TOURO LAW
JACOB D. FUCHSBERG LAW CENTER

Touro Law Review

Volume 39 | Number 1 Article 9

2024

Subjectively Speaking, the Applicable Standard for Deficient Medical Treatment of Pretrial Detainees Should Be One of Objective Reasonableness

Benjamin R. Black
Touro Law Center

Follow this and additional works at: https://digitalcommons.tourolaw.edu/lawreview

Part of the Constitutional Law Commons, and the Fourteenth Amendment Commons

Recommended Citation

Black, Benjamin R. (2024) "Subjectively Speaking, the Applicable Standard for Deficient Medical Treatment of Pretrial Detainees Should Be One of Objective Reasonableness," *Touro Law Review*: Vol. 39: No. 1, Article 9.
Available at: https://digitalcommons.tourolaw.edu/lawreview/vol39/iss1/9

This Note is brought to you for free and open access by Digital Commons @ Touro Law Center. It has been accepted for inclusion in Touro Law Review by an authorized editor of Digital Commons @ Touro Law Center. For more information, please contact lross@tourolaw.edu.

SUBJECTIVELY SPEAKING, THE APPLICABLE STANDARD FOR DEFICIENT MEDICAL TREATMENT OF PRETRIAL DETAINEES SHOULD BE ONE OF OBJECTIVE REASONABLENESS

Benjamin R. Black[*]

ABSTRACT

There is no uniformity amongst the circuits when it comes to pretrial detainees claims for inadequate medical care. The circuits are currently grappling with this problem, applying two separate tests to pretrial detainees' 42 U.S.C. § 1983 claims depending on the jurisdiction in which the incident arose. The test that should be applied across all circuits is one of objective reasonableness. However, some circuits do not see it that way, applying the deliberate indifference standard, also known as the subjective standard test. The circuits applying the subjective standard are relying on case law that does not properly analyze the rights of pretrial detainees. These circuits are under the impression that pretrial detainees have the same rights as convicted individuals, which is not the case, as pretrial detainees in fact have greater protections under the Fourteenth Amendment of the United States Constitution. The subjective standard falls short of protecting pretrial detainees and deprives them of rights derived under the Fourteenth Amendment, as the subjective standard stems from the Eighth Amendment, which is inapplicable to pretrial detainees as these individuals have yet to be convicted. The Supreme Court had the opportunity to resolve this issue but declined to do so. The Supreme Court should resolve this issue by applying the objective test to pretrial detainees' inadequate medical care claims brought under § 1983,

* Associate Issue Editor, *Touro Law Review*; J.D. 2023, Touro University Jacob D. Fuchsberg Law Center. I would like to thank my faculty advisor Dean Tiffany Graham who was a tremendous help on this Note, by providing extensive feedback to assist me in developing a more in-depth analysis and well-rounded Note. I would also like to thank Professor Rena Seplowitz who helped me strengthen my Note and helped me throughout my time on the *Touro Law Review*.

Published by Digital Commons @ Touro Law Center,

Touro Law Review, Vol. 39, No. 1 [], Art. 9

which would not impede or diminish the rights of pretrial detainees that are guaranteed by the Fourteenth Amendment.

https://digitalcommons.tourolaw.edu/lawreview/vol39/iss1/9

Black: Subjectively Speaking

I. INTRODUCTION

Inadequate medical care of pretrial detainees and convicted prisoners is an ongoing concern amongst those incarcerated. This Note will focus on pretrial detainees but will make comparisons to individuals who have been convicted of a crime. The distinction between pretrial detainees and convicted individuals is an important one because different laws apply to each. Courts use a subjective standard known as the deliberate indifference standard to determine inadequate medical care of convicted individuals. This standard derives from the Eighth Amendment's "cruel and unusual punishment" language.[1] The deliberate indifference standard is a two-part test: (1) the deprivation of rights alleged must be "sufficiently serious," in other words, the plaintiff must show an objectively serious medical need, and (2) the defendant was deliberately indifferent to those needs.[2] The second prong of this test is what creates a subjective analysis into the defendant's state of mind, as "deliberate indifference" is a state of mind itself.[3] Deliberate indifference was intended for claims brought under the Eighth Amendment that related to punishment.[4] However, deliberate indifference has since expanded to include claims brought by pretrial detainees.[5] Pretrial detainees have greater constitutional protections under the Fourteenth Amendment's Due Process Clause and cannot be punished because they have not had a formal adjudication of guilt.[6] Therefore, the deliberate indifference standard should be inapplicable, but that has not been the case.

There is another standard that has received momentum within the circuit courts when dealing with pretrial detainees and deficient medical treatment. The objective standard test provides less stringent requirements for plaintiffs seeking remedies for their inadequate medical care while under the supervision of government officials. The objective standard test derives from a pivotal Supreme Court case, *Kingsley v. Hendrickson*.[7] The Supreme Court laid out a two-part test.

---

[1] Estelle v. Gamble, 429 U.S. 97, 101-03 (1976).
[2] Farmer v. Brennan, 511 U.S. 825, 834 (1994).
[3] *See* Brief for Indiana et al. as Amici Curiae Supporting Petitioners, Gordon v. Cnty. of Orange, 888 F.3d 1118 (9th Cir. 2018) (No. 18-337), 2018 WL 5026287, at *9.
[4] *Estelle*, 429 U.S. at 101-03.
[5] *See Farmer*, 511 U.S. 825; *see also Estelle*, 429 U.S. 97 (1976).
[6] Darnell v. Pineiro, 843 F.3d 17, 35 (2d Cir. 2017).
[7] 576 U.S. 389 (2015).

Published by Digital Commons @ Touro Law Center,

Touro Law Review, Vol. 39, No. 1 [], Art. 9

First, the defendant must have a reckless, knowing, or purposeful state of mind.[8] The second prong of the test examines the perspective of a reasonable officer and what he knew at the time.[9] The circuits using this standard have different variations, some writing in the conjunctive and others in the disjunctive, but no matter the variation used, the test is objective.

The objective standard is the appropriate standard to apply when discussing pretrial detainees' claims for inadequate medical care. Courts using this standard have not had an influx of frivolous suits and have had no problems with its application.[10] If the subjective deliberate indifference standard were to be applied, this would create a hurdle for pretrial detainees to receive any remedy for their deprivation of rights under the Fourteenth Amendment.

Defendants in § 1983 claims also have a shield of protection known as qualified immunity, which is an affirmative defense that protects government agents.[11] This immunity is applicable to both the objective and subjective standards. However, when applied to the subjective standard it seems nearly impossible for detainees who are deprived of their rights to have any form of remedy. The subjective standard adds another layer of protection to these government officials by requiring that pretrial detainees, who were in the care of these officials, prove a mens rea element and look into the mind of the official who deprived the pretrial detainees of their constitutional rights.

This Note proceeds in six sections. Section II discusses 42 U.S.C. § 1983, deprivation of rights in a civil action, and a government agent's immunity from suit. Section III examines the distinction

---

[8] *Id.* at 396.

[9] *Id.* at 395.

[10] *Id.* at 402. Respondents tried to argue that applying the subjective standard would "protect against a relative flood of claims" brought by pretrial detainees. The Court referenced the Prison Litigation Reform Act of 1995, stating this act is designed to stop frivolous suits from being brought against prison officials. The Court rejected this argument by stating that there is no evidence of an influx of filings in the circuits using the objective standard.

[11] *See* Lisa Soronen, *Civil and Criminal Justice Qualified Immunity,* NATIONAL CONFERENCE OF STATE LEGISLATURES, https://www.ncsl.org/research/civil-and-criminal-justice/qualified-immunity.aspx (last visited Feb. 12, 2023); Michael E. Beyda, *Affirmative Immunity: A Litigation-Based Approach to Curb Appellate Courts' Raising Qualified Immunity Sua Sponte*, 89 FORDHAM L. REV. 2693, 2696 (2021).

https://digitalcommons.tourolaw.edu/lawreview/vol39/iss1/9

between the Eighth and Fourteenth Amendments. Section IV explores § 1983 claims brought by pretrial detainees regarding inadequate medical care. This section also discusses other § 1983 claims that helped shape the current state of inadequate medical care claims prior to the Supreme Court's decision in *Kingsley* and the *Kingsley* decision itself. Section V analyzes the current circuit split as a result of the *Kingsley* decision and the standard used by each court when looking at deficient medical treatment claims brought by pretrial detainees. Section VI explains why the objective standard should be applied to resolve the current circuit split. Lastly, Section VII concludes this Note.

II. 42 U.S.C. § 1983 Claims and Immunities from Suit

A. 42 U.S.C. § 1983

42 U.S.C. § 1983 is used for civil actions when there has been a deprivation of rights.[12] 42 U.S.C. § 1983 was adopted to enforce the provisions of the Fourteenth Amendment.[13] Before the Civil Rights Act of 1871, the states had no process by which an individual could seek remedies for constitutional violations that were guaranteed under the United States Constitution.[14] Proponents of the bill wanted to rectify this issue through legislation in which guaranteed rights could be enforced.[15]

---

[12] 42 U.S.C. § 1983 (2021):

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. *Id.*

[13] *Liability Under Section 1983*, ORANGE CNTY. DEP'T OF EDUC., 1, 1 (2003) https://ocde.us/LegalServices/Documents/LIABILITY_UNDER_SECTION_1983_wcopyright.pdf.

