A FORCE TO BE RECKONED WITH: CONFRONTING THE (STILL) UNRESOLVED QUESTIONS OF EXCESSIVE FORCE JURISPRUDENCE AFTER *KINGSLEY*

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INTRODUCTION

It is difficult to imagine a world without 42 U.S.C. § 1983, "the workhorse of modern civil rights litigation."[1] Section 1983 provides a federal cause of action for deprivations of constitutional and federal statutory rights by any state or state official acting under color of law.[2] The statute creates no substantive rights itself, but has

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1. Alan W. Clarke, *The Ku Klux Klan Act and the Civil Rights Revolution: How Civil Rights Litigation Came to Regulate Police and Correctional Officer Misconduct*, 7 SCHOLAR 151, 152 (2005).

2. Section 1983, originally enacted as part of the Civil Rights Act of 1871 (also known as the Ku Klux Klan Act), reads, in relevant part:

> 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 . . . .

42 U.S.C. § 1983 (2012).

served as the jurisdictional vehicle for challenging nearly every alleged deprivation of a constitutional right by the states over the past several decades: from the right to wear black armbands in school in protest of the Vietnam War[3] to the right to same-sex marriage.[4]

One of the rights protected through Section 1983 is the right to be free from excessive force. However, this protection does not arise from any single, express provision in the constitution. Rather, an individual's right to be free from excessive force is embodied in three separate constitutional amendments: the Fourth Amendment, Eighth Amendment, and Fourteenth Amendment.[5] The Fourth Amendment protects arrestees and free individuals from unreasonable seizures, which has been interpreted to include freedom from excessive force.[6] The Eighth Amendment's Cruel and Unusual Punishment clause protects convicted inmates from malicious and sadistic harm while incarcerated.[7] The Fourteenth Amendment's substantive due process protections apply to pretrial detainees and guarantee them freedom from excessive force.[8]

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3. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504 (1969) ("This complaint was filed in the United States District Court by petitioners . . . under § 1983 of Title 42 of the United States Code.").

4. *See* Second Am. Compl. for TRO and Decl. and Inj. Relief at 11, Obergefell v. Wymyslo, 962 F. Supp. 2d 968 (S.D. Ohio 2013) (No. 13-cv-501) (indicating that Petitioners seek relief under Section 1983 for violation of their Fourteenth Amendment rights to equal protection and due process of law by Ohio's failure to recognize Petitioners' same-sex marriage licenses issued by Maryland). *Obergefell v. Wymyslo* would later be appealed to the Supreme Court *sub nom Obergefell v. Hodges*, in which the Supreme Court affirmed that the Fourteenth Amendment requires states to recognize valid same-sex marriage licenses issued by other states. *See* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

5. *See* MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION CLAIMS & DEFENSES § 3:12 (2016) [hereinafter SCHWARTZ, SECTION 1983 LITIGATION CLAIMS].

6. Graham v. Conner, 490 U.S. 386, 395 (1989) ("[A]ll claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard . . . .").

7. Whitley v. Albers, 475 U.S. 312, 327 (1986) ("We think the Eighth Amendment, which is specifically concerned with the unnecessary and wanton infliction of pain in penal institutions, serves as the primary source of substantive protection to convicted prisoners in cases such as this one, where the deliberate use of force is challenged as excessive and unjustified.").

8. *Graham*, 490 U.S. at 395 n.10 ("[T]he Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment."). *See generally* Kingsley v. Hendrickson, 135 S. Ct. 2466 (2015).

Although the Due Process Clause has been the established source of the pretrial detainee's right to be free from excessive force since at least 1989[9]—if not before[10]—it was not until the Supreme Court's *Kingsley v. Hendrickson* decision in 2015 that the precise standard for determining whether a pretrial detainee's due process rights have been violated by an act of allegedly excessive force was established.[11] Prior to *Kingsley*, a split had developed between the circuits, with some courts adopting an objective reasonableness standard similar to that used in excessive force cases brought under the Fourth Amendment, and others adopting a subjective intent standard similar to the malicious and sadistic standard used to analyze excessive force cases brought under the Eighth Amendment.[12] The Supreme Court finally settled this unresolved issue twenty-six years after *Graham*, holding that the correct standard for pretrial

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9. *Graham*, 490 U.S. at 395 n.10.

10. Prior to *Graham*, the Supreme Court held in *Bell v. Wolfish* that the Due Process Clause protects pretrial detainees from "certain conditions and restrictions of pretrial detainment." Bell v. Wolfish, 441 U.S. 520, 533 (1979). The Court went on to hold that "[i]n evaluating the constitutionality of conditions or restrictions of pretrial detention that implicate only the protection against deprivation of liberty without due process of law, we think that the proper inquiry is whether those conditions amount to punishment of the detainee. For under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." *Id.* at 535. In *Graham*, the Court cited with approval these passages from *Bell* when they affirmed that that the Due Process Clause protects a pretrial detainee from excessive force that amounts to punishment. *Graham*, 490 U.S. at 395 n.10. Even before *Bell*, Judge Friendly authored an extremely influential and well-received opinion in the case of *Johnson v. Glick*, in which the Second Circuit held that pretrial detainees are protected against excessive force by their jailers through the Constitution's substantive due process protections. Johnson v. Glick, 481 F.3d 1028, 1032–33 (2d Cir. 1973), *cert. denied*, 414 U.S. 1033 (1973).

11. *See* Kingsley v. Hendrickson, 744 F.3d 445, 456 (7th Cir. 2014) (Hamilton, J., dissenting) ("The Supreme Court has not settled the question of the [excessive force] standard for pretrial detainees. *Graham* explicitly left it open.").

12. *See Kingsley*, 135 S. Ct. at 2471–72 (2015) ("Kingsley filed a petition for certiorari asking us to determine whether the requirements of a § 1983 excessive force claim brought by a pretrial detainee must satisfy the subjective standard or only the objective standard. In light of disagreement among the Circuits, we agreed to do so."); *Kingsley*, 744 F.3d at 456 n.1 (Hamilton, J., dissenting) ("There is a long-standing circuit split on the substantive standard for these excessive force claims by pretrial detainees."); SCHWARTZ, SECTION 1983 LITIGATION CLAIMS, *supra* note 5, at § 3.16 ("[A] split of authority had developed in the circuit courts as to whether detainee due process excessive force claims are governed by an objective reasonableness standard or by a subjective intent to inflict excessive force standard.").

detainee excessive force claims brought under the Fourteenth Amendment is an objective one.[13]

In doing so, however, the Court failed to address two related questions and expressly reserved them for future resolution. These questions are: (1) whether reckless actions (as opposed to deliberate actions) that cause objectively unreasonable force are sufficient to state a claim under the Fourteenth Amendment;[14] and (2) whether the Court's holding that an objective standard is sufficient for assessing excessive force claims by pretrial detainees under the Fourteenth Amendment is in conflict with the Court's prior holdings that a subjective standard is required to assess excessive force claims brought by convicted prisoners under the Eighth Amendment.[15]

This Note seeks to analyze these two unresolved questions, predict how the Court will resolve them in the future, and explore the consequences of the predicted outcomes. These questions also have broader implications than the specific context of pretrial detainee excessive force claims. How the Court settles these questions could change the doctrine for other constitutional torts as well—beyond the excessive force and pretrial detainee contexts and into other abuse of power contexts. In expressly reserving these questions, the Court is likely planting the seeds for expansion and change in constitutional torts doctrine, as they have done many times before.[16] This prediction matches the Court's incrementalist approach to developing Section 1983 case law.

The remainder of this Note will proceed as follows. Part I will provide background on the history and development of Section 1983, the Court's incrementalist approach to developing Section 1983 case law, and the circuit split that preceded *Kingsley v. Hendrickson*. Part II will discuss the facts and opinions in *Kingsley* and the unresolved questions the Court reserved for the future. Part III will explore the

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13. *See Kingsley*, 135 S. Ct at 2472.

14. *Id.*

15. *Id.* at 2476.

16. *See, e.g.*, Michael K. Cantwell, *Constitutional Torts and the Due Process Clause*, 4 TEMP. POL. & CIV. RTS. L. REV. 317, 326 (1995) (describing the Court's "dubious dictum" in *Paul v. Davis* as "the seedling from which sprang *Parratt v. Taylor*, after fertilization by *Ingraham v. Wright*."); SHELDON H. NAHMOD, CIVIL RIGHTS & CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 § 3:21 (2015), Westlaw (database updated Sept. 2016) (noting that an earlier edition of the treatise predicted, based on the Court's dicta in *Tennessee v. Garner*, that the Court would move to reduce the role of substantive due process in police excessive force cases, which they did four years later in *Graham*).

first unresolved question of whether recklessness is sufficient to support liability in a pretrial detainee excessive force case, drawing on established doctrine and fundamental principles of the Fourteenth Amendment's substantive due process protections to predict how the Court will answer this question in the future. Similarly, Part IV will explore the second unresolved question of whether the Eighth Amendment's subjective standard for excessive force cases should be replaced with an objective standard and draw on established doctrine to predict how the Court will resolve this question in the future. The Note concludes by predicting that (1) the Court will not find reckless acts that cause objectively unreasonable harm sufficient to constitute excessive force under the Fourteenth Amendment, and (2) the Court will find that an objective reasonableness standard is sufficient—if not better than the current subjective reasonableness standard—to assess excessive force claims brought by convicted inmates under the Eighth Amendment.

While this Note predominantly discusses actions brought under Section 1983 for deprivations of federally protected rights by state officials, the Court's holdings, jurisprudence, and interpretations of federally protected rights apply similarly to claims brought under a *Bivens* action—the federal analog to Section 1983—which allows an individual to bring a claim against *federal* officials for deprivations of federally protected rights.[17] Therefore, the ensuing discussion applies to all constitutional torts, whether they are brought against state actors under Section 1983 or federal actors under a *Bivens* claim.

17. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

I. BACKGROUND

A. History of Section 1983

Despite Section 1983's important place in contemporary constitutional and civil rights law, the statute was not always a prominent tool for vindicating rights. Congress enacted Section 1983 in 1871 as part of the Ku Klux Klan Act with a purpose to "effectuate broad constitutional protections set in place in the aftermath of the Civil War."[18] However, the statute did not become a workable tool for vindicating constitutional rights until the 1960s.[19] This was due to a series of Supreme Court decisions in the late 1800s that narrowly interpreted Congress' powers under the Enforcement Clause of the Fourteenth Amendment—out of which Section 1983 was enacted—and limited the phrase "under color of state law" to only those actions which were officially sanctioned by the state.[20]

This construction would persist—sending Section 1983 into temporary retirement—until 1961, when the Supreme Court delivered the watershed opinion of *Monroe v. Pape*.[21] As renowned Section 1983 scholar Professor Martin Schwartz explains:

> *Monroe* resolved two important issues that allowed 42 U.S.C. § 1983 to become a powerful statute for enforcing rights secured by the Fourteenth Amendment. First, the Court held that actions taken by state government officials in carrying out their official responsibilities, even if contrary to state law, were nevertheless actions taken "under color of law . . . ." Second, the Court held that individuals who assert a violation of federally protected rights have a federal remedy under § 1983 even if the officials' actions also violated state law for which the state affords a remedy.[22]

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18. Clarke, *supra* note 1, at 153.
19. *Id.* at 156, 164.
20. *See* Cantwell, *supra* note 16, at 317–18.
21. Monroe v. Pape, 365 U.S. 167 (1961). For an extensive analysis of the origin, hibernation, and resurrection of Section 1983, see generally Clarke, *supra* note 1.
22. MARTIN A. SCHWARTZ, FED. JUD. CTR., SECTION 1983 LITIGATION 1–2 (Kris Markrian ed., 3d ed. 2014) [hereinafter SCHWARTZ, FED. JUD.].

Before *Monroe,* state officials were effectively immune from federal oversight and liability for violations of constitutional rights, despite the fact that Section 1983 had been enacted ninety years prior for the very purpose of addressing this type of misconduct.[23] Victims of constitutional rights deprivations at the hands of the States were forced to turn to the state courts to redress their grievances, which, for "reason[s] of prejudice, passion, neglect, intolerance or otherwise," [24] translated into a lack of available or sufficient remedies.[25] This was particularly true for minorities and prisoners in the post-Civil War, Jim Crow South.[26] *Monroe* changed that, making it clear that Congress intended for Section 1983 to "provide[] a remedy where state law [is] inadequate," as well as to "provide a federal remedy where the state remedy, though adequate in theory, [is] not available in practice."[27] As such, the Court revitalized Section 1983's scope and effect, announcing that it would construe Section 1983's broad remedial provisions with an eye towards these purposes. After *Monroe*, the Civil Rights Movement of the 1960s was able to seize Section 1983 to create a new, true remedy—a federal remedy—for deprivations of constitutional rights by state actors.[28]

With *Monroe*'s landmark holding, claims of state misconduct resulting in a deprivation of constitutional rights flooded the federal courts under the Section 1983 cause of action.[29] From 1871 to 1960, only 23 Supreme Court cases referenced Section 1983.[30] From 1960 to 2005, however, 625 Supreme Court cases and 121,803 federal circuit and district court opinions cited to Section 1983. What's more, in the ten years between 2006 and 2015, there were 88 *new* Supreme Court cases and 250,994 *new* federal circuit and district court opinions referencing Section 1983.[31] In other words, in the ten years between 2005 and 2015, the lower federal courts have referenced Section 1983 more than twice as many times as they did during the forty-five years

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23. Clarke, *surpa* note 1, at 157–58.
24. *Monroe*, 365 U.S. at 180.
25. Clarke, *supra* note 1, at 157–58.
26. *Id.*
27. *Monroe*, 365 U.S. at 173–74. *See also* SCHWARTZ, FED. JUD., *supra* note 22, at 2.
28. Clarke, *supra* note 1, at 164, 182.
29. *See* SCHWARTZ, FED. JUD., *supra* note 22, at 2.
30. Clarke, *supra* note 1, at 156 n.28.
31. The 1960 to 2005 and 2005 to 2015 data was compiled from Lexis Advance searches using the following search query: "42 U.S.C. § 1983" or "Section 1983". The searches were filtered to only include federal cases. The searches were further filtered by the appropriate timeframe.

between 1960 and 2005.[32] Clearly, Section 1983 remains one of the most important—if not *the* most important—civil rights statutes, serving as "the vehicle by which any citizen can sue . . . representatives of state and local governments (including law enforcement and corrections officers) for misconduct."[33]

B. Incrementalist Development of Section 1983 Case Law

While litigants have made liberal use of Section 1983's federal remedy, the Supreme Court has been slow to develop a complete body of constitutional tort doctrine and case law, preferring a "slow but steady expansion of [the] remedy."[34] This long and delicate approach is the product of two concerns. First, because Section 1983 provides no substantive rights itself—only a federal avenue for redressing state deprivations of federally protected rights—courts must discern the contours of each right guaranteed by the Constitution and federal law in order to determine whether a specific set of facts constitutes a violation of that right.[35] As the Constitution protects dozens of rights and federal laws protect hundreds more, this is a monumental task. Furthermore, in cases of constitutional interpretation—where the Supreme Court's decisions are final, save for a constitutional amendment or a future Supreme Court opinion overturning the precedent—the Court prefers to tread softly, interpreting constitutional rules narrowly and incrementally, and avoiding constitutional questions altogether when possible.[36] As a result, the

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32. It should be noted that these numbers do not reflect the number of new cases brought through Section 1983 claims. These numbers are only indicative of the number of cases the federal courts cite or refer to Section 1983 for one reason or another. The searches are only meant to illustrate the fact that since *Monroe*, the use and importance of Section 1983 has increased exponentially.

