KINGSLEY BREATHES NEW LIFE INTO SUBSTANTIVE DUE PROCESS AS A CHECK ON ABUSE OF GOVERNMENT POWER

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"[O]ur Fourteenth Amendment precedents may be read more broadly or narrowly depending upon how one chooses to read them. Faced with the choice, I would adopt a "sympathetic" reading, one which comports with dictates of fundamental justice and recognizes that compassion need not be exiled from the province of judging."[1]

INTRODUCTION

For over twenty-five years I have written law review articles criticizing the Supreme Court's emasculation of substantive due process as a check on the abuse of power by government officials, such as police, jailers, public school teachers, and social workers. The Court has ratcheted up the standard to

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1 DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 213 (1989) (Blackmun, J., dissenting).

hold that only the most egregious official misconduct—that which "shocks the conscience"—will be considered arbitrary in a constitutional sense. The Court has made it much more difficult for individuals to challenge executive, as opposed to legislative, action, despite the fact that substantive due process was intended, like its forbearer, Magna Carta, to limit the power of the King—the executive branch. Further, many courts have borrowed the Eighth Amendment's "cruel and unusual punishment" standard, thereby treating all victims the same as convicted criminals, who must prove subjective criminal recklessness in order to hold government officials liable for their wrongdoing. Although the question of what is an "abuse of government power" is not easily answered, superimposing the Eighth Amendment subjective state-of-mind requirement on those who have never been convicted of a crime, such as the civilly committed, students, and pretrial detainees, is totally unwarranted.

In 2015 the Supreme Court, in *Kingsley v. Hendrickson*,[2] for the first time in decades, issued an opinion that favors victims of abuse of power. It held that a pretrial detainee alleging excessive force must show only that the force purposefully used against him was *objectively unreasonable* in order to demonstrate a due process violation.[3] The Court specifically rejected jury instructions mandating that pretrial detainees satisfy the Eighth Amendment subjective deliberate indifference test, which requires proof that the official acted with malicious, sadistic intent to harm.[4] The opinion has significance for detainees alleging excessive force, but also for those challenging conditions of confinement, including the denial of prompt, adequate medical care and the failure to protect from other inmates. Further, *Kingsley*'s rationale provides a basis for overturning appellate court cases that have used Eighth Amendment standards to reject claims brought by others, such as the civilly committed and students who are mistreated by public officials.

Part I of this Article briefly summarizes the origin and judicial development of substantive due process, focusing on the lead cases that have led appellate courts to narrowly construe the substantive due process guarantee. Part II discusses the *Kingsley* opinion, both the majority's analysis and the dissent's objection to the use of an objective reasonableness test. Part III suggests how *Kingsley* can be used by litigators seeking to protect pretrial detainees, not only from excessive force, but also from an official's failure to protect or failure to care for the medical and other needs of pretrial detainees. Part IV explains how this case can be used to overturn restrictive holdings involving corporal punishment in schools as well as the mistreatment of the civilly committed.

For many years I have argued that federal substantive due process should be given its intended meaning as a limitation on arbitrary abuses of executive power and that victims of such abuse should not be relegated to the vagaries of the shocks-the-conscience test. *Kingsley*'s rejection of criminal recklessness

2 135 S. Ct. 2466 (2015).

3 *Id.* at 2473.

4 *Id.* at 2476–77.

in favor of an objectively unreasonable standard of culpability is a promising step forward.

I. Origins and Development of Substantive Due Process in the Supreme Court

The concept of substantive due process has strong historical roots dating back to Magna Carta and the Lockean tradition.[5] The use of substantive due process as the source for protecting nontextual rights from state and federal legislation has a long and contested history, including, most recently, the Supreme Court's reliance on substantive due process, coupled with equal protection, to strike down state bans on same-sex marriage.[6]

In 1952, the Supreme Court officially recognized substantive due process as a limitation on the power of the executive branch in *Rochin v. California*.[7] The Court invoked substantive due process defensively in a criminal proceeding to exclude evidence that was obtained by pumping the defendant's stomach.[8] The Court stated that substantive due process is violated by official conduct that "shocks the conscience" or constitutes force that is "brutal" and "offend[s] even hardened sensibilities."[9] The "shocks the conscience" standard emerged as the test for determining whether misconduct by executive officials is so aggravated that it violates substantive due process.[10]

The Supreme Court decided *Rochin* before incorporation of the Fourth Amendment, which prohibits states from conducting unreasonable searches and seizures.[11] The Court has subsequently clarified that it will reject any substantive due process claim that falls under a more explicit constitutional guarantee, such as the Fourth or Eighth Amendment.[12] However, the Court

5 Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism and the Fifth Amendment*, 58 Emory L.J. 585 (2009); *see also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 847 (1992) (acknowledging that due process has its roots in the Magna Carta); Daniels v. Williams, 474 U.S. 327, 331 (1986) ("[T]he Due Process Clause, like its forbear in the Magna Carta, was 'intended to secure the individual from the arbitrary exercise of the powers of government.'" (citation omitted) (quoting Hurtado v. California, 110 U.S. 516, 527 (1884))). Magna Carta's influence on the development of constitutional due process rights is described in John V. Orth, Due Process of Law: A Brief History 7 (2003).

6 *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2589–90 (2015).

7 342 U.S. 165 (1952).

8 *Id.* at 173.

9 *Id.* at 172–73.

10 *See* United States v. Salerno, 481 U.S. 739, 746 (1987) ("'[S]ubstantive due process' prevents the government from engaging in conduct that 'shocks the conscience' . . . ." (quoting *Rochin*, 342 U.S. at 172)); Whitley v. Albers, 475 U.S. 312, 327 (1986) (quoting *Rochin* with approval).

11 *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961); *see also* U.S. Const. amend. IV.

12 *See* Graham v. Connor, 490 U.S. 386, 388 (1989) (holding that the standards of the Fourth Amendment, rather than substantive due process, govern a claim of excessive force); *Whitley*, 475 U.S. at 326–27 (stating that the Eighth Amendment is "the primary

has recognized that pretrial detainees, who are no longer protected by the Fourth Amendment but who have not been convicted so as to trigger the Eighth Amendment, have a liberty interest in being free from arbitrary treatment, and that substantive due process creates a duty to protect detainees from guards and other inmates and to provide them with safe conditions of confinement and necessary medical care.[13]

In addition, the Supreme Court has recognized that those civilly committed to state mental institutions have a "historic liberty interest" in personal security that is "protected substantively by the Due Process Clause."[14] Further, involuntarily committed patients "are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish."[15] Although reasoning that the decisions of qualified medical professionals should be deemed presumptively valid, the Court nonetheless acknowledged that the constitutionally protected liberty interest required the state "to provide minimally adequate or reasonable training to ensure safety and freedom from undue restraint."[16] After balancing the competing concerns, the Court held that substantive due process is violated if decisions by doctors and nurses constitute "such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment."[17]

In 1998, the Supreme Court revisited and significantly restricted the meaning of substantive due process as a limitation on executive power in *County of Sacramento v. Lewis*.[18] The case involved alleged reckless conduct by a deputy sheriff who conducted a deadly high-speed chase of two boys riding a motorcycle after they failed to obey an officer's command to stop.[19] Philip

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source of substantive [due process] protection" for a prisoner shot in the leg during the quelling of a riot); *see also* Kingsley v. Hendrickson, 135 S. Ct. 2466, 2479 (2015) (Alito, J., dissenting) (arguing that the case should have been dismissed because the substantive due process question should await a determination of "whether a pretrial detainee can bring a Fourth Amendment claim based on the use of excessive force by a detention facility employee"). Citing *Graham*, Justice Alito asserted that if a Fourth Amendment claim is available, the Court should not rely on substantive due process. *Id.*

13 City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983) (reasoning that where there has been no "'formal adjudication of guilt' . . . the Eighth Amendment has no application" (quoting Ingraham v. Wright, 430 U. S. 651, 672 n.40 (1977))); *accord* Bell v. Wolfish, 441 U.S. 520, 535–36, 539 (1979); *see also* Manuel v. City of Joliet, 137 S. Ct. 911, 918–19 (2017) (holding that, where the judicial probable cause determination is based on evidence fabricated by the police, the Fourth Amendment continues to protect pretrial detainees despite the formal onset of a criminal proceeding—legal process does not convert a Fourth Amendment claim into one based on the Due Process Clause).

14 Youngberg v. Romeo, 457 U.S. 307, 315 (1982) (quoting *Ingraham*, 430 U.S. at 673).

15 *Id.* at 321–22.

16 *Id.* at 319.

17 *Id.* at 323.

18 523 U.S. 833 (1998).

19 *Id.* at 836–37.

Lewis, the passenger on the motorcycle, was struck and killed.[20] The Court confirmed that substantive due process may be used to challenge abuses of government power: "Since the time of our early explanations of due process, we have understood the core of the concept to be protection against arbitrary action . . . ."[21] The majority cautioned, however, that the "criteria to identify what is fatally arbitrary differ depending on whether it is legislation or a specific act of a government officer that is at issue."[22] With regard to the latter, only "the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.' "[23] The Court explained that executive action raises "a particular need to preserve the constitutional proportions of constitutional claims, lest the Constitution be demoted to what we have called a font of tort law."[24] Invoking *Rochin*, the Court imposed a threshold mandate that the behavior be "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience."[25]

In *Lewis*, the Court refined the *Rochin* test by addressing the substantive due process state-of-mind requirement, which is also the subject of *Kingsley*.[26] The Supreme Court has imposed different culpability (state-of-mind) requirements depending on the type of wrongdoing and the constitutional guarantee at issue. For example, to succeed on a Fourth Amendment excessive force claim there must be evidence that the force used was "objectively unreasonable."[27] On the other hand, a convicted inmate bringing an excessive force claim under the Eighth Amendment's Cruel and Unusual Punishment Clause must prove that the force was utilized for the purpose of

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20 *Id.* at 837.

21 *Id.* at 845. The Court rejected the argument that the plaintiff's substantive due process claim should be analyzed as a Fourth Amendment seizure because the defendant's conduct could not be considered a seizure of Lewis. *Id.* at 842–44; *see also* Ciminillo v. Streicher, 434 F.3d 461, 465 (6th Cir. 2006) (citing Brower v. Cty. of Inyo, 489 U.S. 593, 596–97 (1989)) (explaining that a Fourth Amendment seizure occurs only when government terminates freedom of movement through means intentionally applied; thus, where police simply tried to stop a suspect by flashing lights and continued pursuit, no seizure had occurred).

22 *Lewis*, 523 U.S. at 846.

23 *Id.* (quoting Collins v. City of Harker Heights, 503 U.S. 115, 129 (1992)).

24 *Id.* at 848 n.8.

25 *Id.*; *see* Rosalie Berger Levinson, *Time to Bury the Shocks the Conscience Test*, 13 CHAP. L. REV. 307, 334–47 (2010) (presenting several arguments for overturning *Lewis*' restrictive "shocks the conscience" standard); *see also* Christensen v. Cty. of Boone, 483 F.3d 454, 462 n.2 (7th Cir. 2007) (per curiam) (explaining that when a plaintiff complains of abuse of executive power the "conscience-shocking" test determines liability, rather than the traditional strict scrutiny standard used to measure the constitutionality of legislative acts; thus, even if a fundamental right is identified and has been impaired, a court must initially determine whether the government action can be characterized as arbitrary or conscience-shocking in a constitutional sense).

26 *See infra* Part II.

27 Graham v. Connor, 490 U.S. 386, 397 (1989).

punishing him—"[an] unnecessary and wanton infliction of pain"[28] applied "maliciously and sadistically."[29]

The commingling of the standard for inmates and pretrial detainees began in 1973 when the Second Circuit, in an opinion by Judge Friendly, produced a four-factor test to determine whether the use of force against a detainee "shocks the conscience."[30] The fourth criterion asked "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."[31] Many lower courts took this fourth criterion and made "malicious and sadistic intent" a *determinative* factor in assessing a substantive due process claim.[32] The Supreme Court later adopted this language in explicating the standard of culpability necessary to prove an Eighth Amendment excessive force viola-

28 Whitley v. Albers, 475 U.S. 312, 320 (1986).

29 Hudson v. McMillian, 503 U.S. 1, 7 (1992).

30 Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973), *rejected by Graham*, 490 U.S. 386.

31 *Id.* (citing as other criteria the need for force, the amount of force used, and the extent of injury inflicted).