[14] *Id.*

[15] *Id.*

The statute provides "every person who, under color of any statute, ordinance, regulation, custom, or usage. . . . subjects or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured."[16] The Supreme Court held in *Monroe v. Pape*[17] that the language "under color of" included acts done by an official who is acting under state authority.[18]

An individual can bring a § 1983 claim against state and local officials who are being sued in their personal capacity (i.e., as an individual), but cannot be sued in their official capacity as they are not deemed "persons" under § 1983.[19] This is because when acting under official capacity they "assume the identity of the government that employs them."[20] Therefore, a plaintiff seeking remedial measures must bring suit against the individuals themselves and not against the government agency that employs the individual.[21]

This statute is particularly important when pretrial detainees, alleging deprivation of their rights, try to sue local and state officials, regardless of whether the claim pertains to conditions of confinement, cruel and unusual punishment, or unreasonable search and seizures. Section 1983 is the statute under which pretrial detainees would sue when they were deprived of their rights to medical care or if they received inadequate medical care from government officials. To be successful when bringing a § 1983 claim, plaintiffs must prove two elements: (1) they "must show the alleged conduct occurred under

[16] 42 U.S.C. § 1983 (2021).
[17] Monroe v. Pape, 365 U.S. 167 (1961).
[18] *Id.* at 183-85. This opinion dealt with how "color of statute" was defined. Even though it was not referring directly to § 1983 the definition still holds true. The Court relied on precedent, in determining what "color of statute" meant. It first cited to *United States v. Classic*, in which the Court stated "misuse of power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law.'" The Court then reaffirmed its prior definition in *Screws v. United States*. (*Classic*, 313 U.S. 299, 326 (1941); *Screws*, 325 U.S. 91, 108-13 (1945)).
[19] Hafer v. Melo, 502 U.S. 21, 27 (1991). Hafer won the election for auditor general and fired 18 individuals. They brought suit against Hafer in both her official capacity and individually. The appellate court reversed the lower court's decision in part stating that the petitioner cannot be liable for decisions made regarding employment under her official capacity. However, she can be sued under her personal capacity because she was operating under the color of state law.
[20] *Id.*
[21] *Id.* at 31.

Black: Subjectively Speaking

color of state law"; and (2) they "must show that the [alleged] conduct deprived plaintiffs of rights, privileges, or immunities" guaranteed by the United States Constitution or a federal statute.[22] The defendants, however, have qualified immunity in some circumstances.[23]

B. Qualified Immunity

Qualified immunity is a shield that protects government officials from liability for civil damages so long as the alleged conduct "does not violate established statutory or constitutional rights of which a reasonable person would have known."[24] This immunity includes most state and local government officials, such as police officers and correctional officers.[25] Those officials who act reasonably will be protected from liability for civil damages; however, those who are incompetent or those who purposely violate the law are not.[26] When determining whether qualified immunity applies, courts try to decipher if the law that was allegedly violated was a "clearly established statutory or constitutional right of which a reasonable person would have known."[27] The plaintiff must prove that the official violated his or her rights and also that the right violated has been clearly established

---

[22] *Liability Under Section 1983*, ORANGE CNTY. DEP'T OF EDUC., 1, 2 (2003). https://ocde.us/LegalServices/Documents/LIABILITY_UNDER_SECTION_1983_wcopyright.pdf.

[23] The Supreme Court has only allowed absolute immunity for a limited number of officials, the President of the United States, legislators when carrying out their legislative functions, and judges when carrying out their judicial functions. State executive officials and local officials are entitled to qualified immunity. *Hafer*, 502 U.S. at 29.

[24] Pearson v. Callahan, 555 U.S. 223, 231 (2009) (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

[25] *See* Lisa Soronen, *Civil and Criminal Justice Qualified Immunity*, NATIONAL CONFERENCE OF STATE LEGISLATURES, https://www.ncsl.org/research/civil-and-criminal-justice/qualified-immunity.aspx (last visited Feb. 12, 2023).

[26] *Id.*

[27] *Harlow*, 457 U.S. at 818. The issue in the case was "the scope of the immunity available to the senior aides and advisers of the President of the United States in a suit for damages based upon their official acts." This case dealt with a conspiracy during the Nixon administration where two White House aides to former President Nixon conspired to violate the statutory rights of Fitzgerald. *Harlow*, 457 U.S. at 802. This case has the same facts set out in *Nixon v. Fitzgerald*. The Court held government officials performing discretionary functions are generally shielded from liability for civil damages. 457 U.S. 731 (1982)).

Published by Digital Commons @ Touro Law Center,

Touro Law Review, Vol. 39, No. 1 [], Art. 9

at the time of the violation.[28] This standard test of qualified immunity is a malleable one as it "generally requires civil rights plaintiffs to show not just a clear legal rule, but a prior case with functionally identical facts."[29] Therefore, even if the plaintiff's rights were violated, there may not be a case whose facts coincide with the one at issue, resulting in the plaintiff not having any remedy. When qualified immunity is combined with a subjective standard analysis for a deficient medical care claim it is nearly impossible for plaintiffs to have any form of remedy.

It is relevant to look at not only qualified immunity, but also whether the claim is being brought under the Eighth or Fourteenth Amendment. It is important to differentiate between these amendments, as some § 1983 claims would not pass muster under the Eighth Amendment, but would suffice under the Fourteenth Amendment.

III. DISTINCTION BETWEEN THE EIGHTH AND FOURTEENTH AMENDMENT

A. Eighth Amendment

The Eighth Amendment of the United States Constitution states that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[30] Both pretrial detainees and convicted individuals are protected from inhumane treatment, but the source of the protection is derived from different constitutional amendments.[31] The Eighth Amendment protects those already convicted of crimes,[32] as the Eighth Amendment applies "only after the state has complied with the constitutional guarantees traditionally

[28] Abby Dockum, *Kingsley, Unconditioned: Protecting Pretrial Detainees with an Objective Deliberate Indifference Standard in §1983 Conditions-of-Confinement Claims*, 53 ARIZ. ST. L.J. 707, 725 (2021) (discussing qualified immunity as an affirmative defense from liability).

[29] Jay Schweikert, *Qualified Immunity*, A.B.A. (Dec. 17, 2020), https://www.americanbar.org/groups/public_education/publications/insights-on-law-and-society/volume-21/issue-1/qualified-immunity/.

[30] U.S. CONST. amend. VIII.

[31] David C. Gorlin, *Evaluating Punishment in Purgatory: The Need to Separate Pretrial Detainees' Conditions-of-Confinement Claims from Inadequate Eighth Amendment Analysis*, 108 MICH. L. REV. 417, 419 (2009); *see* Ingraham v. Wright, 430 U.S. 651, 671 n.40 (1977).

[32] *Ingraham*, 430 U.S. at 664.

https://digitalcommons.tourolaw.edu/lawreview/vol39/iss1/9

Black: Subjectively Speaking

associated with criminal prosecutions.[33] The Supreme Court has held that the Eighth Amendment does not provide any protection to those who have not had a formal adjudication of guilt and therefore does not apply to pretrial detainees.[34] The Eighth Amendment's "cruel and unusual punishment" requires an inquiry into the defendant's state of mind and should not be applied to claims brought by pretrial detainees.

B. Fourteenth Amendment

The Fourteenth Amendment to the United States Constitution is divided into five sections. This Note is concerned with the end of the first section which reads:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, *without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws.[35]

The Fourteenth Amendment, in contrast with the Eighth Amendment, provides protection for pretrial detainees.[36] When a state wants to impose some sort of "punishment," the proper constitutional guarantee is the Fourteenth Amendment's Due Process Clause.[37] However, since pretrial detainees have yet to be convicted of a criminal act, they are presumed innocent.[38] As such, the Fourteenth Amendment's Due Process Clause protects them from all acts intended to punish.[39] Thus, pretrial detainees have "*greater protections under the Constitution*" than those who have had their day in court.[40] It is for

---

[33] Graham v. Connor, 490 U.S. 386, 398 (1989) (citing Ingraham v. Wright, 430 U.S. 651, 671 n.40 (1997)).
[34] Gorlin, *supra* note 31, at 421.
[35] U.S. CONST. amend. XIV, § 1 (emphasis added).
[36] Gorlin, *supra* note 31, at 419-20.
[37] Bell v. Wolfish, 441 U.S. 520 & n.16 (1979).
[38] *See* Brief for Indiana et al. as Amici Curiae Supporting Petitioners, Gordon v. Cnty. of Orange, 888 F.3d 1118 (9th Cir. 2018) (No. 18-337), 2018 WL 5026287, at *7 ("Pretrial detainees are *different* from convicted prisoners- and similar to free persons-in that detainees enjoy a presumption of innocence.").
[39] Kate Lambroza, *Pretrial Detainees and the Objective Standard After Kingsley v. Hendrickson*, 58 AM. CRIM. L. REV. 429, 452 (2021).
[40] Chrisco v. Hayes, No. 17-cv-00072-MSK-MEH, 2017 U.S. Dist. LEXIS 187935 (D. Colo. Nov. 14, 2017) (citing *Bell*, 441 U.S. at 535) (emphasis added).

Published by Digital Commons @ Touro Law Center,

this reason that the Due Process Clause of the Fourteenth Amendment is applicable to claims of deficient medical treatment brought by pretrial detainees, halting government officials from infringing on a pretrial detainee's substantive due process rights. The Eighth Amendment approach to this matter (the deliberate indifference test) is repugnant to the analysis in *Kingsley* as discussed in Part IV.

Prior to *Kingsley*, courts applied the Eighth Amendment's deliberate indifference approach to pretrial detainees.[41] Subsequently, the applicable test in some circuits regarding pretrial detainees' deficient medical claims changed as a result of *Kingsley*, causing a rift amongst the circuit courts.

IV. KINGSLEY V. HENDRICKSON

A. Inadequate Medical Care Pre-*Kingsley*

Prior to the Court's decision in *Kingsley*, which caused some circuits to reevaluate their approach to pretrial detainees' § 1983 inadequate medical care claims, pretrial detainees were subject to the deliberate indifference standard found in *Estelle v. Gamble*.[42] The Court in *Estelle* held that for prisoners to bring an Eighth Amendment claim, they must "allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs."[43] The Court did not go into great detail defining what the "deliberate indifference" standard meant to inadequate medical care. Subsequent cases elaborated further on what exactly deliberate indifference entails.[44] Deliberate indifference is a definition that falls between negligence and purpose or knowledge,[45] and is broken down into a two part test: (1) the deprivation of rights alleged must be "sufficiently

[41] Estelle v. Gamble, 429 U.S. 97 (1976).
[42] *Estelle*, 429 U.S. at 104-05.
[43] *Id.* at 106.
[44] *See* Farmer v. Brennan, 511 U.S. 825, 835-37 (1994) (The Court held that the deliberate indifference standard is described as "a state of mind something more blameworthy than negligence." The Court stated that the official "must know[] of and disregard[] the 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." *Id.* at 837. The case follows *Estelle* and elaborates on the definition concluding it requires the plaintiff to prove a subjective requirement.). *Id.*
[45] *Id.* at 835-36.

serious," in other words, the plaintiff must show an objectively serious medical need; and (2) that the defendant was deliberately indifferent to that need.[46] This test is also known as the subjective standard because deliberate indifference is a state of mind itself.[47] The second prong of the deliberate indifference standard requires that the plaintiff show that the defendant actually knew his acts or omissions would cause a substantial risk to an individual's health.[48] It is therefore something more than negligence by the defendant.[49] Many circuit courts have come to the conclusion that deliberate indifference is analogous to recklessness.[50] When it came time to apply a standard to pretrial detainees' inadequate medical care claims, rather than convicted persons' claims, the majority of the Supreme Court decided to expand the Eighth Amendment approach of cruel and unusual punishment cases and use of the subjective standard, requiring pretrial detainees to prove a mens rea element in order to succeed on their claim.[51] Without a definitive answer from the Supreme Court prior to the *Kingsley* decision, regarding inadequate medical care claims, lower courts applied *Estelle's* deliberate indifference standard.[52] This should not have been the case.

