an inmate is subject to Eighth Amendment scrutiny only after the inmate has been convicted through a lawful prosecution.[26] The Eighth Amendment prohibits the "inflict[ion]" of "cruel and unusual punishments."[27] As interpreted by the Supreme Court, the Eighth Amendment protects human dignity by limiting the government's power to punish within the bounds of "civilized standards" as measured by

24. Margo Schlanger, *The Constitutional Law of Incarceration, Reconfigured*, 103 CORNELL L. REV. 357, 362–63 (2018). Due to the importance of the distinction between pretrial detention and postconviction detention to this Comment, for the sake of precision and clarity, this Comment refers to people in custody who *have not* been convicted as "pretrial detainees" or "detainees" and to people in custody who *have* been convicted as "convicted prisoners" or "prisoners." It uses "inmate" as a general term that encompasses both detainees and prisoners. *But see* Eddie Ellis, *Language*, PRISON STUD. PROJECT, http://prisonstudiesproject.org/language/ [https://perma.cc/KCZ5-DMRP] (encouraging the use of humanizing language to refer to people with criminal records).

25. Schlanger, *supra* note 24, at 362–63.

26. Ingraham v. Wright, 430 U.S. 651, 671 n.40 (1977).

27. U.S. CONST. amend. VIII. The Eighth Amendment applies to the states through the Fourteenth Amendment. Robinson v. California, 370 U.S. 660, 666 (1962).

"the evolving standards of decency that mark the progress of a maturing society."[28]

Hence, the Court has construed the Eighth Amendment not only to forbid "physically barbarous punishments," such as torture methods, but also to create certain obligations owed by the government to those it imprisons.[29] For example, the Court has held that the government must maintain humane conditions of confinement, provide medical care, and protect inmates from serious harm at the hands of others.[30] Thus, while the government has the power to punish those who have been convicted of crimes, the Eighth Amendment limits the types of punishment the government may employ and affords certain rights to those it punishes.[31]

2. Fourteenth Amendment Rights of Pretrial Detainees

Those who have not been convicted but have been charged with a crime and are being held in custody are considered pretrial detainees.[32] Detainees in state custody are protected under the Due Process Clause of the Fourteenth Amendment.[33] Under that clause, which says that states may not "deprive any person of life, liberty, or property, without due process of law," a pretrial detainee is free from punishment altogether.[34] The Due Process Clause has been interpreted broadly, and its application is far-reaching.[35] In the context of punishment, the Supreme Court has determined that punishing someone implicates her liberty interests, so the government may not inflict punishment unless the person has received due process—here, a lawful prosecution and

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28. Trop v. Dulles, 356 U.S. 86, 100–01 (1958); Meghan J. Ryan, *Taking Dignity Seriously: Excavating the Backdrop of the Eighth Amendment*, 2016 U. ILL. L. REV. 2129, 2141.

29. Estelle v. Gamble, 429 U.S. 97, 102 (1976).

30. *See, e.g.*, Helling v. McKinney, 509 U.S. 25, 33 (1993); *Estelle*, 429 U.S. at 103–04; Farmer v. Brennan, 511 U.S. 825, 833–34 (1994).

31. *See Estelle*, 429 U.S. at 102.

32. Bell v. Wolfish, 441 U.S. 520, 523 (1979).

33. *See id.* at 535. *Bell* involved federal detainees, so it was decided under the Due Process Clause of the Fifth Amendment. *Id.* But the Court conflated its Fifth and Fourteenth Amendment due-process precedent, *id.* at 535 n.17, and later decisions made clear that state detainees have the same due-process rights under the Fourteenth Amendment as federal detainees have under the Fifth Amendment, *see* Kingsley v. Hendrickson, 576 U.S. 389, 397–98 (2015). Because only state officials are subject to liability under § 1983, this Comment refers to the Fourteenth Amendment.

34. U.S. CONST. amend. XIV, § 1; *Bell*, 441 U.S. at 535 ("[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.").

35. *See generally* E. THOMAS SULLIVAN & TONI M. MASSARO, THE ARC OF DUE PROCESS IN AMERICAN CONSTITUTIONAL LAW, at xi–xiv (2013).

conviction.[36] This in turn explains why convicted prisoners receive less constitutional protection: they have received due process and thus may lawfully be deprived of their liberty under the Fourteenth Amendment (so long as the punishment comports with the Eighth Amendment).[37]

Because the Fourteenth Amendment protects pretrial detainees from punishment, the conditions to which they may be lawfully subjected turns on how "punishment" is defined. The legal standard for "punishment" is inexact, however, and will be discussed further in Part II.B.3. Nevertheless, at least two points are settled regarding the rights of detainees. First, detainees' freedom from punishment does not equate to freedom from confinement and its associated conditions.[38] The Supreme Court has held that the government's interest in ensuring the presence of defendants at trial justifies detention, which has inherent incidental restrictions on liberty.[39] Second, the Fourteenth Amendment protections of pretrial detainees are at least as great as the Eighth Amendment protections of convicted prisoners.[40] At a minimum, then, detainees are entitled to humane conditions, medical care, protection from harm, and other rights afforded to prisoners.[41] Thus, the constitutional rights of a pretrial detainee lie somewhere between those of a free citizen and a convicted prisoner.

B. Section 1983: The Cause of Action for Constitutional Violations

Section 1983 provides a civil remedy to those who have been deprived by a state official of a right held under federal law.[42] Accordingly, an inmate in a state or local detention facility who alleges that an officer violated his Eighth or Fourteenth Amendment rights may sue the officer under § 1983.[43]

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36. *See Bell*, 441 U.S. at 535 n.17; Ingraham v. Wright, 430 U.S. 651, 674 (1977) ("[W]here school authorities . . . deliberately decide to punish a child for misconduct . . . Fourteenth Amendment liberty interests are implicated.").

37. *See Bell*, 441 U.S. at 535 n.16.

38. *Id.* at 536–37.

39. *Id.* at 523, 537.

40. City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983).

41. *See supra* note 30 and accompanying text.

42. 42 U.S.C. § 1983 ("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 . . . ."); Monroe v. Pape, 365 U.S. 167, 172 (1961).

43. *See* § 1983. In addition to § 1983 claims against officers—to which this Comment limits its focus—inmates may make § 1983 claims against municipalities. *See* Monell v. Dep't of Soc.

In general, § 1983 claims by inmates can be divided into two types: use-of-force and conditions-of-confinement.[44] Use-of-force claims arise when an inmate alleges that an officer applied excessive physical force to his or her person.[45] For example, an inmate might allege that a corrections officer threw him to the ground, beat him, or shot him.[46] Conditions-of-confinement claims can vary widely, but they involve an injury resulting from a condition of an inmate's incarceration.[47] The three common categories of conditions-of-confinement claims involve inadequate medical care (medical-needs claims), failure to protect an inmate from other inmates (failure-to-protect claims), and unsanitary or inhumane facilities or other conditions (general conditions claims).[48]

Over time, the Supreme Court has crafted different standards for § 1983 claims based on both the type of claim and the status of the plaintiff as either a convicted prisoner or a pretrial detainee.[49] However, the standards have not always been clear, and the lines between them have frequently blurred.[50] The following sections summarize the mental-state requirements[51] in place for § 1983 suits by inmates against individual officers prior to the Supreme

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Servs., 436 U.S. 658, 694–95 (1978) (holding a local government is liable under § 1983 "when execution of [its] policy or custom . . . inflicts the injury"); Nicole B. Godfrey, *Institutional Indifference*, 98 OR. L. REV. 151, 183–85 (2020). Beyond a federal § 1983 action, inmates may also make state claims. *See* Caroline Davidson, *State Constitutions and the Humane Treatment of Arrestees and Pretrial Detainees*, 19 BERKELEY J. CRIM. L. 1, 54–59 (2014).

44. Schlanger, *supra* note 24, at 363.

45. *See* Milo Miller, *Electrified Prison Fencing: A Lethal Blow to the Eighth Amendment*, 38 CAL. W. L. REV. 63, 64 n.6 (2001).

46. *See, e.g.*, Wilkins v. Gaddy, 559 U.S. 34, 35 (2010) (recounting a prisoner's allegations that an officer slammed him onto a concrete floor and beat him); Whitley v. Albers, 475 U.S. 312, 314–16 (1986) (describing a prisoner being shot in the leg by an officer during a prison riot).

47. *See* Miller, *supra* note 45, at 64 n.6.

48. Catherine T. Struve, *The Conditions of Pretrial Detention*, 161 U. PA. L. REV. 1009, 1011 (2013); *see also* Wilson v. Seiter, 501 U.S. 294, 303 (1991) ("[T]he medical care a prisoner receives is just as much a 'condition' of his confinement as the food he is fed, the clothes he is issued, the temperature he is subjected to in his cell, and the protection he is afforded against other inmates.").

49. *See* Schlanger, *supra* note 24, at 364 tbl.1.

50. *Id.* at 364–65. For example, prior to *Kingsley*, most of the Supreme Court's § 1983 inmate jurisprudence involved convicted prisoners rather than pretrial detainees, so the lower courts frequently applied the same analysis to both detainee and prisoner claims. *Id.* at 365.

51. Civil mental-state requirements are related to the criminal doctrine of mens rea, or criminal intent. *See* WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 5.1 (3d ed. 2018). There are five basic mens rea levels: (1) *intention* or *purpose* to commit an act; (2) *knowledge* of the nature of an act or its result; (3) *recklessness* in committing an act or causing its result, or a subjective awareness of the risk posed; (4) *negligence* in committing an act or causing its result, or creating an objectively unreasonable risk; and (5) *strict liability*, where an actor is liable regardless of her mental state. *Id.* § 5.1(c). The same state-of-mind standards may also be used in civil suits. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS §§ 8A, 281, 500, 519 (AM. L. INST. 1965).

Court's *Kingsley* decision in 2015.[52] First, Part II.B.1 describes the malicious-and-sadistic standard applied to use-of-force claims by convicted prisoners. Then, Part II.B.2 describes the subjective deliberate indifference standard used for conditions-of-confinement claims by convicted prisoners. Finally, Part II.B.3 considers the Court's murky pre-*Kingsley* guidance for claims by pretrial detainees. Together, the remainder of Part II and Part III define the current, post-*Kingsley* state-of-mind standards for § 1983 inmate claims, which are summarized in Figure 1.

52. This Comment focuses on the Supreme Court's § 1983 inmate jurisprudence since 1976. For a history going back to the nineteenth century, see Schlanger, *supra* note 24, at 365–85.

Figure 1. Mental-state requirements for § 1983 inmate claims

	Eighth Amendment (claims by prisoners)	*Fourteenth Amendment (claims by detainees)*
Use of force	"[M]aliciously and sadistically to cause harm"[53]	Intentional use of objectively unreasonable force[54]
Conditions of confinement	Subjective deliberate indifference: "'consciously disregar[ded]' a substantial risk of serious harm"[55]	*See below*

Fourteenth Amendment conditions of confinement			
Subjective standard		*Objective standards*	
Generally, subjective deliberate indifference[56]		Ninth Circuit	(1) Intentional decision with respect to the condition AND (2) Objectively reckless as to the risk presented by the condition[57]
		Second Circuit	(1) Intentionally imposed the condition OR (2) Objectively reckless as to the risk presented by the condition[58]
		Seventh Circuit	(1) Objectively unreasonable action or inaction AND (2) at least reckless in considering the consequences [59]

53. Hudson v. McMillian, 503 U.S. 1, 7 (1992); *see infra* Part II.B.1.

54. Kingsley v. Hendrickson, 576 U.S. 389, 395 (2015); *see infra* Part III.A.

55. Farmer v. Brennan, 511 U.S. 825, 839 (1994) (quoting MODEL PENAL CODE § 2.02(2)(c) (AM. L. INST. 1985)); *see infra* Part II.B.2.

56. *See infra* Part III.B.1.