32 *See* Kitchen v. Dallas Cty., 759 F.3d 468, 477–78 (5th Cir. 2014) (holding that estate of pretrial detainee that was claiming detainee was a victim of excessive force must meet the same standard as a convicted prisoner suing under the Eighth Amendment, and thus, estate must prove officers used force maliciously and sadistically for the very purpose of causing harm); Gonzalez-Fuentes v. Molina, 607 F.3d 864, 880–85 (1st Cir. 2010) (asserting that to establish a substantive due process violation based on executive, as opposed to legislative, action, the shocks-the-conscience test is limited to "violations of personal rights . . . so severe . . . so disproportionate to the need presented, and . . . so inspired by malice or sadism . . . that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience" (first three alterations in original) (internal quotation marks omitted) (quoting Moran v. Clarke, 296 F.3d 638, 647 (8th Cir. 2002) (en banc))); Fennell v. Gilstrap, 559 F.3d 1212, 1217–19 (11th Cir. 2009) (per curiam) (holding that deputy's conduct in kicking pretrial detainee in the face, which resulted in severe fractures and the necessity for surgery, did not constitute excessive force in violation of the Fourteenth Amendment because the use of force against a detainee is excessive only if it "shocks the conscience," and only force that is applied maliciously and sadistically to cause harm will be found to shock the conscience); Orem v. Rephann, 523 F.3d 442, 446–48 (4th Cir. 2008) (holding that to succeed on an excessive force claim under the Due Process Clause, plaintiff must show deputy "inflicted unnecessary and wanton pain and suffering," which requires looking to the need for application of force, the relationship between the need and the amount of force used, the extent of the injury inflicted, and whether force was applied in a good faith effort to maintain and restore discipline or maliciously and sadistically for the purpose of causing harm (quoting Taylor v. McDuffie, 155 F.3d 479, 483 (4th Cir. 1998))), *abrogated on other grounds by* Wilkins v. Gaddy, 559 U.S. 34 (2010) (per curiam); Cummings v. McIntire, 271 F.3d 341, 345–47 (1st Cir. 2001) (finding that police officer's unprovoked and angry shove of a person who asked for directions while officer was busy directing traffic did not shock the conscience and thus did not amount to denial of substantive due process; although this situation did not involve a high-speed law enforcement chase, nor did it involve a situation where decisionmaking was unhurried, the record did not permit a finding that officer acted maliciously and sadistically for the very purpose of causing harm).

tion.[33] However, unlike substantive due process, both the text of the Eighth Amendment—"cruel and unusual punishment"—and the understanding that a conviction diminishes one's rights provide greater justification for this draconian standard.[34]

In *Lewis*, the Court confronted the question of what level of culpability is necessary to satisfy *Rochin*'s "shock-the-conscience" standard with regard to those not yet convicted of a crime. It reasoned that government officials who act with "deliberate indifference" to constitutional rights "shock the conscience"—for example, prison guards who are deliberately indifferent to the medical needs of pretrial detainees.[35] However, the *Lewis* Court explained that because deliberate indifference implies the opportunity for actual deliberation, this standard could not reasonably apply to police officers who face a situation calling for fast action.[36] Thus, the Court held that injuries stemming from a "high-speed chase[ ] with no intent to harm suspects physically or to worsen their legal plight [did] not give rise to liability under the Fourteenth Amendment."[37]

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33 *See supra* note 29 and accompanying text; *cf.* Kingsley v. Hendrickson, 135 S. Ct. 2466, 2475–76 (2015) (clarifying that the "malicious and sadistic" language was not intended as "a *necessary* condition for liability" under substantive due process).

34 *See* Sandin v. Conner, 515 U.S. 472, 485 (1995) (holding that when the state punishes convicted prisoners, it does not violate liberty interests protected by the Due Process Clause); Wilson v. Seiter, 501 U.S. 294, 300 (1991) (adopting subjective deliberate indifference as the Eighth Amendment standard for judging conditions of confinement because "[i]f the pain inflicted is not formally meted out as punishment . . . some mental element must be attributed to the inflicting officer" to qualify as cruel and unusual (emphasis omitted)).

35 Cty. of Sacramento v. Lewis, 523 U.S. 833, 849–50 (1998). The Court also cited *Youngberg v. Romeo* as establishing a substantive due process violation where medical personnel at a state mental institution failed to provide minimally adequate training and habilitation to those who were involuntarily committed. *Id.* at 852 n.12 (citing Youngberg v. Romeo, 457 U.S. 307, 319–25 (1982)).

36 *Id.* at 854.

37 *Id.*; *see also* Steele v. Cicci, 855 F.3d 494, 502–03 (3d Cir. 2017) (explaining that under *Lewis*, pretrial detainees challenging executive, as opposed to legislative, action must show the deprivation shocks the conscience, and this demands a "degree of wrongfulness" that ranges from deliberate indifference to actual intent to cause harm depending upon the circumstances (quoting Vargas v. City of Philadelphia, 783 F.3d 962, 973 (3d Cir. 2015))); *Vargas*, 783 F.3d at 973–74 (recognizing that the degree of wrongfulness necessary to satisfy the "conscience shocking" level depends on the circumstances, and that actual intent must be proved where officers face a "hyperpressurized environment" requiring snap judgment (quoting Sanford v. Stiles, 456 F.3d 298, 308–09 (3d Cir. 2006) (per curiam))); Bingue v. Prunchak, 512 F.3d 1169, 1175–77 (9th Cir. 2008) (joining the Eighth Circuit in adopting a categorical rule that the intent-to-harm standard, rather than the deliberate indifference standard, applies to all high-speed police pursuits aimed at apprehending suspected offenders because it is too difficult for courts to determine in hindsight whether a high-speed chase involved an emergency or nonemergency situation).

The Court cited with approval the Eighth Amendment standard used to impose liability for harm caused in a prison riot case.[38] Because the deceased's family members in *Lewis* did not allege that the deputies acted with "intent to harm" when they struck and killed their son, they failed to meet the shocks-the-conscience test.[39] On the other hand, the Court clarified that a "deliberate indifference" test should govern claims alleging abuse of executive power in a nonemergency situation.[40] However, it did not specify whether objective or subjective deliberate indifference should be the standard,[41] and this created the circuit split addressed in *Kingsley*.[42]

Outside the law enforcement context, the "state-of-mind" requirement for substantive due process claims has been equally contentious. For example, the Supreme Court has recognized that corporal punishment or other disciplinary action taken by public school teachers may violate substantive due process. While rejecting procedural due process claims, the Court in *Ingraham v. Wright*[43] recognized that imposition of corporal punishment by public school officials deprives students of liberty.[44] However, several appellate courts have required students to meet a draconian criminal recklessness standard in order to successfully sue their teachers for violating substantive due process.[45] Similarly, appellate courts have ratcheted up the standard for

38 *Lewis*, 523 U.S. at 851–54 (citing *Whitley v. Albers*, 475 U.S. 312, 318–22 (1986), for the principle that convicts, in the context of a prison riot, must show that a use of force constituted an "unnecessary and wanton infliction of pain" (quoting *Whitley*, 475 U.S. at 320)).

39 *Id.* at 855.

40 Lower courts have generally applied a deliberate indifference test in nonemergency situations. *See, e.g.*, Okin v. Vill. of Cornwall-on-Hudson Police Dep't, 577 F.3d 415, 431–32 (2d Cir. 2009) (holding that because officers had ample time for reflection to decide what course of action to take in response to domestic violence, deliberate indifference was the requisite state of mind for showing that defendants' conduct shocked the conscience). However, some appellate courts have held that even where there is time to deliberate, the "intent to harm" standard should be used whenever government officials must balance competing legitimate concerns. *See* Levinson, *supra* note 25, at 325–27 (critiquing these cases).

41 Darnell v. Pineiro, 849 F.3d 17, 29 (2d Cir. 2017) (explaining that the Supreme Court's deliberate indifference standard "can be defined subjectively (what a person actually knew, and disregarded), or objectively (what a reasonable person knew, or should have known)"); Walton v. Dawson, 752 F.3d 1109, 1117 (8th Cir. 2014) (stating that "the Supreme Court has never specified whether 'deliberate indifference' is subjective or objective in the context of a Fourteenth Amendment claim against a municipal prison official," and explaining that liability attaches under the Eighth Amendment only if the official *actually* knows of and disregards an excessive risk of harm, whereas an objective standard permits liability to be premised on "obviousness or constructive notice" (emphasis omitted) (quoting Farmer v. Brennan, 511 U.S. 825, 841 (1994))).

42 *See infra* Part II.

43 430 U.S. 651 (1977).

44 *Id.* at 672.

45 *See infra* Part IV.

proving substantive due process violations against those who are civilly committed.[46]

Thus, although the Supreme Court has recognized substantive due process as a constitutional check on executive power, the open-ended shocks-the-conscience standard, as explicated in *Lewis*, led many appellate courts to impose an extremely high state-of-mind threshold on those who challenge misuse of government power. Thirty years ago, the Supreme Court held that a deprivation of liberty must involve more than negligent conduct.[47] *Lewis* clarified that, except in emergency situations, deliberate indifference is the standard for assessing culpability. However, the shocks-the-conscience language it invoked—conduct "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience"[48]—was interpreted by many courts to require detainees to meet the Eighth Amendment's subjective, rather than an objective, deliberate indifference standard.[49] Whereas "subjective" deliberate indifference requires proof that the defendant acted with *actual* knowledge of constitutional risks, "objective" deliberate indifference recognizes *a knew or should have known* ("constructive notice") standard.[50]

II. *KINGSLEY* RESOLVES CIRCUIT CONFLICT IN FAVOR OF AN OBJECTIVE REASONABLENESS TEST

Michael Kingsley was a pretrial detainee who claimed he was subjected to excessive force after he refused to remove a piece of paper covering a light above his bed.[51] Although there were conflicting accounts as to whether Kingsley continued to resist the officers after he was handcuffed and moved to a receiving cell, it was uncontested that officers applied a Taser to Kingsley's back for approximately five seconds.[52] He was then left handcuffed in the receiving cell for fifteen minutes, after which the officers returned and removed the handcuffs.[53]

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46 *See infra* Part IV.

47 *See* Daniels v. Williams, 474 U.S. 327, 330–36 (1986) (holding that a violation of due process requires more than negligence; however, the Court did not decide whether intent or deliberate indifference or recklessness should be the standard).

48 Cty. of Sacramento v. Lewis, 523 U.S. 833, 848 n.8 (1998).

49 *See* Kingsley v. Hendrickson, 744 F.3d 443, 450–51 (7th Cir. 2014) (citing Seventh Circuit precedent using Eighth Amendment standards), *rev'd*, 135 S. Ct. 2466 (2015); *id.* at 457 n.1 (Hamilton, J., dissenting) (noting that whereas the Ninth Circuit applied an objective Fourth Amendment standard to excessive force claims brought by pretrial detainees, the Third and Eleventh Circuits applied the Eighth Amendment standard).

50 Walton v. Dawson, 752 F.3d 1109, 1117 (8th Cir. 2014); *see also* Rosalie Berger Levinson, *Who Will Supervise the Supervisors? Establishing Liability for Failure to Train, Supervise, or Discipline Subordinates in a Post-*Iqbal/Connick *World*, 47 HARV. C.R.-C.L. L. REV. 273, 283–85 (2012) (explaining the importance of the difference between subjective and objective deliberate indifference when victims of abuse of power seek to hold government officials accountable for their wrongdoing).

51 Kingsley v. Hendrickson, 135 S. Ct. 2466, 2470 (2015).

52 *Id.*

53 *Id.*

After Kingsley filed a pro se complaint under 42 U.S.C. § 1983 alleging excessive use of force, the four jail officers moved for summary judgment.[54] The district court followed Seventh Circuit precedent, which applied Eighth Amendment standards to pretrial detainees, requiring them to prove that defendants acted with malicious and sadistic intent for the purpose of causing them harm.[55] The trial court denied summary judgment, but in its jury instructions it asserted that (1) "[e]xcessive force means force *applied recklessly* that is unreasonable in light of the facts and circumstances of the time," and that (2) the plaintiff must prove that the "[d]efendants knew that using force presented a risk of harm to plaintiff, but they *recklessly* disregarded plaintiff's safety."[56]

On appeal to the Seventh Circuit, Kingsley asserted that these instructions wrongfully conflated the standard for excessive force claims under the Eighth Amendment and the Due Process Clause by requiring him to show that the defendants acted with reckless disregard for his rights.[57] The Seventh Circuit rejected this argument and held instead that a pretrial detainee, like a convicted inmate, must show "an actual intent to violate [the plaintiff's] rights or reckless disregard for his rights," and thus a subjective inquiry into the officer's state of mind is necessary.[58]

In dissent, Judge Hamilton opined that the appropriate standard for excessive use of force against a pretrial detainee should be an objective reasonableness test, similar to the Fourth Amendment.[59] He expressed his concern that pretrial detainees who cannot post bail may remain in jail for weeks or months, and, citing earlier Seventh Circuit precedent, he asserted that "[t]he transition from arrest to pretrial detention does not give officers 'greater ability to assault and batter' the detainees."[60]

In a five–four decision, the Supreme Court agreed with Judge Hamilton that the relevant culpability standard is objective, not subjective, deliberate indifference. Thus, the jury instruction suggesting that Kingsley had to prove the defendant's subjective state of mind (recklessness) in using excessive force was error.[61] Justice Breyer, in his majority opinion, explained that the lower courts had conflated two separate state-of-mind questions. "The first concerns the defendant's state of mind with respect to his physical acts," and here there was no dispute that the officers deliberately intended to restrain and tase Kingsley.[62] The second question addressed "the defendant's state of

54 *Id.* at 2471.

55 Kingsley v. Hendrickson, 744 F.3d 443, 447 (7th Cir. 2014), *rev'd*, 135 S. Ct. 2466 (2015).

56 *Kingsley*, 135 S. Ct. at 2471 (second emphasis added).

57 *Kingsley*, 744 F.3d at 448.

58 *Id.* at 451 (alteration in original) (quoting Wilson v. Williams, 83 F.3d 870, 875 (7th Cir. 1996)).

59 *Id.* at 460–62 (Hamilton, J., dissenting).

60 *Id.* at 460 (quoting Titran v. Ackman, 893 F.2d 145, 147 (7th Cir. 1990)).