A pretrial detainee should not have to prove a "reckless" state of mind, or any state of mind for that matter, when bringing a claim against an official regarding inadequate medical treatment. Pretrial detainees should not be burdened with proving a mens rea requirement

---

[46] *Id.* at 834.
[47] *See* Brief for Petitioners, Gordon v. Cnty. of Orange, 888 F.3d 1118 (9th Cir. 2018) (No. 18-337).
[48] *See id.*
[49] *Farmer*, 511 U.S. at 835 (deliberate indifference is inappropriate in excessive force cases (citing Hudson v. McMillian, 503 U.S. 1, 6 (1992)).
[50] *Id.* at 836.
[51] *See, e.g.*, Estelle v. Gamble, 429 U.S. 97, 104-06 (1976); *Farmer*, 511 U.S. at 834-35.
[52] Brief for Indiana et al. as Amici Curiae Supporting Petitioners, Gordon v. Cnty. of Orange, 888 F.3d 1118 (9th Cir. 2018) (No. 18-337), 2018 WL 5026287, at *9 (citing Smith v. Sangamon Cnty. Sheriff's Dep't, 715 F.3d 188, 191 (7th Cir. 2013); Coscia v. Town of Pembroke, 659 F.3d 37, 39 (1st Cir. 2011); Clouthier v. Cnty. of Contra Costa, 591 F.3d 1232, 1241-42 (9th Cir. 2010); Martinez v. Beggs, 563 F.3d 1082, 1088 (10th Cir. 2009); Caiozzo v. Koreman, 581 F.3d 63, 66, 69-72 (2d Cir. 2009); Phillips v. Roane Cnty., 534 F.3d 531, 539-40 (6th Cir. 2008); Butler v. Fletcher, 465 F.3d 340, 344 (8th Cir. 2006); Cook ex rel. Est. of Tessier v. Sheriff of Monroe Cnty., 402 F.3d 1092, 1115 (11th Cir. 2005); Wolosyn v. Cnty. of Lawrence, 396 F.3d 314, 319-20 (3d Cir. 2005); Brown v. Harris, 240 F.3d 383, 388 (4th Cir. 2001); Hare v. City of Corinth, 74 F.3d 633, 643 (5th Cir. 1996)).

Touro Law Review, Vol. 39, No. 1 [], Art. 9

to receive an adequate remedy when they are at the mercy of government officials to provide them adequate care. *Kingsley* takes a different approach, disregarding a mens rea element to a pretrial detainee's § 1983 claim and applying a logical and more appropriate standard known as the objective standard.[53]

B. *Kingsley v. Hendrickson* Procedure

In 2011, Michael Kingsley, a pretrial detainee, sued a number of correctional officers at Monroe County jail in Wisconsin under § 1983, alleging his rights had been violated under the Fourteenth Amendment's Due Process Clause due to excessive force.[54] The district court denied defendants' motion for summary judgment because there was a clear dispute as to the material facts.[55] The jury found that Kingsley's due process rights were not violated, and it was later determined on appeal by the Seventh Circuit that the jury instructions were not erroneous, affirming the lower court's decision.[56] The Supreme Court granted Kingsley's petition for a writ of certiorari regarding "whether, to prove an excessive force claim, a pretrial detainee must show that the officers were subjectively aware that their use of force was unreasonable, or only that the officers' use of that force was objectively unreasonable."[57] What began as a pro se plaintiff's claim for the violation of his Fourteenth Amendment rights has now become a very controversial case among the circuits, causing a split among them, with each circuit trying to determine whether the objective or subjective standard should apply with regard to § 1983 claims brought by pretrial detainees.

C. *Kingsley v. Hendrickson* Analysis

In *Kingsley v. Hendrickson*, the question was to determine whether a subjective or objective standard should apply to a force that was deliberately used.[58] The Court applied the objective standard

[53] *Kingsley*, 576 U.S. 389 (2015).
[54] Kingsley v. Josvai, No. 10-cv-832-bbc, 2011 U.S. Dist. LEXIS 158769, at *1 (W.D. of Wis. Nov. 16, 2011).
[55] *Kingsley*, 576 U.S. at 393.
[56] *Id.* at 403; Kingsley v. Hendrickson, 744 F.3d 443, No. 12-3639, 2014 U.S. App. LEXIS 3972 (7th Cir. Mar. 3, 2014).
[57] *Kingsley*, 576 U.S. at 391-92.
[58] *Id.* at 391.

https://digitalcommons.tourolaw.edu/lawreview/vol39/iss1/9

because it is consistent with precedent,[59] is workable,[60] and would protect any officer who is acting in good faith.[61] The Court decided this was the proper standard to apply in excessive force claims and did not require the plaintiff to prove a state of mind.[62]

The excessive force claim in this case arose because Kingsley, the detainee, refused to remove a piece of paper from a light fixture, when asked on several occasions to remove it.[63] Four officers proceeded to enter Kingsley's cell where he was then handcuffed, forcibly removed and placed into a receiving cell.[64] Sergeant Hendrickson placed his knee into Kingsley's back.[65] Explicit language was exchanged which resulted in Kingsley allegedly getting his head slammed into a concrete bunk.[66] Hendrickson then directed another officer to tase Kingsley.[67] Kingsley was tased for five seconds and then left alone while still handcuffed in the receiving cell for fifteen minutes.[68]

The Federal District Court and the Court of Appeals for the Seventh Circuit held that a "subjective inquiry" into the mind of the officers was required.[69] The jury instructions required a state of mind that was malicious and sadistic in nature for the purpose of causing harm to the plaintiff.[70] These jury instructions required Kingsley to

---

[59] *Id.* at 397.
[60] *Id.* at 399.
[61] *Id.*
[62] *Id.* at 392.
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.* at 393.
[68] *Id.*
[69] *See id.*; *Kingsley*, No. 10-cv-832-bbc, 2011 U.S. Dist. LEXIS 158769; *Kingsley*, 744 F.3d 443, No. 12-3639, 2014 U.S. App. LEXIS 3972.
[70] *Kingsley*, 744 F.3d at 447. The jury instructions were:

> Excessive force means force applied recklessly that is unreasonable in light of the facts and circumstances of the time. Thus, to succeed on his [Kingsley's] claim of excessive use of force, plaintiff must prove each of the following factors by a preponderance of the evidence: (1) Defendants used force on plaintiff; (2) Defendants' use of force was unreasonable in light of the facts and circumstances at the time; (3) Defendants knew that using force presented a risk of harm to plaintiff, but they recklessly disregarded plaintiff's safety by failing to take reasonable measures to minimize the risk of harm to plaintiff; and Defendants' conduct caused some harm to plaintiff . . . . Also, in deciding whether one or more defendants

Touro Law Review, Vol. 39, No. 1 [], Art. 9

prove the defendants "'recklessly disregarded his safety' . . . while telling the jury it could consider objective factors in making this determination."[71] Kingsley argued that the word "recklessly" requires a subjective state of mind requirement and the Supreme Court agreed, determining that the jury instructions were erroneous because they required an application of the subjective standard.[72]

The Supreme Court concluded that the objective standard should apply, resulting in a pretrial detainee not having to prove the defendant's state of mind.[73] The Respondents in the case argued that the subjective standard should be applied, showing that the force used was done "maliciously and sadistically to cause harm" and was not applied in a good faith effort.[74] Respondents cited to numerous cases which the Supreme Court did not find persuasive, two of which pertained to the Eighth Amendment.[75] As noted in previous Supreme Court cases and many others, the Eighth Amendment's Cruel and Unusual Punishment Clause and the Fourteenth Amendment's Due Process Clause have fundamentally different natures. The Eighth Amendment, as previously stated, pertains to convicted individuals and deals with punishment. Pretrial detainees cannot legally be punished because they have yet to be convicted.