57. Castro v. County of Los Angeles, 833 F.3d 1060, 1071 (9th Cir. 2016); *see infra* Part III.B.2.a.

58. Darnell v. Pineiro, 849 F.3d 17, 35 (2d Cir. 2017); *see infra* Part III.B.2.b.

59. Miranda v. County of Lake, 900 F.3d 335, 353–54 (7th Cir. 2018); *see infra* Part III.B.2.c.

1. Eighth Amendment Use-of-Force Standard

The Court set forth the mental-state requirement for use-of-force claims by convicted prisoners in *Whitley v. Albers*[60] and broadened its application in *Hudson v. McMillian*.[61] In *Whitley*, decided in 1986, the Court established a heightened standard for prison use-of-force claims involving exigent circumstances.[62] The plaintiff, a convicted prisoner, had been shot in the leg by the defendant officer during a prison riot.[63] In a 5–4 decision, the Supreme Court held that at least when there are exigent circumstances like a riot, the standard in a prison use-of-force case is "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."[64] The *Whitley* majority noted that officers should receive deference in responding to potentially dangerous circumstances in order to protect their own safety and that of other inmates.[65]

Six years later, the Supreme Court broadened the reach of the *Whitley* malicious-and-sadistic standard by applying it to a case with no exigent circumstances.[66] In *Hudson v. McMillian*, a prisoner alleged that officers kicked and punched him while he was handcuffed and shackled, causing bruises, swelling, and loose teeth.[67] The Court upheld the trial court's judgment for the plaintiff, but a five-Justice majority held that the malicious-and-sadistic standard is the correct state-of-mind requirement in all Eighth Amendment force cases.[68] The Court reasoned that even absent exigent circumstances, corrections officers should receive deference in situations involving force because they may require quick action to preserve order.[69]

The malicious-and-sadistic standard continues to govern use-of-force claims by convicted prisoners and is seen as a very difficult standard for

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

61. Hudson v. McMillian, 503 U.S. 1 (1992).

62. *Whitley*, 475 U.S. at 320–21.

63. *Id.* at 314–16.

64. *Id.* at 320–21 (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973)). The dissent argued for an objective standard: "[T]he 'unnecessary and wanton' infliction of pain on prisoners constitutes cruel and unusual punishment prohibited by the Eighth Amendment, even in the absence of intent to harm." *Id.* at 328 (Marshall, J., dissenting).

65. *Id.* at 321–22.

66. *Hudson*, 503 U.S. at 7.

67. *Id.* at 4.

68. *Id.* at 4, 7, 9. In an unusual alignment, Justices Stevens, Blackmun, Thomas, and Scalia opposed the extension of *Whitley*. *Id.* at 13 (Stevens, J., concurring in part and in the judgment); *id.* at 14 (Blackmun, J., concurring in the judgment); *id.* at 24 (Thomas, J., dissenting).

69. *Id.* at 6 (majority opinion).

prisoners to meet.[70] It is not enough for a prisoner to prove that an officer's use of force was objectively unreasonable or unnecessary; the prisoner must also show that the officer had a malicious and sadistic intent to cause harm.[71]

2. Eighth Amendment Conditions-of-Confinement Standard

Like use-of-force claims, conditions-of-confinement claims by prisoners also include a weighty state-of-mind element.[72] The Supreme Court laid the groundwork for the modern standard in *Estelle v. Gamble*, a 1976 case in which a convicted prisoner alleged inadequate medical care for a back injury.[73] The Court held that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' proscribed by the Eighth Amendment."[74] It did not elaborate on the meaning or application of "deliberate indifference."[75]

Fifteen years later, in *Wilson v. Seiter*, the Court applied the deliberate indifference standard to a general conditions claim by a prisoner alleging a variety of unsafe and unsanitary conditions.[76] The *Wilson* Court held that *Estelle*'s deliberate indifference standard applies to all conditions-of-confinement claims by convicted prisoners.[77] Writing for the majority, Justice Scalia stated that the standard stems directly from the text of the Eighth Amendment:

> The source of the intent requirement is not the predilections of this Court, but the Eighth Amendment itself, which bans only cruel and unusual *punishment*. If the pain inflicted is not formally meted out as *punishment* by the statute or the sentencing judge, some mental

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70. *See* Struve, *supra* note 48, at 1030; David M. Shapiro, *To Seek a Newer World: Prisoners' Rights at the Frontier*, 114 MICH. L. REV. FIRST IMPRESSIONS 124, 130 (2016); David M. Shapiro & Charles Hogle, *The Horror Chamber: Unqualified Impunity in Prison*, 93 NOTRE DAME L. REV. 2021, 2039 (2018).

71. Whitley v. Albers, 475 U.S. 312, 319–21 (1986).

72. *See* Farmer v. Brennan, 511 U.S. 825, 839 (1994).

73. Estelle v. Gamble, 429 U.S. 97, 98 (1976).

74. *Id.* at 104 (citation omitted) (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976)). Justice Blackmun concurred in the judgment without opinion. *Id.* at 108. Justice Stevens dissented, arguing for an objective standard. *Id.* at 116 (Stevens, J., dissenting).

75. Schlanger, *supra* note 24, at 371.

76. Wilson v. Seiter, 501 U.S. 294, 296 (1991). Specifically, the prisoner alleged overcrowding; excessive noise; inadequate heating, cooling, and ventilation; unsanitary restrooms and dining facilities; and housing with unhealthy inmates. *Id.*

77. *Id.* at 303. Four Justices concurred in the judgment but rejected the application of the deliberate indifference standard to a general conditions-of-confinement claim, arguing instead for an objective standard. *Id.* at 306–07 (White, J., concurring in the judgment).

> element must be attributed to the inflicting officer before it can qualify.[78]

If an act or omission is not intentional, the majority decided, it cannot, by definition, be punishment.[79] Though *Wilson* established the necessity of intent and affirmed deliberate indifference as the appropriate standard for a conditions-of-confinement claim, the Court still did not elaborate on the meaning or application of "deliberate indifference."[80]

In the ensuing years, courts interpreted the deliberate indifference standard differently.[81] Some circuits required a showing that an official *actually knew* of a risk of harm to the prisoner[82] (a subjective deliberate indifference standard based on criminal recklessness[83]), while others found deliberate indifference where an official *should have known* of the risk[84] (an objective deliberate indifference standard based on civil recklessness[85]).

In *Farmer v. Brennan* in 1994, the Court resolved the split.[86] *Farmer* was a failure-to-protect case brought by a transgender woman who was beaten and raped while detained in a men's prison.[87] The Court held that deliberate indifference is a subjective standard in Eighth Amendment cases.[88] Specifically, to prove deliberate indifference, a prisoner must show that an officer "[knew] of and disregard[ed] an excessive risk to inmate health or safety."[89] The *Farmer* Court reached this decision by drawing on its definition of punishment in *Wilson*.[90] The Eighth Amendment prohibits cruel

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78. *Id.* at 300 (majority opinion).

79. *See id.*

80. *Id.* at 303.

81. Farmer v. Brennan, 511 U.S. 825, 832 (1994).

82. *E.g.*, Berry v. Muskogee, 900 F.2d 1489, 1498 (10th Cir. 1990) (requiring "actual knowledge of the specific risk of harm"); Goka v. Bobbitt, 862 F.2d 646, 651 (7th Cir. 1988).

83. *See* MODEL PENAL CODE § 2.02(2)(c) (AM. L. INST. 1985) ("A person acts recklessly . . . when he consciously disregards a substantial and unjustifiable risk that . . . will result from his conduct.").

84. *E.g.*, Young v. Quinlan, 960 F.2d 351, 360–61 (3d Cir. 1992) (stating an official may be liable "when he knows or should have known of a sufficiently serious danger to the inmate" (emphasis omitted)); Redman v. County of San Diego, 942 F.2d 1435, 1443 (9th Cir. 1991).

85. *See* RESTATEMENT (SECOND) OF TORTS § 500 (AM. L. INST. 1965) (defining civil recklessness based on an actor's action or failure to act when he knows or reasonably should have known that his conduct creates a substantial risk of physical harm).

86. *Farmer*, 511 U.S. at 832.

87. *Id.* at 829–30.

88. *Id.* at 837. Justices Blackmun and Stevens concurred, joining the Court's judgment in favor of the plaintiff, but continued to advocate for an objective standard. *Id.* at 851 (Blackmun, J., concurring); *id.* at 858 (Stevens, J., concurring).

89. *Id.* at 837 (majority opinion).

90. *Id.* at 837–38; *see* John Boston, David C. Fathi & Elizabeth Alexander, Farmer v. Brennan*: Defining Deliberate Indifference Under the Eighth Amendment*, 14 ST. LOUIS U. PUB. L. REV. 83, 88 (1994).

and unusual *punishments*, not cruel and unusual *conditions*, the majority reasoned, and an act or omission does not constitute *punishment* unless the actor knowingly inflicts harm.[91]

The *Farmer* Court also explained why it distinguished between the malicious-and-sadistic standard for the state-of-mind element in prisoner use-of-force claims and the lower subjective deliberate indifference standard in prisoner conditions-of-confinement claims. When an officer must act quickly and decisively, as in a situation involving the use of force, a plaintiff must prove a higher level of culpability than when an officer has time to consider his action or inaction.[92] Still, like the malicious-and-sadistic standard, the subjective deliberate indifference standard—requiring a prisoner to prove an officer "'consciously disregard[ed]' a substantial risk of serious harm" to the prisoner[93]—is considered difficult for plaintiffs to meet.[94]

3. Fourteenth Amendment Standard

In contrast to the several § 1983 prisoner cases it decided in the 1980s and 1990s, the Supreme Court heard only one major pretrial-detainee case prior to *Kingsley*.[95] In *Bell v. Wolfish*, decided in 1979, a class of pretrial detainees challenged "a veritable potpourri" of jail conditions and practices.[96] First, the Court held that detainees have a Fourteenth Amendment right to be free from punishment, as discussed previously in Part II.A.2.[97] The Court then attempted to determine what constitutes "punishment."[98]

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91. *See Farmer*, 511 U.S. at 838–39.

92. *See id.* at 835–36.

93. *Id.* at 839 (quoting MODEL PENAL CODE § 2.02(2)(c) (AM. L. INST. 1985)).

94. Shevon L. Scarafile, *"Deliberate Indifference" or Not: That Is the Question in the Third Circuit Jail Suicide Case of* Woloszyn v. Lawrence County, 51 VILL. L. REV. 1133, 1136 (2006); James McNally, Note, *Inmate Payment of Health Care—Divisiveness in the Federal Courts in the Application of the* Estelle *Standard and* City of Revere v. Massachusetts General Hospital, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 687, 715–16 (1998).

95. *See* Schlanger, *supra* note 24, at 364 tbl.1.

96. Bell v. Wolfish, 441 U.S. 520, 523, 527 (1979). Specifically, the detainees alleged "overcrowded conditions, undue length of confinement, improper searches, inadequate recreational, educational, and employment opportunities, insufficient staff, and objectionable restrictions on the purchase and receipt of personal items and books." *Id.* at 527.

97. *Id.* at 535.

98. *See id.* at 537–39.

Citing other precedent on "punishment,"[99] the *Bell* Court designated three ways in which a detainee could show a condition was punitive, though it did not say they were exhaustive.[100] First, punitiveness can be shown by an officer's expressed intent to punish.[101] Second, if a condition is not "reasonably related to a legitimate governmental objective," a court can infer an intent to punish, making the condition unconstitutional.[102] Conversely, if the condition does serve a legitimate government goal, it "does not, without more, amount to 'punishment.'"[103] The Court did not define what amounts to a legitimate governmental objective, but it did identify two: the need to manage the detention facility (giving deference to jail administrators) and the need to ensure the detainee's presence at trial.[104] Last, even if there is no expressed intent to punish and there is a legitimate government purpose, a court can still find a condition punitive if the government purpose is insufficient to justify the punishment.[105] The *Bell* majority provided the hypothetical of throwing a shackled detainee in a dungeon to ensure his presence at trial: while the condition serves a legitimate government goal, there are "so many alternative and less harsh methods" of accomplishing it that the condition constitutes punishment.[106]

Ultimately, the majority did not make explicit whether the punitiveness—and thus the constitutionality—of a condition should be judged objectively or subjectively, but the dissenters seemed to believe the Court had imposed a primarily subjective standard.[107] Justice Marshall wrote, "To make detention officials' intent the critical factor in assessing the constitutionality of impositions on detainees is unrealistic in the extreme," and he went on to advocate for a standard focused on the effect of the conditions on detainees.[108] Reaching the same conclusion, Justice Stevens, joined by Justice Brennan, brushed aside the legitimate-governmental-objective test as providing

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99. *See* Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963) (finding a statute that stripped citizenship from draft dodgers to be unconstitutionally punitive); *cf.* De Veau v. Braisted, 363 U.S. 144 (1960) (holding a statute that barred felons from holding office in waterfront unions was not punitive when it was it was an important part of a necessary regulatory scheme).