61 *Kingsley*, 135 S. Ct. at 2472.

62 *Id.* The Court did not rule out the possibility that reckless, as opposed to purposeful actions, were also actionable. *Id.*

mind with respect to whether his use of force was 'excessive,'" and, as to this question, the Court resolved the circuit split by adopting an objective reasonableness standard for substantive due process excessive force claims.[63] If the officers intentionally, rather than accidentally or negligently, used a certain level of force, their subjective state of mind when doing so was irrelevant, and the only question was whether their actions were reasonable under the circumstances.[64] Detainees need not demonstrate that officials subjectively intended to punish them or to "maliciously and sadistically" injure them.[65]

The Court explained that the Due Process Clause, unlike the Eighth Amendment that applies to convicted criminals, protects pretrial detainees from the use of "force that amounts to punishment."[66] Further, even absent an express intent to punish, a pretrial detainee may prevail by producing "objective evidence that the challenged governmental action is not rationally related to a legitimate governmental objective or that it is excessive in relation to that purpose."[67]

In justifying its rejection of subjective deliberate indifference, the Court asserted that an objective standard comported with the training already provided to officers who interact with detainees.[68] In addition, it sufficiently protected officers who act in good faith because "a court must judge the reasonableness of the force used from the perspective and with the knowledge of the defendant officer."[69] The use of force will be actionable only where it was "an intentional and knowing act," and officers will enjoy qualified immunity unless the use of excessive force violated a clearly established right.[70] Further, the Court noted that the objective standard was already part of pattern jury instructions in several circuits,[71] and in those circuits there was no evidence of frivolous filings by pretrial detainees.[72]

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63 *Id.* at 2472–73.

64 *Id.*

65 *Id.* at 2475–76 (explaining how this language, which stemmed from the Second Circuit's decision in *Johnson v. Glick*, was never intended to be "a *necessary* condition for liability"). *Compare* Hudson v. McMillian, 503 U.S. 1, 7 (1992) (holding that subjective intent to cause malicious and sadistic harm is required to prove a violation of the Eighth Amendment), *with* Graham v. Connor, 490 U.S. 386, 397 (1989) (holding that an officer's "underlying intent and motivation" is not a determinative factor in deciding whether the officer violated the Fourth Amendment).

66 *Kingsley*, 135 S. Ct. at 2473 (quoting *Graham*, 490 U.S. at 395 n.10).

67 *Id.* at 2473–74.

68 *Id.* at 2474.

69 *Id.*

70 *Id.* For a discussion of qualified immunity in the context of substantive due process claims brought by pretrial detainees, see IVAN E. BODENSTEINER & ROSALIE BERGER LEVINSON, 2 STATE AND LOCAL GOVERNMENT CIVIL RIGHTS LIABILITY § 2:13 (2017).

71 *Kingsley*, 135 S. Ct. at 2474; *see also* Kingsley v. Hendrickson, 744 F.3d 443, 458 (7th Cir. 2014) (Hamilton, J., dissenting) (explaining that the Committee on Pattern Civil Jury Instructions of the Seventh Circuit approved use of this objective reasonableness standard for excessive force claims by pretrial detainees as well as arrestees in 2009).

72 *Kingsley*, 135 S. Ct. at 2476.

The Court ultimately determined that the jurors were erroneously instructed that Kingsley had to show that the officers "recklessly disregarded" his safety, because this imposed an additional requirement beyond the need to show that the purposeful use of force was unreasonable in light of the facts and circumstances at the time.[73] Because the jury was told to "weigh [defendants'] subjective reasons for using force and subjective views about the excessiveness of the force," the case was remanded to the court of appeals to determine whether that error was harmless.[74]

The significance of this ruling is reflected in the remand. During the oral argument, Justice Alito suggested that because subjective intent may be inferred from objective factors it really made no difference whether a purely objective or subjective standard was used.[75] The Seventh Circuit thought otherwise. It held that the erroneous jury instruction was not harmless because the jury may have concluded that, although the officers acted in an objectively unreasonable manner, they lacked the subjective intent required by the erroneous instruction.[76] The court further found that a reasonable officer should have been on notice that slamming a nonresistant detainee against a wall and using a stun-gun while he was handcuffed violated the clearly established substantive due process right to be free from excessive force.[77]

The Supreme Court in *Kingsley* admonished that the only relevant factors for assessing excessive force under substantive due process are the same objective ones that govern the Fourth Amendment, namely

> the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff's injury; any effort made by the officer to temper or to limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting.[78]

As the Seventh Circuit acknowledged on remand, adding the subjective intent requirement to prove excessive force "increased, significantly, [Kingsley's] burden of proof."[79]

It is noteworthy that the majority did not mention the rigorous shocks-the-conscience standard in adjudicating the substantive due process claim. Nor did it discuss the need to identify a "fundamental right" or the difference between acts and failure to act—all theories relied upon by appellate

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73 *Id.* at 2476–77.

74 *Id.* at 2477.

75 Transcript of Oral Argument at 13, Kingsley v. Hendrickson, 135 S. Ct. 2466 (2015) (No. 14-6368); *see also infra* notes 160–163 and accompanying text.

76 Kingsley v. Hendrickson, 801 F.3d 828, 831 (7th Cir. 2015) (per curiam).

77 *Id.* at 832.

78 *Kingsley*, 135 S. Ct. at 2473. These factors allow courts to weigh security concerns as well as the specific circumstances that the officer faced.

79 *Kingsley*, 801 F.3d at 831.

courts to restrict substantive due process claims.[80] Instead, the majority based its analysis on the 1979 decision in *Bell v. Wolfish* where the Supreme Court adopted an objective standard to evaluate the detainees' substantive due process challenge to prison conditions, including a prison's practice of double-bunking.[81] The *Bell* Court did not examine the prison officials' subjective beliefs about the policy, but rather, looked only to objective evidence to assess whether the conditions were reasonably related to the legitimate purpose of holding detainees for trial and whether they were excessive in relation to that purpose.[82]

As to *Lewis*'s holding that a "purpose to cause harm" is needed in the context of a prison-riot situation or a high-speed chase, the Court explained that the *Lewis* opinion was referring to "the defendant's intent to commit the acts in question, not to whether the force intentionally used was 'excessive.'"[83] Thus, the *Lewis* Court was addressing what *Kingsley* characterized as the "first" state-of-mind question.[84] For either the Fourth or Fourteenth Amendment there must be some intentional or possibly reckless conduct to establish a constitutional violation. *Lewis* simply recognized that "liability for negligently inflicted harm is [below] the threshold of constitutional due process."[85]

Thus, even in cases calling for quick action, if that action is intentional, the Eighth Amendment state-of-mind test should not govern detainees' claims of excessive force. This explication is critical. Many appellate courts have required detainees to prove that officials acted "maliciously and sadistically for the very purpose of causing harm" whenever they are responding to emergency or rapidly evolving situations.[86] The Fourth Amendment's objec-

80 Levinson, *supra* note 25, at 320–22 (critiquing appellate court decisions that have imposed this requirement); *see also infra* notes 91–93 and accompanying text (discussing Justice Scalia's reliance on the absence of a fundamental right to reject Kingsley's substantive due process claim).

81 Bell v. Wolfish, 441 U.S. 520, 541–43 (1979).

82 *Id.* at 539–43.

83 *Kingsley*, 135 S. Ct. at 2475 (emphasis omitted) (citing Cty. of Sacramento v. Lewis, 523 U.S. 833, 854 n.13 (1998)).

84 *Id.* at 2472; *see supra* notes 62–63 and accompanying text.

85 *Lewis*, 523 U.S. at 849 (citing Daniels v. Williams, 474 U.S. 327, 328 (1986)); *see also* Brower v. Cty. of Inyo, 489 U.S. 593, 596–97 (1989) (holding that "seizure" requires "intentional acquisition of physical control" through "means intentionally applied" (emphasis omitted)).

86 *See, e.g.*, Shreve v. Franklin Cty., 743 F.3d 126, 133–38 (6th Cir. 2014) (quoting Darrah v. City of Oak Park, 255 F.3d 301, 306 (6th Cir. 2001)) (recognizing that pretrial detainee's excessive force claim is governed by the Due Process Clause, but finding that the shocks-the-conscience test, when applied to officials responding to a rapidly evolving, dangerous situation, is the same as the Eighth Amendment test; thus, plaintiff must show that defendant acted maliciously and sadistically for the very purpose of causing harm); Fuentes v. Wagner, 206 F.3d 335, 343–48 (3d Cir. 2000) (holding that placement of convicted, but unsentenced, county prison inmate in restraint chair for eight hours following disturbance did not violate substantive due process, even if prison officials overreacted in using this chair, where there was no evidence that conduct was maliciously or sadistically taken to

tive reasonableness standard already takes this temporal factor into account. In *Graham v. Connor*, the Court explained that "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."[87] Assuming, however, that the conduct is deliberate, detainees should no longer have to prove a mens rea of criminal recklessness in order to prevail. Instead, as several appellate courts have now recognized, culpability for the deliberate use of excessive force must be assessed from the perspective of a reasonable officer, including one who must make a split-second decision.[88]

Justice Scalia, joined by the Chief Justice and Justice Thomas, argued in dissent that the *Bell* opinion focused on "intent to punish," which necessarily implies subjective intent.[89] Further, he explained that the substantive due process claim in *Bell* arose in the context of a conditions-of-confinement case where jail security policies resulted from "considered deliberation by the authority imposing the detention," thus making it logical to infer "punitive intent."[90] Ultimately, Justice Scalia opined that there was no substantive due

cause harm because prison officials had to quickly respond in order to quell a disturbance and to minimize the possibility of an escalating disruption inside the prison).

87 Graham v. Connor, 490 U.S. 386, 396–97 (1989).

88 *See* Dilworth v. Adams, 841 F.3d 246, 255 (4th Cir. 2016) (remanding district court decision because it imposed the malicious, sadistic, culpable state-of-mind standard instead of *Kingsley*'s objective reasonableness standard); Miranda-Rivera v. Toledo-Dávila, 813 F.3d 64, 70 (1st Cir. 2016) (holding that after *Kingsley* "a pre-trial detainee need not necessarily prove the officer's intent to harm or punish," but only that the force used failed the objective reasonableness standard of the Fourth Amendment); Coley v. Lucas Cty., 799 F.3d 530, 537–39 (6th Cir. 2015) (applying *Kingsley* to hold that excessive force claims brought by pretrial detainees require plaintiff to show that the force purposefully or knowingly used against him was objectively unreasonable, taking into account such factors as the relationship between the need for the use of force and the amount used, the extent of injury inflicted, officer's efforts to temper or limit the amount of force, the severity of the security problems, the threat reasonably perceived, and whether the detainee was actively resisting; under this standard, police officer's shoving of fully restrained pretrial detainee, causing him to strike his head on the cement floor and die from the injuries, constituted "gratuitous force" in violation of detainee's rights where detainee was handcuffed, in a belly chain and leg irons, and fully incapable of causing any disruption); Ondo v. City of Cleveland, 795 F.3d 597, 610 (6th Cir. 2015) (holding that *Kingsley* confirmed that an objective standard, which is assessed from the perspective of a reasonable officer, including one who must make split-second judgments, must now govern substantive due process claims alleging excessive force); *cf.* Ryan v. Armstrong, 850 F.3d 419, 427–28 (8th Cir. 2017) (recognizing that excessive force claims of pretrial detainees are analyzed under the objective reasonableness standard set forth in *Kingsley*, but finding that defendant's actions in extracting pretrial detainee from his jail cell by placing body weight on him while he was on the ground in a prone position and then twice deploying a taser in stun mode during the extraction could not be viewed as objectively unreasonable where detainee, as viewed in the video, was actively resisting the extraction procedure).

89 *Kingsley*, 135 S. Ct. at 2478 (Scalia, J., dissenting).

90 *Id.*

process liberty interest in being free from objectively unreasonable force because "Kingsley's interest is not one of the 'fundamental liberty interests' that substantive due process protects."[91] Notably, many appellate courts have required victims of executive misconduct to initially identify a fundamental liberty interest,[92] despite the fact that Justice Scalia made the very same argument without garnering any support eighteen years earlier in his concurring opinion in *Lewis*.[93] Asserting traditional federalism concerns, he chastised the majority for abandoning this strict approach and for its "tender-hearted desire to tortify the Fourteenth Amendment."[94]

III. *KINGSLEY*'S IMPACT ON FUTURE SUBSTANTIVE DUE PROCESS LITIGATION INVOLVING PRETRIAL DETAINEES

The Supreme Court's rejection in *Kingsley* of a subjective state-of-mind requirement is significant. As discussed in Part II, prior to this case most

91 *Id.* at 2479.