The *Kingsley* Court arrived at this conclusion by implementing a two-prong test.[76] In order to satisfy the first prong, the defendant "must possess a purposeful, a knowing, or possibly a reckless state of mind."[77] The Court specifically chose these words as to not be confused with negligence because negligence does not fall under the

> used unreasonable force and acted with reckless disregard of plaintiff's right you may consider factors . . . . *Id.*

[71] *Kingsley*, 576 at 402-03.
[72] *Id.* at 403.
[73] *Id.* at 395.
[74] *Id.* at 400 (citing Brief for Respondents at 27, Kingsley v. Hendrickson, 576 U.S. 389 (2015) (No. 14-6368), 2015 WL 1519055, at *27).
[75] *Id.* at 400 (citing Brief for Respondents at 27, Kingsley v. Hendrickson, 576 U.S. 389 (2015) (No. 14-6368), 2015 WL 1519055, at *27). The cases cited by the Respondents that pertain to the Eighth Amendment were: Hudson v. McMillian, 503 U.S. 1 (1992); Whitley v. Albers, 475 U.S. 312 (1986); the remainder of the cases cited were: Cnty. of Sacramento v. Lewis, 523 U.S. 833 (1998); Johnson v. Glick, 481 F.2d 1028 (2d Cir. 1973).
[76] *Kingsley*, 576 U.S. at 395-96.
[77] *Id.* at 396.

https://digitalcommons.tourolaw.edu/lawreview/vol39/iss1/9

Due Process Clause of the Constitution.[78] The second prong of the test asks whether the force was excessive. To determine this, the Court applied the objective standard.[79] The second prong is to be determined from "the perspective of a reasonable officer on the scene and what he knew at the time," not what he knew in hindsight.[80] The Court arrived at this conclusion by first noting that the objective standard is consistent with precedent,[81] but it also dove into its previous analysis of *Graham* and *Bell*.[82] In *Graham*, the Court stated the Due Process Clause protects pretrial detainees from force that amounts to punishment.[83] The Court in *Bell* determined that pretrial detainees can prevail if they prove that the official's action is not related to a "legitimate nonpunitive governmental interest" which is consistent with the objective standard because it does not examine the official's mind but rather looks to objective facts surrounding the case.[84] This standard is not one that can be applied mechanically to all cases and must be analyzed on a case-by-case basis.[85] Lastly, the Court discussed the good faith nature of an official[86] and found that the objective standard adequately protects any official who acts in good faith.[87]

The Supreme Court in *Kingsley* took a step in the right direction by applying the objective standard to excessive force claims and explicitly rejecting the Respondents' Eighth Amendment arguments pertaining to punishment. However, this still leaves a lot to be determined by the lower courts and how it should analyze other pretrial detainees' claims under § 1983. It seems as if an official who is doing his or her job and acting with good faith should have nothing to worry about regarding the objective standard as many facilities "train officers to interact with all detainees as if the officers' conduct is subject to an objective reasonableness standard."[88] There should be

---

[78] *Id.*; *see Kingsley*, 774 F.3d at 458 (Hamilton, J., dissenting); *see also* Lambroza, *supra* note 39, at 438 n.54.
[79] *Kingsley*, 576 U.S. at 395.
[80] *Id.*
[81] *Id.* at 397.
[82] *Id.* at 398-400.
[83] *Id.* (citing Graham v. Connor, 490 U.S. 386, 395 (1989)).
[84] *Id.* at 398.
[85] *Id.* at 397 (citing *Graham*, 490 U.S. at 396).
[86] *Id.* at 399.
[87] *Id.*
[88] *Id.*

Touro Law Review, Vol. 39, No. 1 [], Art. 9

uniformity among the circuits and lower courts when a pretrial detainee brings a § 1983 claim. A detained individual should not have different hurdles when trying to prove a § 1983 claim depending on where the detention is located; however, this is still occurring across the country.[89]

V. THE CURRENT CIRCUIT SPLIT

The *Kingsley* case caused a great divide among the circuit courts. The decision in *Kingsley* only referenced excessive force claims; it did not decide on the other claims that can be brought under § 1983 dealing with confinement, failure to protect, and the primary focus of this Note—deficient medical treatment. There is a four-to-three circuit split at the moment regarding whether the subjective or objective standard should be applied to pretrial detainees' substantive due process claims. As previously discussed, the Supreme Court ruled on the excessive force claims but left the circuits to determine which standard to apply, the objective or subjective standard, to other § 1983 claims. It seems reasonable to believe that there should be uniform application of the objective standard to all pretrial detainees' claims, but not all circuits see it that way, leaving appellate courts to grapple with the important question. The Supreme Court has stated that the states are required to provide medical care to pretrial detainees, but it has never explicitly stated the appropriate standard that should be applied in those cases.[90] This section will analyze the different approaches that are being taken in each circuit. This section will also discuss *Strain v. Regalado*,[91] the Supreme Court's most recent opportunity, which it declined, to answer the question of what standard needs to be applied when analyzing pretrial detainees' claims of deficient medical treatment.

[89] *See, e.g.*, Whitney v. City of Saint Louis, 887 F.3d 857 (8th Cir. 2018); Dang v. Sheriff, Seminole Cnty. Fla., 871 F.3d 1272 (11th Cir. 2017); Alderson v. Concordia Par. Corr. Facility, 848 F.3d 415 (5th Cir. 2017); Butler v. Fletcher, 465 F.3d 340 (8th Cir. 2006).
[90] Brief for Indiana et al. as Amici Curiae Supporting Petitioners, Gordon v. Cnty. of Orange, 888 F.3d 1118 (9th Cir. 2018) (No. 18-337), 2018 WL 5026287, at *8.
[91] 977 F.3d 984 (10th Cir. 2020).

Black: Subjectively Speaking

A. Circuits Using the Subjective Standard

1. The Fifth Circuit

The Fifth Circuit believes the deliberate indifference standard is the applicable standard when looking at a § 1983 claim brought by a pretrial detainee.[92] In *Alderson v. Concordia Parish Correctional Facility*, the Fifth Circuit stated that a plaintiff bringing an action must show the official or medical staff "knew of and disregarded a substantial risk of serious harm."[93] The official's conduct has to be reckless.[94] In *Alderson,* the plaintiff brought an inadequate medical care claim to which the court applied the deliberate indifference standard.[95] The court stated, to show deliberate indifference the plaintiff can demonstrate that the official refused to treat the plaintiff, ignored complaints, or intentionally mistreated the plaintiff.[96] The official in this case allegedly stated to the plaintiff to "man up and wait til [sic] medical staff returns from the Christmas holiday," when the plaintiff was suffering from stab wounds that occurred in the correctional facility.[97] The lower court stated that the plaintiff failed to show facts that he suffered substantial harm.[98] The circuit court realized that the facts alleged can show deliberate indifference.[99] The facts outlined in this case would be sufficient under the objective standard. The officer involved should have known the risk involved and intentionally refused to provide adequate care. A plaintiff should not have to prove deliberate indifference in any sense. This case proves the importance of having an objective standard in place to protect pretrial detainees from inadequate care in the hands of government supervision. The plaintiff here was stabbed numerous times in an incident while in the care of a correctional facility and no medication or care was provided for days.[100] A plaintiff should not

[92] *See Alderson*, 848 F.3d 415.
[93] *Id.* at 419-20 (citing Domino v. Tex. Dep't of Crim. Just., 239 F.3d 752, 755 (5th Cir. 2001)).
[94] *Id.* at 420.
[95] *Id.* at 418.
[96] *Id.* at 422.
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.* at 419.

Published by Digital Commons @ Touro Law Center,

Touro Law Review, Vol. 39, No. 1 [], Art. 9

have to wait in fear for governmental officials to act; the officials should intervene and provide adequate care, unlike in *Alderson*.[101]

2. The Eighth Circuit

The Eighth Circuit is in accord with the Fifth Circuit.[102] In *Whitney v. City of Saint Louis*,[103] the Eighth Circuit concluded the objective standard is not appropriate to § 1983 claims.[104] After Whitney was arrested on August 4, 2014,[105] he was taken to St. Louis University Hospital due to an irregular heartbeat.[106] While he was there, doctors determined he was suicidal.[107] Four days later he was deemed "fit for confinement" and moved to St. Louis City Justice Center.[108] On August 10, 2014, Whitney was moved to a medical facility inside the Justice Center because he was suffering from heroin withdrawals, congestive heart failure, hypertension, and diabetes mellitus.[109] Whitney's cell was monitored by "closed-circuit television."[110] The individual in charge of monitoring his cell was Ms. Sharp.[111] While Sharp was monitoring Whitney, she watched him pace back and forth, and just fourteen minutes later she discovered Whitney hanged himself using his own hospital gown.[112] It is unclear whether Sharp was diligently monitoring Whitney during this fourteen-minute interval.

After Whitney's death, an unnamed medical practitioner at the Justice Center reported that Whitney suffered from suicidal

---

[101] *Id.* at 418-19. The plaintiff was prescribed antibiotics and painkillers for multiple puncture wounds and potential broken ribs. Alderson asked the official for his prescription, but did not receive it until a week later. As a result of the event, Alderson suffered from mental instability and lived in fear of his life from both inmates and jail staff.

[102] *See* Karsjens v. Laurey, 988 F.3d 1047 (8th Cir. 2021); Leftwich v. Cnty. of Dakota, 9 F.4th 966 (8th Cir. 2021); Whitney v. City of Saint Louis, 887 F.3d 857 (8th Cir. 2018).

[103] *Whitney*, 887 F.3d 857.

[104] *Id.* at 860.

[105] *Id.* at 859.

[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] *Id.*

https://digitalcommons.tourolaw.edu/lawreview/vol39/iss1/9

Black: Subjectively Speaking

thoughts.[113] However, Whitney denied that claim before his passing when questioned by correctional officers.[114] Whitney's father brought suit asserting claims under § 1983.[115] The complaint alleged that Sharp acted with deliberate indifference by failing to adequately monitor Whitney, failing to provide timely medical care, and failing to intervene.[116] The circuit court relied on precedent which established that "whether an official was deliberately indifferent requires both an objective and a subjective analysis."[117] The circuit court stated that Whitney's father needed to show that Sharp had actual knowledge that Whitney posed a substantial risk of suicide and if that was proven then he must prove that Sharp failed to take reasonable precautions to abate the risk.[118] Whitney's father could not show that Sharp had actual knowledge of his suicidal thoughts or tendencies.[119] The court also looked at the procedural aspects, referencing *Iqbal*[120] and *Twombly*,[121] stating the complaint contained a legal conclusion and failed to make any reference to Sharp's knowledge.[122] The court went on to state that the objective standard in *Kingsley* could not be applied to this case because *Kingsley* dealt with excessive force while this was a case pertaining to deliberate indifference.[123] The circuit court concluded the proper standard to apply is the subjective standard.[124] If this case was viewed under the less stringent requirement of the objective standard test, withholding the procedural mishaps, it is likely a different result would have occurred. Whitney's father would not have to prove the defendant's state of mind regarding Whitney's inadequate care, but that the defendant was aware of and should have known about the medical need, viewed in the totality of the circumstances. Sharp should have known of Whitney's condition based on the fact that Sharp was supposed to monitor Whitney's cell and was required to make a

[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] *Id.* at 860.
[118] *Id.* (citing Coleman v. Parkman, 349 F.3d 534, 538 (8th Cir. 2003)).
[119] *Id.*
[120] Ashcroft v. Iqbal, 556 U.S. 622, 678 (2009).
[121] Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).
[122] *Whitney*, 887 F.3d at 860.
[123] *Id.* at 860 n.4; *see also* Petition for Writ of Certiorari at 12, Strain v. Regalado, 977 F.3d 984 (10th Cir. 2020) (No. 20-1562), 2021 WL 1911091, at *12.
[124] *Id.* at 859-60.

physical check if he was not visible. Here, Whitney was not visible as he hanged himself in the shower area. Sharp failed to act accordingly and did not abate any risk, which resulted in Whitney's death. When viewed under the objective standard Whitney's father would not have to prove a mens rea element to receive a remedy for his son's death.