33. Clarke, *supra* note 1, at 156–57.

34. Hudson v. Michigan, 547 U.S. 586, 597 (2006).

35. *See* Baker v. McCollan, 443 U.S. 137, 140 (1979) ("The first inquiry in any § 1983 suit, therefore, is whether the plaintiff has been deprived of a right 'secured by the Constitution and laws.'"); *cf.* Cantwell, *supra* note 16, at 342–43 ("[T]he Supreme Court has significantly restricted the operative scope of § 1983, first by requiring that plaintiffs establish not merely a tortious act but a constitutional violation by a state actor, and then by narrowly construing the protections afforded by the constitutional provision in question.").

36. *See, e.g.*, Planned Parenthood of Se. Penn. v. Casey, 505 U.S. 833, 954–55 (1992) (Rehnquist, C.J., dissenting) ("Erroneous decisions in such constitutional cases are uniquely durable, because correction through legislative action, save for constitutional amendment, is impossible."); Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406–07 (1932) (Brandeis, J., dissenting) (noting an exception to the principle of stare decisis when the Court is interpreting the

Court has been deliberately slow in developing the jurisprudence of constitutional torts since *Monroe*.

Second, because Section 1983 allows federal courts to review the actions and alleged misconduct of states and state officials, there are obvious federalism concerns involved. Such concerns have existed since 1871, when many Senators in the 42nd Congress characterized the statute as an unauthorized and "covert attempt to transfer another large portion of jurisdiction from the State tribunals, to which it of right belongs, to those of the United States."[37] While this argument has since been dispensed of, the Supreme Court remains cautious in expanding the types of conduct that are considered constitutional torts.[38] Especially in cases where the right allegedly deprived is part of the broad substantive due process protections of the Fourteenth Amendment, the Court has acted cautiously and skeptically in drawing the line between conduct which is a constitutional violation and conduct which falls below the safeguards of the Constitution, where the appropriate remedy is instead a state cause of action in tort.[39] As then-Justice Rehnquist stated in *Daniels v. Williams*, "[o]ur Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society."[40] Thus, in drawing the contours of constitutional protections and determining whether state action is conduct in violation of the Constitution—and not merely tortious conduct in violation of state law—the Supreme Court has moved at a purposefully slow pace, always mindful that the constitution is not meant to be "a font of tort law to be superimposed upon whatever systems may already be administered by the States."[41]

Constitution because of the difficulty in overturning a constitutional rule); *see also* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 345–49 (1936) (Brandeis, J., concurring) (describing the canon of constitutional avoidance, or rules the Supreme Court has developed to resolve cases without answering constitutional questions whenever possible).

37. *Monroe*, 365 U.S. at 179 (quoting CONG. GLOBE, 42d Cong., 1st Sess. 50 (1871)).

38. *See* Cantwell, *supra* note 16, at 318–19.

39. *See* Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992) ("As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended.").

40. Daniels v. Williams, 447 U.S. 327, 332 (1986).

41. Paul v. Davis, 424 U.S. 693, 701 (1986); *see also id.* ("We have noted the 'constitutional shoals' that confront any attempt to derive from congressional civil

While the Supreme Court has proceeded slowly, the federal district and circuit courts have had to keep steady pace with the increasing number of Section 1983 challenges entering the federal courts. "Each year the federal courts face dockets filled with huge numbers of § 1983 cases. The lower court decisional law is voluminous."[42] As a result of this rapid increase in Section 1983 challenges, but little guidance from the Supreme Court, the federal circuit courts have had to take up the mantle of interpreting what state conduct is sufficient to qualify as a deprivation of a federally protected right. Naturally, this has led to conflicts between the circuits as to what constitutes such a deprivation.[43]

It is typically only when a clear divide in circuit decisional law appears that the Supreme Court will step in to resolve the conflict. Even when the Court steps in, however, their decisions often leave other associated ambiguities unresolved. In keeping with its incrementalist approach, the Court has, on frequent occasion, expressly reserved pending questions for future cases.[44] On other occasions, when announcing a relatively significant change in Section 1983 jurisprudence, the Court will "frequently includ[e] countervailing language to soften their impact."[45]

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rights statutes a body of general federal tort law . . . ." (quoting Griffin v. Breckenridge, 403 U.S. 88, 101–02 (1971))).

42. *See* SCHWARTZ, FED. JUD., *supra* note 22, at 4.

43. *Id.*

44. *See, e.g.*, Graham v. Connor, 490 U.S. 386, 395 (1989) ("Our cases have not resolved the question whether the Fourth Amendment continues to provide individuals with protection . . . beyond the point at which arrest ends and pretrial detention begins, and we do not attempt to answer that question today."); *Daniels*, 447 U.S. at 332 ("[T]his case affords us no occasion to consider whether something less than intentional conduct . . . is enough to trigger the protections of the Due Process Clause."); Whitley v. Albers, 475 U.S. 312, 327 (1986) ("Because this case involves prison inmates rather than pretrial detainees or persons enjoying unrestricted liberty we imply nothing as to the proper answer to [the question left open in *Daniels v. Williams.*]").

45. Cantwell, *supra* note 16, at 319; *see id.* ("For example, in *Monroe* itself, the Court ameliorated its holding that § 1983 covers unauthorized as well as authorized acts by providing that municipalities cannot be the subject of a claim under § 1983. And when blanket municipal immunity was overruled in *Monell v. Department of Social Services,* the Court again softened its holding by limiting liability to instances in which acts were taken 'pursuant to official municipal policy.'" (internal citations omitted)).

C. Circuit Split Preceding *Kingsley*

One such area of ambiguity and conflict in the circuits was the question of what standard should be used to determine if a pretrial detainee's right to be free from excessive force under the Fourteenth Amendment's Due Process Clause has been violated. The problem originated after *Graham v. Connor,* when the Court held that the Fourteenth Amendment protects pretrial detainees from excessive force, rather than the Fourth Amendment (which protects arrestees and free citizens from unreasonably excessive force in seizures) or the Eighth Amendment (which protects convicted prisoners from cruel and unusual punishment).[46] Although the Court in *Graham* put to rest the dispute over which amendment protects pretrial detainee excessive force claims, it failed to articulate the standard for determining whether a violation of the Fourteenth Amendment has occurred.[47] As a result, a large circuit split endured for years,[48] with some circuits applying an objective reasonableness test similar to the Fourth Amendment standard, [49] and others applying a subjective intent test similar to the Eighth Amendment standard.[50]

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46. *Graham*, 490 U.S. at 392–95 (citing Johnson v. Glick, 481 F.2d 1028 (2d Cir. 1973), *cert. denied*, 414 U.S. 1033 (1973) (applied the Fourteenth Amendment's due process protections to a pretrial detainee, rather than the Fourth or Eighth Amendments)); Bell v. Wolfish, 441 U.S. 520, 535 (1979) (holding that claims by pretrial detainees are brought under the Fourteenth Amendment).

47. Martin A. Schwartz, *Supreme Court Pretrial Detainee Excessive Force Decision*, N.Y. L.J. (Aug. 28, 2015), http://www.newyorklawjournal.com/id=1202735839595/Supreme-Court-Pretrial-Detainee-Excessive-Force-Decision ("[P]rior to its recent decision in Kingsley, the Supreme Court had not decided the due process standard for pretrial detainee excessive force claims.") [hereinafter Schwartz, *Supreme Court*].

48. *See supra* notes 11–12 and accompanying text.

49. *See, e.g.*, Gibson v. County of Washoe, Nev., 290 F.3d 1175, 1197 (9th Cir. 2002) ("[W]e have determined that the Fourth Amendment sets the 'applicable constitutional limitations' for considering claims of excessive force during pretrial detention." (quoting Pierce v. Multnomah County, 76 F.3d 1032, 1043 (9th Cir. 1996), *cert. denied*, 519 U.S. 1006 (1996))).

50. *See, e.g.*, Murray v. Johnson, 367 F. App'x 196, 198 (2d Cir. 2010) (relying on the Eighth Amendment excessive force standard articulated in *Hudson v. McMillian* in holding that the test for a pretrial detainee's excessive force claim under the Fourteenth Amendment's Due Process Clause is a subjective test).

II. THE CASE OF *KINGSLEY*

A. Facts of Kingsley v. Hendrickson

In April 2010, Michael Kingsley was booked in Monroe County Jail in Sparta, Wisconsin as a pretrial detainee pending adjudication of a drug charge.[51] On May 20, 2010, an officer performing a routine cell check noticed a piece of paper covering a light above Kingsley's bed and ordered him to remove it.[52] Kingsley refused and continued to refuse throughout the night.[53] The next morning, the jail administrator ordered Kingsley to remove the paper, and Kingsley refused yet again.[54] The jail administrator directed four officers to transfer Kingsley to a receiving cell so that they could remove the paper themselves.[55] The four officers ordered Kingsley to stand up, move towards the door, and keep his hands behind him, which Kingsley also refused to do.[56] In response, the officers "handcuffed him, forcibly removed him from the cell, carried him to a receiving cell, and placed him face down on a bunk with his hands handcuffed behind his back."[57]

The parties disagree about what happened immediately after, with the officers testifying that Kingsley resisted their efforts to remove his handcuffs and Kingsley testifying that he did not resist, and instead, two of the officers "slammed his head into the concrete bunk—an allegation the officers deny."[58] Neither party, however, disputes that Sergeant Stan Hendrickson—one of the officers involved in the altercation—directed another officer to "stun Kingsley with a Taser," which was applied to Kingsley's back for approximately five seconds.[59] Following the stun, Kingsley was left handcuffed and alone in the receiving cell for fifteen minutes, after which officers returned and removed the handcuffs.[60] Kingsley was subsequently placed on medical watch, but he refused to speak with

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51. Kingsley v. Hendrickson, 744 F.3d 443, 445 (7th Cir. 2014), *rev'd*, 135 S. Ct. 2466 (2015).
52. Kingsley v. Hendrickson, 135 S. Ct. 2466, 2470 (2015).
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*

the nurse and did not seek any medical attention for any injuries allegedly sustained during the incident.[61]

B. Lower Court Opinions

In December 2010, Kingsley filed a *pro se* Section 1983 complaint in the United States District Court for the Western District of Wisconsin, alleging that the officers "used excessive force against him, in violation of the Fourteenth Amendment's Due Process Clause."[62] The four defendant-jail officers filed a motion for summary judgment on the excessive force claim, which the district court denied.[63] The district court, relying on Seventh Circuit precedent interpreting the appropriate standard for excessive force claims brought under the Eighth Amendment, held that in order for force against a pretrial detainee to be constitutionally excessive and in violation of the Fourteenth Amendment, the defendants must have acted with the malicious and sadistic intent of causing harm to the plaintiff.[64] Finding that "a reasonable jury could conclude that defendants acted with malice and intended to harm plaintiff when they used force against him," the district court denied their motion for summary judgment.[65] Thus, Kingsley's excessive force claim proceeded to trial.[66]

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61. *Kingsley*, 744 F.3d at 446.

62. *Kingsley*, 135 S. Ct. at 2471. Kingsley also claimed violations of Wisconsin law as a result of the alleged use of excessive force. In addition, Kingsley alleged that jail officials violated his Fourteenth Amendment right to procedural due process by denying him process before placing him in a receiving cell as punishment for failing to follow the orders of the officers, resisting officers, disorderly conduct, and causing a jail disruption. Upon cross-motions for summary judgment, the district court granted summary judgment for the procedural due process claims, holding that Kingsley did not suffer a sufficient deprivation of his liberty interest to require the type of hearing Kingsley claims he was denied. *See* Kingsley v. Josvai, No. 10-cv-832-bbc, 2011 U.S. Dist. LEXIS 158769, at *2, *10–12 (W.D. Wis. Nov. 16, 2011). The only issue on appeal to the Seventh Circuit and later to the Supreme Court was Kingsley's Fourteenth Amendment excessive force claim.

63. *Kingsley*, 135 S. Ct. at 2471.

64. *Josvai*, 2011 U.S. Dist. LEXIS 158769, at *13–19; s*ee also*, *Kingsley*, 744 F.3d at 447 ("Although the [district] court in its ruling, concluded that the relevant constitutional right was contained within the Fourteenth Amendment because of Mr. Kingsley's status as a pretrial detainee, the court applied Eighth Amendment excessive force standards in assessing the claim.").