100. *See* Kyla Magun, Note, *A Changing Landscape for Pretrial Detainees? The Potential Impact of* Kingsley v. Hendrickson *on Jail-Suicide Litigation*, 116 COLUM. L. REV. 2059, 2070 (2016).

101. *See Bell*, 441 U.S. at 538.

102. *Id.* at 539.

103. *Id.*

104. *Id.* at 540, 540 n.23; Struve, *supra* note 48, at 1015.

105. *Bell*, 441 U.S. at 539 n.20.

106. *Id.*

107. *See id.* at 565 (Marshall, J., dissenting); *id.* at 585 (Stevens, J., dissenting).

108. *Id.* at 565, 567 (Marshall, J., dissenting).

"virtually no protection" and worried that the intent test would "only 'encourage hypocrisy and unconscious self-deception'" by officers.[109]

Some find error in the dissenters' conclusion that the majority's standard was subjective.[110] When the *Bell* Court applied its standard for punitiveness, it made no mention of the defendants' states of mind.[111] Rather, the Court held that the plaintiffs showed no hardship from the jail's practice of double-bunking and that other restrictions had reasonable, nonpunitive security justifications.[112] To be sure, the Court found for the defendants on each of the § 1983 allegations made under the Fourteenth Amendment.[113] But it did not seem to do so based on the officers' subjective mindsets. Instead, the decision rested on objective circumstances surrounding the challenged conditions: the lack of hardship to the prisoners and the legitimate security rationales.[114]

Because the objective circumstances in *Bell* were dispositive, the Court did not expound on what else, if anything, would have been required for the plaintiffs to prove Fourteenth Amendment violations under § 1983.[115] Moreover, *Bell* was decided in 1979, prior to *Whitley* (1986), *Wilson* (1991), *Hudson* (1992), and *Farmer* (1994).[116] Although those cases involved claims by prisoners under the Eighth Amendment, lower courts regularly applied their standards to claims by detainees under the Fourteenth Amendment.[117] Accordingly, prior to the *Kingsley* decision, a variety of standards had accumulated across the circuits for § 1983 claims by pretrial detainees.[118]

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109. *Id.* at 585 (Stevens, J., dissenting) (quoting HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 33 (1968)).

110. *See* Schlanger, *supra* note 24, at 375–77.

111. *Id.* at 376–77.

112. *Bell*, 441 U.S. at 542, 554, 561. Double-bunking refers to the practice of housing two inmates in a cell designed for one inmate by furnishing it with a double-bunk bed. *Id.* at 542.

113. *Id.* at 563.

114. Schlanger, *supra* note 24, at 376–77; Struve, *supra* note 48, at 1015.

115. *Bell*, 441 U.S. at 561–62.

116. *Bell*, 441 U.S. 520; Whitley v. Albers, 475 U.S. 312 (1986); Wilson v. Seiter, 501 U.S. 294 (1991); Hudson v. McMillian, 503 U.S. 1 (1992); Farmer v. Brennan, 511 U.S. 825 (1994).

117. *See* Struve, *supra* note 48, at 1024–32; *see, e.g.*, Goebert v. Lee County, 510 F.3d 1312, 1326 (11th Cir. 2007) ("[T]he standards under the Fourteenth Amendment are identical to those under the Eighth."); Clouthier v. County of Contra Costa, 591 F.3d 1232, 1241 (9th Cir. 2010) ("We have long analyzed claims that correctional facility officials violated pretrial detainees' constitutional rights . . . under a 'deliberate indifference' standard."); United States v. Walsh, 194 F.3d 37, 48–49 (2d Cir. 1999) (applying the malicious-and-sadistic standard to a § 1983 use-of-force claim by a pretrial detainee).

118. *See* Struve, *supra* note 48, at 1024–32.

III. *KINGSLEY* AND ITS PROGENY

The Supreme Court's decision in *Kingsley v. Hendrickson* largely resolved the § 1983 standard for use-of-force claims by pretrial detainees, but it raised new issues for conditions-of-confinement claims. Since *Kingsley*, the circuits have divided as to whether an objective mental-state standard should also apply to conditions-of-confinement claims.

A. The Kingsley *Decision*

In *Kingsley v. Hendrickson*, the Supreme Court held that a pretrial detainee making a use-of-force claim need only show that an officer's purposeful acts were objectively unreasonable—a landmark decision for detainees' rights.[119] On May 20, 2010, Michael Kingsley was being held in a Wisconsin jail while awaiting trial on a drug charge.[120] A corrections officer noticed a piece of paper covering the light above Kingsley's bed and told him to remove it.[121] Kingsley refused and ignored several more orders to uncover his light.[122] Eventually, the jail administrator ordered that Kingsley be moved to a solitary holding cell so officers could remove the paper.[123] Kingsley did not comply with the four officers assigned to move him, so they handcuffed him, carried him to the holding cell, and placed him face-down on a concrete bunk.[124] One officer used his knee to apply force to Kingsley's back, and Kingsley alleged that the officers hit his head on the bunk even though he was not resisting.[125] Finally, an officer used a Taser on Kingsley's back for five seconds.[126] The officers then left the cell, leaving Kingsley alone in handcuffs for about fifteen minutes before they returned to remove the restraints.[127]

Kingsley filed a § 1983 claim against the officers alleging excessive force in violation of his Fourteenth Amendment right to be free from punishment.[128] The case went to trial, and at its conclusion, the judge instructed the jury to

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119. Kingsley v. Hendrickson, 576 U.S. 389, 395 (2015); *see* Rosalie Berger Levinson, Kingsley *Breathes New Life into Substantive Due Process as a Check on Abuse of Government Power*, 93 NOTRE DAME L. REV. 357, 358 (2017).

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

121. *Id.*

122. *Id.*; *see also* Mekela Panditharatne, *When Is the Use of Force by Police Reasonable?*, ATLANTIC (July 17, 2015), https://www.theatlantic.com/politics/archive/2015/07/police-force-supreme-court-kingsley/398861/ [https://perma.cc/4KNN-4YTB].

123. *Kingsley*, 576 U.S. at 392; Panditharatne, *supra* note 122.

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

125. *Id.*

126. *Id.* at 393; *see also* Panditharatne, *supra* note 122 (describing the events further).

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

128. *Id.*

apply a subjective standard to the use-of-force claim, advising that the officers were liable only if their use of force was objectively unreasonable *and* they applied the force with reckless disregard for Kingsley's rights.[129] The jury found for the officers.[130] Kingsley appealed, arguing a purely objective standard should apply to use-of-force claims under the Fourteenth Amendment.[131] A divided Seventh Circuit panel affirmed the jury verdict.[132]

When the case reached the Supreme Court in 2015, the Court framed the issue as a binary one: must a pretrial detainee show that the officers were subjectively aware their use of force was unreasonable or merely that the use of force was objectively unreasonable?[133] But the Court's decision did not follow its framing. Instead, it held in a 5–4 decision that there are two distinct state-of-mind requirements in a use-of-force claim.[134]

The first state-of-mind element of a use-of-force claim involves the actual physical acts of the defendant officer—"his state of mind with respect to the bringing about of certain physical consequences in the world."[135] The *Kingsley* Court did not decide the requisite standard for this element because it was not disputed in the case, but the majority suggested that an officer must act at least recklessly or perhaps knowingly to satisfy this element.[136] For example, had an officer negligently or accidentally used a Taser on Kingsley, the officer could not be held liable for that act.[137] It would seem rare for an officer to apply force unintentionally, but this element was important in preserving precedent: the Court had held in a previous § 1983 Fourteenth Amendment case that "liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process."[138]

The second state-of-mind element of a use-of-force claim involves the defendant's interpretation of the force used—his "state of mind with respect to whether his use of force was 'excessive.'"[139] Though the defendants argued in favor of the *Whitley–Hudson* malicious-and-sadistic standard, the Court held that in detainee cases, the second state-of-mind element is an objective inquiry—that an officer's belief as to the excessiveness of his use of force is

129. *Id.*
130. *Id.* at 394.
131. *Id.*
132. Kingsley v. Hendrickson, 744 F.3d 443 (7th Cir. 2014), *vacated*, 576 U.S. 389 (2015).
133. *Kingsley*, 576 U.S. at 391; Schlanger, *supra* note 24, at 403.
134. *Kingsley*, 576 U.S. at 395; *see* Levinson, *supra* note 119, at 366–67.
135. *Kingsley*, 576 U.S. at 395.
136. *Id.* at 395–96; *see* Schlanger, *supra* note 24, at 403.
137. *See Kingsley*, 576 U.S. at 396.
138. County of Sacramento v. Lewis, 523 U.S. 833, 849 (1998) (holding an officer pursuing a suspect in a car chase was not liable for depriving the suspect's passenger of his Fourteenth Amendment due-process right to life when the officer was negligent at most).
139. *Kingsley*, 576 U.S. at 395.

irrelevant.[140] Instead, the factfinder must determine only whether the force used was objectively reasonable.[141] The Court did add qualifications to the "reasonableness" standard: the determination must be made "from the perspective of a reasonable officer on the scene, including what the officer knew at the time," and account for the government's interest in maintaining a secure facility, with deference to jail policies and practices.[142] Nonetheless, the *Kingsley* decision was heralded by both legal scholars and popular media as a major victory for pretrial detainees.[143]

The *Kingsley* Court offered three justifications for an objective standard. First, it is consistent with *Bell*.[144] *Bell*, the Court explained, did not *require* proof of an officer's intent to punish in order to establish a Fourteenth Amendment violation, though such proof is sufficient.[145] Absent evidence of subjective intent, *Bell* allowed for an objective standard: an action amounts to unconstitutional punishment if it is unrelated to a nonpunitive government goal or if it is excessive in relation to the goal.[146] The Court rejected the defendants' argument that the *Bell* test was modified by the malicious-and-sadistic standard.[147] In fact, *Kingsley* explicitly distinguished § 1983 cases brought by detainees under the Fourteenth Amendment from those brought by prisoners under the Eighth Amendment.[148]

The Court's second justification was that an objective standard is workable.[149] Some circuits already used it, and many jails already trained their officers as though their conduct was subject to an objective reasonableness inquiry.[150] Finally, the Court found that an objective standard was appropriate

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140. *See id.* at 400–02. The Court found that the jury instruction at Kingsley's trial improperly set forth a subjective standard, vacated the circuit court decision, and remanded the case. *Id.* at 403–04. The case was retried, and the jury again found for the defendants. Judgment in a Civil Case, Kingsley v. Hendrickson, No. 3:10-CV-00832 (W.D. Wis. Mar. 1, 2016), ECF No. 238.

141. *Kingsley*, 576 U.S. at 396–97.

142. *Id.* at 397, 399–400.

143. *See, e.g.*, Levinson, *supra* note 119, at 358; Shapiro & Hogle, *supra* note 70, at 132–33; Panditharatne, *supra* note 122; Mark Joseph Stern, *After Freddie Gray*, SLATE (June 22, 2015, 4:16 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2015/06/supreme_court_kingsley_v_hendrickson_a_new_protection_against_police_abuse.html [https://perma.cc/J8HA-2GV6].

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

145. *Id.*; *see* Bell v. Wolfish, 441 U.S. 520, 538 (1979).

146. *Kingsley*, 576 U.S. at 398; *see Bell*, 441 U.S. at 561.

147. *Kingsley*, 576 U.S. at 400–01; *see also* Schlanger, *supra* note 24, at 405.

148. *Kingsley*, 576 U.S. at 400 ("The language of the two [amendments] differs, and the nature of the claims often differs. And, most importantly, pretrial detainees (unlike convicted prisoners) cannot be punished at all . . . .").

149. *Id.* at 399.

150. *Id.*

because it still protected officers acting in good faith.[151] The Court cited the qualifications placed on the "reasonableness" standard as well as the availability of qualified immunity.[152] In the context of a § 1983 inmate claim, qualified immunity is an affirmative defense that shields a corrections officer from liability unless the inmate proves not only that the officer violated a right of the inmate but also that the right was "clearly established" at the time of the violation.[153] Notably, qualified immunity has been widely criticized for myriad reasons, including that it undermines people's rights and protects officers even when they act in bad faith.[154]

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151. *Id.*

152. *Id.* at 399–400.