92 *See, e.g.*, Karsjens v. Piper, 845 F.3d 394, 408 (8th Cir. 2017) (holding that district court erred in ruling that substantive due process protects against action that shocks the conscience *or* action that interferes with rights implicit in the concept of ordered liberty; rather, *Lewis* mandated that civilly committed sex offenders demonstrate *both* that their treatment was conscience-shocking *and* that it violated a fundamental liberty interest); Folkerts v. City of Waverly, 707 F.3d 975, 980–81 (8th Cir. 2013) (stating that "[t]o establish a substantive due process violation, the [plaintiffs] must demonstrate that a fundamental right was violated and that [the officer]'s conduct shocks the conscience"; but here, even if officer's behavior during interrogation and investigation of intellectually disabled suspect violated his fundamental rights, officer's behavior did not shock the conscience); Christensen v. Cty. of Boone, 483 F.3d 454, 461–65 (7th Cir. 2007) (per curiam) (rejecting substantive due process claim brought by couple who complained they were stalked and trailed by an officer in his squad car as a result of a personal vendetta, because the couple could not identify a fundamental right that was directly and substantially impaired by the officer's conduct); Flowers v. City of Minneapolis, 478 F.3d 869, 871–74 (8th Cir. 2007) (finding no actionable claim against a police lieutenant who directed his officers to conduct a month-long patrol of a private residence because he did not like the occupants moving into his neighborhood; absent a showing both that the conduct violated a fundamental right and shocked the conscience, no substantive due process violation could be asserted).

93 Cty. of Sacramento v. Lewis, 523 U.S. 833, 860–61 (1998) (Scalia, J., concurring); *see also* Rosalie Berger Levinson, *Reining in Abuses of Executive Power Through Substantive Due Process*, 60 FLA. L. REV. 519, 541–55 (2008) (presenting arguments as to why substantive due process challenges to executive action should reach beyond the protection of "fundamental" rights to include all arbitrary deprivations of liberty and property); Levinson, *supra* note 25, at 320–22 (critiquing the Justices' conflicting opinions in *Lewis* as to whether the shocks-the-conscience test replaces the fundamental rights analysis that applies when legislative, as opposed to executive, action is challenged).

94 *Kingsley*, 135 S. Ct. at 2479 (Scalia, J., dissenting); *see* Levinson, *supra* note 93, at 556–59 (challenging Justice Scalia's concerns about federalism and "tortifying" the Fourteenth Amendment). In a separate dissent, Justice Alito asserted that the Court should have first determined whether a pretrial detainee can bring a Fourth Amendment claim based on the use of excessive force by a detention facility employee before addressing the controversial substantive due process claim. *Kingsley*, 135 S. Ct. at 2479 (Alito, J., dissenting); *see supra* note 12 and accompanying text.

appellate courts conceded that substantive due process, not the Eighth Amendment, governed claims brought by pretrial detainees. Nonetheless, while often invoking shocks-the-conscience language, they imposed the Eighth Amendment subjective intent standard, which requires detainees to prove that the officials used force "maliciously and sadistically for the very purpose of causing harm."[95] *Kingsley* clarified that an objective reasonableness standard, not subjective criminal recklessness, will now govern detainee claims of excessive force.[96] Further, the Court did not invoke the highly charged shocks-the-conscience language of *Rochin* and its progeny.

On the other hand, the *Kingsley* majority emphasized that the official's conduct—namely, the physical acts of restraining and tasing Kingsley—was deliberate/intentional.[97] In contrast, many detainees challenge a failure to act (i.e., a failure to provide safe conditions of confinement, including necessary medical care and protection from other inmates). In cases involving "inaction," finding the requisite culpability level is a bit more complicated. This Part explores what impact *Kingsley* should have on litigating these types of claims brought by pretrial detainees.

A. Conditions of Confinement

As noted in Part II, the Supreme Court has applied different culpability standards depending on the specific constitutional provision at issue and the factual context (i.e., whether the wrongdoer had time to deliberate). With regard to a conditions-of-confinement claim, the Supreme Court in *Bell* held that a pretrial detainee is entitled to be free from conditions that amount to punishment.[98] In contrast, a convicted prisoner is entitled to be free only from conditions that constitute "cruel and unusual punishment."[99] In both cases the "conditions must be objectively serious enough to amount to a constitutional deprivation, and the defendant prison official must possess a sufficiently culpable state of mind."[100]

In *Farmer v. Brennan*, the Supreme Court explicated the culpability standard necessary to prove an Eighth Amendment violation. It explained that:

95 *See, e.g.*, Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973), *rejected by* Graham v. Connor, 490 U.S. 386, 396–97 (1989); *supra* notes 30–32 and accompanying text.

96 *Kingsley*, 135 S. Ct. at 2473–74; *see also supra* note 88 for decisions acknowledging this change.

97 *Kingsley*, 135 S. Ct. at 2472; *see also* Davis v. Wessel, 792 F.3d 793, 799–802 (7th Cir. 2015) (holding that civil detainee alleging guards used excessive force in refusing to remove his handcuffs, causing him to urinate on himself, must prove defendants took their action with an expressed intent to punish *or* that the actions were not rationally related to a legitimate, nonpunitive governmental purpose *or* that the actions appeared excessive in relation to that purpose; however, *Kingsley* confirmed that plaintiff must initially establish that defendants possessed a purposeful, knowing, or possibly reckless state of mind with respect to their actions toward the plaintiff).

98 Bell v. Wolfish, 441 U.S. 520, 535 (1979) ("[T]he proper inquiry is whether those conditions amount to punishment of the detainee." (footnote omitted)).

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

100 Smith v. Dart, 803 F.3d 304, 309 (7th Cir. 2015) (footnote omitted).

> [A] prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.[101]

The Court conceded that this subjective recklessness standard allows an official to avoid liability when he fails "to alleviate a significant risk that he *should have* perceived but did not."[102] But, it specifically rejected an "invitation to adopt an objective test for deliberate indifference."[103]

Despite the Supreme Court's admonition in *Bell* that the Due Process Clause, not the Eighth Amendment, governs challenges to conditions of confinement brought by pretrial detainees,[104] prior to *Kingsley* many appellate courts simply borrowed the Eighth Amendment standard of culpability, thereby requiring detainees to meet a subjective criminal recklessness standard.[105] Some relied on *Bell*'s assertion that detainees have a substantive due

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

102 *Id.* at 838 (emphasis added).

103 *Id.* at 837.

104 Bell v. Wolfish, 441 U.S. 520, 535 n.16 (1979) ("Due process requires that a pretrial detainee not be punished. A sentenced inmate, on the other hand, may be punished . . . .").

105 *See, e.g.*, Budd v. Motley, 711 F.3d 840, 842–43 (7th Cir. 2013) (per curiam) (holding that pretrial detainee's challenge to jail conditions are examined under the Eighth Amendment, which requires that the conditions demonstrate deliberate indifference to the denial of a minimally civilized measure of life's necessities; however, evidence of poor sanitation and hygiene along with lack of heat and bedding, overcrowding, and inadequate recreation cumulatively may be sufficient to state a claim for relief, especially where three doctors told the plaintiff that unsanitary conditions caused his leg infection and he testified that the jail conditions traumatized him); Villegas v. Metro. Gov't of Nashville, 709 F.3d 563, 568–79 (6th Cir. 2013) (holding that pretrial detainee's claim that she was shackled during labor should be analyzed under the Eighth Amendment; thus, she was required to prove that the official was aware of facts from which an inference of substantial risk of harm could be drawn and that the official drew that inference); Davis v. Oregon Cty., 607 F.3d 543, 548–52 (8th Cir. 2010) (holding that pretrial detainees' claims regarding conditions of confinement are analyzed in the same way as those under the Eighth Amendment; thus, detainees must show that defendants acted with subjective deliberate indifference in failing to ensure plaintiffs' safety after a fire broke out at the county jail); Ledbetter v. City of Topeka, 318 F.3d 1183, 1188 (10th Cir. 2003) (holding that the Eighth Amendment provides the benchmark for due process claims brought by pretrial detainees, and thus plaintiff must prove officials knew of and disregarded an excessive risk to his health and safety and that the deprivation was "sufficiently serious"). *Compare* Pierce v. Cty. of Orange, 526 F.3d 1190, 1205 (9th Cir. 2008) (noting that the Fourteenth Amendment "right against jail conditions or restrictions that 'amount to punishment'" is a "standard [that] differs significantly from the standard relevant to convicted prisoners" (quoting *Bell*, 441 U.S. at 535–37)), *with* Hubbard v. Taylor, 399 F.3d 150, 163–66 (3d Cir. 2005) (asserting that in resolving pretrial detainees' challenge to conditions of confinement, which involved celling three detainees in a cell designed to be occupied by a single person, the district court should have employed due process analysis to determine whether conditions of confinement amounted to punishment, rather than the Eighth Amendment standard,

process right to not be subjected to "punishment"[106] to infer that subjective intent to punish must be established.[107] The Supreme Court rejected this argument in *Kingsley*, specifically holding that a pretrial detainee need not prove intent to punish; rather, as *Bell* instructed, a pretrial detainee may prevail by showing that the defendant's purposeful actions were not "rationally related to a legitimate nonpunitive governmental purpose."[108] Notably, however, *Kingsley* rejected the use of this Eighth Amendment standard in the context of an excessive force claim where the victim can more readily point to an intentional physical act.

Where a detainee alleges deliberate, as opposed to unintended, constitutional violations with regard to conditions of confinement, *Kingsley* strongly suggests that superimposing Eighth Amendment standards, as opposed to an objective deliberate indifference test, is unwarranted. In fact, the dissenting Justices in *Kingsley* distinguished *Bell* as a case where a subjective intent standard was *less* appropriate because jail officials have time to deliberate and to address grave, pervasive conditions of confinement.[109] Also, the Court in *Bell* explained that "if a restriction or condition [of pretrial detention] is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees."[110] Some courts, even before *Kingsley*, allowed detainees to prevail *either* by showing express intent to punish *or* by inferring such intent where the conditions

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which mandates only that punishment not be cruel and unusual; whereas Eighth Amendment is designed to protect those convicted of crimes, pretrial detainees cannot be punished at all under the Due Process Clause).

106 *Bell*, 441 U.S. at 541–43.

107 Jackson v. Buckman, 756 F.3d 1060, 1067–69 (8th Cir. 2014) (holding that although a pretrial detainee cannot be subject to any punishment, whether cruel-and-unusual or not, evidence must show that the defendant's purpose in using force was to injure, punish, or discipline detainee); Butler v. Fletcher, 465 F.3d 340, 344–45 (8th Cir. 2006) (reasoning that despite *Bell*'s holding that due process restricts punishing a detainee prior to the adjudication of guilt, the substantive due process inquiry is whether detainee has been improperly punished and infliction of punishment is a deliberate act intended to chastise or deter, and thus, deliberate indifference, rather than a lesser "reasonably related to a legitimate governmental objective" standard should apply); Hart v. Sheahan, 396 F.3d 887, 892–93 (7th Cir. 2005) (explaining that although pretrial detainees have greater rights than convicted inmates, when the issue is whether brutal treatment should be "assimilated to punishment," the standard is the same); Demery v. Arpaio, 378 F.3d 1020, 1029–32 (9th Cir. 2004) (invoking the Supreme Court's ruling that a detainee may not be punished prior to an adjudication of guilt and finding that a substantive due process violation occurs only where government action caused the detainee to suffer some harm or disability and the purpose of this action was to punish the detainee); *see also* Kingsley v. Hendrickson, 135 S. Ct. 2466, 2478 (2015) (Scalia, J., dissenting).

108 *Kingsley*, 135 S. Ct. at 2473 (internal quotation marks omitted) (quoting *Bell*, 441 U.S. at 561).

109 *Id.* at 2478 (Scalia, J., dissenting).

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

were not reasonably related to a legitimate government objective or were excessive in relation to that objective.[111]

Similarly, the majority in *Kingsley* emphasized that detainees need not prove that a deliberate physical act was taken with the intent to punish. It explained that the *Bell* Court applied an "objective standard" to a variety of jail conditions without "consider[ing] the prison officials' subjective beliefs about [the conditions]."[112] In the context of a conditions case, it should suffice that officials intentionally (or possibly recklessly) subjected detainees, through action or inaction, to conditions which fail *Bell*'s objective "reasonable relation" test.[113] Indeed, combining the *Kingsley* majority opinion and dissent,[114] eight Justices endorsed the view expressed in *Bell* that an objective "reasonable relation" test should govern "conditions" claims brought by pretrial detainees.

The Fifth Circuit, even before *Kingsley*, recognized that where a detainee is challenging an established condition of confinement—a "systemic" violation—*Bell*'s "reasonably related to a nonpunitive purpose" standard should govern.[115] On the other hand, the Fifth Circuit required detainees to satisfy

111 Blackmon v. Sutton, 734 F.3d 1237, 1240–43 (10th Cir. 2013) (reasoning that *Bell* requires courts to determine whether there was an express intent to punish or, if not, whether plaintiff can nonetheless show that the restriction in question bears no reasonable relationship to any legitimate governmental objective, and holding that district court erred in applying Eighth Amendment "malicious and sadistic" test with regard to juvenile pretrial detainee who spent many hours shackled to a Pro-Straint chair, which used wrist, waist, chest, and ankle restraints to arguably punish the eleven-year-old); Duvall v. Dallas Cty., 631 F.3d 203, 206–09 (5th Cir. 2011) (per curiam) (holding that to succeed on a conditions of confinement claim, pretrial detainee need only show that the condition, "has no reasonable relationship to a legitimate governmental interest" and "intent to [subject a detainee to inhumane conditions of confinement or abusive jail practices] is nevertheless presumed when [the county] incarcerates the detainee in the face of such known conditions and practices" (quoting Hare v. City of Corinth, 74 F.3d 633, 644 (5th Cir. 1996) (en banc))); Byrd v. Maricopa Cty. Sheriff's Dep't, 629 F.3d 1135, 1140 (9th Cir. 2011) (en banc) (in determining whether strip search of pretrial detainee violates substantive due process, *Bell* explains that the critical inquiry is "whether particular restrictions and conditions accompanying pretrial detention amount to punishment in the constitutional sense of that word," and punitive intent may be inferred if a restriction is not reasonably related to a legitimate goal (quoting *Bell*, 441 U.S. at 538)); Stevenson v. Carroll, 495 F.3d 62, 67–68 (3d Cir. 2007) (holding that district court erred in dismissing pretrial detainees' claim that their placement in restrictive confinement violated their substantive due process rights, because, although plaintiffs must allege that the deprivation was objectively sufficiently serious and that the officials subjectively acted with a sufficiently culpable state of mind, a measure will be deemed unconstitutional punishment in violation of pretrial detainees' substantive due process rights if there is a showing of an express intent to punish, or the restriction or condition is not rationally related to a legitimate non-punitive government purpose, or the restriction is excessive in light of that purpose).