3. The Tenth Circuit

In *Barrie v. Grand County*,[125] the Tenth Circuit relied heavily on *Estelle* and the Circuit's precedent.[126] In *Barrie*, Alan Charles Ricks committed suicide in the county jail located in Grandy County, Utah.[127] Ricks's estate along with his mother and his heirs filed multiple claims, one being a § 1983 civil rights claim for inadequate medical care.[128] The plaintiffs in this case tried, but failed, to argue the standard that should be applied is one of objective reasonableness.[129] The court determined the deliberate indifference standard was appropriate.[130] The *Barrie* court relied on a quote from a previous case, which claimed "pretrial detainees . . . are entitled to the same degree of protection regarding medical attention as that afforded convicted inmates under the Eighth Amendment"; therefore, the deliberate indifference standard must be used to judge serious medical needs.[131] The court concluded the custodian of the pretrial detainee must know of the risk involved and then act with deliberate indifference to the known risk.[132] The plaintiffs, in this case, could not prove such a rigid requirement.

---

[125] 119 F.3d 862 (10th Cir. 1997). The plaintiffs in this case were aware of the Tenth Circuit's use of the deliberate indifference standard in medical care claims; however, they argued that because Ricks was not brought before a magistrate judge prior to his suicide the applicable standard was one of objective reasonableness.

[126] The court cited to numerous cases throughout its opinion including multiple Supreme Court cases as well as Tenth and Eleventh Circuit cases such as: Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983); Estelle v. Gamble, 429 U.S. 97, 104 (1976); Wilson v. Meeks, 52 F.3d 1547, 1555 (10th Cir. 1995); Est. of Hocker v. Walsh, 22 F.3d 995, 998 (10th Cir. 1994); Howard v. Dickerson, 34 F.3d 978, 980-81 (10th Cir. 1994); Martin v. Bd. of Cnty. Comm'r of Cnty. of Pueblo, 909 F.2d 402 (10th Cir. 1990); and many more.

[127] *Barrie*, 199 F.3d at 863.

[128] *Id.*

[129] *Id.* at 865.

[130] *Id.* at 866-71.

[131] *Id.* at 867 (citing Frohmader v. Wayne, 958 F.2d 1024, 1028 (10th Cir. 1992)).

[132] *Id.* at 869.

Black: Subjectively Speaking

The Supreme Court recently denied a writ of certiorari in the Tenth Circuit case of *Strain v. Regalado*.[133] Mr. Pratt was held in Tulsa County jail and exhibited alcohol withdrawal symptoms.[134] A few days later Pratt was placed on seizure precautions, which required staff to check his vital signs every eight hours.[135] A number of nurses checked on Pratt, although some nurses did not check his vitals.[136] Dr. Curtis McElroy noticed a two-centimeter cut on his forehead and a pool of blood in his cell.[137] Dr. McElroy, who was aware of Pratt's symptoms and medical records, did not send Pratt to a hospital or provide more care.[138] Dr. McElroy did nothing in response to Pratt's physical care.[139] Rather, Dr. McElroy proceeded to record that Pratt received a dose of Valium earlier that morning.[140] There was another Armor nurse who came across Pratt later that afternoon and that nurse recognized Pratt needed assistance with daily living activities.[141] Again, nothing was done.[142] Around midnight one morning, Pratt lay motionless in his cell and it was later determined he had suffered a cardiac arrest.[143] He was sent to the hospital and diagnosed with a seizure disorder and other ailments which left him *permanently disabled*.[144] Faye Strain, as the guardian of Pratt, brought suit because

---

[133] 977 F.3d 984 (10th Cir. 2020).

[134] *Id.* at 987.

[135] *Id.*

[136] *Id.* at 988; *see* Petition for Writ of Certiorari at 6-7, Strain v. Regalado, 977 F.3d 984 (10th Cir. 2020) (No. 20-1562), 2021 WL 1911091, at *7.

> Patricia Deane, a nurse, conducted an assessment and documented that Pratt was experiencing "constant nausea, frequent dry heaves and vomiting," "severe" tremors, "acute panic states as seen in severe delirium or acute schizophrenic reactions, [sic] "drenching sweats," confusion about "place/or person"' and "continuous hallucinations" (citation omitted). She did not contact a physician, check his vitals, or perform any additional assessments (citation omitted). Respondent Curtis McElroy, a medical doctor, documented a laceration on Pratt's forehead and a pool of blood in the cell, and was aware of Pratt's earlier symptoms, but still did not send him to the hospital (citation omitted). Respondent Kathy Loehr, a mental health counselor, also failed to seek additional care for Pratt despite observing the obvious signs and symptoms of brain injury. *Id.*

[137] *Id.* at 988.

[138] *Id.*

[139] *See id.*

[140] *Id.*

[141] *Id.*

[142] *See id.*

[143] *Id.*

[144] *Id.* (emphasis added).

Touro Law Review, Vol. 39, No. 1 [], Art. 9

of the inadequate medical care.[145] Strain argued the objective standard should be applied following the *Kingsley* decision.[146]

The opinion in *Strain* was quick to define deliberate indifference as an act or omission that needs to be objectively unreasonable and the defendant must have acted with subjective awareness of the risk.[147] The court stated the word "deliberate" makes a subjective component essential to the claim.[148] The objective prong "must be 'sufficiently serious' to constitute a deprivation of constitutional dimension."[149] A serious medical need is one that is diagnosed by a doctor requiring treatment or one that is obvious to a lay person.[150] The subjective prong, as previously defined, is one satisfied when the plaintiff can show the medical official knew of and disregarded an excessive risk to the detainee's health or safety.[151] The medical official has to be aware of the facts in which an inference can be drawn, that if disregarded could result in serious harm, and must draw said inference.[152] The court expressly declined the *Kingsley* approach.[153] One reason the court declined the *Kingsley* approach is because *Kingsley* dealt with excessive force claims and did not directly deal with the detainee, but rather the force used against the detainee.[154] Another reason related to the subjective component found in the deliberate indifference standard.[155] Lastly, the court stated the weight of precedent should not extend the objective standard to a "new context or new category of claims" because it would contradict the principles of stare decisis.[156]

---

[145] *Id.*
[146] *Id.* at 989.
[147] *Id.* at 987.
[148] *Id.*
[149] *Id.* at 989-90 (citing Self v. Crum, 439 F.3d 1227, 1230 (10th Cir. 2006) (quoting Farmer v. Brennan, 511 U.S. 825, 834 (1994)).
[150] *Id.* at 990.
[151] *Id.*
[152] *Id.* (citing Mata v. Saiz, 427 F.3d 745, 751 (10th Cir. 2005) (quoting *Farmer*, 511 U.S. at 837)).
[153] *Id.* at 991 (stating "[w]e decline to extend *Kingsley* to Fourteenth Amendment deliberate indifference claims").
[154] *Id.*
[155] *Id.*
[156] *Id.*

4. The Eleventh Circuit

The Eleventh Circuit used the subjective standard before the *Kingsley* decision and continues to use it.[157] In a more recent case decided in 2017, *Nam Dang v. Sheriff, Seminole County Florida*,[158] the Eleventh Circuit stated a deliberate indifference standard applies to inadequate medical care claims being brought by pretrial detainees under § 1983.[159] In *Dang*, Nam Dang, the pretrial detainee, was arrested and while in the correctional facility was acting bizarrely according to Alicia Scott, who was a licensed practical nurse.[160] Scott checked Dang's vitals and placed him in the mental health segregation for observation.[161] Multiple nurses checked on him and he was monitored regularly.[162] One morning after Dang informed Densmore, a registered nurse, about a two-week long headache, Densmore ran tests on him and observed white spots on his tongue and also noted he was unsteady when standing.[163] After observing him, Densmore asked Dr. Ogunsanwo to see Dang immediately, and after Dr. Ogunsanwo observed him, he suspected meningitis and had him transported to the emergency room, where he was later diagnosed with meningitis.[164] Dang then filed a § 1983 suit alleging inadequate medical care against the jail's health care providers as well as Seminole County Sheriff.[165]

Dang alleged inadequate medical care under the Fourteenth Amendment; however, the court stated Dang's claim would be evaluated under the same standards as a prisoner's claim under the Eighth Amendment.[166] Dang needed to prove "(1) a serious medical need; (2) the health care providers' deliberate indifference to that need; and (3) causation . . . ."[167] To show that there was deliberate indifference, Dang was required to prove that the defendants had

---

[157] Franklin v. Curry, 783 F.3d 1246, 1249 (11th Cir. 2013); Hamm v. DeKalb Cnty., 774 F.2d 1567 (11th Cir. 1985); *see* Moore v. Admin. of the Chambers Cnty. Sheriff's Dep't, No. 3:17-CV-37-ALB, 2019 U.S. Dist. LEXIS 217858, at *13-17 (M.D. of Ala. Dec. 18, 2019).
[158] 871 F.3d 1272.
[159] *Id.* at 1279.
[160] *Id.* at 1277.
[161] *Id.*
[162] *Id.* at 1277-78.
[163] *Id.* at 1278.
[164] *Id.*
[165] *Id.*
[166] *Id.* at 1279.
[167] *Id.* (citing Goebert v. Lee Cnty., 510 F.3d 1312, 1326 (11th Cir. 2007)).