153. *See* Ashcroft v. al-Kidd, 563 U.S. 731, 735 (2011). The qualified-immunity inquiry is objective. Harlow v. Fitzgerald, 457 U.S. 800, 818–19 (1982). Still, it essentially adds an extra element that the plaintiff must prove—that the violated right was "clearly established." *Al-Kidd*, 563 U.S. at 735. The Supreme Court has defined this inquiry narrowly, holding that the right's existence must be "beyond debate," *id.* at 741, and that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law," Malley v. Briggs, 475 U.S. 335, 341 (1986); *see also* Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1798 (2018) [hereinafter Schwartz, *The Case Against Qualified Immunity*] ("[T]he Court's recent qualified immunity decisions make it seem nearly impossible to find clearly established law that would defeat the defense."). Thus, courts have increasingly granted officers qualified immunity even under egregious circumstances. *See* Press Release, John Kramer, Inst. for Just., George Floyd and Beyond: How "Qualified Immunity" Enables Bad Policing (June 3, 2020), https://ij.org/press-release/beyond-george-floyd-how-qualified-immunity-enables-bad-policing/ [https://perma.cc/MTB3-PKYY] (listing cases). After siding with defendants in twenty consecutive qualified-immunity cases over fifteen years, *see* Joanna C. Schwartz, *After Qualified Immunity*, 120 COLUM. L. REV. 309, 310–11 (2020) [hereinafter Schwartz, *After Qualified Immunity*], the Supreme Court recently broke its streak by vacating a grant of qualified immunity to corrections officers alleged to have left an inmate naked for six days in two freezing-cold cells that were covered in feces and raw sewage, Taylor v. Riojas, 141 S. Ct. 52, 53–54 (2020) (per curiam).

154. Criticism has come from judges. *See, e.g.*, Baxter v. Bracey, 140 S. Ct. 1862, 1864–65 (2020) (Thomas, J., dissenting from the denial of certiorari); Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting); Zadeh v. Robinson, 928 F.3d 457, 479–81 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part); Jamison v. McClendon, 476 F. Supp. 3d 386, 401–09, 418–23 (S.D. Miss. 2020); Manzanares v. Roosevelt Cnty. Adult Det. Ctr., 331 F. Supp. 3d 1260, 1294–95 n.10 (D.N.M. 2018); Thompson v. Clark, No. 14-CV-7349, 2018 WL 3128975, at *11–13 (E.D.N.Y. June 26, 2018).

Criticism has come from legal scholars. *See, e.g.*, Schwartz, *The Case Against Qualified Immunity*, *supra* note 153, at 1818; William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 60–61 (2018); Karen M. Blum, *Qualified Immunity: Time To Change the Message*, 93 NOTRE DAME L. REV. 1887, 1901–04 (2018); Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 66–67, 73–74 (2017); Erwin Chemerinsky, *Closing the Courthouse Doors*, HUM. RTS., July 2015, at 5, 5–7; John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 255–56 (2013); James E. Pfander, Essay, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 COLUM. L. REV. 1601, 1615–18 (2011).

Writing in dissent, Justice Scalia, joined by Chief Justice Roberts and Justice Thomas, argued that objectively unreasonable force is not, on its own, a "punishment" in violation of the Fourteenth Amendment.[155] The dissenters did agree with the majority that *Bell* was the relevant precedent rather than the Eighth Amendment cases decided thereafter and thus that pretrial detainees could not be subjected to punishment.[156] But Justice Scalia—who wrote the *Wilson* opinion that defined an intent to punish as a necessary condition of punishment—stated that "*Bell* makes intent to punish the focus of its due-process analysis."[157] Rather than directly identifying punishments, he said, the objective inquiries laid out in *Bell*—the relation to a nonpunitive government goal and excessiveness in relation to the goal—work as heuristics that can be used to logically infer an intent to punish.[158] The dissent argued that while those heuristics work for "considered decisions by the detaining authority" such as the jail conditions at issue in *Bell*, they do not work in the excessive-force context where an officer must act quickly.[159] In the dissenters' view, then, an objective element could substitute for the subjective intent necessary to prove "punishment," but only in a conditions-of-confinement claim.[160]

Nonetheless, the *Kingsley* majority explicitly spoke only to the use-of-force standard.[161] Thus, there is now substantial clarity as to the state-of-mind requirements for Eighth Amendment use-of-force and conditions-of-confinement claims and for Fourteenth Amendment use-of-force claims. When it comes to the state-of-mind element for

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Criticism has come from politicians. A bipartisan bill to eliminate the qualified-immunity defense was introduced in the U.S. House of Representatives in June 2020. Ending Qualified Immunity Act, H.R. 7085, 116th Cong. (2020). Senate Republicans opposed the bill, but some expressed openness to more limited reforms. Mairead McArdle, *Qualified-Immunity Reform Divides Senate GOP*, NAT'L REV. (July 2, 2020, 5:35 PM), https://www.nationalreview.com/news/qualified-immunity-reform-divides-senate-gop/ [https://perma.cc/39DK-PU7Q]. Absent judicial or congressional action, others have suggested that state and local actors can implement reforms to offset qualified immunity. Ilya Somin, *States Can Reform Qualified Immunity on Their Own*, REASON: THE VOLOKH CONSPIRACY (June 26, 2020, 12:21 AM), https://reason.com/volokh/2020/06/26/states-can-reform-qualified-immunity-on-their-own/ [https://perma.cc/E8GG-8GKY]; Alex Reinert, *We Can End Qualified Immunity Tomorrow*, BOS. REV. (June 23, 2020), http://bostonreview.net/law-justice/alex-reinert-we-can-end-qualified-immunity-tomorrow [https://perma.cc/WY5Y-EEFA].

155. *Kingsley*, 576 U.S. at 405 (Scalia, J., dissenting). Justice Alito also dissented based on his belief that the case was improvidently granted. *Id.* at 408 (Alito, J., dissenting).

156. *Id.* at 404–05 (Scalia, J., dissenting).

157. *Id.* at 406.

158. *Id.*; *see* Schlanger, *supra* note 24, at 409.

159. *Kingsley*, 576 U.S. at 406 (Scalia, J., dissenting).

160. *See id.* at 405–06; Levinson, *supra* note 119, at 374; Schlanger, *supra* note 24, at 409.

161. *See Kingsley*, 576 U.S. at 391–92.

Fourteenth Amendment conditions-of-confinement claims, however, the circuits are split.

*B. The Post-*Kingsley *Circuit Split*

In the wake of the *Kingsley* holding, most circuits continue to use a subjective standard in pretrial-detainee conditions-of-confinement claims, either because they have expressly rejected the extension of *Kingsley* or because the issue has not come before them. Three circuits, however, have decided that the *Kingsley* holding necessitates an objective standard for conditions-of-confinement claims by detainees.

1. Limiting *Kingsley*: Circuits Applying a Subjective Standard

Some circuits have explicitly rejected the use of *Kingsley*'s objective standard in conditions-of-confinement cases, while others have yet to hear a case that provides the opportunity to revisit the issue. A month after the *Kingsley* decision, the Fifth Circuit applied its existing subjective standard in *Estate of Henson v. Wichita County*, a pretrial-detainee conditions case, without mentioning *Kingsley*.[162] In a later Fifth Circuit pretrial conditions case, *Alderson v. Concordia Parish Correctional Facility*, the majority responded to a concurring judge's advocacy for an objective standard[163] with a footnote stating that it was bound by its post-*Kingsley* precedent to continue applying a subjective standard.[164]

Following the Fifth Circuit's lead, most circuits that chose to continue applying a subjective state-of-mind standard after *Kingsley* have done so with little explanation. In *Dang ex rel. Dang v. Sheriff of Seminole County*, a case in which a detainee argued that an objective standard should apply to his conditions-of-confinement claim, the Eleventh Circuit responded in a footnote by distinguishing *Kingsley* as a use-of-force case.[165] The Eighth Circuit did the same in *Whitney v. City of St. Louis*.[166] In *Miranda-Rivera v. Toledo-Dávila*, the First Circuit took an implicit approach by applying *Kingsley* to the pretrial detainees' use-of-force claims while using a

162. Estate of Henson v. Wichita County, 795 F.3d 456, 463–64 (5th Cir. 2015).

163. Alderson v. Concordia Par. Corr. Facility, 848 F.3d 415, 424–25 (5th Cir. 2017) (Graves, J., specially concurring in part).

164. *Id.* at 419 n.4 (majority opinion).

165. Dang *ex rel.* Dang v. Sheriff of Seminole Cnty., 871 F.3d 1272, 1279 n.2 (11th Cir. 2017).

166. Whitney v. City of St. Louis, 887 F.3d 857, 860 n.4 (8th Cir. 2018).

subjective deliberate indifference standard for their conditions claims, with no mention of *Kingsley* in the latter context.[167]

Finally, in *Strain v. Regalado*, a medical-needs case, the Tenth Circuit provided three reasons for its refusal to extend *Kingsley*.[168] First, the court said that *Kingsley* turned on factors specific to the use-of-force context.[169] It argued that objective evidence is uniquely capable of proving intent to punish in claims involving affirmative acts, like use of force, as opposed to inaction, which is more likely to be implicated in conditions-of-confinement claims.[170] Second, the Tenth Circuit argued that by its terms, deliberate indifference "presupposes a subjective component," citing *Farmer*'s rejection of objective deliberate indifference for Eighth Amendment claims.[171] Finally, the court said that principles of stare decisis cautioned against a broad reading of *Kingsley*.[172]

While those five circuits have explicitly rejected the extension of *Kingsley* to conditions-of-confinement cases, three others have continued to apply a subjective standard for procedural reasons. The Third Circuit did so because it found an objective standard would not have affected the outcome of the case.[173] The Fourth Circuit did so because the plaintiffs did not raise the subjective standard as an issue.[174] And the Sixth Circuit has done so for both reasons in different cases.[175] In *Richmond v. Huq*, however, after remarking that neither party raised the issue, the Sixth Circuit noted that *Kingsley* "calls into serious doubt" the use of the subjective deliberate indifference standard in pretrial-detainee conditions-of-confinement cases.[176]

2. Extending *Kingsley*: Circuits Applying an Objective Standard

Three circuits have read *Kingsley* to require an objective standard for all § 1983 claims by pretrial detainees under the Fourteenth Amendment, but they have fashioned slightly different standards. This Section summarizes the decisions of the Ninth, Second, and Seventh Circuits, sequentially, that extended *Kingsley* to conditions-of-confinement claims.

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167. Miranda-Rivera v. Toledo-Dávila, 813 F.3d 64, 70, 74 (1st Cir. 2016).
168. Strain v. Regalado, 977 F.3d 984, 991 (10th Cir. 2020).
169. *Id.* at 991.
170. *See id.* at 991–92.
171. *Id.* at 992–93.
172. *Id.* at 991.
173. *See* Moore v. Luffey, 767 F. App'x 335, 340 n.2 (3d Cir. 2019).
174. *See* Heyer v. U.S. Bureau of Prisons, 849 F.3d 202, 209–10 (4th Cir. 2017).
175. *See* Griffith v. Franklin County, 975 F.3d 554, 570–71 (6th Cir. 2020); Richmond v. Huq, 885 F.3d 928, 938 n.3 (6th Cir. 2018).
176. *Richmond*, 885 F.3d at 938 n.3.

a. Ninth Circuit: Castro v. County of Los Angeles[177]

Castro v. County of Los Angeles—the failure-to-protect case in which a drunken misdemeanor arrestee was beaten in a sobering cell by a violent felony arrestee—was the first case to extend *Kingsley* to the conditions-of-confinement context.[178] Based on the language of the *Kingsley* opinion and its distinction between Eighth and Fourteenth Amendment protections, the Ninth Circuit found that a pretrial detainee did not need to prove a defendant's subjective intent to punish in a § 1983 claim.[179] The court held closely to *Kingsley*, noting that a similar two-prong state-of-mind analysis was required in the conditions-of-confinement context.[180] Specifically, a pretrial detainee must show that (1) "[t]he defendant made an intentional decision with respect to the conditions under which the plaintiff was confined;" and (2) "[t]he defendant did not take reasonable available measures to abate" a risk of serious harm caused by those conditions "even though a reasonable officer in the circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant's conduct obvious."[181]

Applying the first state-of-mind element to the facts of *Castro*, the Ninth Circuit found that there was no dispute that the officers had intentionally placed both inmates in the same cell.[182] As for the second state-of-mind element, because the jury found that the plaintiff had proven a subjective standard (that is, that the defendants actually knew of a substantial risk of serious harm to the plaintiff), the Ninth Circuit necessarily inferred that he had proven the lower objective standard (that a reasonable officer under the circumstances would have recognized the risk).[183]

b. Second Circuit: Darnell v. Pineiro[184]

Like the Ninth Circuit in *Castro*, the Second Circuit in *Darnell v. Pineiro* extended *Kingsley* to conditions-of-confinement claims, but it crafted a slightly different objective standard. In *Darnell*, a class of plaintiffs alleged that they were subjected to punitive conditions in pretrial detention, including

177. Castro v. County of Los Angeles, 833 F.3d 1060 (9th Cir. 2016) (en banc).

178. *See supra* text accompanying notes 1–19.