112 *Kingsley*, 135 S. Ct. at 2473–74.

113 *Id.* at 2472 (leaving open the possibility of imposing liability for "reckless" conduct).

114 *See supra* note 90 and accompanying text.

115 Estate of Henson v. Wichita Cty., 795 F.3d 456, 463–69 (5th Cir. 2015); *see also* Montano v. Orange Cty., 842 F.3d 865, 875 (5th Cir. 2016) (acknowledging that, even in

Farmer's subjective deliberate indifference test where they made an "episodic-acts-or-omissions" claim against some specifically named jail officials.[116] Thus, the Fifth Circuit maintained that the critical question is whether the defendants' acts or omissions were sufficiently extended or pervasive to prove an intended condition or practice.

After *Kingsley*, pretrial detainees alleging that the challenged "conditions" reflect a policy or practice have satisfied what Justice Breyer described as the first state-of-mind requirement—that the action was deliberate and not merely negligent.[117] At that point, as the Seventh Circuit has acknowledged, pretrial detainees can prevail "by providing only objective evidence that the challenged governmental action is not rationally related to a legitimate governmental objective or that it is excessive in relation to that purpose."[118]

The most difficult questions arise with so-called "episodic" violations, where the harm does not occur pursuant to an established practice or policy, and where, in fact, the official's action may be contrary to policy. *Kingsley* recognized that detainees must prove "the defendant 'possess[ed] a purposeful, a knowing, or possibly a reckless state of mind' with respect to [his] actions (or inaction)."[119] However, once this is established, *Kingsley* held that an intended act violates substantive due process "even if the act was not

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the absence of a formal policy, evidence of a pattern of acts or omissions or pervasive misconduct by jail officials may prove that the conditions were intended, and here the consistent testimony of jail employees established a de facto policy); Smith v. Dart, 803 F.3d 304, 309 n.2 (7th Cir. 2015) (asserting that where a detainee alleges "potentially systemic" constitutional violations, the subjective state-of-mind element is "not at issue").

116 *Henson*, 795 F.3d at 464.

117 *See supra* note 62 and accompanying text.

118 Mulvania v. Sheriff of Rock Island Cty., 850 F.3d 849, 856–58 (7th Cir. 2017) (quoting *Kingsley*, 135 S. Ct. at 2373–74) (invoking *Kingsley*, the court found that the jail's underwear policy, which deprived female inmates of their underwear if it was not white, was not rationally related to a legitimate government objective, and, even if it were, the policy was excessive in relation to that purpose, unnecessarily depriving women of their dignity interest); *see also* Ingram v. Cole Cty., 846 F.3d 282, 286–88 (8th Cir. 2017) (invoking *Kingsley* to reject subjective deliberate indifference standard that applied to convicted inmates and finding that county's laundry policy, which deprived pretrial detainees of all clothing for approximately seven hours every four nights for women and every two to three nights for men, during which time guards and cellmates could see them naked, was not "reasonably related to a legitimate governmental objective"; although a "minimal deprivation" does not violate the Constitution, here the frequency with which cellmates were exposed constituted more than a de minimis deprivation, and the government failed to explain why the jail could not provide enough clothes to avoid extended periods without clothing), *vacated and reh'g en banc granted* (8th Cir. Apr. 17, 2017).

119 Davis v. Wessel, 792 F.3d 793, 801 (7th Cir. 2015) (first alteration in original) (quoting *Kingsley*, 135 S. Ct. at 2472); *cf.* Smith v. Dart, 803 F.3d 304, 309 n.2, 310 (7th Cir. 2015) (recognizing that the subjective intent aspect of *Kingsley* may be inferred where a detainee alleges "potentially systemic" violations, such as pest infestation, contaminated water, and inadequate food, but then asserting that Eighth Amendment standards still govern other conditions of confinement claims brought under the Fourteenth Amendment and that the protection afforded detainees and convicted inmates is "functionally indistinguishable").

intended as punishment."[120] *Kingsley* flatly rejected the imposition of *Farmer*'s subjective criminal recklessness test whenever a detainee's rights are violated by deliberate decisions regarding conditions of confinement, even if a policy or practice cannot be established.[121] Further, failure to meet the nebulous shocks-the-conscience standard should no longer provide a rationale for subjecting detainees to conditions that are not reasonably related to legitimate government objectives.[122]

B. Failure to Protect from Others

The action/inaction dichotomy used to exonerate jail officials in "conditions" cases has also been invoked to reject other substantive due process claims, even where the failure to act manifests deliberate indifference to the rights of detainees. This principle is particularly problematic in cases where the detainee is harmed by others who are incarcerated. The argument is that where government officials' "inaction," as opposed to their "affirmative" acts, causes harm, a heightened culpability standard is required.[123] However, the core of substantive due process is its protection against "abuse of power," which should encompass a government official's deliberate failure to act that

120 *Davis*, 792 F.3d at 801 (quoting Hart v. Sheahan, 396 F.3d 887, 892 (7th Cir. 2005)).

121 *Kingsley*, 135 S. Ct. at 2473; *see also* Steele v. Cicchi, 855 F.3d 494, 506 (3d Cir. 2017) (applying objective test but finding that pretrial detainee's placement in administrative segregation did not violate his substantive due process rights because the decision was reasonably related to internal security reasons, and, even if segregation was not the least restrictive means available to accomplish its nonpunitive objective, this does not mean the transfer was an excessive response to a legitimate security concern); Darnell v. Pineiro, 849 F.3d 17, 32–38 (2d Cir. 2017) (holding that *Kingsley* overturned precedent that required pretrial detainee to meet the same Eighth Amendment standards as convicted prisoners with regard to a challenge to conditions of confinement; because deliberate indifference is defined objectively, it sufficed that pretrial detainee proved 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"; pretrial detainees are no longer required to establish subjective intent to punish or to expose detainees to a substantial risk of harm, and thus official need not have subjective awareness that his acts or omissions pose a substantial risk of harm).

122 *Cf. Steele*, 855 F.3d at 502–03 (holding that pretrial detainee who claimed his substantive due process rights were violated by officials' failure to provide him unlimited, nonlegal phone privileges during his administrative segregation could not show that this "shocked the conscience," as required to support claim, even though detainee argued that this prevented him from finding a cosignor for his bail and exercising his bail option); Baribeau v. City of Minneapolis, 596 F.3d 465, 483–84 (8th Cir. 2010) (per curiam) (finding that confiscation of a detainee's prosthetic leg was not arbitrary or conscience-shocking in a constitutional sense).

123 *See, e.g.*, *Kingsley*, 135 S. Ct. at 2478 (Scalia, J., dissenting) (noting that unlike failure-to-protect claims, which always relate to a government actor's omissions, conditions-of-confinement claims might be properly characterized as affirmative governmental acts).

can be causally linked to the constitutional deprivation.[124] The Supreme Court clarified that government officials have a constitutional duty to protect detainees from harmful conditions of confinement in *Bell v. Wolfish*.[125] This should include the protection of detainees from dangerous cellmates.

The Supreme Court's decision in *Farmer*, which interpreted the Eighth Amendment to impose a criminal recklessness standard, involved a convicted inmate who claimed that guards failed to protect him from other inmates.[126] In this context, where the affirmative act was committed by a fellow inmate, not a guard, the Supreme Court mandated evidence that officials were aware of facts from which an inference of a substantial risk could be drawn and that they *actually* drew this inference and acted with *subjective* deliberate indifference.[127] For detainees, the breach of the constitutional duty to protect from harm should not trigger this "subjective" criminal recklessness standard. Nonetheless, prior to *Kingsley* most appellate courts required detainees to meet Eighth Amendment standards,[128] and some courts have continued to do so.[129]

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124 Rosalie Berger Levinson, *Wherefore Art Thou* Romeo*: Revitalizing* Youngberg*'s Protection of Liberty for the Civilly Committed*, 54 B.C. L. REV. 535, 553 (2013) (challenging this false dichotomy); *see also* Thomas A. Eaton & Michael Wells, *Government Inaction as a Constitutional Tort:* DeShaney *and Its Aftermath*, 66 WASH. L. REV. 107, 109 n.9 (1991) (noting that "the distinction between acts and omissions often turns on how one poses the question").

125 441 U.S. 520, 536–37 (1979).

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

127 *See id.* at 836.

128 *See* Walton v. Dawson, 752 F.3d 1109, 1117–18 (8th Cir. 2014) (holding that *Farmer*'s subjective knowledge measure of deliberate indifference is used to evaluate Fourteenth Amendment claims by pretrial detainees against jail officials, including failure-to-protect claims, and thus, plaintiff must prove officials personally knew of the constitutional risks posed by their failure to take sufficient remedial action to protect him from other prisoners); Goodman v. Kimbrough, 718 F.3d 1325, 1331–34 (11th Cir. 2013) (asserting that although substantive due process, not the Eighth Amendment, technically governs claims brought by a pretrial detainee, the standard is identical; thus, a detainee assaulted by others must produce sufficient evidence that jail officials had subjective knowledge of a risk of serious harm, that they disregarded that risk, and that their conduct rose to the level of deliberate indifference); Schoelch v. Mitchell, 625 F.3d 1041, 1046–48 (8th Cir. 2010) (recognizing that jail custodians have a comparable duty to protect pretrial detainees under the Due Process Clause as they have under the Eighth Amendment, court held that to prove unconstitutional failure to protect from battery of another inmate, detainee must show: (1) an objectively serious deprivation (i.e., incarceration under conditions posing a substantial risk of serious harm), and (2) that defendant was deliberately indifferent to this substantial risk of harm, which requires a subjective test that defendant was aware of facts from which the inference could be drawn that a substantial risk of serious harm existed and that he *actually drew the inference*); Klebanowski v. Sheahan, 540 F.3d 633, 639–40 (7th Cir. 2008) (finding that detainee who alleged that jail officials acted with deliberate indifference to the risk of housing gang members with nongang members failed to show that the officers acted with the equivalent of criminal recklessness (i.e., that they were actually aware of a substantial risk of harm to plaintiff's safety and yet failed to take appropriate steps to protect him from the specific danger)); Burrell v. Hampshire Cty., 307 F.3d 1, 7–9 (1st Cir. 2002) (although conceding that pretrial detainees are protected under the Due

The Ninth Circuit recently questioned this view, finding that *Kingsley*'s state-of-mind analysis required a different approach to a failure-to-protect claim.[130] Jonathan Castro was a pretrial detainee assigned to a sobering cell at a police station. Authorities later placed a "combative" inmate arrested on felony charges in the same cell, contrary to established jail policy, and despite the availability of empty cells.[131] Castro attempted to attract attention by banging on the cell window, but officials failed to intervene to protect him from harm, and as a result, he was severely beaten and suffered permanent injuries.[132]

The district court, which addressed Castro's failure-to-protect claim prior to *Kingsley*, followed prevailing precedent and held that the Eighth Amendment requires evidence that the guards had subjective knowledge that Castro faced a substantial risk of serious harm and yet disregarded that risk.[133] The jury found in Castro's favor, but the defendants appealed, arguing that there was insufficient evidence to meet the subjective standard.[134]

On appeal, less than two months after *Kingsley*, a Ninth Circuit panel found *Kingsley* inapplicable, reasoning that, unlike excessive force claims, failure-to-protect claims required proof of a subjective wrongful state of mind because they do not involve affirmative acts.[135] En banc review was granted, and a split panel held that *Kingsley* eliminated the need to show subjective awareness of a risk of harm and that an objective standard should apply.[136]

The en banc court explained that "[t]he underlying federal right, as well as the nature of the harm suffered, is the same for pretrial detainees' excessive force and failure-to-protect claims," because both categories arise under the Due Process Clause, rather than the Eighth Amendment's Cruel and Unusual Punishment Clause.[137] It asserted that the Supreme Court in *Kings-*

Process Clause rather than the Eighth Amendment, the court concluded that the standard is the same, namely a pretrial detainee, who was seriously assaulted by a fellow detainee, had to demonstrate that he was incarcerated under conditions imposing a substantial risk of serious harm and that prison officials were deliberately indifferent in that they were subjectively aware of facts from which an inference of substantial risk could be drawn and they actually drew such an inference).

129 *See* Richko v. Wayne Cty., 819 F.3d 907, 915–20 (6th Cir. 2016) (asserting that Eighth Amendment standards apply to detainees claiming inmate-on-inmate violence; thus, detainee must prove that official subjectively perceived facts from which to infer a substantial risk and actually drew the inference, yet disregarded the risk; although plaintiff need not show that defendant acted with the very purpose of causing harm, there must be evidence that he "refused to verify underlying facts that he strongly suspected to be true, or declined to confirm inferences of risk that he strongly suspected to exist" (quoting *Farmer*, 511 U.S. at 843 n.8)).