65. *Josvai*, 2011 U.S. Dist. LEXIS 158769, at *18. Although the district court's denial of summary judgment was not appealed by defendants, it is worth clarifying that after the Supreme Court's decision in *Kingsley*, a court's

application of the Eighth Amendment's subjective excessive force standard to determine whether a pretrial detainee's Fourteenth Amendment rights are violated would be in error since the Fourteenth Amendment now requires an objective analysis, rather than the subjective analysis currently required under the Eighth Amendment's malicious and sadistic standard.

66. At this time, the district court appointed Kingsley counsel. *Kingsley*, 744 F.3d at 447.

At the end of trial, the district court instructed the jury as follows:

> Excessive force means force *applied recklessly* that is unreasonable in light of the facts and circumstances of the time. Thus, to succeed on his 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
>
> (4) Defendants' conduct caused some harm to plaintiff.[67]

The jury returned a verdict for the defendants.[68] Kingsley filed an appeal with the Seventh Circuit, arguing that the correct standard for judging a pretrial detainee's Fourteenth Amendment excessive force claim is objective reasonableness. Kingsley asserted that "the [judge's] instruction wrongfully conflated the standard for excessive force claims under the Eighth and Fourteenth Amendments and that, as a result, the instructions incorrectly required him to demonstrate that the defendants acted with reckless disregard for his safety."[69] Finding against Kingsley, a panel of the Seventh Circuit held that to violate a pretrial detainee's Fourteenth Amendment

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

68. *Id.*

69. *Kingsley*, 744 F.3d at 448. In his appeal to the Seventh Circuit, Kingsley also argued that the district court's instruction regarding harm (the fourth prong in the instructions) was in error because "the jury might confuse the element of harm for some sort of lasting or significant injury." *Id.* The Seventh Circuit found that this objection was waived at trial, and therefore not proper for appellate review. *Id.* at 454–55. This issue was not a question on certiorari to the Supreme Court, and therefore was not considered.

rights, there must be "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 required.[70]

One member of the panel, Judge Hamilton, dissented, arguing that the appropriate standard for a pretrial detainee's excessive force claim under the Fourteenth Amendment is an objective reasonableness test similar to the Fourth Amendment, rather than the heightened subjective standard required under the Cruel and Unusual Punishment Clause of the Eighth Amendment, which applies to convicted prisoners who have already had their guilt adjudicated.[71] Relying on both Seventh Circuit and Supreme Court precedent, Hamilton asserted that "the transition from arrest to pretrial detention does not give officers greater ability to assault and batter the detainees."[72]

Kingsley filed a petition for certiorari on the question of "[w]hether the requirements of a 42 U.S.C. § 1983 excessive force claim brought by a plaintiff who was a pretrial detainee at the time of the incident are satisfied by a showing that the state actor deliberately used force against the pretrial detainee and the use of force was objectively unreasonable."[73] Noting a large circuit split on the issue, the Court agreed to grant certiorari and give clarity to the long-neglected question.[74]

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

71. *Id.* at 460 (Hamilton, J., dissenting).

72. *Id.* (quoting Titran v. Ackman, 893 F.2d 145, 147 (7th Cir. 1990) (quotation marks omitted)).

73. Petition for a Writ of Certiorari at (i), Kingsley v. Hendrickson, 135 S. Ct. 2466 (2015) (No. 14-6368).

74. *Kingsley*, 135 S. Ct. at 2472; *see also Kingsley*, 744 F.3d, at 456–57 (Hamilton, J., dissenting) (noting that "[t]he Supreme Court has not settled the question of the standard for pretrial detainees," which *Graham v. Connor* explicitly left open in 1989, collecting cases to demonstrate the "long-standing circuit split on the substantive standard for these excessive force claims by pretrial detainees," and "respectfully submit[ing] that our court and/or the Supreme Court needs to bring greater clarity to this question for the sake of both detainees and law enforcement and correctional personnel.").

C. Supreme Court Opinion and Dissents

In a 5-4 decision authored by Justice Breyer, the Court concluded that with respect to claims of excessive force brought by pretrial detainees under the Fourteenth Amendment, "the relevant standard is objective not subjective[, and t]hus, the defendant's state of mind is not a matter that a plaintiff is required to prove."[75] The Court clarified that in excessive force cases there are actually two state of mind questions, requiring a bifurcated, two-part analysis.[76] "The first concerns the defendant's state of mind with respect to his physical acts—*i.e.*, his state of mind with respect to the bringing about of certain physical consequences in the world."[77] In the context of the facts at issue, there was no dispute that the officers deliberately intended to use the force they did—i.e., to restrain and tase Kingsley.[78] "The second question concerns the defendant's state of mind with respect to whether his use of force was 'excessive.'"[79] This was the question in dispute and the question which had created a rift between the circuits.

The Court finally ended the debate and held that the deliberate use of force is unconstitutional only if it is found to be objectively unreasonable.[80] The Court rejected the notion that a litigant must prove a state actor subjectively intended to punish the pretrial detainee or cause malicious and sadistic pain in order to make out an excessive force claim under the Fourteenth Amendment.[81] Following *Kingsley*, the subjective intent of an officer or guard in an excessive force action brought by a pretrial detainee is only pertinent to the first question in the bifurcated analysis—whether the officer or guard's action which caused the allegedly excessive force was "deliberate—*i.e.*, purposeful or knowing," rather than accidental or negligent.[82] All that matters in evaluating the reasonableness of an officer or guard's deliberate actions which allegedly result in excessive force—the second step of the analysis—is whether the officer or guard's actions are in accord

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

76. For the remainder of this note, the two-part analysis created by the Court in *Kingsley* is referred to as a bifurcated analysis.

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

78. *Id.*

79. *Id.*

80. *Id.* at 2472–73.

81. *Id.* This is the test currently used for excessive force claims brought by convicted inmates under the Eighth Amendment. *See generally supra* Part IV-C.

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

with what a reasonable officer or guard on the scene would have done in the same situation.[83]

The Court further identified a variety of circumstantial factors which "may bear on the reasonableness or unreasonableness of the force used," including:

> 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.[84]

However, the Court noted that these factors are only examples and are neither exclusive nor necessary to find that the force used was objectively unreasonable.[85]

Applying this bifurcated objective reasonableness standard to the jury instructions at issue in *Kingsley*, the Court agreed that they erroneously required the jury to find that the defendant-officers recklessly disregarded Kingsley's safety, thereby adding an unnecessary subjective intent requirement.[86] The Court accordingly vacated the decision of the Seventh Circuit and remanded the case to determine whether the district court's error was harmless.[87] On remand, the Seventh Circuit determined that the error was not harmless because the addition of a subjective intent requirement to prove excessive force "increased, significantly, [Kingsley's] burden of proof."[88] Accordingly, the case was remanded to the district court for a new trial.[89]

Two dissents were filed. Justice Scalia, joined by Chief Justice Roberts and Justice Thomas, believed that the Court's "cases hold that the intentional infliction of punishment upon a pretrial detainee may violate the Fourteenth Amendment; but the infliction of

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83. *Id.* at 2472–73.
84. *Id.* at 2473.
85. *Id.*
86. *Id.* at 2476–77.
87. *Id.* at 2477.
88. Kingsley v. Hendrickson, No. 12-3639, 2015 U.S. App. LEXIS 15963, at *4–5 (7th Cir. 2015), *on remand from*, 135 S. Ct. 2466 (2015).
89. *Id.* at *1.

'objectively unreasonable' force, without more, is not the intentional infliction of punishment."[90] Justice Scalia based this rationale on the Court's seminal pretrial detainee case, *Bell v. Wolfish*, in which the Court held that the Due Process Clause forbids inflicting punishment on pretrial detainees because they have not yet been found guilty.[91] Although he conceded that the objective reasonableness of the force used can make good sense as a heuristic for identifying subjective intent in cases of considered decision making by authorities—such as when jail officials enact detention policies after debate and discussion—Justice Scalia argued that it is not a good proxy for inferring intent in an excessive force case, when "[a]n officer's decision regarding how much force to use is made 'in haste, under pressure, and frequently without the luxury of a second chance.'"[92]

Justice Alito also filed a dissent arguing that certiorari was improvidently granted.[93] He believed that the Court should not have considered the Fourteenth Amendment question presented until the Court resolved another question left open since *Graham*: "whether a pretrial detainee can bring a Fourth Amendment claim based on the use of excessive force by a detention facility employee."[94] Justice Alito correctly pointed out that per the precedent set in *Graham*, "[i]f a pretrial detainee can bring such a claim, we need not and should not rely on substantive due process," a doctrine the Court has always been cautious to expand.[95] However, because the majority disagreed with Justice Alito and decided that the Fourteenth Amendment standard is virtually identical to the Fourth Amendment's objective reasonableness standard, this unresolved question has been rendered moot for all practical purposes.[96]

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90. *Kingsley*, 135 S. Ct. at 2477 (Scalia, J., dissenting).

91. *Id.* at 2478. *See generally* Bell v. Wolfish, 441 U.S. 520 (1979) (discussing key differences between the rights of pretrial detainees and convicted inmates).

92. *Kingsley*, 135 S. Ct. at 2478 (Scalia, J., dissenting) (quoting Hudson v. McMillian, 503 U.S. 1, 6 (1992)).

93. *Id.* at 2479 (Alito, J., dissenting).

94. *Id.*

95. *Id. See also supra* Part I-B.

96. *See* SCHWARTZ, SECTION 1983 LITIGATION CLAIMS, *supra* note 5, at § 3:12 (noting that while the *Graham* Court left the question of when arrest ends and pretrial detention begins unresolved, the question is now only "academic" because the excessive force standards for an arrestee and a pretrial detainee are the same after *Kingsley*).

D. Unresolved Questions from *Kingsley*

In holding that a pretrial detainee must only show objectively unreasonable force to succeed on an excessive force claim under the Fourteenth Amendment, the Court resolved one question that had remained open and contested for twenty-six years. Nonetheless, in so doing, the Court created two new questions, both of which it explicitly reserved for future cases, in line with the Court's policy of incremental expansion to Section 1983 case law and substantive due process protections.

First, the Court affirmed *Daniels*' holding that negligent and accidental acts by officers which cause harm to a pretrial detainee do not constitute a violation of the Fourteenth Amendment.[97] However, the Court refused to consider the question of whether reckless acts which cause force are sufficient to state a claim for excessive force under the Fourteenth Amendment, or if only deliberate uses of force rise to the level of a due process violation,[98] as is the case with excessive force claims brought under the Eighth Amendment.[99]

Second, the Court acknowledged that its decision to institute an objective reasonableness test for excessive force claims brought by pretrial detainees under the Fourteenth Amendment "may raise questions" about the current requirement of proof of subjective intent for the same claims brought by convicted inmates under the Eighth Amendment.[100] Nonetheless, the Court declined to address the issue at that time.[101]

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

98. *Id.* ("Whether [recklessness] might suffice for liability in the case of an alleged mistreatment of a pretrial detainee need not be decided here; for the officers do not dispute that they acted purposefully or knowingly with respect to the force they used against Kingsley.").

99. *See* Hudson v. McMillian, 503 U.S. 1, 7–9 (1992) (requiring subjective intent to cause malicious and sadistic harm to constitute violation of the Eighth Amendment).

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

101. *Id.*

III. THE FIRST UNRESOLVED QUESTION—IS RECKLESSNESS ENOUGH?

In *Kingsley*, the Court bifurcated the Fourteenth Amendment excessive force analysis into two separate questions. The first question is whether or not the act which caused the force was deliberate.[102] The Court affirmed that accidental and negligent acts which cause excessive force to a pretrial detainee are insufficient to violate the Fourteenth Amendment (i.e., accidental and negligent acts are not deliberate).[103] However, the Court left open the possibility that reckless acts—those which fall in the gray area between negligent and intentional—could "suffice for liability in the case of an alleged mistreatment of a pretrial detainee."[104] In other words, the Court left open the question of whether or not reckless acts constitute deliberate acts.[105]

Part III seeks to predict how the Court will eventually resolve this open question by analyzing the underlying principles of the shocks the conscience standard used to determine when conduct is sufficiently culpable to violate the Fourteenth Amendment's substantive due process protections. Part III-A begins by defining recklessness in the context of substantive due process doctrine, based on the Court's prior opinions on the subject. Part III-B recalls the origin, purposes, and principles of the shocks the conscience standard. Part III-C then breaks down the analysis the Court uses to decide the appropriate level of culpability required to shock the conscience and violate the Fourteenth Amendment for different types of substantive due process claims. Part III-D concludes this venture by applying the analysis discussed in Part III-C to the unresolved question of whether recklessness is a sufficient level of culpability to state a claim under the Fourteenth Amendment in pretrial detainee excessive force cases. Although this analysis leads to the conclusion that reckless acts are

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102. *Id.* at 2472.

103. *Id.*

104. *Id.*; *see also* County of Sacramento v. Lewis, 523 U.S. 833, 849–51 (1998) (recognizing that recklessness might suffice for liability in certain Fourteenth Amendment claims, but holding that it was an inappropriate standard of liability in the context of a high speed police pursuit); Daniels v. Williams, 474 U.S. 327, 334 n.3 (1986) (holding that negligent acts that result in injury to a pretrial detainee categorically fail to state a claim for violation of the Fourteenth Amendment, but refusing to decide whether "something less than intentional conduct, such as recklessness or 'gross negligence,' is enough to trigger the protections of the Due Process Clause.").

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

insufficient to state a claim in the pretrial detainee excessive force context, Part III-E discusses a counter-argument and demonstrates why it is ultimately unpersuasive.