179. *Castro*, 833 F.3d at 1069–70. Though *Castro* spoke only to failure-to-protect cases, the Ninth Circuit later applied the same standard to other conditions cases, noting that the Supreme Court treats all conditions-of-confinement claims the same. Gordon v. County of Orange, 888 F.3d 1118, 1124–25 (9th Cir. 2018) (citing Wilson v. Seiter, 501 U.S. 294, 303 (1991)).

180. *Castro*, 833 F.3d at 1070–71.

181. *Id.* at 1071.

182. *Id.* at 1072.

183. *Id.*

184. Darnell v. Pineiro, 849 F.3d 17 (2d Cir. 2017).

overcrowding, poor sanitation, infestation, extreme temperatures, and failure by officers to protect them from other inmates.[185] The district court granted summary judgment to the defendant officers, finding in part that the detainees could not prove subjective deliberate indifference as a matter of law.[186]

On appeal, the Second Circuit overturned its precedent that required the same subjective deliberate indifference standard to be used in both Eighth and Fourteenth Amendment cases, finding it had "no basis" after *Kingsley*.[187] Rather, the court held that an objective deliberate indifference standard was appropriate for the state-of-mind element of a Fourteenth Amendment claim:

> [T]he pretrial detainee must prove that the defendant-official acted intentionally to impose the alleged condition, or recklessly failed to act with reasonable care to mitigate the risk that the condition posed to the pretrial detainee even though the defendant-official knew, or should have known, that the condition posed an excessive risk to health or safety.[188]

In short, to satisfy the mental-state element of a conditions-of-confinement claim in the Second Circuit, a pretrial detainee need only show that the officer acted with objective deliberate indifference.[189]

c. Seventh Circuit: Miranda v. County of Lake[190]

In *Miranda v. County of Lake*, the Seventh Circuit joined the Ninth and Second Circuits by applying an objective state-of-mind standard to a conditions-of-confinement claim, but it, too, developed its own elements. In *Miranda*, the estate of a woman who died in pretrial custody sued several of the jail's healthcare providers for inadequate medical care.[191] The woman was detained on several charges stemming from her failure to appear for jury duty.[192] She began a hunger strike and was placed in the jail's medical unit so doctors and social workers could monitor her physical and mental health.[193] Her condition deteriorated, and after fifteen days without food or water, she was brought to a hospital where she died five days later.[194]

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185. *Id.* at 23–26.

186. *Id.* at 28.

187. *Id.* at 34–35. The City of New York ultimately settled the case on behalf of the defendants for $401,000. Stipulation & Order of Settlement & Dismissal at 3, Cano v. City of New York, No. 13-CV-3341 (E.D.N.Y. May 11, 2018), ECF No. 122.

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

189. *See id.*

190. Miranda v. County of Lake, 900 F.3d 335 (7th Cir. 2018).

191. *Id.* at 342.

192. *Id.* at 341. Incidentally, she was not a U.S. citizen and was ineligible for jury duty. *Id.*

193. *Id.*

194. *See id.* at 342.

Remanding the case for retrial on other grounds, the Seventh Circuit took the opportunity to extend *Kingsley* to pretrial-detainee medical-needs claims.[195] Based on *Kingsley*'s distinction between Eighth and Fourteenth Amendment cases, the court determined that it could no longer apply the same standard to both types of cases and that an objective standard applies to detainee conditions-of-confinement claims.[196] Like the Ninth Circuit, the Seventh Circuit crafted its standard based on the two-prong state-of-mind analysis in *Kingsley*, but it used different elements.[197] First, a pretrial detainee must show that the "defendants acted purposefully, knowingly, or perhaps even recklessly when they considered the consequences of" their actions.[198] Applying this prong to the case at hand, the Seventh Circuit instructed that it would be met if, for example, the defendants purposely, knowingly, or recklessly made the decision to keep the woman in the jail rather than send her to the hospital.[199] Conversely, the first prong would not be met if the defendants had forgotten she was in jail or confused her medical chart with another inmate's.[200] As for the second prong, a detainee need only show that an officer's action or inaction was objectively unreasonable.[201]

In sum, all three circuits that apply *Kingsley* to conditions-of-confinement claims use a primarily objective standard. The Ninth Circuit in *Castro* interpreted *Kingsley* to require an intentional decision by the officer with respect to the challenged condition, but only objective recklessness for the officer's failure to mitigate the risk.[202] The Second Circuit in *Darnell* imposed an objective deliberate indifference standard that could be met using either of the two prongs of *Castro*.[203] And the Seventh Circuit in *Miranda* required plaintiffs to show that a defendant was at least reckless in considering the consequences of an objectively unreasonable action.[204]

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195. *Id.* at 350, 352. The trial court granted judgment as a matter of law to the defendants, concluding that no reasonable jury could find they caused the woman's death. *Id.* at 346. The Seventh Circuit, however, found the plaintiffs had presented sufficient causation evidence to send the case to the jury and thus were entitled to a new trial. *Id.* at 348. At the new trial, the jury found for the plaintiffs and awarded more than $2,750,000 to the woman's estate and surviving heirs. Order, Estate of Gomes v. Elazegui, No. 12-CV-4439 (N.D. Ill. Oct. 10, 2019), ECF No. 427.

While *Miranda* was specific to the medical-needs context, the Seventh Circuit has since held that the objective standard should be applied in all conditions-of-confinement claims. Hardeman v. Curran, 933 F.3d 816, 823 (7th Cir. 2019).

196. *Miranda*, 900 F.3d at 352.

197. *Id.* at 353.

198. *Id.*

199. *Id.* at 354.

200. *Id.*

201. *Id.*

202. *See* Castro v. County of Los Angeles, 833 F.3d 1060, 1071 (9th Cir. 2016) (en banc).

203. *See* Darnell v. Pineiro, 849 F.3d 17, 35 (2d Cir. 2017).

204. *See Miranda*, 900 F.3d at 353–54.

IV. ANALYSIS

Though the Supreme Court has clarified the mental-state requirement for force and conditions claims brought by prisoners and for force claims brought by detainees, the standard for detainee conditions claims remains unclear, evidenced by the divide between circuits. The Supreme Court should establish a uniform standard in order to both increase public trust in the correctional system through stronger accountability and protect constitutional rights and principles. Specifically, the Court should adopt the Second Circuit's objective deliberate indifference standard.

A. The Importance of Uniformity

Given its traditional role of "defin[ing] and vindicat[ing] the rights guaranteed by the Constitution" and "assur[ing] the uniformity of federal law," the Supreme Court should settle the scope of the Fourteenth Amendment protections of pretrial detainees.[205] The current circuit split raises potential issues with both public trust and constitutional principles.

1. Distrust in an Unaccountable System

Prisons and jails have come under increased scrutiny in recent years, leading to public skepticism of correctional facilities and an emergent prison abolition movement.[206] The scrutiny is deserved. Studies show that each year,

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205. Report of the Study Group on the Caseload of the Supreme Court, 57 F.R.D. 573, 578 (1972); *see also* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). The Supreme Court has received many petitions asking it to resolve the issue, but it has denied them all. *See, e.g.*, Petition for Writ of Certiorari at i, Sanchez v. Young County, 139 S. Ct. 126 (2018) (No. 17-1638); Petition for Writ of Certiorari at i, County of Orange v. Gordon, 139 S. Ct. 794 (2019) (No. 18-337); Petition for Writ of Certiorari at i, Saunders v. Ivey, 139 S. Ct. 1325 (2019) (No. 18-760).

206. *See, e.g.*, Adam Gopnik, *The Caging of America*, NEW YORKER (Jan. 22, 2012), https://www.newyorker.com/magazine/2012/01/30/the-caging-of-america [https://perma.cc/ALF2-V2U2]; Michael Sainato, *Why Are So Many People Dying in US Prisons and Jails?*, GUARDIAN (May 26, 2019, 2:00 AM), https://www.theguardian.com/us-news/2019/may/26/us-prisons-jails-inmate-deaths [https://perma.cc/B98X-LGSV]; Arthur Rizer, Opinion, *The Economic and Moral Costs of Our Inhumane Prison System*, WASH. EXAMINER (Jan. 11, 2020, 1:00 AM), https://www.washingtonexaminer.com/opinion/the-economic-and-moral-costs-of-our-inhumane-prison-system [https://perma.cc/3ZZB-PNEJ]; Melissa Gira Grant, *Imagining a World Without Prisons*, NEW REPUBLIC (Oct. 17, 2019), https://newrepublic.com/article/155411/imagining-world-without-prisons [https://perma.cc/J7F7-DD3C]; Kim Kelly, *What the Prison-Abolition Movement Wants*, TEEN VOGUE (Dec. 26, 2019), https://www.teenvogue.com/story/what-is-prison-abolition-movement [https://perma.cc/9QDF-F87Q].

more than 4,200 inmates die in state custody;[207] more than twenty percent of male inmates are physically assaulted;[208] and about 1,400 substantiated instances of sexual victimization occur in detention facilities,[209] though experts believe the rate of sexual abuse is actually much higher.[210] In a dramatic example, in twenty-six days in January 2020, nine inmates in the custody of a single Mississippi prison died: three by suicide, two from stab wounds, two from blunt-force beating injuries, one from neck injuries suffered during an altercation, and one from natural causes.[211] In the pretrial context specifically, a Reuters investigation found that from 2008 to 2019, at least 4,998 people died in jail, including about 1,500 who died by suicide, despite not having been convicted of the offense for which they were being held and being constitutionally entitled to freedom from punishment.[212]

Correctional facilities are also ripe for illness and disease given their generally crowded nature, poor healthcare, and lack of hygiene supplies.[213] For example, during the COVID-19 pandemic, prisons and jails were home

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207. MARGARET NOONAN ET AL., BUREAU OF JUST. STAT., MORTALITY IN LOCAL JAILS AND STATE PRISONS, 2000–2013—STATISTICAL TABLES 7, 20 (2015), https://www.bjs.gov/content/pub/pdf/mljsp0013st.pdf [https://perma.cc/H73S-M38U].

208. *See* Nancy Wolff & Jing Shi, *Contextualization of Physical and Sexual Assault in Male Prisons: Incidents and Their Aftermath*, 15 J. CORR. HEALTH CARE 58, 58 (2009).

209. BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., SEXUAL VICTIMIZATION REPORTED BY ADULT CORRECTIONAL AUTHORITIES, 2012–15, at 1 (2018), https://www.bjs.gov/content/pub/pdf/svraca1215_sum.pdf [https://perma.cc/UU4J-7S4Z]. In 2015, fifty-eight percent of substantiated incidents involved inmate-on-inmate victimization, while forty-two percent involved staff-on-inmate victimization. *Id.*

210. *See* Alysia Santo, *Prison Rape Allegations Are on the Rise*, MARSHALL PROJECT (July 25, 2018, 8:00 AM), https://www.themarshallproject.org/2018/07/25/prison-rape-allegations-are-on-the-rise [https://perma.cc/QCB5-5F3R]. Nearly 25,000 incidents of sexual violence in detention facilities were reported to officials in 2015. BUREAU OF JUST. STAT., *supra* note 209, at 1.