subjective knowledge of a risk of serious harm and that they disregarded the risk.[168] The court went on to state that subjective knowledge requires the defendant to 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."[169] The court concluded that the medical staff did not act with deliberate indifference.[170] Based on the facts of the case, the conclusion seems correct, but the standard used to reach the conclusion was incorrect. The court's reasoning for not applying the objective standard found in *Kingsley* was similar to the Fifth Circuit's, stating *Kingsley* involved an excessive force claim, not a claim of inadequate medical care due to deliberate indifference.[171] The court then stated, however, if it were to use the objective standard, the only claim applicable to this case would be negligence, which is not covered under either standard.[172]

Based on the Eleventh Circuit's analysis, the act was deemed negligence strictly because it did not meet the subjective deliberate indifference standard.[173] Given the facts of this case, it is difficult to determine whether the outcome would have changed, but the court should have used a different test. The court disregarded the objective standard analysis simply because the facts did not meet the subjective deliberate indifference standard, concluding it must therefore be negligence. The court should have, at a minimum, included an objective standard analysis after deeming it insufficient to satisfy the subjective standard test, because a finding of negligence "only after a subjective deliberate indifference analysis does not suffice to stave off whether the facts would allege a constitutional violation under the objective standard."[174]

---

[168] *Id.* at 1280.
[169] *Id.*
[170] *Id.* at 1283.
[171] *Id.* at 1279 n.2 (citing *United States v. Kaley*, which stated the case at issue here is not "squarely on point" and does not "actually abrogate or directly conflict with" the standard and claim brought by Dang. 579 F.3d 1246, 1255 (11th Cir. 2009)); *see also* Petition for Writ of Certiorari at 12, Strain v. Regalado, 977 F.3d 984 (10th Cir. 2020) (No. 20-1562), 2021 WL 1911091, at *12.
[172] *Id.* at 1279 n.2.
[173] *See* Lambroza, *supra* note 39, at 458.
[174] *Id.* at 458.

Black: Subjectively Speaking

B. Circuits Using the Objective Standard

The Second, Seventh, and Ninth Circuits follow the objective approach that is laid out in *Kingsley*. Some of the cases did not directly discuss inadequate medical care of pretrial detainees. However, these courts extended the objective standard to all pretrial detainee claims brought under § 1983.[175] These circuits follow the rational analysis of *Kingsley* and apply the objective standard to pretrial detainees' § 1983 claims.

1. The Ninth Circuit

The Ninth Circuit was the first to lead the charge for the application of the objective standard found in *Kingsley* and interpreted the decision broadly.[176] This broad interpretation was applied in *Castro v. County of Los Angeles*[177] which dealt with a failure-to-protect claim that was brought under the Fourteenth Amendment.[178] In *Castro*, the court made reference to *Kingsley*, stating the court in *Kingsley* "did not limit its holding to force" but left the door open to other governmental actions generally.[179] A 2018 case came to the Court of Appeals for the Ninth Circuit two years after the decision in *Castro*, *Gordon v. County of Orange*.[180] In *Gordon*, the claim brought dealt with the inadequate medical care of a pretrial detainee.[181] The circuit court explicitly rejected the subjective deliberate indifference standard.[182] The court stated that the Eighth Amendment analysis provides a "minimum standard of care" in determining pretrial

---

[175] Castro v. Cnty. of Los Angeles, 833 F.3d 1060, 1070 (9th Cir. 2016) (stating there is not a single deliberate indifference standard that can apply to all § 1983 claims).
[176] Brief for Indiana et al. as Amici Curiae Supporting Petitioners, Gordon v. Cnty. of Orange, 888 F.3d 1118 (9th Cir. 2018) (No. 18-337), 2018 WL 5026287, at *11; *see* Castro v. Cnty. of Los Angeles, 833 F.3d 1060 (9th Cir. 2016).
[177] *Castro*, 833 F.3d 1060.
[178] *Id.* at 1064.
[179] *Id.* at 1070.
[180] 888 F.3d 1118 (9th Cir. 2018).
[181] *Id.* This case came about due to the death of Mr. Gordon after he was detained. Mr. Gordon was arrested for drug charges and while detained went through an opioid withdrawal. He showed clear signs of withdrawal and because of inadequate medical care, Mr. Gordon died.
[182] *Id.* at 1122.

Touro Law Review, Vol. 39, No. 1 [], Art. 9

detainees' rights under the Fourteenth Amendment which include the right to adequate medical care.[183]

Applying a broad interpretation is logical according to the Ninth Circuit.[184] The court in *Gordon* looked at a number of factors to determine whether the objective standard is appropriate for inadequate medical care.[185] First, the court stated that § 1983 claims themselves do not require a state of mind requirement.[186] Second, the court stated there is no significant distinction between inadequate medical care claims and confinement claims. Third, the court noted that it has analyzed medical care claims consistently with failure-to-protect claims for a number of years.[187]

The Ninth Circuit properly applied *Kingsley* and did so broadly. One should not have different hurdles to prove inadequate medical care claims under § 1983. The Second and Seventh Circuits soundly followed the lead of the Ninth Circuit.[188]

2. The Second Circuit

The Second Circuit followed suit of *Kingsley* and the Ninth Circuit.[189] In *Darnell v. Pineiro*,[190] the Second Circuit decided the lower court erred in applying the deliberate indifference standard.[191] *Darnell* dealt with conditions of confinement in a Brooklyn, New York holding facility.[192] The conditions were so grotesque that nine separate individuals brought suit pertaining to their confinement.[193] The lower court's ruling came shortly after the *Kingsley* decision.[194] The opinion in *Darnell* broke down the analyses of earlier Second Circuit and Supreme Court decisions and explained why the objective standard

[183] *Id.* (citing Carnell v. Grimm, 74 F.3d 977 (9th Cir. 1996)).
[184] *Id.* at 1124.
[185] *Id.* at 1124-25.
[186] *Id.* at 1124.
[187] *Id.*
[188] *See* Darnell v. City of N.Y., 849 F.3d 17 (2d Cir. 2017); Miranda v. Cnty. of Lake, 900 F.3d 335 (7th Cir. 2018).
[189] *See* Darnell v. Pineiro, 843 F.3d 17 (2d Cir. 2017).
[190] *Id.*
[191] *Id.* at 30.
[192] *Id.* at 20.
[193] *Id.*
[194] *Id.* at 21.

should be applied.[195] In *Darnell*, the court stated "it is plain that punishment has no place in defining the mens rea element of a pretrial detainee's claim under the Due Process Clause."[196] The court concluded that the deliberate indifference standard is inapplicable to the Fourteenth Amendment Due Process claims and should be viewed objectively.[197] Even though this case pertains to conditions of confinement of pretrial detainees, the Second Circuit made sure to state that pretrial detainees cannot be punished under the Fourteenth Amendment regardless of the claims brought.[198]

The Second Circuit heard a case subsequent to the decision of *Darnell* and held the trial court's decision in *Bruno v. Schenectady*[199] was erroneous because it relied on the subjective standard which predated the *Darnell* decision.[200] The *Bruno* court mentioned that the lower court relied on the defendant's mindset, rather than what a reasonable person would do under the circumstances.[201]

3. The Seventh Circuit

The prevailing case that changed the way the Seventh Circuit views § 1983 claims brought under the Fourteenth Amendment's Due Process Clause is *Miranda v. County of Lake*.[202] This case arose when Lyvita Gomes was arrested for failure to show for jury duty and when arrested she resisted, leading to two separate charges.[203] Ms. Gomes was later released but she failed to appear on her next court date, which ended fatally for Ms. Gomes.[204] Prior to this case, the Seventh Circuit

---

[195] *Id.* at 32-36. The court went into detail regarding the *Farmer* decision and then the *Kingsley* decision and why the objective standard found in *Kingsley* is the appropriate standard to apply. The ruling in *Darnell* not only overturned the decision from the lower court, but overturned the ruling of *Caiozzo v. Koreman*, 581 F.3d 63 (2d Cir. 2009), which the Second Circuit relied on when dealing with Fourteenth Amendment Due Process Claims.
[196] *Id.* at 35; *see* Brief for Indiana et al. as Amici Curiae Supporting Petitioners, Gordon v. Cnty. of Orange, 888 F.3d 1118 (9th Cir. 2018) (No. 18-337), 2018 WL 5026287, at *12.
[197] *Id.*
[198] *Id.*; *see* Lambroza, *supra* note 39, at 443.
[199] Bruno v. Schenectady, 727 Fed. App'x 717 (2d Cir. 2018).
[200] *Id.* at 720.
[201] *Id.*
[202] 900 F.3d 335 (7th Cir. 2018).
[203] *Id.* at 341.
[204] *Id.*

relied on the subjective standard regarding Fourteenth Amendment Due Process claims.[205] The decision in *Kingsley* shifted the approach the Circuit took when analyzing these type of claims, after it realized the rational steps to such an analysis.[206]

In *Miranda*, Ms. Gomes's estate brought suit based upon the deficient medical treatment Ms. Gomes received, or put more precisely, the medical treatment that she did not receive.[207] After being incarcerated, Gomes went on a hunger strike and the medical staff responded by placing her on a suicide watch.[208] The subsequent events resulted in deficient medical treatment. Social workers and physicians checked on Gomes daily and they realized her physical condition worsened.[209] They tried to persuade her to eat and drink water but to no avail; she would eat nothing and lay in bed refusing to speak.[210] Despite the fact that prison physicians diagnosed her with a "psychotic disorder," Gomes was never taken to a hospital or administered medication of any sort.[211] A doctor, who was on vacation during this occurrence, returned to work and, immediately upon hearing about Gomes, ordered her transfer to a hospital for evaluation and treatment.[212] However, it was too late and Ms. Gomes died; her death was labeled a suicide.[213]

On appeal, the Seventh Circuit focused on the intent and whether the lower court had properly instructed the jury.[214] During this analysis, the court looked at both *Estelle* and *Farmer*, stating the subjective standard is "closely linked to the language of the Eighth Amendment" implying it should not be applied in Fourteenth Amendment Due Process claims.[215] The court stated that "[p]retrial detainees stand in a different position: they have not been convicted of anything, and they are still entitled to the constitutional presumption of innocence."[216] The court even stated that in the past, when using