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

131 *Id.* at 1065.

132 *Id.*

133 *Id.* at 1068.

134 *Id.* at 1072.

135 *See* Castro v. Cty. of Los Angeles, 797 F.3d 654, 665 (9th Cir. 2015).

136 *Castro*, 833 F.3d at 1069–70.

137 *Id.*

ley did not limit its holding to excessive force claims, but spoke broadly about the rights of detainees.[138] Thus, detainees should not have to prove the defendant's subjective intent to punish, even in cases involving failure to take action to protect.[139] The harm in both situations is the same. Whether excessive force is applied directly by a jailer or by a fellow inmate is irrelevant because jailers have the same duty to protect pretrial detainees from violence at the hands of other inmates.[140] The court conceded that the state-of-mind question may be more complex because in excessive force cases it is easier to determine that the officer's physical conduct was intentional.[141] Nonetheless, it reasoned that the officials who housed Castro with a combative inmate, despite a clear risk of harm, made an intentional decision.[142] Castro did not have to prove the officials' subjective actual awareness of the level of risk their decision would cause.[143] Pretrial detainees must prove "more than negligence but less than [criminal] subjective intent."[144] The court adopted a four-prong test to clarify the requisite level of culpability that should govern "failure to" claims:

> (1) The defendant made an intentional decision with respect to the conditions under which the plaintiff was confined;
>
> (2) Those conditions put the plaintiff at substantial risk of suffering serious harm;
>
> (3) The defendant did not take reasonable available measures to abate that risk, even though a reasonable officer in the circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant's conduct obvious; and
>
> (4) By not taking such measures, the defendant caused the plaintiff's injuries.[145]

As to the third element, the Ninth Circuit cited the *Restatement of Torts* for the proposition that "'reckless disregard' may be shown by an objective standard under which an individual 'is held to the realization of the aggravated risk which a reasonable [person] in his place would have, although he does not himself have it.'"[146] The *Restatement*'s distinction is critical. The Supreme Court in *Farmer* acknowledged that even a convicted inmate who alleges a failure to protect is not required to show that guards acted with the

138 *See id.* at 1070.

139 *See id.* at 1069–70.

140 *See id.*

141 *See id.* at 1070.

142 *Id.* at 1072–73.

143 *See id.* at 1072.

144 *Id.* at 1071.

145 *Id.* With respect to the first factor, note that the Court in *Kingsley* left open the possibility that something less than intent (i.e., "'a reckless state of mind' with respect to the defendant's actions (or inaction)") could suffice. Davis v. Wessel, 792 F.3d 793, 801 (7th Cir. 2015) (quoting Kingsley v. Hendrickson, 135 S. Ct. 2466, 2472 (2015)).

146 *Castro*, 833 F.3d at 1071 (alteration in original) (quoting RESTATEMENT (SECOND) OF TORTS § 500 cmt. a (AM. LAW INST. 2016)).

"very purpose of causing harm or with knowledge that harm will result."[147] Intent may sometimes be inferred.[148] Ultimately, however, the Supreme Court in *Farmer* rejected the civil law recklessness standard in favor of a criminal recklessness state of mind.[149] In sharp contrast, the Ninth Circuit ruled that detainees, like Castro, need only present evidence "that a reasonable officer in the circumstances would have appreciated the high degree of risk involved."[150]

In cases involving breach of the constitutional duty to protect, once it is established that a jail official made a deliberate decision to expose a detainee to a substantial risk of serious harm, an objective state-of-mind standard should govern. The core message of *Kingsley* is that pretrial detainees should not be subject to the same rigorous culpability standards as convicted inmates.

C. Denial of Prompt, Appropriate Medical Treatment

Another common type of failure-to-act case involves pretrial detainees who claim that government officials failed to provide them prompt, appropriate medical treatment. *Bell* held that detainees cannot be punished, and, thus, rigorous Eighth Amendment standards should not apply in assessing their conditions of confinement.[151] Nonetheless, most courts, while acknowledging *Bell*, have applied Eighth Amendment standards to detainees, requiring them to prove that officials actually knew that the detainee faced a substantial risk of serious harm if medical treatment was not provided and yet acted with subjective deliberate indifference to that risk.[152] Thus, even in cases where

147 Farmer v. Brennan, 511 U.S. 825, 835 (1994).

148 *See infra* note 159 and accompanying text.

149 *See Farmer*, 511 U.S. at 843 n.8 (explaining that, at a minimum, an inmate must prove that the correctional officer himself "refused to verify underlying facts that he strongly suspected to be true, or declined to confirm inferences of risk that he strongly suspected to exist"); *see also* Heather M. Kinney, *The "Deliberate Indifference" Test Defined: Mere Lip Service to the Protection of Prisoners' Civil Rights*, 5 TEMP. POL. & C.R. L. REV. 121 (1995) (explaining the differences between civil recklessness and criminal recklessness).

150 *Castro*, 833 F.3d at 1072; *see also* Darnell v. Pineiro, 849 F.3d 17, 32–38 (2d Cir. 2017) (joining the Ninth Circuit in holding that *Kingsley* mandates overturning precedent, which required pretrial detainees to meet the same Eighth Amendment standards as convicted prisoners with regard to a challenge to conditions of confinement; deliberate indifference must be defined objectively for a due process claim, and thus it sufficed that pretrial detainee proved 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"; pretrial detainees are no longer required to establish subjective intent to punish or to expose detainees to a substantial risk of harm because, unlike the Eighth Amendment, officials can violate due process "without meting out any punishment," and thus detainee need not prove official's subjective awareness that his acts or omissions posed a substantial risk of harm).

151 Bell v. Wolfish, 441 U.S. 520, 535 (1979).

152 *See, e.g.*, Craig v. Floyd Cty., 643 F.3d 1306, 1310 (11th Cir. 2011) (holding that although pretrial detainees are protected by the Due Process Clause, rather than the

prison officials make a deliberate decision to deny medical treatment despite objective facts that should have made them aware that a detainee was in immediate danger of serious harm, they are insulated from liability in the absence of evidence that they were actually aware of the danger in a subjective sense and subjectively recognized that their actions were inappropriate in light of that risk.[153]

In 1976, the Supreme Court held that convicted prisoners have an Eighth Amendment right to medical care and that "deliberate indifference to serious medical needs" is the governing standard of liability.[154] *Farmer* later explained, however, that deliberate indifference under the Eighth Amendment requires proof of subjective criminal recklessness.[155] The Court had the opportunity in *City of Revere v. Massachusetts General Hospital*[156] to clarify the appropriate standard for assessing substantive due process claims of inadequate medical care brought by pretrial detainees. Instead, the Court simply concluded that the Fourteenth Amendment afforded protections "at least as great as the Eighth Amendment protections available to a convicted prisoner," without clarifying the substantive due process culpability standard.[157] In *Lewis*, the Court invoked *City of Revere* in explaining that deliberate indifference to the medical needs of pretrial detainees is "egregious enough" to satisfy the "conscience-shocking" element required of substantive due process claims, but again the objective versus subjective state-of-mind question was not addressed.[158]

Some appellate courts have acknowledged language in *Farmer* suggesting that the Eighth Amendment's subjective mental state may sometimes be inferred from objective facts demonstrating that the "medical need was 'obvi-

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Eighth Amendment, medical treatment claims are subject to the same scrutiny); Caiozzo v. Koreman, 581 F.3d 63, 70–72 (2d Cir. 2009) (adopting the position of the First, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits, that the *Farmer* test, which demands evidence that a defendant was actually subjectively aware of a risk of danger, applies equally to pretrial detainees who claim they are denied adequate medical care), *overruled on other grounds by Darnell*, 849 F.3d 17; Parrish *ex rel.* Lee v. Cleveland, 372 F.3d 294, 302–09 (4th Cir. 2004) (holding that although deliberate indifference is the standard that governs officials' alleged failure to attend to a detainee's serious medical needs, this requires a showing that officials subjectively recognized a substantial risk of harm and subjectively recognized that actions were inappropriate in light of that risk).

153 *See* Burnette v. Taylor, 533 F.3d 1325, 1331–32 (11th Cir. 2008) (cautioning that substantive due process liability is not triggered by an official's failure to alleviate a significant medical risk that should have been perceived because imputed or collective knowledge does not satisfy the need to show deliberate indifference; plaintiff must demonstrate both an awareness of facts from which an inference of serious risk could be drawn and that the official actually drew the inference).

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

155 *See supra* notes 101–103 and accompanying text.

156 463 U.S. 239 (1983).

157 *Id.* at 244.

158 Cty. of Sacramento v. Lewis, 523 U.S. 833, 849–50 (1998) (citing *City of Revere*, 463 U.S. at 244).

ous' and that the officer's response was 'obviously inadequate.'"[159] However, the Court in *Farmer* cautioned that obviousness does not necessarily prove "subjective knowledge," and that a prison guard must be given the opportunity to show that "the obvious escaped him."[160] *Farmer* clearly held that a subjective mens rea of criminal recklessness governs; in fact, the Court specifically rejected the civil law recklessness standard.[161] It stressed that lower courts must be clear in instructing jurors that proof of subjective intent is required under the Eighth Amendment and that the question of what a reasonable man would or should have known is irrelevant.[162]

The Sixth Circuit, both before and after *Kingsley*, has rejected the use of the Eighth Amendment's heightened malice standard in favor of a "traditional" deliberate indifference test where there was clearly time for officials to deliberate regarding a detainee's serious medical need.[163] As previously discussed, the "objective" reasonableness standard of the Fourth Amendment already incorporates this temporal factor as highly relevant in assessing culpa-

159 Barton v. Taber, 820 F.3d 958, 965 (8th Cir. 2016) (quoting Thompson v. King, 730 F.3d 742, 747 (8th Cir. 2013)); *see id.* at 964–65 (applying Eighth Amendment subjective deliberate indifference standard to claim brought by the estate of a pretrial detainee who died of heart condition following arrest on intoxication-related charges, but finding that the facts alleged were sufficient to create an inference that the state trooper was deliberately indifferent to the detainee's need for medical attention because the detainee showed *obvious* signs that he needed prompt medical attention, and subjective criminal recklessness may be inferred from facts that demonstrate that a medical need was obvious and that an officer's response was "obviously inadequate"); Thomas v. Cook Cty. Sheriff's Dep't, 604 F.3d 293, 301–02 (7th Cir. 2010) (applying the same legal standard to a pretrial detainee's claim alleging deliberate indifference to medical needs as developed under the Eighth Amendment, but recognizing that circumstantial evidence can be used to establish subjective awareness and subjective deliberate indifference); Phillips v. Roane Cty., 534 F.3d 531, 540 (6th Cir. 2008) (asserting that a detainee need not show that an officer acted with the specific intent to cause harm, and because officials seldom admit the subjective component, courts may infer from circumstantial evidence that a prison official had the requisite knowledge).

160 Farmer v. Brennan, 511 U.S. 825, 843 n.8, 848 (1994); *see also* Martinez v. Beggs, 563 F.3d 1082, 1089–91 (10th Cir. 2009) (explaining that pretrial detainees alleging denial of medical attention must meet the Eighth Amendment standard that requires a plaintiff to prove that defendants actually knew a detainee faced a substantial risk of harm and that even an obvious risk cannot conclusively establish an inference that the official subjectively knew of this risk).

161 *Farmer*, 511 U.S. at 836–37.

162 *Id.* at 843 n.8.

163 Brown v. Chapman, 814 F.3d 436, 444–45 (6th Cir. 2016) (holding that where a pretrial detainee alleges denial of access to adequate medical care, the relevant standard depends on whether officials have time to deliberate regarding that care; because officials had fifteen minutes to appreciate the need for medical treatment, deliberate indifference as opposed to a heightened malice standard should have been used in assessing the claim); Jones v. City of Cincinnati, 521 F.3d 555, 560 (6th Cir. 2008) (holding that deliberate indifference to serious medical needs of pretrial detainees constitutes a substantive due process violation and rejecting use of heightened malice standard because there was time to deliberate where officers left arrestee on the ground for a prolonged time, even after noticing arrestee had stopped breathing).

bility.[164] Where officials make a deliberate decision to deny objectively necessary medical treatment, *Kingsley* now dictates that no further mens rea should be necessary to prove a substantive due process violation.[165] Nonetheless, most appellate courts have continued to impose the Eighth Amendment's criminal subjective mens rea standard, even after *Kingsley*.[166]

164 *See supra* note 87 and accompanying text.

165 Of course, detainees must still satisfy the requirement of an objectively serious medical need, and often detainees' claims are lost on this basis. *See, e.g.*, Mead v. Palmer, 794 F.3d 932, 936–37 (8th Cir. 2015) (applying Eighth Amendment deliberate indifference standard and holding that civilly committed sex offender failed to prove he suffered an objectively serious medical need based on denial of his request for dentures, where he was never prescribed dentures as a medical necessity).