211. Lici Beveridge, *Mississippi Prison Crisis: 14th State Inmate Death*, CLARION LEDGER (Jan. 30, 2020, 6:32 PM), https://www.clarionledger.com/story/news/local/2020/01/30/mississippi-prison-crisis-14th-state-inmate-dies-since-dec-29/2857878001/ [https://perma.cc/HA6Z-4Q2K]. In total, in the sixty-five days from December 29, 2019 to March 3, 2020, twenty-four men died in the custody of the Mississippi Department of Corrections. Lici Beveridge, *Mississippi Prison Crisis: 23rd, 24th Inmate Deaths Reported Since Late December*, CLARION LEDGER (Mar. 5, 2020, 12:04 PM), https://www.clarionledger.com/story/news/local/2020/03/04/23rd-mississippi-inmate-death-since-dec-29-reported/4951406002/ [https://perma.cc/URU5-DZSH].

212. Peter Eisler et al., *Why 4,998 Died in U.S. Jails Without Getting Their Day in Court*, REUTERS (Oct. 16, 2020, 11:00 AM), https://www.reuters.com/investigates/special-report/usa-jails-deaths/ [https://perma.cc/W8KK-MW4G].

213. Joseph A. Bick, *Infection Control in Jails and Prisons*, 45 CLINICAL INFECTIOUS DISEASES 1047, 1047 (2007).

to some of the largest and deadliest outbreaks.[214] Experts were particularly concerned about jails as vectors for the coronavirus due to the frequent turnover of detainees who come and go from their communities, as opposed to prisons where the population is relatively stable.[215] Inmates filed dozens of lawsuits asking courts to enforce federal health and safety guidelines against detention facilities, finding mixed success.[216] With protocols varying between facilities based on court orders and local policies,[217] more than 626,000 people in jails or prisons have been infected with COVID-19 and at least 2,790 inmates and corrections officers have died, though these figures are believed to be underestimates.[218] In prisons, the infection rate was 5.5 times higher and the death rate 3 times higher than among the general population.[219] Nevertheless, the mitigation efforts that did occur in some jurisdictions—especially reductions of inmate populations through fewer arrests and temporary, compassionate, and early releases—not only saved lives but also

214. *See* Alexandria Macmadu et al., *COVID-19 and Mass Incarceration: A Call for Urgent Action*, 5 LANCET e571, e571 (2020) (stating that forty of the fifty largest clustered outbreaks were in detention facilities).

215. Anna Flagg & Joseph Neff, *Why Jails Are So Important in the Fight Against Coronavirus*, MARSHALL PROJECT (Mar. 31, 2020, 5:00 AM), https://www.themarshallproject.org/2020/03/31/why-jails-are-so-important-in-the-fight-against-coronavirus [https://perma.cc/4BB9-VRWV]. Studies showed that significant percentages of coronavirus cases could be traced to detention centers. Eric Reinhart & Daniel L. Chen, *Incarceration and Its Disseminations: COVID-19 Pandemic Lessons from Chicago's Cook County Jail*, 39 HEALTH AFFS. 1412, 1412 (2020) (finding that more than fifteen percent of Illinois's cases in the first month of the pandemic could be traced to the Cook County Jail); GREGORY HOOKS & WENDY SAWYER, PRISON POL'Y INITIATIVE, MASS INCARCERATION, COVID-19, AND COMMUNITY SPREAD (Dec. 2020), https://www.prisonpolicy.org/reports/covidspread.html [https://perma.cc/T3PJ-GLYQ] (finding that thirteen percent of U.S. cases in the summer of 2020 were linked to incarceration).

216. Burton Bentley II, *The Growing Litigation Battle over COVID-19 in the Nation's Prisons and Jails*, LAW.COM (Aug. 25, 2020, 6:00 PM), https://www.law.com/2020/08/25/the-growing-litigation-battle-over-covid-19-in-the-nations-prisons-and-jails/ [https://perma.cc/MPH9-RF34]. Most notably, without explanation, a five-Justice U.S. Supreme Court majority stayed an injunction requiring stronger mitigation efforts in a California jail. *Id.*; *see* Barnes v. Ahlman, 140 S. Ct. 2620, 2620 (2020) (mem.).

217. *See Reducing Jail and Prison Populations During the Covid-19 Pandemic*, BRENNAN CTR. FOR JUST. (Feb. 26, 2021), https://www.brennancenter.org/our-work/research-reports/reducing-jail-and-prison-populations-during-covid-19-pandemic [https://perma.cc/B6U9-ZGTW].

218. *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES, https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html (Mar. 19, 2021, 12:18 AM) [https://perma.cc/92SU-S7WA]; Roni Caryn Rabin, *Prisons Are Covid-19 Hotbeds. When Should Inmates Get the Vaccine?*, N.Y. TIMES (Dec. 2, 2020), https://www.nytimes.com/2020/11/30/health/coronavirus-vaccine-prisons.html [https://perma.cc/7S6U-TAMT].

219. Brendan Saloner et al., *COVID-19 Cases and Deaths in Federal and State Prisons*, 324 JAMA 602, 602–03 (2020).

became an unintended test of decarceration, with early indicators showing positive results.[220]

In addition to death, violence, and illness, media reports from around the country describe overcrowding, understaffing, extreme heat, rodent infestations, unlimited solitary confinement, deprivation of basic necessities, and other harsh and potentially life-threatening conditions in jails and prisons.[221] Organizations like the United Nations and the American Civil Liberties Union operate projects aimed at improving detention conditions;[222] activists, especially currently and formerly incarcerated people, have worked on the issue for decades;[223] and the popular Netflix series *Orange Is the New*

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220. *See* Linda So et al., *America's Inmate Population Fell by 170,000 amid COVID. Some See a Chance To Undo Mass Incarceration*, REUTERS (Oct. 28, 2020, 12:00 PM), https://www.reuters.com/investigates/special-report/usa-jails-release/ [https://perma.cc/QWZ9-HKAP]; Kelly Servick, *Pandemic Inspires New Push To Shrink Jails and Prisons*, SCIENCE (Sept. 17, 2020, 10:15 AM), https://www.sciencemag.org/news/2020/09/pandemic-inspires-new-push-shrink-jails-and-prisons [https://perma.cc/T6YE-EDGB]; We the People Podcast, *Will Coronavirus Change Criminal Justice?*, NAT'L CONST. CTR. (Apr. 30, 2020), https://constitutioncenter.org/interactive-constitution/podcast/will-coronavirus-change-criminal-justice [https://perma.cc/53Z3-BMV7]; *see also Decarceration and Crime During COVID-19*, ACLU (July 27, 2020), https://www.aclu.org/news/smart-justice/decarceration-and-crime-during-covid-19/ [https://perma.cc/8E8U-DRJN] (finding local crime rates had no relation to reduced jail populations in the first three months of the pandemic).

221. *See, e.g.*, Matt Ford, *The Everyday Brutality of America's Prisons*, NEW REPUBLIC (Apr. 5, 2019), https://newrepublic.com/article/153473/everyday-brutality-americas-prisons [https://perma.cc/3EV9-UPXB] (summarizing a Department of Justice report that found Alabama prisons were understaffed by two-thirds and plagued by physical and sexual violence); Jolie McCullough, *Heat Is Part of Life at Texas Prisons, but Federal Judge Orders One To Cool It*, TEX. TRIB. (July 20, 2017, 12:00 AM), https://www.texastribune.org/2017/07/20/texas-prison-heat-air-conditioning-lawsuit/ [https://perma.cc/QN7P-BE4L] (stating seventy-five percent of Texas's prisons and jails lack air conditioning in inmate living areas); Jason Pohl & Ryan Gabrielson, *California's Jails Are in a Deadly Crisis. Here's How Experts Suggest Fixing Them.*, PROPUBLICA (Jan. 6, 2020, 8:00 AM), https://www.propublica.org/article/californias-jails-are-in-a-deadly-crisis-heres-how-experts-suggest-fixing-them [https://perma.cc/F47T-SAWJ] (noting the powerlessness of inspectors to enforce state standards for jail conditions and unlimited isolation periods for mentally ill detainees); Madeleine Thompson, *A Report Found Inhumane Conditions in Cleveland Jails and the Community Wants Answers*, CNN (Dec. 15, 2018, 10:44 PM), https://www.cnn.com/2018/12/15/us/ohio-cuyahoga-county-jail-conditions-report/index.html [https://perma.cc/M7UH-Q655] (describing mice; tainted drinking water; and a lack of access to food, toothbrushes, and toilet paper in Cuyahoga County, Ohio jails).

222. *See Why Promote Prison Reform?*, UNITED NATIONS OFF. ON DRUGS & CRIME, https://www.unodc.org/unodc/en/justice-and-prison-reform/prison-reform-and-alternatives-to-imprisonment.html [https://perma.cc/VF5L-4QFC]; *Cruel, Inhuman, and Degrading Conditions*, ACLU, https://www.aclu.org/issues/prisoners-rights/cruel-inhuman-and-degrading-conditions [https://perma.cc/67YJ-MBYV].

223. *See, e.g.*, *Our Demands*, FORMERLY INCARCERATED, CONVICTED PEOPLE & FAMS. MOVEMENT, https://ficpfm.org/demands/ [https://perma.cc/H8HF-NFG9]; Sitawa Nantambu Jamaa, *Prisoner Human Rights Movement #1 Blue Print Overview*, PRISONER HUM. RTS.

Black as well as celebrities like media personality Kim Kardashian, rappers Jay-Z and Yo Gotti, and NFL player Demario Davis have drawn public attention to deficient inmate living conditions.[224]

High-profile deaths of pretrial detainees have further highlighted public distrust of detention facilities. When Sandra Bland was found dead in 2015 in the Waller County (Texas) Sheriff's Office jail cell where she had been detained for three days on charges stemming from a traffic stop, officials said she died by suicide.[225] Bland's family questioned that account, however, saying she was not suicidal and suggesting police may have been involved in her death, pointing to several unusual surrounding circumstances.[226] Bland's death became part of the Black Lives Matter movement, raising issues at the intersection of racism, policing, and detention.[227] Her mother filed a lawsuit

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MOVEMENT, https://prisonerhumanrightsmovement.wordpress.com/blue-print/blue-print-overview/ [https://perma.cc/Z5L2-6CHW]. *See generally* MARIE GOTTSCHALK, THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA 165–96 (2006); Ellen M. Barry, *Women Prisoners on the Cutting Edge: Development of the Activist Women's Prisoners' Rights Movement*, 27 SOC. JUST. 168 (2000).

224. *See* Piper Kerman, Opinion, *What's Happening in 'Orange Is the New Black' Is Happening to Real Women Behind Bars*, WASH. POST (July 25, 2019, 2:55 PM), https://www.washingtonpost.com/opinions/whats-happening-in-orange-is-the-new-black-is-happening-to-to-real-women-behind-bars/2019/07/25/9fa0f94c-aef3-11e9-8e77-03b30bc29f64_story.html [https://perma.cc/4A85-DMFV]; *Kim Kardashian West: The Justice Project* (Oxygen television broadcast Apr. 5, 2020), https://www.oxygen.com/kim-kardashian-west-the-justice-project/season-1/special-episode/kim-kardashian-west-the-justice [https://perma.cc/GFJ5-PQRK]; Alissa Zhu, *'Constant Peril': Mississippi Parchman Inmates File 2nd Lawsuit Aided by Jay-Z, Yo Gotti*, CLARION LEDGER (Feb. 26, 2020, 2:39 PM), https://www.clarionledger.com/story/news/2020/02/26/mississippi-parchman-inmates-file-2nd-lawsuit-aided-jay-z-yo-gotti-prison-crisis/4881560002/ [https://perma.cc/9SCJ-ZTCH]; Louder than a Riot, *Making Revolution Irresistible*, NPR (Dec. 16, 2020, 11:59 PM), https://www.npr.org/transcripts/947147392 [https://perma.cc/G86G-3UH7]; Demario Davis, Opinion, *New Orleans Saints LB Demario Davis on Prison Violence: 'Mississippi Must Do Better.'*, CLARION LEDGER (Jan. 16, 2020, 5:00 AM), https://www.clarionledger.com/story/opinion/columnists/2020/01/16/new-orleans-saints-lb-demario-davis-prison-violence-mississippi-must-do-better/4479782002/ [https://perma.cc/S6Z2-HTW2].