A. Defining Recklessness

Recklessness is a legal term of art with different meanings depending on the context in which it is used. The two most common usages of the term are civil recklessness and criminal recklessness. In civil law, the term recklessness usually refers to a person who acts, or fails to act when he or she has a duty to act, "in the face of an unjustifiably high risk of harm that is either known *or so obvious that it should be known*."[106] In criminal law, recklessness usually refers to "when a person disregards a risk of harm of which he *is* aware," regardless of whether the risk was so obvious that the person *should* have been aware of the risk.[107] The difference between the two definitions is whether the allegedly reckless actor needs to have personally and actually perceived the risk of harm (subjective definition used in criminal law), or whether it is sufficient for the risk to be so objectively obvious that the allegedly reckless actor can be held liable for his actions or omissions even if he did not personally and actually perceive the risk of harm (objective definition used in civil law).[108]

In 1994, the Supreme Court held in *Farmer v. Brennan* that the narrower criminal recklessness definition should apply to the Section 1983 claim at issue.[109] *Farmer* involved a *Bivens* failure to protect claim by a convicted inmate alleging that prison officials violated her Eighth Amendment right to be free from cruel and unusual punishment when they failed to protect her from an assault

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106. Farmer v. Brennan, 511 U.S. 825, 836 (1994) (emphasis added) (citing RESTATEMENT (SECOND) OF TORTS § 500 (AM. LAW INST. 1965)).

107. *Farmer*, 511 U.S. at 837 (emphasis added) (citing MODEL PENAL CODE §§ 2.02(2)(c), cmt. 3 (AM. LAW INST. 1985)).

108. *Id.* at 836–37; *see also* Heather M. Kinney, *The "Deliberate Indifference" Test Defined*, 5 TEMP. POL. & CIV. RTS. L. REV. 121 (1995) (analyzing the *Farmer v. Brennan* opinion and explaining the differences between civil recklessness and criminal recklessness).

109. *Farmer*, 511 U.S. at 837 ("[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.").

by other inmates.[110] Such claims are analyzed under a standard known as deliberate indifference—a standard virtually identical to the mens rea of recklessness.[111] The question before the Court was whether the deliberate indifference standard requires subjective knowledge of the risk, like criminal recklessness, or whether the objective test for recklessness used in civil law is sufficient to state a constitutional claim.[112] The Court based their decision to adopt the criminal definition of recklessness on the finding that criminal recklessness' subjective knowledge requirement best comports with the text and purpose of the Eighth Amendment—to prevent cruel and unusual punishment.[113] "An official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot . . . be condemned as the infliction of punishment."[114] Therefore, only when an official is actually aware of a significant risk of harm and consciously disregards that risk can an official be found to have acted recklessly.[115]

Although the Court in *Farmer* was specifically defining the deliberate indifference standard in the Eighth Amendment failure to protect context when they adopted the criminal definition of recklessness, there are multiple indications that this decision applies to more than just Eighth Amendment failure to protect claims. Indeed, the *Farmer* Court conceded that deliberate indifference is nothing more than a fancy name for what is generally referred to as recklessness.[116] While the Supreme Court has not explicitly stated that the *Farmer* holding and analysis applies outside the context of Eighth Amendment failure to protect claims, every federal circuit has assumed this to be the case and has applied *Farmer*'s definition of recklessness to other types of constitutional tort claims, including

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110. *Id.* at 830–31.

111. *Id.* at 836 ("[T]he Courts of Appeals have routinely equated deliberate indifference with recklessness . . . . It is, indeed, fair to say that acting or failing to act with deliberate indifference to a substantial risk of serious harm to a prisoner is the equivalent of recklessly disregarding the risk.").

112. *Id.* at 829, 836–37.

113. *Id.* at 837–38.

114. *Id.* at 838.

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

116. *Id.* at 836 ("With deliberate indifference lying somewhere between the poles of negligence at one end and purpose or knowledge at the other, the Courts of Appeals have routinely equated deliberate indifference with recklessness . . . . It is indeed, fair to say that acting or failing to act with deliberate indifference to a substantial risk of serious harm to a prisoner is the equivalent of recklessly disregarding that risk.").

claims made by pretrial detainees under the Fourteenth Amendment.[117] It seems highly unlikely that every federal circuit would reach this conclusion if it was incorrect, and it seems even more unlikely that the Supreme Court would fail to correct this conclusion for over twenty years if it was a misinterpretation of *Farmer*'s intended reach.

Further evidence of the trans-substantive and trans-Amendment scope of *Farmer*'s definition of recklessness can be found in *County of Sacramento v. Lewis,* and even in *Kingsley. Lewis* involved a Fourteenth Amendment substantive due process claim for the allegedly reckless death of a passenger in a vehicle that the police were pursuing at high speeds.[118] In discussing whether recklessness is sufficient to state a claim under the Fourteenth Amendment's substantive due process clause, the Court pointed to the deliberate indifference standard used for Eighth Amendment inadequate medical care claims (which is the same deliberate indifference standard used in failure to protect claims like *Farmer*)[119] as an

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117. *See* Caiozzo v. Koreman, 581 F.3d 63, 71 n.3 (2d Cir. 2009) (collecting cases from the First, Second, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits and reiterating that deliberate indifference claims are analyzed under the *Farmer* definition, regardless of whether the claim is brought by a convicted inmate under the Eighth Amendment or a pretrial detainee under the Fourteenth Amendment); *see also* Paulino v. Burlington Cty. Jail, 438 F. App'x. 106, 109 (3d Cir. 2011) (citing *Caiozzo* and agreeing with the other federal circuits that the definition and state of mind requirements for the deliberate indifference standard are the same for claims brought by pretrial detainees as they are for claims brought by convicted inmates); Johnson v. Meltzer, 134 F.3d 1393, 1398 (9th Cir. 1998) (quoting *Farmer* to define the elements of a deliberate indifference claim brought by a pretrial detainee for failure to provide adequate medical care); Shaw v. District of Columbia, 944 F. Supp. 2d 43, 57–58 (D.D.C. 2013) (quoting *Farmer* to define the elements of a deliberate indifference claim brought by a pretrial detainee for dangerous conditions of confinement). *Cf.* Harvey v. District of Columbia, 798 F.3d 1042, 1051–52 (D.C. Cir. 2015) (applying the subjective definition of recklessness and Farmer's deliberate indifference standard in a case claiming a violation of an involuntarily committed person's Fourteenth Amendment right to adequate medical care, without deciding whether some lesser standard than deliberate indifference should apply to persons who are not convicted).

118. County of Sacramento v. Lewis, 523 U.S. 833, 836–37 (1998).

119. *Cf. Farmer*, 511 U.S. at 835 (noting that the term deliberate indifference was originally used in Estelle v. Gamble, 429 U.S. 97, 104 (1976)—an Eighth Amendment denial of adequate medical care case—and proceeding to define deliberate indifference as the equivalent of criminal recklessness); *see also* Leavitt v. Corr. Med. Servs., 645 F.3d 484, 497 (2011) (citing *Farmer*'s subjective definition of recklessness to define the deliberate indifference test for inadequate medical care claims).

example of when recklessness is sufficient to state a claim for a violation of substantive due process *under the Fourteenth Amendment*.[120] This same discussion in *Lewis* is cited by the Court in *Kingsley* to support the proposition that recklessness may be sufficient to state a claim for excessive force against a pretrial detainee under the Fourteenth Amendment.[121] Thus, the Court must have intended for *Farmer*'s adoption of the criminal definition of recklessness to apply to other constitutional torts brought through Section 1983—including Fourteenth Amendment substantive due process claims like those at issue in *Lewis* and *Kingsley*. It would be illogical for the Court to cite to cases and doctrines that use *Farmer*'s subjective definition of recklessness as examples of when recklessness is sufficiently culpable to state a violation of the Fourteenth Amendment's substantive due process clause if they did not intend for the cited cases' definition of recklessness to apply to such Fourteenth Amendment substantive due process claims.

Having determined that recklessness in the substantive due process context likely requires actual appraisal of a substantial risk of harm and conscious disregard of that risk, it is necessary to envision how this definition would fit into *Kingsley*'s bifurcated test. Since *Kingsley* bifurcated the analysis into two inquiries—a subjective inquiry of whether the actor intended to use the force exerted and an objective inquiry into the reasonableness of that force—the recklessness analysis only matters for the subjective inquiry of whether the actor intended to use the force exerted.[122] Thus, assuming recklessness is a permissible standard of liability, the bifurcated *Kingsley* test for reckless actions would be as follows: (1) whether the actor took an action that while not intended to cause force, carried with it a substantial risk of causing such force, which the officer knew of and disregarded, and (2) whether the force used was objectively reasonable given the circumstances.

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120. *Lewis*, 523 U.S. at 849–50 ("Whether the point of the conscience-shocking is reached when injuries are produced with culpability falling within the middle range . . . 'such as recklessness or gross negligence,' is a matter for closer calls. To be sure, we have expressly recognized the possibility that some official acts in this range may be actionable under the Fourteenth Amendment, and our cases have compelled recognition that such conduct is egregious enough to state a substantive due process claim in at least one instance[—deliberate indifference to the medical needs of pretrial detainees]" (internal citations omitted)).

121. Kingsley v. Hendrickson, 135 S. Ct. 2466, 2472 (2015).

122. *Id.*

B. The Shocks the Conscience Standard

When attempting to discern the standard of culpability required to violate a right, the natural first place to look is the text of the source providing for the right in the first place.[123] Unfortunately, Section 1983 contains no mens rea element in its text.[124] Instead, the mens rea required to violate a constitutional right is derived from, and varies with, the constitutional right allegedly abridged.[125]

The Fourteenth Amendment's Due Process Clause, the constitutional right in question here, contains two separate protections. One protection is procedural and ensures that deprivations of the rights to life, liberty, and property occur only after receiving fair process.[126] The other protection is substantive and it prohibits "certain government actions regardless of the fairness of the procedures used to implement them."[127] The substantive due process protection serves "to prevent government from abusing [its] power, or employing it as an instrument of oppression,"[128] as well as to protect individuals against arbitrary government acts that are without reasonable justification.[129] Excessive force cases brought by pretrial detainees are essentially substantive due process claims asserting that the individual's right to be free from restraint on his or her

123. *See generally* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990) (explaining that the modern approach to statutory interpretation always begins with the text of the statute).

124. *See supra* note 2; *see also* Daniels v. Williams, 474 U.S. 327, 329–30 (1986) ("After examining the language, legislative history, and prior interpretations of the statute, we concluded that § 1983, unlike its criminal counterpart, 18 U.S.C. § 242, contains no state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right. We adhere to that conclusion.").

125. *See, e.g.*, *Daniels*, 474 U.S. at 330 ("[I]n any given § 1983 suit, the plaintiff must still prove a violation of the underlying constitutional right; and depending on the right, merely negligent conduct may not be enough to state a claim."); Estelle v. Gamble, 429 U.S. 97, 105 (1976) (requiring deliberate indifference to a prisoner's serious medical needs to show a violation of the Eighth Amendment's prohibition against cruel and unusual punishment); Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977) (finding invidious discriminatory purpose is necessary to violate the Equal Protection Clause).

126. *See* United States v. Salerno, 481 U.S. 739, 746 (1987).

127. *Daniels*, 474 U.S. at 331.

128. Collins v. City of Harker Heights, 503 U.S. 115, 126 (1992) (quoting DeShaney v. Winnebago Cty. Dept. of Soc. Servs., 489 U.S. 189, 196 (1989) (quotation marks omitted)).

129. County of Sacramento v. Lewis, 523 U.S. 833, 845–47 (1998).

liberty (and life in the most serious of cases) was violated by "an abuse of executive power so clearly unjustified by any legitimate objective of law enforcement as to be barred by the Fourteenth Amendment."[130]

When the time came for the Supreme Court to define what conduct qualifies as a constitutional violation of substantive due process—as opposed to a mere state tort or crime—the Court took the fundamental principles and purposes of substantive due process and synthesized what is known as the "shocks the conscience" test in *Rochin v. California*.[131] Noting that the due process clause is the most indefinite and vague enumerated right in the Constitution—but contains the most comprehensive set of protections of an individual's liberty—the Court opted for a flexible standard, requiring an individualized assessment of the facts and circumstances surrounding each alleged violation to determine whether the conduct is shocking to the conscience.[132] As Justice Frankfurter put it in his majority opinion:

> In dealing not with the machinery of government but with human rights, the absence of formal exactitude, or want of fixity of meaning, is not an unusual or even regrettable attribute of constitutional provisions. Words being symbols do not speak without a gloss . . . . [T]he gloss of some of the verbal symbols of the Constitution does not give them a fixed technical content. It exacts a continuing process of application.[133]

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130. *Id.* at 840.

131. Rochin v. California, 342 U.S. 165 (1952). *See generally* Carly DeRubeis, *Casenote: Fourteenth Amendment—Due Process—A High Speed Police Pursuit with Deliberate Indifference to the Survival of the Suspect's Passenger is Not Sufficient to Meet the Shocks-the-Conscience Test and Therefore Does Not Violate the Substantive Due Process Provision of the Fourteenth Amendment—County of Sacramento v. Lewis, 118 S.Ct. 1708 (1998)*, 10 SETON HALL CONST. L.J. 1185 (2000) (discussing, inter alia, the origin and history of the shocks the conscience test and *Rochin*); Stephen Shapiro, *Keeping Civil Rights Actions Against State Officials in Federal Court*, 3 LAW & INEQ. 161, 171 (1985) (critiquing the shocks the conscience standard as a "nebulous standard" with results varying "from case to case, depending on the sensitivities of the conscience of the individual judge.").

132. *Rochin*, 342 U.S. at 169–72.

133. *Id.* at 169–70.