166 *See* Dang *ex rel.* Dang v. Sheriff, Seminole Cty., 871 F.3d 1272, 1279 n.2, 1279–82 (11th Cir. 2017) (reasoning that *Kingsley* involved excessive force and does not extend to claims of inadequate medical treatment of pretrial detainees, which continue to be governed by the same standard as a prisoner's claim under the Eighth Amendment, where plaintiff who claimed inadequate medical care from doctors and nurses for his treatment of meningitis, which caused multiple strokes and permanent injuries, could not satisfy the Eighth Amendment deliberate indifference standard, which requires evidence of an objectively serious medical need, subjective knowledge of the risk of serious harm, and disregard of that risk); *id.* at 1280 ("[I]mputed or collective knowledge cannot serve as the basis for a due process claim of deliberate indifference" to a pretrial detainee's serious medical need. (alteration in original) (quoting Burnette v. Taylor, 533 F.3d 1325, 1331 (11th Cir. 2008))); Phillips v. Sheriff of Cook Cty., 828 F.3d 541, 554 (7th Cir. 2016) (applying Eighth Amendment standards to class action, which included pretrial detainees who claimed inadequate medical care, despite *Kingsley*'s recognition of a more protective standard for detainees than for convicted inmates who allege excessive force); Mason v. Lafayette City-Par. Consol. Gov't, 806 F.3d 268, 279 (5th Cir. 2015) (holding that detainee must show that official had subjective knowledge of a substantial risk of serious medical harm and then acted with deliberate indifference, which suggests "wanton disregard for any serious medical needs" (internal quotation marks omitted)); Burton v. Downey, 805 F.3d 776, 785–86 (7th Cir. 2015) (finding that a two-day delay in providing pain medication to pretrial detainee failed to show the culpable state of mind necessary to satisfy Eighth Amendment standard that infliction must be deliberate or reckless in a criminal-law sense); Baynes v. Cleland, 799 F.3d 600, 618–20 (6th Cir. 2015) (holding that there was no evidence that deputies were both aware of facts from which it could be inferred that detainee faced a substantial risk of serious harm and that deputies in fact drew this inference, as necessary to support a claim that detainee was denied substantive due process); *see also* Rife v. Okla. Dep't of Pub. Safety, 854 F.3d 637, 647–49 (10th Cir. 2017) (explaining that pretrial detainees must satisfy the same standard required under the Eighth Amendment for claims alleging inadequate medical care, but ruling that detainee presented sufficient evidence of a conscious disregard of a substantial health risk, which would meet the subjective prong of *Farmer*, because the plaintiff presented evidence of an obvious risk to his health or safety that could indicate official's subjective knowledge and conscious disregard of that risk); Collins v. Al-Shami, 851 F.3d 727, 731–34 (7th Cir. 2017) (concluding, without resolving whether *Kingsley*'s less demanding objective unreasonable standard governs due process claims of inadequate medical care, that district court properly dismissed pretrial detainee's claim because detainee failed to meet even the less demanding "objectively unreasonable under the circumstances" standard); Dixon v. Cty. of Cook, 819 F.3d 343, 349–50 (7th Cir. 2016) (holding that pretrial detainee, who claimed denial of adequate medical treatment, plausibly alleged enough to survive a motion to dismiss, even under

Further, where professional prison doctors or nurses, as opposed to guards, make the decision to deny adequate medical care, pretrial detainees should be treated the same as those who have been involuntarily institutionalized. The Supreme Court in *Youngberg v. Romeo* held that medical decisions that constitute a "substantial departure from accepted professional judgment" violate the guarantee of substantive due process.[167] While a few courts have held that deliberate indifference may be inferred where medical professionals act contrary to accepted medical standards,[168] other courts have refused to apply *Youngberg* and have instead imposed the Eighth Amendment's subjective deliberate indifference standard.[169]

Eighth Amendment standards, by showing the official knew detainee had a chest tumor and offered him only nonprescription pain medication, that she ordered psychiatric consult to determine whether detainee was malingering, and that she ordered his wheelchair removed upon his return to the regular jail); Bailey v. Feltmann, 810 F.3d 589, 593–94 (8th Cir. 2016) (holding that, although *Kingsley* adopted an objective reasonableness standard for arrestees claiming excessive force, the law regarding denial of medical care is not clear, and thus, to survive qualified immunity, pretrial detainee must prove deliberate indifference under the Eighth Amendment standard, and plaintiff failed to produce sufficient evidence to show that defendant had actual knowledge of an objectively serious medical need and yet deliberately disregarded it).

167 *See* Youngberg v. Romeo, 457 U.S. 307, 314 (1982); *supra* notes 14–17 and accompanying text; *see also infra* Part IV (discussing this case).

168 *See* King v. Kramer, 680 F.3d 1013, 1018–19 (7th Cir. 2012) (recognizing that whereas nonmedical officers may not be found deliberately indifferent unless they have knowledge that prison doctors or their assistants are mistreating or not treating a prisoner, deliberate indifference on the part of medical staff may be inferred when the medical professional's decision is "such a substantial departure from accepted professional judgment . . . as to demonstrate that the person responsible did not base the decision on such a judgment" (quoting Estate of Cole *ex rel.* Pardue v. Fromm, 94 F.3d 254, 261–62 (7th Cir. 1996))); *cf.* Holloway v. Del. Cty. Sheriff, 700 F.3d 1063, 1072–73 (7th Cir. 2012) (finding that jail physician's decision to prescribe nonnarcotic medications for pain, rather than the OxyContin that his treating physician had prescribed, was not "a substantial departure from accepted professional standards," even if the doctor asserted he did not believe in prescribing OxyContin for pain management, because there was no evidence that this belief was based on personal rather than medical reasons).

169 *Dang ex rel. Dang*, 871 F.3d at 1279–82 (applying Eighth Amendment standards that govern nonmedical defendants and, without citing *Youngberg*, rejecting pretrial detainee's claim that doctors and nurses violated his substantive due process rights by failing to recognize his symptoms of meningitis); Jackson v. Buckman, 756 F.3d 1060, 1065–66 (8th Cir. 2014) (asserting that pretrial detainee who alleged a violation of his right to medical care must meet Eighth Amendment deliberate indifference standard, and merely demonstrating that prison doctor committed medical malpractice did not meet this standard absent evidence that the doctor's actions were so inappropriate as to evidence intentional maltreatment or a refusal to provide essential care); Ramos v. Patnaude, 640 F.3d 485, 489–90 (1st Cir. 2011) (holding that Eighth Amendment deliberate indifference standard applied to due process claims challenging doctor's treatment decisions and concluding that jury could not possibly find that doctor "actually understood that such a substantial risk existed and was actually indifferent to it in failing to take appropriate mitigating action"; although a jury could conclude, as an expert testified, that the doctor could have provided more prompt medical care and that the level of treatment was inadequate under professional

D. Suicide Prevention

As with claims of failure to provide safe conditions of confinement or adequate medical treatment, in suicide cases most appellate courts have required that plaintiffs meet the Eighth Amendment's subjective deliberate indifference test, thereby requiring evidence that officials actually knew that a detainee was a serious suicide risk and yet acted with criminal deliberate indifference to that risk.[170] Some courts continue to apply this standard after *Kingsley*.[171]

Where medical professionals make treatment decisions regarding suicidal detainees, *Youngberg*'s objective standard should govern—decisions that constitute "a substantial departure from accepted professional judgment" violate substantive due process.[172] As to jail guards and officials, the Ninth Circuit's decision in *Castro* provides an appropriate analysis, namely, plaintiffs

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norms, this does not equate with deliberate indifference and is inconsistent with the required finding of subjective deliberate indifference to a substantial risk); Clouthier v. Cty. of Contra Costa, 591 F.3d 1232, 1241–49 (9th Cir. 2010) (refusing to apply *Youngberg*'s holding that mentally ill detainees have a constitutional right to mental health care that does not substantially depart from accepted professional judgment, and thus, plaintiff could not avoid the burden of showing that individual defendants subjectively acted with deliberate indifference to a substantial risk of serious harm), *overruled in part by* Castro v. Cty. of Los Angeles, 833 F.3d 1060, 1070 (9th Cir. 2016) (en banc).

170 *See* Luckert v. Dodge Cty., 684 F.3d 808, 817–19 (8th Cir. 2012) (holding that although detainees have a constitutional right to be protected from the known risks of suicide, plaintiff failed to show that the deceased's jailers acted with deliberate indifference in the sense of criminal recklessness); Rice *ex rel.* Rice v. Corr. Med. Servs., 675 F.3d 650, 678–81 (7th Cir. 2012) (holding that jail personnel could not be held liable for the death of a pretrial detainee because there was no evidence that guards were subjectively aware of the possibility that the detainee might engage in compulsive water drinking behavior that would cause him to die); Rosario v. Brawn, 670 F.3d 816, 820–22 (7th Cir. 2012) (holding that pretrial detainees are subject to the Eighth Amendment deliberate indifference standard, which requires evidence that defendants subjectively knew the detainee was at substantial risk of committing suicide and yet intentionally disregarded that risk); *Clouthier*, 591 F.3d at 1242 (holding that parents who claimed that officials failed to prevent their son's suicide had to meet *Farmer*'s subjective deliberate indifference test); Brumfield v. Hollins, 551 F.3d 322, 331–32 (5th Cir. 2008) (holding that a plaintiff must prove officials acted with subjective deliberate indifference to the rights of the deceased who committed suicide); Gray v. City of Detroit, 399 F.3d 612, 616 (6th Cir. 2005) (rejecting plaintiff's claim due to lack of evidence that defendant *actually* knew detainee was at risk of committing suicide, as required under the Eighth Amendment).

171 *See, e.g.*, Hyatt v. Thomas, 843 F.3d 172, 177–80 (5th Cir. 2016) (applying Eighth Amendment standards and holding that, although plaintiff presented sufficient evidence to infer that jail official actually knew of a substantial risk that pretrial detainee was a suicide risk, she failed to meet *Farmer*'s deliberate indifference test, even if the official's response to suicide risk was "imperfect"); Jackson v. West, 787 F.3d 1345, 1354–56 (11th Cir. 2015) (holding that the district court erred in not granting summary judgment to correction officers who allegedly failed to prevent detainee's suicide where, even if officers were aware that detainee had made explicit suicide threats in the past, none had subjective knowledge of a significant risk that pretrial detainee would attempt suicide).

172 *Youngberg*, 457 U.S. at 314; *see supra* notes 14–17, 167–69 and accompanying text.

should prevail where a prison official (1) makes an intentional decision with regard to conditions of confinement that (2) puts a suicidal detainee at substantial risk of harm, and (3) fails to take preventive measures that are reasonable and available even though a reasonable official would have appreciated the high degree of risk involved, and (4) this failure caused the detainee's injury.[173] This approach recognizes *Kingsley*'s core message that detainees are entitled to greater protection than convicted inmates, and thus, proof of criminal mens rea should no longer be required in assessing liability.

IV. *Kingsley*'s Impact on Substantive Due Process Claims Brought by the Civilly Committed and Students

In 1982, the Supreme Court recognized that those who are involuntarily committed to a state institution enjoy a constitutionally protected liberty interest which guarantees the right to reasonably safe conditions of confinement, freedom from unreasonable restraint, and minimally adequate training sufficient to ensure those liberty interests.[174] In a unanimous decision, the Court held that when medically trained government officials make decisions that constitute a substantial departure from professional judgment, they violate the substantive due process guarantee of the Fifth and Fourteenth Amendments.[175] The Court specifically rejected the state's argument that the rigorous Eighth Amendment subjective deliberate indifference or criminal recklessness standard should govern the due process rights of those who are civilly committed to state institutions.[176]

Despite the Supreme Court's admonition that those who are civilly committed in state institutions do not lose their core liberty interests and that they enjoy greater protection than convicted criminals, appellate courts have seriously eroded the substantive due process protection recognized in *Youngberg*.[177] Many of these courts have relied on language in *Lewis* that "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.'"[178] Although the Supreme Court in *Lewis* did not overturn *Youngberg*, and in fact cited it as valid authority,[179] some federal courts have ruled that the shocks-the-conscience test superseded the *Youngberg* standard.[180] Further, most of these courts have held that this "new" test requires

173 *See supra* note 145 and accompanying text.

174 *Youngberg*, 457 U.S. at 315–19.

175 *Id.* at 324.

176 *Id.* at 325 ("[W]e conclude that the jury was erroneously instructed on the assumption that the proper standard of liability was that of the Eighth Amendment.").

177 *See* Levinson, *supra* note 124 (tracing and critiquing this demise).

178 Cty. of Sacramento v. Lewis, 523 U.S. 833, 846 (1998) (quoting Collins v. City of Harker Heights, 503 U.S. 115, 129 (1992)).

179 *Id.* at 852 n.12.