225. David Montgomery & Michael Wines, *Dispute over Sandra Bland's Mental State Follows Death in a Texas Jail*, N.Y. TIMES (July 22, 2015), https://www.nytimes.com/2015/07/23/us/sandra-blands-family-says-video-sheds-no-light-on-reason-for-her-arrest.html [https://perma.cc/FG59-HMTX].

226. *Id.*; Rhonda Swan, Opinion, *Sandra Bland Shows Necessity of Black Lives Matter Movement*, SUN SENTINEL (July 24, 2015, 11:26 PM), https://www.sun-sentinel.com/opinion/fl-rscol-oped0727-20150724-column.html [https://perma.cc/HXB9-QU8L] (describing the unusual circumstances).

227. Swan, *supra* note 226. In the United States, systemic racism causes racially disparate incarceration rates. *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 7–10, 19–22 (10th anniversary ed. 2020). Though Black people

against the Sheriff's Office and several individual officers alleging, among others, § 1983 failure-to-protect and medical-needs claims, resulting in a $1.9 million settlement that also required changes to the jail's procedures.[228]

Even more prominent was financier Jeffrey Epstein's death in a Manhattan jail in 2019 while he was facing federal charges involving a powerful sex-trafficking ring.[229] Officials stated he died by suicide, but speculation to the contrary was widespread, particularly online, where the phrase "Epstein didn't kill himself" became a popular meme.[230] Suspicion was so high that President Donald Trump retweeted alternative theories of Epstein's death, and other lawmakers called for independent investigations.[231]

While Bland's family received a settlement from Waller County and two corrections officers faced federal criminal charges related to Epstein's

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make up only 12% of the U.S. population, they compose 33% of its prison population. John Gramlich, *Black Imprisonment Rate in the U.S. Has Fallen by a Third Since 2006*, PEW RSCH. CTR. (May 6, 2020), https://www.pewresearch.org/fact-tank/2020/05/06/black-imprisonment-rate-in-the-u-s-has-fallen-by-a-third-since-2006/ [https://perma.cc/PH3P-63YL]. In contrast, white people—63% of the total U.S. population—make up just 30% of the prison population. *Id.* Thus, substandard conditions in detention facilities disproportionately affect Black people and other racial groups that experience high incarceration rates, including Hispanic and Indigenous people. *Id.*; Roxanne Daniel, *Since You Asked: What Data Exists About Native American People in the Criminal Justice System?*, PRISON POL'Y INITIATIVE (Apr. 22, 2020), https://www.prisonpolicy.org/blog/2020/04/22/native/ [https://perma.cc/2V5M-QAL5]. LGBTQ people are also disproportionately incarcerated and face a heightened risk of mistreatment, with transgender people being especially vulnerable. NAT'L CTR. FOR TRANSGENDER EQUAL., LGBTQ PEOPLE BEHIND BARS: A GUIDE TO UNDERSTANDING THE ISSUES FACING TRANSGENDER PRISONERS AND THEIR LEGAL RIGHTS 5–6 (2018), https://transequality.org/sites/default/files/docs/resources/TransgenderPeopleBehindBars.pdf [https://perma.cc/399B-VWQ8].

228. Complaint, Reed-Veal v. Encinia, No. 4:15-CV-02232 (S.D. Tex. Aug. 4, 2015), ECF No. 1; Carma Hassan et al., *Sandra Bland's Family Settles for $1.9M in Wrongful Death Suit*, CNN (Sept. 15, 2016, 9:46 PM), https://www.cnn.com/2016/09/15/us/sandra-bland-wrongful-death-settlement/index.html [https://perma.cc/5EJP-LDV2].

229. Jane C. Timm & Liz Johnstone, *'Heads Must Roll': After Epstein Found Dead, Lawmakers Want Answers, Justice for Alleged Victims*, NBC NEWS (Aug. 10, 2019, 4:37 PM), https://www.nbcnews.com/politics/politics-news/ocasio-cortez-demands-answers-after-epstein-found-dead-apparent-suicide-n1041101 [https://perma.cc/E7JH-6MJP]. Because he was a federal detainee, Epstein's estate would not have a viable claim under § 1983, which authorizes remedies only against state officials, but the aftermath of his death nevertheless illustrates public distrust of detention facilities.

230. *See* NPR Weekend Edition, *Epstein's Death Becomes a Meme*, NPR (Nov. 16, 2019, 8:02 AM), https://www.npr.org/2019/11/16/780067957/epsteins-death-becomes-a-meme [https://perma.cc/R7S7-KYCE]; *see also* Emma Grey Ellis, *'Epstein Didn't Kill Himself' and the Meme-ing of Conspiracy*, WIRED (Nov. 15, 2019, 9:00 AM), https://www.wired.com/story/epstein-didnt-kill-himself-conspiracy/ [https://perma.cc/AE7L-RUF3].

231. Timm & Johnstone, *supra* note 229.

death,[232] accountability is rare in most instances.[233] Though the high standard for pretrial-detainee conditions-of-confinement claims is just one among many barriers to successful litigation,[234] a uniform standard could give more detainees their day in court, lead to more consistent accountability for wrongdoing, and promote more humane treatment of inmates, thereby restoring some measure of confidence in the corrections system.

2. Disparate Protection of Constitutional Rights Across Circuits

Beyond issues of accountability and public perception, a uniform standard for pretrial-detainee conditions-of-confinement claims is necessary because the scope of a detainee's Fourteenth Amendment due-process rights should not vary based on the circuit in which she is detained. When a court decides what mental state a corrections officer must have for his act or omission to constitute punishment, it decides whether an inmate has a Fourteenth Amendment right to be free from that behavior. For example, a pretrial detainee in the Second Circuit is in effect protected from unreasonable conditions imposed with objective recklessness, while a pretrial detainee in the Eleventh Circuit is protected only from serious risks that an officer knowingly disregards.[235] Thus, for example, a Second Circuit inmate could likely prove the state-of-mind element of a § 1983 claim alleging injuries suffered due to a medical condition that officers should have known (but did not actually know) posed an excessive risk, whereas an Eleventh Circuit detainee's identical claim based on an identical constitutional right would fail. Though there is bound to be some inconsistency in application, a uniform standard across the circuits would at least be consistent with the foundational notion that constitutional rights are shared by all in the United States.[236] For

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232. Bobby Allyn, *Jeffrey Epstein's Prison Guards Are Indicted on Federal Charges*, NPR (Nov. 19, 2019, 11:32 AM), https://www.npr.org/2019/11/19/780794931/prosecutors-charge-correctional-officers-who-guarded-jeffrey-epstein-before-his- [https://perma.cc/YM9D-YNV6].

233. *See* Shapiro & Hogle, *supra* note 70 (explaining legal and situational barriers to inmate lawsuits); *supra* note 153 and accompanying text (discussing qualified immunity).

234. *See* David E. Patton & Fredrick E. Vars, *Jail Suicide by Design*, 68 UCLA L. REV. DISCOURSE 78, 82–86 (2020); Hanna Rutkowski, Note, *Rethinking the Reasonable Response: Safeguarding the Promise of* Kingsley *for Conditions of Confinement*, 119 MICH. L. REV. 829, 839–40 (2021). *See generally* Shapiro & Hogle, *supra* note 70.

235. *Compare* Darnell v. Pineiro, 849 F.3d 17, 35 (2d Cir. 2017), *with* Dang *ex rel.* Dang v. Sheriff of Seminole Cnty., 871 F.3d 1272, 1280 (11th Cir. 2017).

236. *See* THE FEDERALIST NO. 2, at 16 (John Jay) (Lawrence Goldman ed., 2008) ("To all general purposes we have uniformly been one people; each individual citizen everywhere enjoying the same national rights, privileges, and protection."); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 349–50 (1821) ("[T]here must be power in this Court to revise the decision of the

the sake of institutional accountability, public trust, and perhaps most importantly, constitutional consistency, the Supreme Court should settle the state-of-mind requirement for pretrial-detainee conditions-of-confinement claims.

B. The Objective Deliberate Indifference Standard

The appropriate state-of-mind requirement for conditions-of-confinement claims by pretrial detainees under the Fourteenth Amendment is the Second Circuit's objective deliberate indifference standard.[237] That is, a plaintiff should be required to prove either that (1) the defendant intentionally imposed an objectively unreasonable condition; or (2) the defendant recklessly failed to act with reasonable care to mitigate the risk of an objectively unreasonable condition even though she knew or should reasonably have known that it posed an excessive risk.[238]

The Supreme Court should adopt the objective deliberate indifference standard for four reasons. First, it would vindicate the Fourteenth Amendment due-process rights of pretrial detainees as the Court has defined them thus far. Second, objective deliberate indifference comports with Supreme Court precedent that limits § 1983 due-process claims. Third, the standard is workable for all types of pretrial conditions-of-confinement claims. Finally, the objective deliberate indifference standard protects good-faith action by officers.

1. Vindication of Constitutional Rights

While the Supreme Court has not defined the mental-state requirement for pretrial-detainee conditions-of-confinement claims, it has provided some guidance on the minimum scope of a detainee's Fourteenth Amendment rights. Taken together, its guidance effectively requires an objective state-of-mind standard in a detainee's § 1983 claim. To start, in *Kingsley*, the Supreme Court rejected the notion that the Fourteenth Amendment protections of pretrial detainees are the same as the Eighth Amendment protections of convicted prisoners, stating, "The language of the two

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State Court, in order to produce uniformity in the construction of the Constitution . . . ."); Danforth v. Minnesota, 552 U.S. 264, 290–91 (2008) ("[W]hether a constitutional violation occurred . . . . is a 'pure question of federal law . . . which should be applied uniformly throughout the Nation . . . .'" (quoting Am. Trucking Ass'ns v. Smith, 496 U.S. 167, 205 (1990) (Stevens, J., dissenting))).

237. *See Darnell*, 849 F.3d at 35.

238. *Id.*

[amendments] differs, and the nature of the claims often differs. And most importantly, pretrial detainees (unlike convicted prisoners) cannot be punished at all . . . ."[239] The Court's distinction between the rights of pretrial detainees and convicted prisoners was not specific to the use-of-force context,[240] suggesting detainees are entitled to heightened protections in conditions cases, as well.[241]

In addition, in *Farmer*—the case that established a subjective deliberate indifference standard for prisoner conditions-of-confinement claims—the Court suggested that the mental-state requirement for a conditions claim should be lower than that for a use-of-force claim.[242] In the Eighth Amendment context, the *Farmer* Court justified the use of the subjective deliberate indifference standard in conditions claims as opposed to the higher malicious-and-sadistic standard used for force claims by citing the need for urgent action when using force.[243] Though *Farmer* did not speak to the Fourteenth Amendment context, it would be anomalous to set a lower standard in conditions claims than in force claims for prisoners while doing the reverse for detainees. Accordingly, the conditions-of-confinement mental-state requirement for detainees should be objective, putting it on par with *Kingsley*'s mental-state requirement for detainee use-of-force claims.

In fact, even *Kingsley*'s principal dissent acknowledged that an objective state-of-mind element could be appropriate in the conditions context despite arguing against it in the force context.[244] Specifically, Justice Scalia's dissent referred to *Bell*'s objective heuristic for identifying an intent to punish: whether an action is reasonably related to a legitimate governmental goal.[245] The dissent acknowledged that one can logically infer a punitive intent if a "condition" or "policy" lacks a nonpunitive goal, but it argued that the same logic does not apply to the use of force due to the need for haste and the

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

240. *See id.* at 398–401; *see also* Castro v. County of Los Angeles, 833 F.3d 1060, 1070 (2016) ("The [*Kingsley*] Court did not limit its holding to 'force' but spoke to 'the challenged governmental action' generally.").

241. For arguments that both detainees and prisoners are entitled to the same standards of humane conditions, adequate medical treatment, and protection from violence, see Schlanger, *supra* note 24, at 425–33; Shapiro & Hogle, *supra* note 70, at 130–33; Meredith D. McPhail, Note, *Ensuring that Punishment Does, in Fact, Fit the Crime*, U. MICH. J.L. REFORM 213, 227–28 (2018). If so, given *Farmer*'s suggestion that the mental-state standard should be lower in conditions claims than force claims, and given *Kingsley*'s use of an objective standard in force claims, conditions claims under both the Eighth and Fourteenth Amendments should use an objective standard.