At the same time, however, the Court was insistent that this general standard of conscience-shocking and the "vague contours of the Due Process Clause do not leave judges at large," for judges may not draw on their own personal and private notions of what is conscience-shocking, but must base their decisions with regard to the "limits that bind judges in their judicial function." [134] Justice Frankfurter went on to explain that:

> The faculties of the Due Process Clause may be indefinite and vague, but the mode of their ascertainment is not self-willed. In each case "due process of law" requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims . . . on a judgment not *ad hoc* and episodic but duly mindful of reconciling the needs both of continuity and of change in a progressive society.[135]

The key point of *Rochin* is that when determining whether the Fourteenth Amendment has been violated, judges must look at the totality of the circumstances to determine whether or not the allegedly unconstitutional conduct is such an arbitrary or abusive use of government power as to constitute conduct that shocks the conscience.[136] Ultimately, this means that conduct which shocks the conscience in one circumstance may fall short of rising to the level of a constitutional violation in another.[137] While the conscience-shocking

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134. *Id.* at 170–71.

135. *Id.* at 172 (internal citation omitted).

136. *Id.* at 172–73.

137. County of Sacramento v. Lewis, 523 U.S. 833, 850 (1998) ("Deliberate indifference that shocks in one environment may not be so patently egregious in another, and our concern with preserving the constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience-shocking."); Betts v. Brady, 316 U.S. 455, 462 (1942) ("The phrase [due process of law] formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial.").

standard "is no calibrated yard stick, it does, as Judge Friendly put it, 'point the way.'"[138]

C. How the Court Determines When Recklessness is Sufficient to Shock the Conscience

The Court has been confronted with similar questions of whether reckless acts are sufficient to state a constitutional violation in the past. In the Eighth Amendment excessive force context, the Court flatly declined to adopt a deliberate indifference standard, opting instead for a mens rea of purposefully or knowingly causing malicious and sadistic harm.[139] In the Fourteenth Amendment high speed police pursuit context, the Court also declined to accept a deliberate indifference standard, requiring a purpose to cause harm.[140] On the contrary, the Court has accepted reckless conduct as sufficient to state a constitutional claim in the contexts of both Eighth Amendment and Fourteenth Amendment failure to protect,[141] failure to train,[142] and failure to provide medical care claims,[143] among others.[144]

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138. *Lewis*, 523 U.S. at 847 (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973), *cert. denied*, 414 U.S. 1033 (1973)).

139. Hudson v. McMillian, 503 U.S. 1, 6–7 (1992); *see also* Whitley v. Albers, 475 U.S. 312, 320–21 (1986).

140. *Lewis*, 523 U.S. at 853–54.

141. Farmer v. Brennan, 511 U.S. 825, 834 (1994).

142. City of Canton v. Harris, 489 U.S. 378, 388 (1989).

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

144. In delineating the level of mens rea required to state a Section 1983 claim, the Court has spoken in categorical terms. *See, e.g.*, *Lewis*, 523 U.S. at 854 (purpose to cause harm is necessary to give rise to liability under the Fourteenth Amendment for a high-speed police chase); *Hudson*, 503 U.S. at 6–7 (when prison officials are accused of using excessive force, only a purpose to cause harm (specifically, a malicious and sadistic purpose to cause harm) is sufficient to state a claim under the Eighth Amendment); *Estelle*, 429 U.S. at 104 (deliberate indifference is all that is required to state a claim for inadequate medical care). The type of claim sets the rule and the rule is based on the Court's prior analyses regarding the general exigency and countervailing state interests present in such claims. *See* discussion *infra* pp. 230–33. However, one can think of situations where a prison guard is accused of using force recklessly and unnecessarily, in situations that do not involve any emergent threats to the prison official, nor competing priorities to sort through. This is the common problem of over-inclusiveness in rules, which do not flex and adjust to varying degrees of circumstances like standards do. While there are good arguments for creating standards—instead of rules—to determine whether claims rise to the level of a constitutional violation in Section 1983 jurisprudence, the Court has not provided any indication that it is heading in that direction. As such, this Note assumes that

An analysis of the differences between the types of claims for which the Court has accepted recklessness as sufficient to state a constitutional claim, as opposed to other claims where the Court has required a mens rea greater than recklessness, reveals two consistent factors that have guided the Court's decisions: (1) time to deliberate and (2) countervailing state interests.

As the Court stated in *Lewis* when declining to accept deliberate indifference as a sufficient standard of culpability for Fourteenth Amendment high speed police pursuit claims, "the standard is sensibly employed only when actual deliberation is practical."[145] Prison guards and police officers are required to make split-second decisions when responding to violent threats and disturbances—"decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance"[146]—and under "circumstances that are tense, uncertain, and rapidly evolving."[147] In such scenarios, "a deliberate indifference standard does not adequately . . . convey the appropriate hesitancy to critique in hindsight" the decisions of guards or officers to, for example, engage pursuit or neutralize a potentially dangerous situation that the officer or guard has a duty to resolve.[148] Instead, in order to show proper deference to prison guards and police officers—who must act quickly in exigent and dangerous circumstances, with little time to deliberate on the adverse risks of their actions—the Court requires conduct knowingly or purposely taken to cause harm, rather than reckless conduct which causes inadvertent injury, to state a constitutional claim in such cases.[149]

On the contrary, when prison officials or police officers have time to deliberate and are not pressed to make immediate decisions, recklessness is a perfectly reasonable standard of culpability.[150] For claims challenging inadequate medical care, failure to protect, failure

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in predicting whether recklessness is sufficient to state a claim in a Fourteenth Amendment excessive force action, the Court will keep with precedent and announce a categorical rule for the entire field of such claims.

145. *Lewis*, 523 U.S. at 851.

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

147. Graham v. Connor, 490 U.S. 389, 397 (1989).

148. *Lewis*, 523 U.S. at 852 (quoting *Whitley*, 475 U.S. at 320).

149. *See Lewis*, 523 U.S. at 853–54; *Hudson*, 503 U.S. at 6–7; *Whitley*, 475 U.S. at 320–21.

150. *Lewis*, 523 U.S. at 853 (drawing a distinction, for the purposes of liability, between cases where an official has "time to make unhurried judgments," as opposed to ones in which "unforeseen circumstances demand an officer's instant judgment.").

to train, and other conditions of confinement claims—none of which involve pressing emergencies and the need to respond to threatening situations—there is ample time for a guard or police officer to reflect on his actions and evaluate whether they are likely to result in significant injury to a bystander, suspect, pretrial detainee, or convicted inmate. Indeed, "in the custodial situation of a prison, forethought about an inmate's welfare is not only feasible but obligatory under a regime that incapacitates a prisoner to exercise ordinary responsibility for his own welfare."[151]

The second factor that guides the Court's analysis in determining whether recklessness is an appropriate level of culpability for a specific type of constitutional claim is the existence of conflicting state interests. In exigent and dangerous situations like a prison disturbance or a high speed police pursuit, there are often conflicting, yet equally important, governmental responsibilities that the guard or officer will have to choose between when taking action.[152] For instance, in the prison context, whether the "disturbance is a riot or a lesser disruption, corrections officers must balance the need to maintain or restore discipline through force against the risk of injury to inmates."[153] The same is true for police pursuits: "A police officer deciding whether to give chase must balance on one hand the need to stop a suspect . . . and, on the other, the high speed threat to everyone within stopping range, be they suspects, their passengers, other drivers, or bystanders."[154] To allow a recklessness standard of culpability in claims based on these types of scenarios would ignore the difficult choices prison guards and police officers must make while balancing competing obligations in the heat of the moment.[155]

These countervailing interests do not exist to any significant degree in conditions of confinement claims, where the State's primary responsibility is the protection of those it locks up.[156] To use the failure to provide adequate medical care claim as an example:

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151. *Id.* at 851.

152. *Id.* at 851–52.

153. *Hudson*, 503 U.S. 1, 6 (1992) (quoting Whitley, 475 U.S. at 320 (quotation marks omitted)).

154. *Lewis*, 523 U.S. at 853.

155. *Whitley*, 475 U.S. at 320.

156. *See Lewis*, 523 U.S. at 851–52; *see also* DeShaney v. Winnebago Cty. Dept. of Soc. Servs., 489 U.S. 189, 199–200 (1989) ("[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. The rationale for this principle is simple enough: when

> The deliberate indifference standard articulated in *Estelle* [v. Gamble—the hallmark case on denying adequate medical care to prisoners—] was appropriate in the context presented in that case because the State's responsibility to attend to the medical needs of prisoners does not ordinarily clash with other equally important governmental responsibilities. Consequently, "deliberate indifference to a prisoner's serious illness or injury," can typically be established or disproved without the necessity of balancing competing institutional concerns for the safety of prison staff or other inmates.[157]

Therefore, with no significant countervailing interests to attend to in conditions of confinement cases like *Estelle*, there is little risk of unfairly critiquing prison officials or police officers in hindsight for failing to provide constitutionally required protection—like adequate medical care or conditions free from arbitrary or excessive harm—as a result of their reckless acts or omissions.

These two factors—time for deliberation and competing state interests—have been the dispositive forces behind the Court's decisions on whether to permit recklessness as a sufficient level of culpability in certain types of constitutional torts. When prison and police officials take reckless action in exigent situations—situations in which the official must balance conflicting responsibilities in a limited amount of time—inadvertent harm that comes from reckless acts is insufficient to shock the conscience and trigger constitutional liability.[158] When prison and police officials, however, act or fail to act

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the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause." (citation omitted)).

157. *Whitley*, 475 U.S. at 320 (quoting Estelle v. Gamble, 429 U.S. 97, 105 (1976) (citations omitted)).

158. *See, e.g.*, *Lewis*, 523 U.S. at 853–55 (finding that a police officer who engaged in a high speed vehicle pursuit and recklessly caused the death of the passenger in the fleeing car was not liable under Section 1983 because his reckless acts performed in the line of duty, while imprudent in hindsight, did not

in circumstances which provide reasonable time to deliberate on the risks of such acts or omissions, and when there are no countervailing state interests to account for, there is no justification for any inadvertent harm that results from such acts or omissions.[159] In these circumstances, reckless acts and omissions are so abusive of government power as to shock the conscience and violate the Fourteenth Amendment's substantive due process protections.[160]

D. Recklessness Does Not Shock the Conscience in Pretrial Detainee Excessive Force Claims

Just as recklessness is an insufficient standard of culpability to support a Fourteenth Amendment claim for an injury sustained during a high speed police pursuit—as well as an Eighth Amendment claim for an injury sustained during a prison disturbance—it is insufficient to support a Fourteenth Amendment claim for injury sustained during an altercation involving a pretrial detainee. The same dispositive factors that render recklessness inappropriate in these contexts make it inappropriate in excessive force claims by pretrial detainees.

First, when jail officials are confronted with a potentially dangerous detainee, there is little time for the officials to reflect on the unintended consequences of their actions. They must "act quickly and decisively," or risk injury, and even death, to themselves or others in the jail.[161] For example, if a jail official unholsters his Taser in response to an aggressive and uncooperative detainee, and the Taser accidentally discharges, injuring the detainee, it would be inappropriate, based on the Court's precedent, to impose liability on the jail official because of his reckless actions leading up to the accidental discharge.[162] While, in hindsight, it may have been unwise

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shock the conscience and violate the Fourteenth Amendment's substantive due process protections).

159. Note, however, that the official must still subjectively perceive the substantial risk of harm that could result from his acts or omissions. *See supra* Part III-A.

160. *Lewis*, 523 U.S. at 851–52.

161. Hudson v. McMillian, 503 U.S. 1, 6 (1992). *See also* Kingsley v. Hendrickson, 135 S. Ct. 2466, 2474 (2015).

162. *Cf. Kingsley*, 135 S. Ct. at 2472 ("Thus, if an officer's Taser goes off by accident or if an officer unintentionally trips and falls on a detainee, causing him harm, the pretrial detainee cannot prevail on an excessive force claim."); *see also* Daniels v. Williams, 474 U.S. 327, 331 (1986) ("Historically, this guarantee of due

for the official to unholster his Taser, point it at the pretrial detainee, and keep his finger over the trigger, to hold him responsible for this reckless accident would fail to accord the jail official deference to his actions, "made in haste, under pressure, and [] without the luxury of a second chance."[163]

Second, during these exigent situations, jail officials must balance the threat of unrest and harm to jail staff, visitors, and other inmates, with the harm the disruptive inmate might suffer if force is used to neutralize the threat. [164] Jail officials frequently find themselves in situations "calling for fast action" that also pit dueling obligations against each other. [165] "Their duty is to restore and maintain lawful order, while not exacerbating disorder more than necessary to do their jobs. They are supposed to act decisively and show restraint at the same moment . . . ."[166] Allowing reckless actions taken by jail officials in these situations to support a claim for Section 1983 liability would fault the officer for nothing more than failing to make a perfect appraisal of a high pressure situation and identify and execute the ideal solution—one which flawlessly balances the countervailing obligations of the officer—in the midst of disorder.

Excessive force claims by pretrial detainees are prototypical of the scenarios in which the Court has held recklessness is an insufficient standard of culpability to state a constitutional claim. As the Court stated in a remarkably relevant passage of the *Lewis* opinion:

> To recognize a substantive due process violation in these circumstances when only mid-level fault has been shown would be to forget that liability for deliberate indifference to inmate welfare rests upon the luxury enjoyed by prison officials of having time to make unhurried judgments, upon the chance for repeated reflection, largely uncomplicated by the pulls of competing obligations. When such extended opportunities to do better are teamed with protracted failure even to care, indifference is truly shocking. But

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process has been applied to deliberate decisions of government officials to deprive a person of life, liberty, or property.").

163. *Lewis*, 523 U.S. at 852 (quoting Whitley v. Albers, 475 U.S. 312, 320 (1986)).

164. Hudson v. McMillan, 503 U.S. 1, 6 (1992).

165. *Lewis*, 523 U.S. at 853.