180 *See* Montin v. Gibson, 718 F.3d 752, 755 (8th Cir. 2013) (reasoning that even if an involuntarily committed mental patient who was denied unsupervised access to unsecured grounds was subjected to a bodily restraint within the meaning of substantive due process,

that the civilly committed satisfy the rigorous Eighth Amendment standard, which *Youngberg* specifically rejected.[181] Other courts acknowledge that *Youngberg*'s "professional judgment standard . . . is at least as demanding as the Eighth Amendment 'deliberate indifference' standard," but they have then rejected the notion that the *Youngberg* standard is *more* demanding.[182]

These courts have misconstrued *Lewis* as having displaced or weakened *Youngberg*'s protection of the rights of the civilly committed. *Lewis* in fact recognized *Youngberg*'s holding that, in the context of civil commitment, substantive due process is violated when state medical personnel fail to exercise professional judgment.[183] Further, those courts that have equated the professional judgment standard with the Eighth Amendment's criminal recklessness standard have ignored *Youngberg*'s core holding that the rights of the involuntarily committed are greater than the rights of convicted inmates.[184] Those who are in state custody due to mental incapacity arguably enjoy even

officials satisfied the professional judgment standard because a substantive due process claim may be maintained only if the contested state action is "so egregious or outrageous that it is conscience-shocking" (quoting Burton v. Richmond, 370 F.3d 723, 729 (8th Cir. 2004))); J.R. v. Gloria, 593 F.3d 73, 79–81 (1st Cir. 2010) (holding that a civilly committed patient must prove that official misconduct rose to a conscience-shocking level, which requires "'stunning' evidence of 'arbitrariness and caprice'" (quoting DePoutot v. Raffaelly, 424 F.3d 112, 119 (1st Cir. 2005))); Benn v. Universal Health Sys., Inc., 371 F.3d 165, 174–75 (3d Cir. 2004) (noting that even if a professional decision falls substantially below medical standards, it will not be found to violate substantive due process unless it is also "conscience-shocking").

181 *See* Battista v. Clarke, 645 F.3d 449, 453 (1st Cir. 2011) (explaining that "[b]oth the *Farmer* and *Youngberg* tests leave ample room for professional judgment, constraints presented by the institutional setting, and the need to give latitude to administrators who have to make difficult trade-offs as to risks and resources"); Sain v. Wood, 512 F.3d 886, 894–95 (7th Cir. 2008) (holding that the professional judgment standard is the same as *Farmer*'s subjective deliberate indifference standard); Lavender v. Kearney, 206 F. App'x 860, 863 (11th Cir. 2006) (per curiam) ("[R]elevant case law in the Eighth Amendment context also serves to set forth the contours of the due process rights of the civilly committed." (quoting Dolihite v. Maughon *ex rel.* Videon, 74 F.3d 1027, 1041 (11th Cir. 1996))); Moore *ex rel.* Moore v. Briggs, 381 F.3d 771, 773–74 (8th Cir. 2004) (reasoning that the *Lewis* Court "equated deliberate indifference for substantive due process and Eighth Amendment purposes," and thus, an intellectually disabled state home resident had to meet a criminal recklessness standard to recover on his substantive due process claim).

182 *See, e.g.*, Collignon v. Milwaukee Cty., 163 F.3d 982, 988–89 (7th Cir. 1998) (conceding that the Eighth Amendment subjective deliberate indifference standard assesses whether conduct amounts to unlawful punishment for convicted persons, while reasoning that "there is minimal difference in what the two standards require of state actors," because "[o]nly the criminal recklessness standard provides adequate notice of what conduct is or is not permitted").

183 *Lewis*, 523 U.S. at 852 n.12.

184 *See* Rodriguez v. City of New York, 72 F.3d 1051, 1063 (2d Cir. 1995); *see also* Bolmer v. Oliveira, 594 F.3d 134, 142–45 (2d Cir. 2010) (holding that a substantive due process violation will be found where the decision is made based on substantive or procedural criteria that are substantially below the standards generally accepted in the medical community). In *Bolmer*, the court held that the district court did not err in applying this test despite *Lewis*, because a physician's decision that departs from accepted standards meets

greater rights to adequate care and treatment than pretrial detainees who are taken into custody because the state has reasonable cause to believe they have committed a crime.[185] Further, although pretrial detainees are housed in jails or prisons that law enforcement officials supervise, those in state institutions are often housed in hospitals staffed by medical professionals. Because those committed to state institutions for mental incapacity often face lengthy and even lifelong confinement, the Court in *Youngberg* protected their rights by requiring that professional decisions exhibit professional concern and judgment.[186]

Further, as to nonmedical personnel, *Bell*'s holding, now reinvigorated by *Kingsley*, mandates that the deliberate misconduct of those assigned to care for the civilly committed be assessed under an objective reasonableness standard.[187] *Kingsley* confirmed that using an Eighth Amendment criminal recklessness standard for those who have not been convicted of a crime provides insufficient protection from abuse of power.[188] Some courts have acknowledged that where the claim involves excessive force, the substantive due process analysis is the same for pretrial detainees and the civilly committed, and thus *Kingsley*'s objective standard governs.[189] Further, as explained in Part III, *Kingsley* should not be restricted to excessive force claims, but, rather, should be interpreted as a general rejection of the Eighth Amendment's criminal recklessness mens rea for all claims brought by detainees as well as the civilly committed.

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the shocks-the-conscience test, and post-*Lewis* caselaw does not indicate that the professional medical standards test has been overruled. *Id.*

185 *See* Davis v. Rennie, 264 F.3d 86, 99–100 (1st Cir. 2001) (reasoning that the district court did not err in failing to give a shocks the conscience jury instruction in a case challenging whether mental health personnel violated substantive due process by failing to intervene to protect an involuntarily committed mental health patient who was being beaten by another mental health worker). The plaintiff in *Davis* was being held in state custody not due to culpable conduct, but because of mental illness, and mental health workers are held to a more exacting standard than police officers chasing a fleeing car; therefore, the court determined that the proper question is whether the force used was "objectively reasonable" under all the circumstances. *See id.*

186 For a full discussion of the rights of the civilly committed, challenging courts that have viewed *Lewis* as altering *Youngberg*, and criticizing the use of Eighth Amendment standards, see Levinson, *supra* note 124, at 566–69.

187 *See supra* notes 81–82.

188 Kingsley v. Hendrickson, 135 S. Ct. 2466, 2473 (2015).

189 *See* Carter v. Huterson, 831 F.3d 1104, 1109 (8th Cir. 2016) (holding that an objective standard governed a civilly committed plaintiff's claim that defendant officials "physically assaulted and attacked him"); Clay v. Emmi, 797 F.3d 364, 369 (6th Cir. 2015) (explaining that after *Kingsley*, a plaintiff's claim that officers used excessive force while restraining him during a mental health commitment "is subject to the same objective standard as an excessive force claim brought under the Fourth Amendment"); Perez v. Wicker, No. 2:14-cv-558, 2016 WL 3543502, at *4 (M.D. Fla. June 29, 2016) (holding that *Kingsley*'s objective standard applies equally to civilly committed detainees); Madison v. Scott, No. 13-3317, 2015 WL 5734874, at *3 (C.D. Ill. Sept. 29, 2015) (applying *Kingsley*'s objective standard to excessive force claims by civilly committed detainee, but finding officials acted reasonably in light of plaintiff's noncompliance with their orders).

Similarly, public school students who bring substantive due process claims alleging a deprivation of liberty, usually in the form of corporal punishment, sexual abuse, or verbal or physical harassment, are required by many appellate courts to meet the same draconian Eighth Amendment standards as detainees and the civilly committed. The Supreme Court held that public school students have a liberty interest in being free from "appreciable physical pain" in *Ingraham v. Wright*.[190] However, many courts have imposed an extremely high burden on students to establish that their teacher's misconduct truly shocks the conscience.[191] For example, in *Domingo v. Kowalski*,[192] parents challenged a special education teacher's disciplinary methods, which included gagging and strapping an autistic student to a gurney because he was spitting at others and using a belt to strap another student to a toilet because she was not toilet trained and had balance problems.[193] The court recognized that this conduct "may have been inappropriate, insensitive, and even tortious," but it held nonetheless that it was not so egregious as to rise to the level of a substantive due process violation because the parents failed to prove that the conduct was either "clearly extreme and disproportionate to the need presented to be excessive in the constitutional sense," or "so brutal, demeaning, and harmful as literally to shock the conscience."[194]

Borrowing Eighth Amendment language, many appellate courts have required students to prove that their teachers acted with intentional malice or sadism in order to recover.[195] Many of these cases involve teachers who

190 430 U.S. 651, 674 (1977).

191 *See* Doe *ex rel.* Magee v. Covington Cty. Sch. Dist. *ex rel.* Keys, 675 F.3d 849, 868–69, (5th Cir. 2012) (en banc) ("'The burden to show state conduct that shocks the conscience is extremely high, requiring stunning evidence of arbitrariness and caprice that extends beyond mere violations of state law, even violations resulting from bad faith to something more egregious and more extreme.'" (quoting J.R. v. Gloria, 593 F.3d 73, 80 (1st Cir. 2010) (internal quotation marks omitted))); Smith *ex rel.* Smith v. Half Hollow Hills Cent. Sch. Dist., 298 F.3d 168, 173 (2d Cir. 2002) (per curiam) (asserting that, although striking a student without any pedagogical or disciplinary justification is undeniably wrong, not all wrongs perpetrated by a government actor violate due process—rather, only action that can fairly be viewed as brutal and offensive to human dignity shocks the conscience); Lillard v. Shelby Cty. Bd. of Educ., 76 F.3d 716, 725–26 (6th Cir. 1996) (holding that a teacher's conduct in rubbing a student's stomach, accompanied by remark that could reasonably be interpreted as sexually suggestive, although wholly inappropriate, was not sufficient to state a violation of substantive due process rights because it was not brutal and inhumane).

192 810 F.3d 403 (6th Cir. 2016).

193 *Id.* at 407.

194 *Id.* at 410–16 (quoting Webb v. McCullough, 828 F.2d 1151, 1158 (6th Cir. 1987) (internal quotation marks omitted)).

195 *See, e.g.*, Muskrat v. Deer Creek Pub. Schs., 715 F.3d 775, 786–87 (10th Cir. 2013) (holding that to sustain claim involving corporal punishment, plaintiff must show that the conduct "was so disproportionate to the need presented, and was so inspired by malice or sadism . . . [as to amount] to a brutal and inhumane abuse of official power literally shocking to the conscience" (quoting Garcia *ex rel.* Garcia v. Miera, 817 F.2d 650, 655 (10th Cir. 1987))); T.W. *ex rel.* Wilson v. Sch. Bd. of Seminole Cty., 610 F.3d 588, 598–603 (11th Cir. 2010) (reasoning that to claim excessive corporal punishment there must be evidence that

act with objective deliberate indifference to students' rights, and yet claims are rejected and no liability is imposed because the students cannot meet the "inspired by malice or sadism" standard that governs claims brought by adults convicted of a crime. The Supreme Court's rejection in *Kingsley* of Eighth Amendment standards for pretrial detainees surely should apply to students who are subjected to physical abuse by school officials, even if such abuse is not "inspired by malice or sadism."

Conclusion

Substantive due process should be recognized as a meaningful limitation on the arbitrary abuse of executive power by jail and prison officials, medical professionals and nonmedical staff who work in state mental institutions, and public school officials. Courts that have imposed a draconian shocks-the-conscience standard by misconstruing *Lewis*, as well as courts that have imposed the Eighth Amendment's criminal recklessness standard on those never convicted of a crime, have now been alerted by the Supreme Court's analysis in *Kingsley* that an objective civil culpability standard should govern claims of

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the punishment was "obviously excessive" as an objective matter and that the teacher *subjectively* intended to use that obviously excessive amount of force in circumstances where it was foreseeable that serious bodily injury could result; teacher's use of corporal punishment against student with pervasive developmental disorder, which included pinning the student's arms behind his back while she led him to the cool down room, was not arbitrary, egregious, and conscience-shocking because, although the force aggravated the student's developmental disability, exacerbated his behavioral problems, and caused symptoms of post traumatic stress disorder, it was not so severe that it amounted to torture); C.N. v. Willmar Pub. Schs., Indep. Sch. Dist. No. 347, 591 F.3d 624, 634–35 (8th Cir. 2010) (holding that a student must establish both a fundamental right and that the teacher's conduct shocks the contemporary conscience, which mandates evidence that the conduct was "so inspired by malice or sadism . . . that it amounted to brutal and inhumane abuse of official power literally shocking to the conscience" (quoting Golden *ex rel.* Balch v. Anders, 324 F.3d 650, 652–53 (8th Cir. 2003))); Nolan v. Memphis City Schs., 589 F.3d 257, 269–70 (6th Cir. 2009) (holding that a coach's use of corporal punishment against basketball player, who was subjected to paddling two to three times a week over the course of three years, causing both physical pain and psychological injury, was not conscience-shocking because plaintiffs failed to prove "the force applied caused injury so severe, was so disproportionate to the need presented, and was so inspired by malice or sadism . . . that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience" (quoting *Webb*, 828 F.2d at 1158) (internal quotation marks omitted)); Davis v. Carter, 555 F.3d 979, 980–81, 984 (11th Cir. 2009) (holding that a coach's conduct in depriving student of water after he exhibited signs of overheating and not summoning immediate medical care after he collapsed on the football field did not state a cause of action under substantive due process because the complaint could not support a finding that the coach acted willfully or maliciously with an intent to injure the student; deliberate indifference, without more, does not rise to the conscience-shocking level required for a constitutional violation); *cf.* Slade v. Bd. of Sch. Dirs. of Milwaukee, 702 F.3d 1027, 1029–33 (7th Cir. 2012) (acknowledging that the Seventh Circuit has not determined whether deliberate indifference implies the criminal standard of recklessness, which requires actual knowledge of a risk, or the civil standard of obviousness, and conceding that there is "at least a shade of difference" between the two standards).

constitutional wrongdoing. *Kingsley*'s interpretation of substantive due process as a meaningful restraint against the arbitrary misuse of executive power gives hope to all victims of abuse of power.