---

[205] *Id.* at 350.
[206] *Id.* at 351.
[207] *Id.* at 341.
[208] *Id.*
[209] *Id.* at 342.
[210] *Id.* at 341-42.
[211] *Id.*
[212] *Id.* at 342.
[213] *Id.*
[214] *Id.* at 350.
[215] *Id.* at 350.
[216] *Id.*

the deliberate indifference standard, something was missing, which was the difference that exists between the Eighth and Fourteenth Amendment standards.[217] The court relied heavily on *Kingsley* in its analysis, but also referred to its "sister circuits," the Second and Ninth Circuits.[218] The *Miranda* court rejected the argument that was set out previously in *Currie v. Chhabra*,[219] which stated that different standards apply "depending on the relationship between the state and the person in the state's custody."[220] The court concluded there is no logic behind this analysis.[221]

The Seventh Circuit in *Miranda* followed the Second and Ninth Circuits and reasonably concluded that deficient medical treatment claims that are brought under the Due Process Clause of the Fourteenth Amendment are subject only to the objective standard inquiry that was identified in *Kingsley*.[222] The opinion ended by stating a death like Gomes's is especially disturbing because it could have been prevented if adequate care was given to Ms. Gomes.[223]

VI. THE OBJECTIVE STANDARD SHOULD BE EXTENDED TO PRETRIAL DETAINEES' INADEQUATE MEDICAL CARE CLAIMS

Currently, there are roughly two million people incarcerated throughout the United States.[224] Of the two million individuals incarcerated, more than 400,000 individuals are classified as pretrial detainees.[225] Over forty years after the decision of *Bell*, which

---

[217] *Id.*
[218] *Id.* at 351 (citing Gordon v. Cnty. of Orange, 888 F.3d 1118, 1122-25 (9th Cir. 2018); *Bruno*, 727 Fed. App'x at 720); Darnell v. Pineiro, 843 F.3d 17, 34-35 (2d Cir. 2017); Castro v. Cnty. of Los Angeles, 833 F.3d 1060, 1070-71 (9th Cir. 2016).
[219] 728 F.3d 626, 630 (7th Cir. 2013).
[220] *Miranda*, 900 F.3d at 352 (quoting *Currie,* 728 F.3d at 630).
[221] *Id.*
[222] *Id.*
[223] *Id.* at 354.
[224] *Growth in Mass Incarceration*, THE SENTENCING PROJECT, https://www.sentencingproject.org/research/.
[225] *Pretrial Detention Exploring Cost and Outcome of Detaining People Before Trial or Deportation (ie. Instead of Bail or Other Alternatives)*, PRISON POLICY INITIATIVE,
https://www.prisonpolicy.org/research/pretrial_detention/#:~:text=More%20than%20400%2C000%20people%20in,%22hold%22%20on%20their%20release
(last visited Nov. 26, 2023).

reasoned pretrial detainees have greater protections under the Constitution,[226] the Supreme Court has yet to explain how pretrial detainees' due process rights should be interpreted when an official fails to provide adequate care for a serious medical need.[227]

As previously discussed, the Eighth Amendment should not apply to pretrial detainees, as they have not been formally adjudicated. The language of the Eighth and Fourteenth Amendment clauses are "distinctly different."[228] Pretrial detainees' inadequate medical care claims should come under the Fourteenth Amendment, not the Eighth Amendment. The Fourteenth Amendment is the proper amendment to be applied when looking at claims brought by pretrial detainees and the reasons for its implementation for pretrial detainees' inadequate medical care claims will be discussed below.

A. The Eighth and Fourteenth Amendment

The Eighth Amendment is applicable only to those who have been convicted, having been formally adjudicated and found guilty of a charge by a judge or a jury of their peers. The Eighth Amendment protects convicted individuals from cruel and unusual punishment. The Supreme Court has stated, by its very nature, the Eighth Amendment does not apply to those who have not been adjudicated of guilt. As the Eighth Amendment protects convicted individuals from cruel and unusual punishment, the Fourteenth Amendment protects pretrial detainees from any form of punishment.[229] The due process rights of an individual, not convicted, are "at least as great as the Eighth Amendment protections available to a convicted prisoner."[230] Therefore, the Eighth Amendment serves as a floor for pretrial detainees' claims, rather than a ceiling. By using the Supreme Court's own reasoning pretrial detainees have greater protections than those who have been convicted. Circuit courts "graft[] an Eighth Amendment rule governing the punishment of convicts onto . . . Due

[226] *See* Bell v. Wolfish, 441 U.S. 520, 535 (1979).
[227] *See* Kyla Magun, *A Changing Landscape for Pretrial Detainees? The Potential Impact of Kingsley v. Hendrickson on Jail-Suicide Litigation*, 116 COLUM. L. REV. 2059, 2070 (2016).
[228] Petition for Writ of Certiorari at 15, Strain v. Regalado, 977 F.3d 984 (10th Cir. 2020) (No. 20-1562), 2021 WL 1911091, at *12.
[229] *See* Magun, *supra* note 227, at 2069.
[230] City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (citing *Bell*, 441 U.S. at 535 n.16).

Process case[s] about the health and safety of a pretrial detainee. As a result, [defendants can] escape liability, even at the motion to dismiss stage . . . ."[231]

As mentioned, numerous times throughout this Note, the Fourteenth Amendment provides greater protections under the Constitution to pretrial detainees. The language of the Eighth and Fourteenth Amendment are distinctly different. After the Civil War, Congress sought to protect individuals from state interference, which was achieved through the Fourteenth Amendment.[232] Pretrial detainees claiming substantive Due Process violations by state actors shall bring such claims under the Fourteenth Amendment. There is no hint of a subjective intent requirement for establishing fault in the text of the Due Process Clause.[233] Pretrial detainees are the sole responsibility of the state. Therefore, it does not seem logical to follow an Eighth Amendment analysis in regard to pretrial detainees' claims, when they are in the hands of state actors and have not been formally convicted. In *Kingsley*, respondents used two cases in support of the subjective standard.[234] The Court noted that these cases were irrelevant in the claim brought by Kingsley, a pretrial detainee, because those cases dealt with claims brought by convicted prisoners under the Eighth Amendment, "not by claims brought by pretrial detainees under the Fourteenth Amendment's Due Process Clause."[235]

Kingsley proceeded to negate the Eighth Amendment approach as it deemed it inapplicable to pretrial detainees' claims as they cannot be punished "at all."[236] Instead, the Court relied heavily on *Bell*, in its analysis, which is a conditions of confinement case, expanding the objective standard not only to excessive force claims, as in *Kingsley*, but to conditions of confinement claims as well.

---

[231] Petition for Writ of Certiorari at 9, Strain v. Regalado, 977 F.3d 984 (10th Cir. 2020) (No. 20-1562), 2021 WL 1911091, at *9.

[232] Nathan S. Chapman & Kenji Yoshino, *The Fourteenth Amendment Due Process Clause*, CONSTITUTION CENTER, https://constitutioncenter.org/the-constitution/articles/amendment-xiv/clauses/701 (last visited Nov. 26, 2023).

[233] *See* U.S. CONST. amend. XIV, § 1; Petition for Writ of Certiorari at 15, Strain v. Regalado, 977 F.3d 984 (10th Cir. 2020) (No. 20-1562), 2021 WL 1911091, at *15.

[234] Whitley v. Albers, 475 U.S. 312 (1986); Hudson v. McMillian, 503 U.S. 1 (1992).

[235] Kingsley v. Hendrickson, 576 U.S. 389, 390 (2015).

[236] *Id.* at 400.

B. *Kingsley's* Reliance on *Bell*

Bell dealt with conditions of confinement, contrary to *Kingsley*, which dealt with an excessive force claim. The *Bell* Court explicitly rejected a subjective standard requirement.[237] *Kingsley* rested its holding on its reading of *Bell*,[238] furthering the idea that the objective standard was not meant to be applied solely in excessive force claims. The *Kingsley* decision does not even mention its 1976 decision of *Estelle* in its analysis, the one that birthed the deliberate indifference standard, or its 1994 decision of *Farmer*, but instead goes back to its 1979 decision of *Bell*. Significantly, the Court used the language, "challenged governmental action," to describe how a pretrial detainee could prevail with regard to an excessive force claim.[239] This language implies that the *Kingsley* decision is not to be confined only to excessive force claims, but rather to all pretrial detainees' claims stemming from § 1983.[240]

The objective standard as Justice Breyer stated in the majority opinion, is "consistent with precedent," "workable," and "consistent with pattern jury instructions used in several circuits."[241] Justice Breyer went on to state that "many facilities train officers to interact with detainees as if the officers' conduct is subject to objective reasonableness."[242] This is evidenced by an amicus brief submitted to the Supreme Court in *Kingsley* by former corrections administrators and experts, which stated:

> Adopting a subjective constitutional standard for evaluating the use of force against detainees will upset jail staff training, oversight, and discipline. Most immediately, a subjective constitutional rule will interfere with the safe administration of jails because of its negative effect on staff accountability. For one, a subjective standard is more difficult to enforce because it is vague and invites individual discretion. These problems are the reason that appointed monitors always implore jails

[237] Magun, *supra* note 227, at 2082.
[238] *See* Margo Schlanger, *Constitutional Law of Incarceration, Reconfigured*, 103 CORNELL L. REV. 357, 410 (2018).
[239] *Kingsley*, 576 U.S. at 398; *See* Magun, *supra* note 227, at 2089.
[240] *See* Magun, *supra* note 227, at 2089.
[241] *Kingsley*, 576 U.S. at 389.
[242] *Id.* at 390.

> to develop clear, objective policies dictating when force is permitted and when it is not [citation omitted].
>
> In addition, a subjective standard would erode staff accountability because instances of excessive force would be more difficult to discipline. If a jail staff member can cure an otherwise unreasonable use of force by saying that he did not behave recklessly or with malice, then a new and formidable barrier to staff accountability will have been erected. Unlike the question whether conduct was reasonable given the circumstances, jail administrators have an exceedingly difficult time examining a staff member's subjective intentions. *Amici* except that instances of excessive force in jails would only increase if the constitutional standard for using force against pretrial detainees is based on subjective intent. [243]

The Supreme Court has provided the most deference when it comes to excessive force claims, especially because officials have to make quick decisions under pressure.[244] Yet, *Kingsley* was an excessive force claim and applied the objective standard test. The reasonable inference is that less deference shall be given to officials regarding pretrial detainee claims of inadequate medical care, which would result in the application of the objective standard test found in *Kingsley*.