166. *Id.*

> when unforeseen circumstances demand an officer's instant judgment, even precipitate recklessness fails to inch close enough to harmful purpose to spark the shock that implicates "the large concerns of the governors and the governed."[167]

The shocks the conscience test was intended to remain as flexible as the contours of substantive due process. To that end, what constitutes conduct that shocks the conscience in one scenario may be less shocking in another scenario with different circumstances and considerations. The Supreme Court has consistently held that reckless acts which cause injury to a suspect, pretrial detainee, or convicted inmate resulting from harmful conditions of confinement are shocking to the conscience—there is no excuse for recklessness when officials have the sole objective of ensuring the welfare of those in their custody and when there is ample time to deliberate on the consequences of their actions.[168] On the other hand, the Court has just as consistently held that reckless acts which cause injury to a suspect, pretrial detainee, or convicted inmate resulting from exigent situations—those with little time for deliberation and involving conflicting state interests—are not as abusive of government power as to reach the level of conscience-shocking, even if imprudent, unwise, and in violation of state tort law.[169] Of these two scenarios, excessive force claims by pretrial detainees clearly possess the characteristics of the latter, and therefore, it is unlikely that the Court would find recklessness to be a sufficient standard of culpability in pretrial detainee excessive force cases to state a claim for violation of substantive due process.

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167. *Id.* (quoting *Daniels*, 474 U.S. at 332).

168. *Id.* at 849–52 (discussing the reasons why deliberate indifference is an appropriate standard of culpability for failure to provide adequate medical care claims by pretrial detainees and convicted inmates).

169. *Id.* at 852–54 (discussing the reasons why deliberate indifference is an inappropriate standard of culpability for excessive force cases and high speed pursuit cases brought by convicted inmates and pretrial detainees, respectively); *see also* Collins v. City of Harker Heights, 503 U.S. 115, 128 (1992) (discussing how conduct which fails to rise to the level of a constitutional violation may still violate state tort law).

E. Counter-argument—Recklessness is Sufficient for Liability Under the Fourth Amendment

Although this prediction is in line with excessive force cases brought under the Eighth Amendment, it does not match the Court's precedent for excessive force cases brought under the Fourth Amendment during the course of a seizure. To make out an excessive force claim under the Fourth Amendment, a person must demonstrate that: (1) the officer restrained his liberty through means intentionally applied, and (2) the force used during the seizure was objectively unreasonable.[170] If an officer accidentally stumbled and fell on someone and restrained his freedom of movement, this would not constitute a seizure "through means intentionally applied," and there could be no claim for excessive force under the Fourth Amendment.[171] However, if an officer intended to restrain a person's liberty—say by setting up a roadblock around a curve so that the oncoming driver could not see it until he had crashed into it, forcing him to stop—that conduct would be sufficient to support a claim for excessive force under the Fourth Amendment, even if the officer's purpose in setting up the roadblock was only to stop the driver and not to injure or kill him.[172] This is the very definition of recklessness; even though the roadblock was not meant to injure or kill the driver, but rather to force him to stop (i.e., a seizure effectuated through means intentionally applied), the police acted recklessly when they set up the roadblock so that it could not be seen until the last second, thereby disregarding a significant risk of harm.[173]

The Court's precedent permitting reckless behavior to support a claim for excessive force under the Fourth Amendment is precisely the opposite of the prediction made in Part III-D—that the Court is unlikely to find recklessness to be a sufficient standard of culpability in pretrial detainee excessive force cases.[174] Since police officers operate in similar circumstances as prison and jail officials do, it may appear troubling that the Fourth Amendment excessive force decisional law produces a different outcome than the Eighth Amendment excessive force decisional law and the outcome predicted

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170. Graham v. Connor, 490 U.S. 386, 395 (1989).

171. Brower v. County of Inyo, 489 U.S. 593, 596–97 (1989).

172. *Id.* at 599.

173. Whether or not the police actually appraised the risk and then ignored it goes beyond the scope of this hypothetical counter-argument, as does the question of whether the criminal definition of recklessness, requiring subjective knowledge of the risk, applies to Fourth Amendment excessive force cases.

174. *See supra* Part III-D.

for Fourteenth Amendment excessive force cases.[175] However, there are two explanations to account for this difference.

First, it is possible that the Fourth Amendment's current standard allowing for reckless acts to suffice for an excessive force claim is wrong after *Kingsley*. As it currently stands, the Fourth Amendment standard does not require a finding that the force actually used was deliberately intended by the police officer—all that matters is whether the officer intended to seize the person injured.[176] Every federal circuit, except the Second Circuit, has held that even when the force used is accidental, if it is deployed while the officer is attempting to intentionally restrain a person's liberty, and the officer's conduct leading up to the accidental use of force is objectively unreasonable, it is sufficient to state a claim for excessive force under the Fourth Amendment.[177] However, *Kingsley* was the first time the Court bifurcated the state-of-mind analysis for excessive force claims into two parts: (1) intent to use force deliberately, and (2) the officer's intended effect of the force (which is relevant to the Eighth Amendment's subjective intent analysis, but is irrelevant to the Fourth and Fourteenth Amendment's objective reasonableness

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175. *See supra* Part III-D (frequently referring to the case of *County of Sacramento v. Lewis*, which involved an excessive force claim stemming from a high speed police pursuit). Although *Lewis* was a police pursuit case, the Court found that the officer never actually seized the victim. Therefore, the case was properly analyzed under the Fourteenth Amendment, not the Fourth Amendment. *See* County of Sacramento v. Lewis, 523 U.S. 833, 843–44 (1998).

176. *See Brower*, 489 U.S. at 598–99.

177. *See, e.g.*, Henry v. Purnell, 652 F.3d 524, 532 (4th Cir. 2011) (In a case where an officer accidentally shot a suspect with his Glock, rather than his Taser as he had intended, the Fourth Circuit held that "[a]ll actions . . . mistaken or otherwise, are subject to an objective [reasonableness] test."); McCoy v. City of Monticello, 342 F.3d 842, 848 (8th Cir. 2003) (Officer "apparently slipped on the ice, and his gun discharged accidentally, seriously injuring McCoy. Thus, the relevant inquiry is not whether [the officer's] act of firing his gun was 'objectively reasonable,' but whether, under the totality of the circumstances, his act of drawing his gun was 'objectively reasonable.'"); Stamps v. Town of Framingham, Civil No. 12-11908-FDS, 2014 U.S. Dist. LEXIS 177455, at *11–13 (D. Mass. Dec. 26, 2014) (collecting cases and holding that "[e]ven the unintentional or accidental use of deadly force in the course of an intentional seizure may violate the Fourth Amendment if the officer's actions that resulted in the injury were objectively unreasonable."). *But see* Dodd v. Norwich, 827 F.2d 1, 8 (2d Cir. 1987) ("It makes little sense to apply a standard of reasonableness to an accident . . . . Only cases involving intentional conduct have been considered by the Supreme Court.").

analyses).[178] It is quite possible that in the future, the Court will apply this bifurcated structure to Fourth Amendment excessive force claims, especially since the Fourteenth and Fourth Amendment analyses are growing closer in similarity after *Kingsley*.[179]

Another explanation for why recklessness suffices to state a claim for excessive force claims brought under the Fourth Amendment, but not under the Fourteenth Amendment, is the simple fact that the two standards stem from different constitutional Amendments, consisting of different texts and serving different purposes. As the Court made clear in *Graham*, excessive force claims brought under Section 1983 are not governed by a single generic standard, but are governed by the specific constitutional right allegedly infringed upon.[180] This is precisely why the Eighth Amendment excessive force standard currently requires a subjective intent analysis to determine if the force employed was intended to cause malicious or sadistic harm,[181] but the Fourth and Fourteenth Amendment excessive force standards only require an objective reasonableness analysis.[182]

Indeed, this would not be the first time the Fourth Amendment and Fourteenth Amendment excessive force standards differed. Since *Daniels*, the Court has held that negligent and accidental actions are categorically insufficient to state a violation of the Fourteenth Amendment's due process clause.[183] In addition to reckless acts, though, the Fourth Amendment permits accidental and negligent conduct to support a cause of action for excessive force and

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178. Kingsley v. Hendrickson, 135 S. Ct. 2466, 2472 (2015). Although the Court stated that this was not a new principle, and was precisely what they held in *Lewis*, *Kingsley*, 135 S. Ct. at 2475, many scholars in the field of Section 1983 law disagree. *See, e.g.*, Schwartz, *Supreme Court*, *supra* note 47 ("[P]rior to Kingsley, it was not even clear that there were potentially two different state-of-mind issues in excessive force cases.").

179. *See* Schwartz, *Supreme Court*, *supra* note 47 ("[N]ow the same objective reasonableness standard governing arrestee Fourth Amendment excessive force claims also governs detainee excessive force due process claims.").

180. Graham v. Connor, 490 U.S. 385, 393–94 (1989) ("We reject this notion that all excessive force claims brought under § 1983 are governed by a single generic standard. As we have said many times, § 1983 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.' . . . [The] analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force." (quoting Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979))).

181. Hudson v. McMillian, 503 U.S. 1, 6 (1992).

182. *Kingsley*, 135 S. Ct. at 2472–73.

183. Daniels v. Williams, 474 U.S. 327, 330–31 (1986).

unreasonable seizure claims, so long as the officer intended to effectuate a seizure when the accidental or negligent force was used.[184] It would not be unprecedented for the Fourteenth and Fourth Amendment excessive force standards to differ in terms of the level of culpable conduct required to state a constitutional violation.

IV. THE SECOND UNRESOLVED QUESTION— SHOULD THE EIGHTH AMENDMENT ALSO USE AN OBJECTIVE STANDARD FOR EXCESSIVE FORCE CLAIMS?

After holding that the Fourteenth Amendment requires an objective analysis of whether the force used was reasonable, the *Kingsley* Court acknowledged that this "may raise questions about the use of a subjective standard in the context of excessive force claims brought by convicted prisoners."[185] As per custom though, since the facts of *Kingsley* did not present the Court with an opportunity to review the merits of retaining divergent standards, the Court declined to address the question.[186]

Part IV predicts how the Court will eventually resolve the tension between the Fourteenth Amendment's objective standard and the Eighth Amendment's subjective standard by analyzing whether an objective standard fits within the text and purpose of the Eighth Amendment's Cruel and Unusual Punishment Clause, or whether a subjective inquiry is necessary to comport with the objectives behind that protection. Part IV-A begins by addressing certain background principles and assumptions of excessive force constitutional torts. Part IV-B then recounts the history, purpose, and doctrine underlying the Eighth Amendment and defines cruel and unusual punishment in the context of claims brought by convicts during incarceration. Part IV-C describes the subjective standard the Court uses for claims of excessive force under the Cruel and Unusual Punishment Clause. Part IV-D ends the analysis by using the definition of cruel and unusual punishment to determine if an objective standard can satisfactorily determine whether excessive force reaches the level of cruel and unusual, concluding that it can do so even better than the current subjective standard.

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184. *See supra* note 177 and accompanying text.
185. *Kingsley*, 135 S. Ct. at 2476.
186. *Id.*

A. Background Principles and Assumptions of Excessive Force Constitutional Torts

As briefly discussed above in Part III-E, there is no one constitutional standard for all excessive force claims—the applicable standard varies depending on the status of the injured petitioner.[187] The Fourth Amendment's unreasonable seizure standard applies when force is used against a suspect during a seizure.[188] The Fourteenth Amendment's shocks the conscience standard applies when force is used against a pretrial detainee.[189] The Eighth Amendment's cruel and unusual punishment standard applies when force is used against a convicted inmate.[190] Since the standards are judicial constructs intended to serve as proxy tests for determining whether conduct violates the constitutional provision in question, their elements vary from one another in line with the differences between the texts and purposes of the constitutional provisions themselves.[191]

The Court has consistently held that an objective reasonableness standard is sufficient to assess constitutional liability in excessive force claims brought under the Fourth Amendment[192] and, most recently, the Fourteenth Amendment.[193] Thus, there can be no argument that an objective reasonableness standard is categorically unfit to assess constitutional liability in excessive force cases.[194] The only viable argument for why an objective standard would be inappropriate in an Eighth Amendment excessive force claim is that an objective standard would fail to reliably determine whether a violation of the Cruel and Unusual Punishment Clause has occurred. The question that must be asked to resolve the posited query of whether the Fourteenth Amendment's objective standard is in tension with the Eighth Amendment's subjective standard,

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187. *See supra* note 180 and accompanying text.
188. Graham v. Connor, 490 U.S. 386, 394 (1989).
189. *Kingsley*, 135 S. Ct. at 2470.
190. Whitely v. Albers, 475 U.S. 312, 318 (1986).
191. *Cf.* United States v. Lanier, 520 U.S. 259, 272 n.7 (1997) ("*Graham* simply requires that if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision . . . .").
192. *Graham*, 490 U.S at 397.
193. *Kingsley*, 135 S. Ct. at 2470.
194. *Cf. id.* at 2473–75 (discussing reasons why the objective reasonableness standard is appropriate to measure constitutional liability in excessive force claims in the specific context of pretrial detainee cases).

therefore, is whether the Eighth Amendment's text and purpose make an objective standard inappropriate to determine whether force used against a convicted inmate is unconstitutionally excessive.

B. Purpose of the Eighth Amendment and Definition of Cruel and Unusual Punishment

The Eighth Amendment reads: "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."[195] On its face, the Amendment appears to prevent cruel and excessive bail and judicially-imposed sentences, rather than excessive force or dangerous prison conditions. Indeed, until the twentieth century, this was precisely how the Amendment was interpreted.[196] The Court eventually recognized that for "a principle to be vital [it] must be capable of wider application than the mischief which gave it birth,"[197] and has since expanded the scope of the Amendment to also "apply to deprivations that were not inflicted as part of the sentence for a crime," but afterwards, during the prisoner's confinement.[198] Today, the Eighth Amendment definitively protects prisoners from cruel and unusual punishment inflicted during imprisonment.

Less certain is what constitutes cruel and unusual punishment. As the text of the Amendment suggests, punishing a convicted inmate is permitted—it is only punishment which reaches the level of cruel and unusual that is prohibited.[199] Similar to how the

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195. U.S. CONST. amend. VIII.