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

243. *Id.*

244. *See Kingsley*, 576 U.S at 406 (Scalia, J., dissenting).

245. *Id.* at 405–06; *see* Bell v. Wolfish, 441 U.S. 520, 539 (1979).

potential for misjudgment by an officer.[246] Even the Justices opposed to an objective standard in *Kingsley* seemed to agree, then, that an objective standard makes sense for conditions-of-confinement claims.

Applying all of the precedential logic, a pretrial detainee's Fourteenth Amendment right to be free from punishment would be better protected if a defendant could be held liable for his reckless failure to mitigate an unreasonable condition when he reasonably should have known the risk it posed. Under a subjective deliberate indifference standard, however, an officer categorically cannot be liable unless a detainee shows the officer knew a condition posed a serious risk of harm and consciously disregarded it.

Thus, the subjective standard may shield an officer who violates a detainee's rights merely because his intent cannot be proven or because his ignorance itself fostered the unreasonable condition. For example, in *Goodman v. Kimbrough*—an Eleventh Circuit case decided under a subjective deliberate indifference standard—Bruce Goodman, a sixty-seven-year-old man with early-onset dementia, was housed in a jail's administrative segregation section to protect his safety after an arrest for loitering.[247] His first night there, Goodman was severely beaten by his cellmate such that he spent seven days in a hospital under intensive care.[248] Jail policy required the officers assigned to Goodman's section to perform a midnight head count and hourly cell checks, but they failed to conduct any of them.[249] In addition, another inmate who heard the attack pushed an emergency call button several times during the night, but the officers simply deactivated it.[250]

Still, the district court granted summary judgment to the officers and the Eleventh Circuit affirmed because Goodman could not show that the officers knew he was at risk of serious harm.[251] Under the subjective deliberate indifference standard, it did not matter that the officers were unaware of the risk of harm *because* they failed to conduct required checks and ignored an emergency call button. Had the court used an objective standard, however, Goodman could have argued that a reasonable officer would have known there was a substantial risk of harm and that the officers' inaction was reckless. Hence, where a subjective standard might bar strong claims because proof of knowledge is lacking, an objective standard allows for vindication of detainees' constitutional right to be free from punishment.

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246. *Id.*
247. Goodman v. Kimbrough, 718 F.3d 1325, 1329 (11th Cir. 2013).
248. *Id.* at 1330.
249. *Id.* at 1329–30.
250. *Id.* at 1330.
251. *Id.* at 1331–32.

Currently, despite that constitutional right, pretrial detainees are sometimes subjected to brutal conditions ranging from deprivation of basic needs to violence and even death. While a slightly more permissive standard for § 1983 claims would certainly not remedy the problem in its entirety, it may have some deterrent effect for individual officers. Further, it may encourage government entities—which "almost always" provide defense counsel for and indemnify their employees in lawsuits involving on-the-job conduct[252]—to proactively improve custodial conditions, policies, and services. Thus, an objective deliberate indifference standard would be a step toward protecting the Fourteenth Amendment rights of pretrial detainees.

2. Comportment with Limiting Precedent

In addition to aligning with precedent on the breadth of the Fourteenth Amendment rights of pretrial detainees, the objective deliberate indifference standard comports with precedent that limits those rights. Although the Fourteenth Amendment prohibits punishment prior to conviction, the Supreme Court has repeatedly stated that an act or omission does not amount to punishment unless it is done intentionally.[253] Still, as the Court first held in *Bell* and reaffirmed in *Kingsley*, a detainee need not directly prove that an officer's action or inaction was intentional in order to prevail; rather, there are objective tests that can operate as heuristics for identifying intent.[254] Under the objective deliberate indifference standard, then, proving intent to act or not act is one way to meet the state-of-mind element, but it is not the only way.[255] A detainee may also satisfy the state-of-mind element by showing that an officer recklessly failed to act with reasonable care to mitigate the risk posed by an unreasonable condition even though he knew or should have known of its risk.[256] Like how *Bell* allowed courts to infer an official's intent to punish when a condition is not reasonably related to a legitimate governmental goal,[257] the objective deliberate indifference standard allows a court to infer an intentional decision if an officer acts or

252. Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890, 915–16 (2014); *see also* Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1666 (2003).

253. *See, e.g.*, Farmer v. Brennan, 511 U.S. 825, 838–39 (1994); Wilson v. Seiter, 501 U.S. 294, 300 (1991). For arguments that intent should not be a prerequisite for "punishment," see Bell v. Wolfish, 441 U.S. 520, 565–67 (1979) (Marshall, J., dissenting); *Farmer*, 511 U.S. at 854–57 (Blackmun, J., concurring) (calling for *Wilson* to be overruled); Schlanger, *supra* note 24, at 385–88; John F. Stinneford, *The Original Meaning of "Cruel,"* 105 GEO. L.J. 441, 499–501 (2017).

254. *See Bell*, 441 U.S. at 539; Kingsley v. Hendrickson, 576 U.S. 389, 397–98 (2015).

255. Darnell v. Pineiro, 849 F.3d 17, 35 (2d Cir. 2017).

256. *Id.*

257. *Bell*, 441 U.S. at 539.

fails to act when a reasonable officer under the circumstances would have been aware of a dangerous condition. Such an inference is reasonable, particularly when it comes to inaction, where willful ignorance of a challenged condition can otherwise act as a shield.

Because of its accurate deployment of the intent heuristic, the Second Circuit's objective deliberate indifference standard best vindicates detainees' rights in line with precedent. Though the Ninth and Seventh Circuit's analyses appear to follow *Kingsley* more closely with their two required prongs, they are actually too restrictive. The Ninth Circuit requires a plaintiff to prove *both* prongs of the Second Circuit's objective deliberate indifference standard: (1) an intent to act or not act with respect to an unreasonable condition; *and* (2) a reckless failure to mitigate the condition.[258] *Kingsley*, however, requires a detainee to show only that an officer intentionally applied unreasonable force.[259] Thus, the first prong of objective deliberate indifference—which requires a detainee to show that an officer intentionally imposed an unreasonable condition (a method of proving culpability that the Seventh Circuit's standard lacks)—is sufficient on its own.[260] Likewise, the second prong of the objective deliberate indifference standard is sufficient on its own because it acts as a heuristic for the officer's intent.[261] Accordingly, the Second Circuit's objective deliberate indifference standard best aligns with limiting precedent while most fully vindicating the constitutional right of detainees to be free from punishment.

3. Workability

Along with its fit in constitutional theory, the objective deliberate indifference standard is judicially workable. The Second, Seventh, and Ninth Circuits are already using some form of objective standard.[262] Additionally, several circuits used an objective deliberate indifference standard in the eighteen years between *Estelle* (in which the Supreme Court first established deliberate indifference as the state-of-mind requirement for Eighth Amendment conditions claims) and *Farmer* (in which the Court clarified that it was a subjective standard in the Eighth Amendment context).[263]

Moreover, the objective deliberate indifference standard applies neatly across all types of conditions-of-confinement claims: general conditions

258. Castro v. County of Los Angeles, 833 F.3d 1060, 1071 (9th Cir. 2016) (en banc).
259. *Kingsley*, 576 U.S. at 396–97.
260. *See Darnell*, 849 F.3d at 35.
261. *See id.*
262. *See supra* Part III.B.2.
263. *See supra* note 84 and accompanying text.

claims based on both an act and a failure to act, failure-to-protect claims, and medical-needs claims. First, in a general conditions claim based on an affirmative act—such as a suit in which a detainee who was sexually assaulted in a jail challenges a police chief's stated decision to have only an unsupervised male officer present while she was detained[264]—the plaintiff would likely try to prove the state-of-mind element via the first prong of objective deliberate indifference by proving that the staffing decision was intentional and objectively unreasonable. On the other hand, in a general conditions claim based on an omission—such as a case alleging a failure by jail officials to maintain safe and sanitary facilities[265]—an inmate could still try to show the officials intentionally chose not to remedy the conditions. But she could also use the second prong to show that reasonable officers would have been aware of the risk the conditions presented and that the officials recklessly failed to use reasonable care to mitigate the risk, acting as a substitute for an expressed intent to punish.

Next, a failure-to-protect plaintiff could also use either prong. For example, in *Castro*—where the drunk detainee was beaten in a sobering cell by a combative felony arrestee—the detainee could succeed by proving either that (1) the officers intentionally placed him in the same cell as a dangerous accused felon, which was objectively unreasonable; or (2) the officers should have known that doing so posed an excessive risk and they recklessly failed to act with reasonable care to mitigate that risk by, for instance, failing to monitor the cell. Either way, the objective deliberate indifference standard should be manageable for a factfinder.

Finally, in a medical-needs claim—like in *Miranda* where the detainee died following a hunger strike in jail—a plaintiff again could use either prong of the objective deliberate indifference standard. To illustrate, in *Miranda*, the detainee's estate could prove either that (1) the jail doctors intentionally decided to keep her in jail rather than send her to a hospital, which was objectively unreasonable; or (2) the doctors should have known that doing so posed an excessive risk and they recklessly failed to act with reasonable care to mitigate that risk by, for instance, not taking other steps to prevent her death. In sum, no matter the type of claim or which prong a plaintiff uses, the objective deliberate indifference standard is workable for a judge or jury.

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264. *See* Scott v. Moore, 85 F.3d 230, 232–33 (5th Cir. 1996).

265. *See, e.g.*, Marsh v. Butler County, 268 F.3d 1014, 1042 (11th Cir. 2001) (involving a jail with leaky pipes, inoperable plumbing, broken glass in windowsills, and rodent infestations).

4. Protection for Good-Faith Action

While an objective deliberate indifference standard gives more options for plaintiffs to prove the state-of-mind element consistent with the scope of the Fourteenth Amendment, the standard still protects officers from liability for good-faith action. First, objective deliberate indifference categorically bars liability for negligent acts, instead requiring an officer to be at least reckless.[266] Furthermore, the same qualifiers that the *Kingsley* Court put on "reasonableness" in the use-of-force context can also apply in the conditions-of-confinement context. The reasonableness of an officer's efforts to mitigate a challenged condition can be judged "from the perspective and with the knowledge of the defendant officer," accounting for "the legitimate interests in managing a jail," and with "deference to policies and practices needed to maintain order and institutional security."[267] Finally, an officer is still protected by qualified immunity unless she has violated a clearly established right such that a reasonable officer under the circumstances would have understood that her conduct was unlawful.[268] Taking these limits together, it is unlikely that a pretrial detainee could successfully assert a § 1983 claim against an officer acting in good faith.[269]

V. CONCLUSION

Kingsley was a landmark case for pretrial detainees, requiring only an objective state-of-mind standard for their § 1983 use-of-force claims. The state-of-mind element for a detainee's conditions-of-confinement claim, however, remains unclear, with the circuits split between objective and subjective standards. The Supreme Court should resolve this split in favor of an objective deliberate indifference standard, requiring a pretrial detainee to prove either that (1) an officer intentionally imposed an objectively unreasonable condition; or (2) an officer recklessly failed to use reasonable

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266. Requiring at least a reckless state of mind is also consistent with precedent that says negligent harm does not amount to a due-process violation. County of Sacramento v. Lewis, 523 U.S. 833, 849 (1998).

267. Kingsley v. Hendrickson, 576 U.S. 389, 399–400 (2015).

268. *See id.* at 400. An objective standard may also help define the contours of qualified immunity in the conditions context by making it easier for courts to create precedent regarding what conditions are and are not reasonable in jails, thereby "clearly establishing" a detainee's Fourteenth Amendment rights. *See* Anderson v. Creighton, 483 U.S. 635, 639–40 (1987). Separately, even if qualified immunity were eliminated or reformed, *see supra* note 154, the negligence limitation would be sufficient to protect officers acting without a sufficiently blameworthy state of mind. In addition, there are other substantive and procedural limitations to protect against overdeterrence. *See generally* Schwartz, *After Qualified Immunity*, *supra* note 153.

269. *See Kingsley*, 576 U.S. at 400.

care to mitigate the risk presented by an objectively unreasonable condition that he should have known carried a substantial risk. The Court could adopt this standard without disrupting precedent or relaxing its concerns about inmate litigation. In doing so, the Court would allow pretrial detainees to better vindicate their Fourteenth Amendment rights and affirm that detainees are constitutionally entitled to safe and humane conditions of confinement.