The objective standard discussed in *Kingsley* would better align with constitutional standards, decrease deference to prison officials, and most importantly provide greater protection of pretrial detainees' substantive due process rights.[245] The courts should break free from the restraining subjective standard and apply the objective standard, allowing a plaintiff to prove that the official should have known of the

[243] Brief for Former Corrections Administrators and Experts as Amici Curiae Supporting Petitioner, Kingsley v. Hendrickson, 576 U.S. 389 (2015) (No. 14-6368), 2015 WL 1045423, at *21.

[244] *See* Whitley v. Albers, 475 U.S. 312, 320 (1986). This case dealt with convicted prisoners not pretrial detainees. However, this case furthers the argument laid out above with regard to the differences between the Eighth Amendment and Fourteenth Amendment. The Supreme Court stated, "the Eighth Amendment, which is specifically concerned with the unnecessary and wanton infliction of pain in penal institutions, serves as the primary source of substantive protection to convicted prisoners . . . ." *Id.* at 327; Hudson v. McMillian, 503 U.S. 1, 6 (1992).

[245] *See* Magun, *supra* note 227, at 2085.

substantial risk, explicitly rejecting *Farmer'*s actual-knowledge requirement.[246]

C. The Objective Standard is Workable

The Second, Seventh, and Ninth Circuits have proven the objective standard to be workable. The Ninth Circuit took the *Kingsley* decision and expanded it to failure-to-protect claims.[247] The Ninth Circuit stated that *Kingsley* was not meant to be confined solely to excessive force claims.[248] Just two years later, the Ninth Circuit decided the objective standard is the proper standard to be applied to inadequate medical care claims as well.[249] The Second and Seventh Circuits followed suit, expanding *Kingsley* to conditions of confinement and deficient medical treatment claims, respectively.[250] With three circuits expanding *Kingsley* to other pretrial detainees' claims brought under § 1983, some argue that the subjective standard "'protects against a relative flood of claims,' many perhaps unfounded, brought by pretrial detainees."[251] However, there has been no evidence of "rash . . . unfounded filings in Circuits that use an objective standard."[252]

D. Negligence

Any liability as a result of negligently inflicted harm falls below the "threshold of constitutional due process."[253] The objective standard bars liability for negligent acts.[254] *Kingsley* rejected civil recklessness from its analysis, unlike *Farmer*.[255] In *Farmer*, the Court

[246] *Id.* at 2085-86.
[247] *See* Castro v. Cnty. of Los Angeles, 833 F.3d 1060 (9th Cir. 2016).
[248] *Id.* at 1070.
[249] Gordon v. Cnty. of Orange, 888 F.3d 1118, 1122 (9th Cir. 2018).
[250] Darnell v. Pineiro, 843 F.3d 17 (2d Cir. 2017); Miranda v. Cnty. of Lake, 900 F.3d 335 (7th Cir. 2018).
[251] Kingsley v. Hendrickson, 576 U.S. 389, 402 (2015) (citing Brief for Respondents at 38, Kingsley v. Hendrickson, 576 U.S. 389 (2015) (No. 14-6368), 2015 WL 1519055, at *38).
[252] *Id.* at 402.
[253] Cnty. of Sacramento v. Lewis, 523 U.S. 833, 849 (1988).
[254] *See* Abby Dockum, *Kingsley, Unconditioned: Protecting Pretrial Detainees with an Objective Deliberate Indifference Standard in § 1983 Conditions of Confinement Claims*, 52 ARIZ. ST. L.J. 707, 745 (2021).
[255] Schlanger, *supra* note 238, at 407.

explained that "when civil recklessness is the standard . . . plaintiffs can win their case by showing that defendants disregarded serious risks they should have known about."[256] Instead, the *Farmer* Court looked to a subjective criminal recklessness standard, which requires showing a mens rea element.[257] *Kingsley* proceeded to reject civil recklessness as well. The *Kingsley* Court's language in reference to its use of "objective unreasonableness" sounds like negligence, but it is not, as negligence has yet to be constitutionalized. Justice Scalia, in his *Kingsley* dissent, concluded that the majority opinion "tortifies" [sic] the Fourteenth Amendment.[258] Justice Scalia further stated, "[t]he Due Process Clause is not 'a front of tort law to be superimposed upon' that state system."[259] A state official's "'mere lack of due care' does not violate an individual's Fourteenth Amendment rights and a negligence act is insufficient" for a Due Process analysis.[260] The majority opinion in *Kingsley* cited to *County of Sacramento v. Lewis*, stating negligence is below "the threshold of constitutional due process."[261] Justice Breyer went on to state:

> [I]f an officer's Taser goes off by accident or if an officer unintentionally trips and falls on a detainee, causing him harm, the pretrial detainee cannot prevail on an excessive force claim. But if the use of force is deliberate—*i.e.*, purposeful or knowing—the pretrial detainee's claim may proceed.[262]

Kingsley rejected the notion that the objective standard is akin to negligence. Therefore, the standard applies when the officers intended to use such force, rejecting a negligence analysis. The Court's rejection of negligence as a valid claim under the Due Process Clause does not mean it requires a subjective component to the analysis, but rather something more than negligence and less than intent is required.

Looking at it from the lens of inadequate medical care, Justice Stevens's dissent in *Estelle* analyzed it properly. Justice Stevens reasoned, a state "has an obligation to provide persons in custody with

---

[256] *Id.* at 406-07.
[257] *See id.* at 407.
[258] *Kingsley*, 576 U.S. at 408 (Scalia, J., dissenting).
[259] *Id.* (citing Daniels v. Williams, 474 U.S. 327, 332 (1986)).
[260] Magun, *supra* note 227, at 2090.
[261] *Kingsley*, 576 U.S. at 396 (citing Cnty. of Sacramento v. Lewis, 523 U.S. 833, 849 (1998)).
[262] *Id.*

a health care system which meets minimal standards of adequacy . . . the state and its agent have an affirmative duty to provide reasonable access to medical care . . . ."[263] Justice Stevens, continued by stating, not every health care violation violates the Eighth Amendment.[264] However, "when a state adds to this risk,"[265] then the inmate may suffer a violation of his constitutional rights.

The objective standard still provides adequate protection for state officials acting in good faith.[266] *Kingsley* articulated, "by acknowledging that judging the reasonableness of the force used from the perspective and with knowledge of the defendant officer is an appropriate part of the analysis."[267] The Court looked to the defendant's perspective and took into account the realities and necessities of running a corrections facility.[268] If an officer acted negligently, there is no constitutional claim that can be brought. The objective standard bars liability for negligent acts.[269] Qualified immunity also insulates defendants from pretrial detainees' civil claims. State officials are entitled to qualified immunity.[270] Qualified immunity protects state officials from civil damages when they are acting as governmental actors so long as their acts do not violate "established statutory or constitutional rights of which a reasonable person would have known."[271] This would bar civil claims brought by pretrial detainees that resulted from negligence, which adds a shield of protection for defendants. Analyzing plaintiffs' inadequate medical care claims under a subjective standard and then layering it with

---

[263] Estelle v. Gamble, 429 U.S. 97, 116 n.13 (1976) (Stevens, J., dissenting); *See* Schlanger, *supra* note 238, at 415-16 (stating Justice Stevens's "carve out does not tighten the scienter requirement to recklessness—even civil recklessness—by the doctor or a particular prison official. Rather the key to his analysis is the generally elevated level of risk by overall conditions." *Id.* at 416).
[264] *Estelle*, 429 U.S. at 116 n.13.
[265] *Id.* (Stevens, J., dissenting) (stating that a state can add to the risk of inadequate medical care when the state employs a physician who is not competent to give adequate care due to an excessive caseload or inadequate facilities).
[266] *Kingsley*, 576 U.S. at 390, 399.
[267] *Id.* at 390.
[268] *See* Magun, *supra* note 227, at 2092.
[269] Abby Dockum, *Kingsley, Unconditioned: Protecting Pretrial Detainees with an Objective Deliberate Indifference Standard in §1983 Conditions-of-Confinement Claims*, 53 ARIZ. ST. L.J. 707, 725 (2021).
[270] Hafer v. Melo, 502 U.S. 21, 29 (1991).
[271] Pearson v. Callahan, 555 U.S. 223, 231 (2009) (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

Black: Subjectively Speaking

qualified immunity would deprive plaintiffs of any recourse for the deprivation of their rights. Analyzing these claims under an objective standard allows plaintiffs to seek proper recourse for their deprivation, but it also protects state officials who act in good faith, and protects them from negligence as well, given they have qualified immunity.

VII. CONCLUSION

Estelle and *Farmer*'s deliberate indifference standard is outdated and does not comport with pretrial detainees' rights under the Fourteenth Amendment. A change is required to protect the rights of individuals who have not been formally adjudicated of guilt. These individuals have greater protections under the Constitution, but that has not been the case. *Kingsley* was a step in the right direction, applying an objective standard to excessive force claims. The Court did not narrowly construe the objective standard test to apply solely to excessive force and that is evident by its use of *Bell* in its analysis as well as the language used in the analysis itself. *Strain* was the Supreme Court's opportunity to finally answer the question of what is the proper standard to apply regarding pretrial detainees' § 1983 claims, and more specifically, claims of inadequate medical care. Pretrial detainees are in the hands of state actors when they are detained, and when state actors fail to provide adequate care, they should be held accountable for their actions, as long as it is something more than mere negligence. State actors are still protected by their good faith actions, as well as qualified immunity, when acting as a government actor. The Supreme Court should provide a decision in the near future and apply an objective standard to pretrial detainees' claims for inadequate medical care when the detainee is under the supervision of the state. Applying this standard will help pretrial detainees have a proper claim for inadequate care under the Fourteenth Amendment. This will not only solve the pressing issue and split among the circuits, but also provide the adequate protection for those who have not been formally adjudicated.

Published by Digital Commons @ Touro Law Center,