196. *See* Jeffrey D. Bukowski, *The Eighth Amendment and Original Intent*, 99 DICK. L. REV. 419, 419 (1995) ("Traditionally, the prohibition against cruel and unusual punishments has been applied to methods of execution or to sentences imposed upon convicted criminals."); Gregg v. Georgia, 428 U.S. 153, 169–70 (1976) (joint opinion of Stewart, J., Powell, J., and Stevens, J.) (Eighth Amendment was primarily concerned with proscribing sentences of torture and other barbarous methods of punishment).

197. Weems v. United States, 217 U.S. 349, 373 (1910).

198. Bukowski, *supra* note 196, at 419 (citing *Hudson*'s prohibition of excessive force used against a convicted inmate and *Estelle*'s requirement that inmates receive adequate medical care as examples of deprivations inflicted after sentencing and during imprisonment which the expanded scope of the Cruel and Unusual Punishment Clause now encompasses); *see also* Rhodes v. Chapman, 452 U.S. 337, 345 (1981) ("It is unquestioned that '[confinement] in a prison . . . is a form of punishment subject to scrutiny under the Eighth Amendment standards.'" (quoting Hutto v. Finney, 437 U.S. 678, 685 (1978))).

199. *See* Bell v. Wolfish, 441 U.S. 520, 535 (1979) ("A sentenced inmate . . . may be punished, although that punishment may not be 'cruel' or

Court has refused to provide a fixed, mechanical definition for what constitutes conduct that shocks the conscience under the Fourteenth Amendment,[200] the Court has refused to provide a simple benchmark for when conduct becomes cruel and unusual.[201] Instead, the Court has abided by the principle that the Eighth Amendment's prohibition on cruel and unusual punishment is not a static protection fixed in time, but "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society."[202] It "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice."[203]

In the context of Eighth Amendment claims challenging punishment endured while incarcerated, only the "unnecessary and wanton infliction of pain" is sufficient to violate contemporary standards of decency and invoke the Cruel and Unusual Punishment Clause's protections.[204] Unnecessary and wanton inflictions of pain include those that are "totally without penological justification," as well as those which are grossly disproportionate to the severity of the offense provoking the punishment.[205] This is why the Eighth Amendment requires prisons to provide adequate medical care,[206] safe conditions of confinement,[207] and prevent excessive force from being

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'unusual' under the Eighth Amendment."); Trop v. Dulles, 356 U.S. 86, 100 (1958) ("While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards.").

200. *See supra* Part III-B.

201. *Trop*, 356 U.S. at 99–101 ("The exact scope of the constitutional phrase 'cruel and unusual' has not been detailed by this Court . . . . [T]he words of the Amendment are not precise, and their scope is not static.").

202. *Id.* at 101; *see also* Estelle v. Gamble, 429 U.S. 97, 102 ("The Amendment embodies 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . . ,' against which we must evaluate penal measures" (quoting Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968))).

203. Gregg v. Georgia, 428 U.S. 153, 171 (1976) (joint opinion) (quoting Weems v. United States, 217 U.S. 349, 378 (1910)).

204. *See* Whitley v. Albers, 475 U.S. 312, 319 (1986); Rhodes v. Chapman, 452 U.S. 337, 346 (1981); Ingraham v. Wright, 430 U.S. 651, 670 (1977). The Eighth Amendment also prohibits punishments that are grossly disproportionate to the severity of the crime and places substantive limitations on what can be made criminal and punished in the first place. *See Estelle*, 429 U.S. at 103 n.7 (citing *Gregg*, 428 U.S. at 173 and Robinson v. California, 370 U.S. 660 (1962)). Neither of these protections are at issue in excessive force cases brought while incarcerated.

205. *Rhodes*, 452 U.S. at 346 (citations omitted).

206. *Estelle*, 429 U.S. at 104.

207. *Rhodes*, 452 U.S. at 347.

used against inmates.[208] As the Court explained in the context of medical care:

> An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met. In the worst cases, such a failure may actually produce physical "torture or a lingering death . . . ." In less serious cases, denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose. The infliction of such unnecessary suffering is inconsistent with the contemporary standards of decency . . . .[209]

If a prison fails to ensure these safe conditions and prevent excessive force from being inflicted when the prisoner "cannot by reason of the deprivation of his liberty, care for himself," it would result in nothing more than the unnecessary and wanton infliction of pain.[210] Thus, harm meted out during a prisoner's incarceration must be unnecessary or wanton—meaning without, or grossly disproportionate to, penological justification—in order to constitute cruel and unusual punishment.

C. Applying the Cruel and Unusual Punishment Prohibition to Excessive Force Claims

The Court first defined the standard used to assess the constitutionality of physical punishment in *Whitley v. Albers.*[211] There, an inmate brought a Section 1983 challenge alleging violations of his right to be free from cruel and unusual punishment after being shot in the leg by a prison guard during an attempt to quell a prison riot.[212] In assessing the petitioner's claim that the force applied was excessive and in violation of the Cruel and Unusual Punishment Clause, the Court reiterated that after incarceration, only the

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208. *Whitley*, 475 U.S. at 320–21.
209. *Estelle*, 429 U.S. at 103 (quoting In re Kemmler, 136 U.S. 436, 447 (1890)).
210. *Id.* at 104 (quoting Spicer v. Williamson, 132 S.E. 291, 293 (N.C. 1926)).
211. *Whitley*, 475 U.S. at 314.
212. *Id.* at 314–17, 326.

unnecessary and wanton infliction of pain constitutes a violation of the Eighth Amendment.[213]

Drawing on their previous decisions involving punishment during incarceration, the Court noted that "an express intent to inflict unnecessary pain is not required" to constitute cruel and unusual punishment. [214] Simultaneously, the Court found that negligent or accidental acts which lead to the unnecessary and wanton infliction of harm fail to trigger the protection of the Eighth Amendment, as actions that are not intended to be punishment in the first place cannot qualify as punishment.[215] Thus, while an express intent to inflict *unnecessary* pain is not required to be cruel and unusual, the force exerted must be intended to punish in order to implicate the Eighth Amendment in the first place.[216]

In every other type of Eighth Amendment challenge to punishment sustained during the course of a prisoner's incarceration, the Court has synthesized these principles with the unnecessary and wanton standard to require deliberate indifference to the safety of the inmate, be it through inadequate medical care,[217] unsafe conditions of

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213. *Id.* at 319.

214. *Id.* (citing *Estelle*, 429 U.S. at 104 and Rhodes v. Chapman, 452 U.S. 337, 347 (1981)).

215. *Id.* at 319 ("Not every governmental action affecting the interests or well-being of a prisoner is subject to Eighth Amendment scrutiny, however . . . . To be cruel and unusual punishment, conduct that does not purport to be punishment at all must involve more than ordinary lack of due care for the prisoner's interests or safety . . . . It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishment Clause . . . .").

216. *See, e.g.*, Wilson v. Seiter, 501 U.S. 294, 300 (1991) ("If the pain inflicted is not formally meted out as punishment by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify . . . [as] cruel and unusual punishment."); Duckworth v. Franzen, 780 F.2d 645, 651–52 (7th Cir. 1985) ("The infliction of punishment is a deliberate act intended to chastise or deter . . . . If a guard decided to supplement a prisoner's official punishment by beating him, this would be punishment, 'cruel and unusual' because the Supreme Court has interpreted the term to forbid unauthorized and disproportionate, as well as barbarous punishments. But if the guard accidentally stepped on the prisoner's toe and broke it, this would not be punishment in anything remotely like the accepted meaning of the word, whether we consult the usage of 1791, 1868, or 1985.").

217. *Estelle*, 429 U.S. at 104 ("We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain proscribed by the Eighth Amendment." (internal citations omitted)).

confinement,[218] or failure to protect the inmate from harm by other inmates.[219] However, the *Whitley* Court did not believe deliberate indifference was an appropriate standard to determine if punishment meted out during a prison riot is equivalent to the unnecessary and wanton infliction of pain required to violate the Cruel and Unusual Punishment Clause.[220] The Court asserted that what is unnecessary and wanton "does not have a fixed meaning but must be determined with 'due regard for the differences in the kind of conduct against which an Eighth Amendment objection is lodged.'"[221] While deliberate indifference is a sufficient proxy to determine whether inadequate medical care or dangerous conditions of confinement are unnecessary and wanton, it is not a reliable indicator in the context of a prison riot, where officials act "'in haste, under pressure,' and balanced against 'competing institutional concerns for the safety of prison staff or other inmates.'"[222]

Instead, the Court announced a new standard for excessive force claims brought under the Eighth Amendment—one which would accord prison officials "wide-ranging deference . . . to a prison security measure taken in response to an actual confrontation with riotous inmates."[223] For excessive force claims arising out of punishment inflicted during the course of resolving a prison disturbance, "the question [of] whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on '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.'"[224]

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218. *Wilson*, 501 U.S. at 303 ("[W]e see no significant distinction between claims alleging inadequate medical care and those alleging inadequate 'conditions of confinement' . . . . '[I]t is appropriate to apply the deliberate indifference standard articulated in *Estelle*.'" (quoting LaFaut v. Smith, 834 F.2d 389, 391–92 (4th Cir. 1987))).

219. Farmer v. Brennan, 511 U.S. 825, 834 (1994) (stating that the parties agree that in a claim for failure to protect an inmate from harm by other inmates, a deliberate indifference standard applies).

220. *Whitley*, 475 U.S. at 320.

221. *Wilson*, 501 U.S. at 302 (quoting *Whitley*, 475 U.S. at 320). This is similar to the Court's approach to the shocks the conscience standard, and how conduct that shocks in one circumstance may not in another. *See also* note 136 and accompanying text.

222. *Wilson*, 501 U.S. at 302 (quoting *Whitley*, 475 U.S. at 320).

223. *Whitley*, 475 U.S. at 320–22.

224. *Id.* at 320–21 (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973), *cert. denied*, 414 U.S. 1033 (1973)); *see also Wilson,* 501 U.S. at 302 ("In such an emergency situation, we found that wantonness consisted of acting

In other words, in exigent situations, only actions maliciously and sadistically taken for the very purpose of causing harm are sufficiently culpable punishments, given the circumstances, to qualify as unnecessary or wanton inflictions of pain, thereby triggering the Eighth Amendment's protection against such cruel and unusual punishment. This standard was later expanded to apply to any claim where a prison official is accused of using excessive physical force in violation of the Eighth Amendment, be it a prison riot or a physical altercation with one individual inmate.[225]

D. An Objective Standard Comports with the Eighth Amendment Better Than *Whitley*'s Test

To reiterate, the two-part test used to determine whether a violation of the Cruel and Unusual Punishment clause has occurred in all incarceration-related Eighth Amendment challenges except excessive force claims is: (1) a subjective inquiry into whether the prison official's conduct was intended to constitute punishment, and (2) an objective inquiry into whether the punishment was totally without penological justification or was grossly disproportionate to the offense precipitating the need for punishment, thereby constituting the unnecessary and wanton infliction of pain.[226] Put another way, the general test to determine whether punishment is cruel and unusual consists of a subjective analysis of the actor's intent to act and punish in the first place and an objective analysis of the reasonableness of the punishment and resulting harm. This formulation is referred to as a subjective-objective standard, and it is the standard applied to all Eighth Amendment cruel and unusual punishment claims brought by convicted inmates, except for excessive force claims.

The *Whitley* test for excessive force claims brought under the Eighth Amendment can best be described as a subjective-subjective standard, requiring two subjective inquiries into the actor's state of mind to determine whether punishment is unnecessary and wanton. The *Whitley* test asks two questions: (1) did the prison official intend to punish, and (2) did the prison official act maliciously and sadistically, intending for the punishment to cause harm to the prisoner for the sake of causing harm? Both questions are subjective

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'maliciously and sadistically for the very purpose of causing harm.'" (quoting *Whitley*, 475 U.S. at 320–21)).

225. Hudson v. McMillian, 503 U.S. 1, 6–7 (1992).

226. *See supra* Part IV-B.

in that they inquire into the prison official's state of mind and intent to punish, as well as the prison official's state of mind and intent to cause malicious and sadistic harm. The *Whitley* test does not conform to the subjective-objective formulation the Court has used to determine whether punishment reaches the level of cruel and unusual for every other type of post-conviction, incarceration-related Eighth Amendment claim since the Amendment's scope was expanded to cover such incarceration-related injuries in *Weems v. United States*, *Trop v. Dulles,* and *Gregg v. Georgia*.[227] It is an anomalous standard in an area otherwise guided by the subjective-objective formulation.

There is good reason to be concerned with this departure from precedent. For one, requiring a malicious and sadistic purpose to cause harm for excessive force claims reduces the Cruel and Unusual Punishment Clause's protection from one against punishments that result in unnecessary and wanton inflictions of harm, to one only prohibiting punishments that are intended to be malicious and sadistic. A prison official can intend to punish without intent to maliciously and sadistically inflict pain and still cause unnecessary and wanton harm. Indeed, the Court said just as much in *Whitley,* holding that "an express intent to inflict unnecessary pain is not required" to constitute cruel and unusual punishment.[228] Intent to maliciously and sadistically cause harm is therefore not a reliable proxy for determining whether unnecessary and wanton harm has actually occurred from a prison official's deliberate act of punishment. In fact, the term "malicious and sadistic" was originally used by Judge Friendly in *Johnson v. Glick* as *one* relevant factor that a court *could* use to help determine whether conduct shocks the conscience and violates the Fourteenth Amendment.[229] It was not created to serve as an accurate proxy for determining whether the Cruel and

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227. *See generally supra* Part IV-B.

228. *Whitley*, 475 U.S. at 319. The dissent noted this inconsistency as well: "[T]he majority inexplicably arrives at the conclusion that a constitutional violation in the context of a prison uprising can be established only if force was 'maliciously and sadistically for the very purpose of causing harm,' -- thus requiring the very 'express intent to inflict unnecessary pain' that it had properly disavowed." *Id.* at 329 (Marshall, J., dissenting).

229. Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973), *cert. denied*, 414 U.S. 1033 (1973). The other factors Judge Friendly suggested to help determine "whether the constitutional line has been crossed" include "the need for the application of force, the relationship between the need and the amount of force that was used, [and] the extent of the injury inflicted . . . ." *Id.* In addition, Judge Friendly only suggested these four factors as examples, not an exhaustive list. *Id.*

Unusual Punishment Clause is violated, nor was it intended to be a necessary condition to state a constitutional violation. Rather, it was merely "a factor that, if present, could enable a [pretrial detainee] plaintiff to survive a motion to dismiss when otherwise the facts might be insufficient to make out a [substantive due process] claim."[230]

Once subjective intent to punish has been determined, an assessment of the reasonableness of the punishment—with due regard for the circumstances under which it occurred—is all that matters to determine whether the punishment unnecessarily and wantonly inflicted harm. It matters not that a guard did not intend for his or her deliberately inflicted punishment to be malicious and sadistic. To judge the reasonableness of the punishment based on the inflictor's intended effect of the punishment minimizes the Eighth Amendment's protection to freedom from malevolent guards, rather than its true and broader protection of freedom from unnecessary and wanton inflictions of harm.

While the subjective test created in *Whitley* has its flaws, the key question left open by the Court in *Kingsley* is whether an objective standard can serve as a sufficient proxy to determine whether, in the context of excessive force cases brought by convicted inmates, the alleged punishment is cruel and unusual. Following the bifurcated model used by the Court in *Kingsley*, the test would most likely take the form of: (1) whether the prison official intended to use force for the purpose of punishment, and (2) whether the punishment was objectively reasonable from the perspective of a reasonable officer on the scene.[231] Four reasons demonstrate why this objective test can reliably determine whether forceful punishment violates the Eighth Amendment's protections, and can do so even better than the flawed subjective test currently used.

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230. *Whitley*, 475 U.S. at 329 n.1 (Marshall, J., dissenting) (quoting *Glick*, 481 F.2d at 1033).

231. For the same reasons discussed above in Part III with regards to the Fourteenth Amendment, it is unlikely that the Court would permit reckless acts to suffice for excessive force liability under an Eighth Amendment bifurcated objective reasonableness standard, given the presence of exigent circumstances and conflicting state interests when responding to a prison disturbance. Thus, although reckless acts can constitute as punishment for most Eighth Amendment conditions claims, the Court is unlikely to change the culpability requirement from purposeful punishment to reckless acts evincing a knowing willingness that punishment occur, even if they decide to change the reasonableness standard from subjective to objective, as is predicted here.

First, the objective standard is a better indicator of whether punishment is unnecessary and wanton—the core inquiry in any cruel and unusual punishment claim brought by an incarcerated prisoner. Whether punishment has penological justification and is reasonably proportionate to the offense is best assessed by a reasonable prison official in the defendant's shoes at the time of the incident, rather than by the very officer whose forceful actions are on trial. As discussed above, a prison official can inflict punishment that is objectively unnecessary and wanton, without subjectively intending for the punishment to be unnecessary and wanton, let alone malicious and sadistic. By requiring subjective intent to cause malicious and sadistic harm, the *Whitley* standard fails to classify conduct that is objectively wanton and unnecessary—but which the defendant views as justified and reasonable—as cruel and unusual punishment. The objective standard, however, would capture conduct of this type: conduct which prison officials of ordinary reasonableness would deem unnecessary and wanton and in violation of contemporary standards of decency.

This injustice can best be demonstrated through a hypothetical. Suppose an inmate is caught up in the middle of a prison riot, or even a smaller altercation in the courtyard during recreation time. Prison officials swarm the area to break up the altercation and restore order to the facility. The inmate, who is not involved in the riot or altercation, but was merely in the wrong place at the wrong time, moves towards the prison wall and away from the altercation in the middle of the courtyard, and he places his hands above his head to indicate that he is not a threat. A rookie prison guard bursts onto the scene, panics under the pressure, and fearing for his safety, fires his Taser at the inmate—the first person he sees—who is still against the wall with his hands up posing no threat. Under the subjective *Whitley* standard, it is irrelevant that any reasonable prison officer would find that this guard's use of force against an unarmed, non-threatening inmate was unnecessary, wanton, and totally without penological justification. However, so long as the rookie guard did not intend to tase the inmate for the sake of causing harm, but genuinely believed that his actions possessed a semblance of reasonableness and penological justification, the injured inmate has no claim of action for violation of his constitutional rights.[232] Instead of allowing due relief to the innocently injured

232. *See* The Harvard Law Review Association, *Cruel and Unusual Punishments Clause – Treatment of Prisoners*, 106 HARV. L. REV. 220, 228 (1992)

inmate, the *Whitley* standard denies relief, immunizes the unreasonable guard, and further compounds the problem of excessive force in prisons by allowing guards with poor judgment and decision making skills to continue employing force that is objectively unreasonable, but subjectively justified. [233] An objective analysis would put an end to this illogical standard, and give full force to the protections embodied in the Eighth Amendment.

Second, the current subjective test already uses objective indicators to help draw inferences as to whether the use of force evinces a malicious and sadistic intent to harm.[234] The *Whitley* Court explicitly endorsed a variety of objective factors that courts should use to determine the state of mind of defendant prison officials, including:

> [T]he need for the application of force, the relationship between the need and the amount of force that was used, and the extent of injury inflicted . . . [as well] as the extent of the threat to the safety of staff and inmates . . . and any efforts made to temper the severity of a forceful response.[235]

These same factors can be used in an objective test to determine whether a reasonable prison official in the defendant's

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("After *Hudson*, guards can apply any amount of force against passive prisoners with constitutional immunity as long as they do not act maliciously and sadistically but rather for the sake of prison discipline. Ironically, then, *Hudson* leaves abused passive prisoners, those who are not involved in a prison disturbance but nevertheless are victimized by misguided or over-zealous guards, without a constitutional remedy."); *see also id.* at 228 n.71–72 (providing examples of excessive force cases where guards abused prisoners in the name of discipline when force was clearly unnecessary, and discussing psychological studies that verify the potential for well-intentioned people, when in positions of authority, to perform unnecessary acts of cruelty in the name of discipline).

233. *Cf.* United States' Proposed Complaint-in-Intervention, Nunez v. City of New York, No. 11 Civ. 5845, (S.D.N.Y. Dec. 11, 2014), https://www.justice.gov/file/188656/download (describing the pervasiveness of excessive force by prison guards against inmates and pretrial detainees at Rikers Island, in part because of the lack of discipline and liability for problem guards).

234. *Whitely*, 475 U.S. at 321.

235. *Id.* Most of these factors were borrowed from Judge Friendly's opinion in *Glick*, which created an overall objective reasonableness standard for determining when force crosses the line of constitutionality. The *Glick* test did not indicate that courts should inquire into the subjective state of mind of the defendant when assessing the constitutionality of his actions. *See supra* note 229.

shoes at the time of the incident would believe that the force used was appropriate and warranted, or unnecessary and wanton. In fact, the Court in *Kingsley* endorsed almost identical factors to help lower courts decide whether force used by a prison guard is objectively reasonable as those factors endorsed by the *Whitley* Court to help lower courts decide whether a prison guard was acting with a malicious and sadistic intent to harm.[236]

Third, instituting an objective standard is consistent with Eighth Amendment precedent and would have the additional benefit of simplifying the confusing subject of excessive force doctrine. The Court has been steadfast in holding that an Eighth Amendment claim must satisfy both a subjective component and an objective component. [237] Instead of using objective evidence to determine whether conduct is unnecessary and wanton, however, the *Whitley* standard simply infers that the conduct is objectively unreasonable in all cases when a prison official uses force maliciously and sadistically.[238] In other words, the Court has subsumed the objective component within the subjective component in the *Whitley* standard. *Kingsley*'s emphasis on bifurcation proves that this formula is incorrect. In evaluating excessive force claims, we must distinguish the subjective inquiry of whether the actor deliberately employed force (or punishment in the Eighth Amendment context) from the objective inquiry of whether the force was reasonable.[239] The fact that

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236. Kingsley v. Hendrickson, 135 S. Ct. 2466, 2473 (2015); *see also supra* pp. 218–19.

237. *See* Farmer v. Brennan, 511 U.S. 825, 834 (1994) ("Our cases have held that a prison official violates the Eighth Amendment only when two requirements are met. First, the deprivation alleged must be, objectively, sufficiently serious; a prison official's act or omission must result in the denial of the minimal civilized measure of life's necessities." (internal citations omitted)); Wilson v. Seiter, 501 U.S. 294, 298 (1991) ("Our holding in *Rhodes* turned on the objective component of an Eighth Amendment prison claim (Was the deprivation sufficiently serious?) . . . ."); Kathryn R. Urbonya, *Establishing a Deprivation of a Constitutional Right to Personal Security Under Section 1983*, 51 ALB. L. REV. 173, 215–16 (1987) (describing the Court's reliance on objective factors and societal norms to determine when conduct is a violation of contemporary standards of decency and the unnecessary and wanton infliction of pain).

238. Hudson v. McMillian, 503 U.S. 1, 9 (1992).

239. *Kingsley*, 135 S. Ct. at 2472, 2475. Since this focus on bifurcation and limiting the subjective inquiry to only the question of whether a defendant's actions were deliberate is new for the Court, it is not surprising that the Court did not do so or speak in such terms in *Whitley, Hudson*, or *Wilson*. *See, e.g.*, Schwartz, *Supreme Court*, *supra* note 47 ("[P]rior to Kingsley, it was not even clear that there were potentially two different state-of-mind issues in excessive force cases.").

the Court in 1992 believed inquiring into the objective reasonableness of a prison official's force was superfluous (if the official was found to have acted maliciously and sadistically) is demonstrative of why the *Whitley* standard is too stringent a standard to reliably determine whether force violates the Cruel and Unusual Punishment Clause. Furthermore, adopting an objective reasonableness standard for Eighth Amendment excessive force claims would bring the doctrine in line with the Fourth and Fourteenth Amendment excessive force standards, making it easier for state actors, arrestees, detainees, prisoners, and courts to determine when force violates the Constitution, as well as for all parties to better predict and understand the consequences of their actions.[240]

Lastly, as the Court concluded in *Kingsley*, "an objective standard is workable . . . [and] adequately protects an officer who acts in good faith."[241] An objective reasonableness test strikes the ideal balance between serving as a reliable proxy to identify when conduct is unnecessary and wanton and in violation of contemporary standards of decency, and recognizing that deference should be given to prison officials, who are experts in devising "reasonable solutions to the problems they face."[242] The limitations of, and protections from, an objective standard expressed by the Court in *Kingsley* apply equally well to an objective standard applied to Eighth Amendment claims:

> [W]e have stressed that a court must judge the reasonableness of the force used from the perspective and with the knowledge of the defendant officer. We have also explained that a court must take account of the legitimate interests in managing a jail, acknowledging as part of the objective reasonableness analysis that deference to policies and practices needed to maintain order and institutional security is appropriate. And we have limited liability for

240. *See Kingsley*, 135 S.Ct. at 2474 ("Our standard is also consistent with our use of an objective 'excessive force' standard where officers apply force to a person who, like Kingsley, has been accused but not convicted of a crime, but who, unlike Kingsley, is free on bail."); *cf.* Schwartz, *Supreme Court*, *supra* note 47 ("The other major advantage, not mentioned by the court [in *Kingsley*], is that now the same objective reasonableness standard governing arrestee Fourth Amendment excessive force claims also governs detainee excessive force due process claims.").

241. *Kingsley*, 135 S. Ct. at 2474.

242. *Id.*

> excessive force to situations in which the use of force was the result of an intentional and knowing act (though we leave open the possibility of including a 'reckless' act as well). Additionally, an officer enjoys qualified immunity and is not liable for excessive force unless he has violated a 'clearly established' right, such that 'it would [have been] clear to a reasonable officer that his conduct was unlawful in the situation he confronted. It is unlikely (though theoretically possible) that a plaintiff could overcome these hurdles where an officer acted in good faith.[243]

Any fears that an objective standard would fail to account for, and duly defer to, the "inordinately difficult undertaking" [244] of running a prison and maintaining institutional security for prisoners, guards, and visitors alike are appropriately addressed by these limitations. Unfortunately for innocently injured prisoners, comparable protections are not found under the ineffective subjective test currently in place.

CONCLUSION

The Supreme Court has always been reluctant to expand the doctrine of substantive due process, as well as the scope of Section 1983 litigation. For years, the Court neglected to address questions it had long ago reserved—questions which, while unimportant to the majority of the country, are of paramount concern to the nation's ever-growing population of incarcerated individuals. *Kingsley* marks a change to that tradition by providing clarity and closure to a question long overdue for answering.

Notwithstanding this change, there is more work to be done. Especially given the recent attention to prisons and the deplorable and dangerous conditions prisoners face on a daily basis, the Court would do well to resolve the two questions left open in *Kingsley* fairly quickly. Only by providing concrete answers to these looming questions will all stakeholders—be they prisoners, rank-and-file correctional officers, supervising prison officials, or lower courts—be able to predict the consequences of their actions.

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243. *Id.* at 2474–75.
244. Turner v. Safley, 482 U.S. 78, 84–85 (1987).

As Justice Kennedy said in his concurrence in *Davis v. Ayala*, "[p]risoners are shut away—out of sight, out of mind . . . . [I]n decades past, the public may have assumed lawyers and judges were engaged in a careful assessment of correctional policies, while most lawyers and judges assumed these matters were for the policymakers and correctional experts."[245] In *Kingsley* the majority signaled that they are ready to step in and ensure that correctional policies are fair, just, and humane. This could be a turning point in the long neglected area of prisoner's rights, but only if the Court acts and resolves the unanswered questions, rather than perpetually reserving more for the future.

245. Davis v. Ayala, 135 S. Ct. 2187, 2209–10 (2015) (Kennedy, J., concurring).

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