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Precedents Ignored: Erroneous Applications of Due Process Precedents Lead to Unjust Consequences for Pretrial Detainees and a Lack of Accountability for Jailers—*Whitney v. City of St. Louis*, 887 F.3d 857 (8th Cir. 2018).

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Note*

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I. INTRODUCTION

Mass incarceration has led to the confinement of 2.3 million individuals in the United States,[1] despite a steady decline in crime rates since the 1990s.[2] An already strained carceral system,[3] now operating against the backdrop of a nation reeling from the global COVID-19 pandemic,[4] has experienced an influx of detainees as demonstrators are periodically arrested for protesting the very institutions that are sending them to jail.[5] As demonstrators are arrested and detained, often for minor offenses, many people who have not been touched by the criminal justice system before are getting a glimpse at detention facility conditions.[6] Mass arrests and the impacts of COVID-19 on the

1. Press Release, Wendy Sawyer & Peter Wagner, Prison Pol'y Initiative, Mass Incarceration: The Whole Pie 2020 (Mar. 24, 2020), https://www.prisonpolicy.org/reports/pie2020.html [https://perma.cc/GRR8-8TWC].

2. John Gramlich, *What the Data Says (And Doesn't Say) About Crime in the U.S.*, PEW RSCH. CTR. (Nov. 20, 2020), https://www.pewresearch.org/fact-tank/2020/11/20/facts-about-crime-in-the-u-s/ [https://perma.cc/VT87-2KCG].

3. *See* Niall McCarthy, *The World's Most Overcrowded Prison Systems. [Infographic]*, FORBES (Jan. 26, 2018, 7:00 AM), https://www.forbes.com/sites/niallmccarthy/2018/01/26/the-worlds-most-overcrowded-prison-systems-infographic/#2f9c0f401372 [https://perma.cc/Q64D-LF7G] ("[O]vercrowding has become a serious problem in many U.S. prisons with 18 states reporting they were operating at over 100 percent capacity at the end of 2014.").

4. *See* Jason Beaubien, *10% Of Global Population May Have Contracted the Coronavirus, WHO Says*, NPR (Oct. 5, 2020, 5:03 PM), https://www.npr.org/sections/coronavirus-live-updates/2020/10/05/920453483/10-of-global-population-may-have-contracted-the-coronavirus-who-says [https://perma.cc/3P7S-TGQF].

5. *See* Michael Sainato, *'They Set Us Up': US Police Arrested Over 10,000 Protesters, Many Non-Violent*, GUARDIAN (June 8, 2020, 6:00 AM), https://www.theguardian.com/us-news/2020/jun/08/george-floyd-killing-police-arrest-non-violent-protesters [https://perma.cc/BD64-GUPV].

6. *See* Melissa Chan, *These Black Lives Matter Protesters Had No Idea How One Arrest Could Alter Their Lives*, TIME (Aug. 19, 2020, 10:15 AM), https://time.com/5880229/arrests-black-lives-matter-protests-impact/ [https://perma.cc/88C3-BYJQ] (describing the experiences of people with no prior criminal record who were arrested for things like curfew violations while protesting racism and police violence).

carceral system have brought new journalistic attention to the conditions of jails and prisons.[7]

American prisons and jails house over half a million individuals as they await trial,[8] many of whom remain confined pretrial simply because of their inability to pay bail.[9] Bail is often set arbitrarily at amounts that are unaffordable to many.[10] As a result, impoverished individuals spend significant time in confinement while awaiting the resolution of their charges.[11] Apart from losing the ability to move about freely, pretrial detainees often suffer additional negative outcomes—such as loss of employment opportunities[12] and loss of time with children and other dependents.[13] Such individuals, who are already suffering devastating consequences without ever being convicted of any crime, are also often subject to grating conditions.[14]

7. *See* Alice Miranda Ollstein & Dan Goldberg, *Mass Arrests Jeopardizing the Health of Protesters, Police*, POLITICO (June 4, 2020, 5:34 PM), https://www.politico.com/news/2020/06/04/police-arrest-coronavirus-301913 [https://perma.cc/83N2-S9TG]. For a discussion of the impacts of COVID-19 on federal detention, see Gabriel A. Fuentes, *Federal Detention and "Wild Facts" During the COVID-19 Pandemic*, 110 J. CRIM. L. & CRIMINOLOGY 441 (2020).

8. *See* Sawyer & Wagner, *supra* note 1.

9. *See* THOMAS H. COHEN & BRIAN A. REAVES, BUREAU OF JUST. STAT., NCJ 214994, PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS, 1 (2007), https://www.bjs.gov/content/pub/pdf/prfdsc.pdf [https://perma.cc/JY5S-4FPH] (finding that five in six individuals remain detained pretrial because of an inability to pay bail).

10. Anna Maria Barry-Jester, *You've Been Arrested. Will You Get Bail? Can You Pay It? It May All Depend on Your Judge*, FIVETHIRTYEIGHT (June 19, 2018), https://fivethirtyeight.com/features/youve-been-arrested-will-you-get-bail-can-you-pay-it-it-may-all-depend-on-your-judge/ [https://perma.cc/3YJP-6LW2].

11. *See* JEFFREY L. SEDGWICK, BUREAU OF JUST. STAT., NCJ 213476, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2004, at 55 tbl.3.11 (2006), http://bjs.ojp.usdoj.gov/content/pub/pdf/cfjs04.pdf (finding federal defendants who were detained pretrial for inability to pay bail between October 1, 2003, and September 30, 2004, and were subsequently released upon termination of their cases spent, on average, 71.2 days in jail).

12. *See* Will Dobbie et al., *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201, 236 (2018) (finding that individuals released prior to trial are more likely to be employed in the labor market after resolution of their charges).

13. *See* Wendy Sawyer, *How Does Unaffordable Money Bail Affect Families?*, PRISON POL'Y INITIATIVE (Aug. 15, 2018), https://www.prisonpolicy.org/blog/2018/08/15/pretrial/ [https://perma.cc/Q3AF-WLN6] (finding that over half of pretrial detainees who cannot afford to pay bail have minor children).

14. Beth Healy & Christine Willmsen, *Pain and Profits: Sheriffs Hand Off Inmate Care to Private Health Companies*, WBUR (Mar. 24, 2020), https://www.wbur.org/news/2020/03/24/jail-health-companies-profit-sheriffs-watch [https://perma.cc/VZT8-ZZH7] (reporting the results of an investigation into the use of NaphCare, a private company which contracts with correctional facilities to provide healthcare services to confined individuals. The investigation revealed that NaphCare caps the number of off-site visits to a hospital, which disincentivizes jail officials from sending confined individuals to hospitals, even when in critical condition);

Many pretrial detainees suffering harm while in detention do not litigate their potential claims,[15] and when they do, the standard by which courts review their cases varies by jurisdiction.[16] This variation places an already vulnerable population in a state of uncertainty with regard to their ability to access justice and recover after oftentimes traumatic experiences.

In 2015, the Supreme Court decided *Kingsley v. Hendrickson*.[17] Some believed that this decision would bring national uniformity to pretrial detainees' conditions of confinement claims,[18] but circuit courts have diverged in their application of *Kingsley*'s holdings.[19] This Note examines the inconsistency and calls for uniform application of *Kingsley* to all pretrial detainee claims in the Eighth Circuit. Part II describes the framework by which pretrial detainees litigate claims against governmental actors, walks through the doctrinal development underlying such claims, and breaks down the circuit split that ensued post-*Kingsley*. Part III discusses the *Whitney v. Saint Louis*[20] opinion that came out of the Eighth Circuit in 2017. Finally, Part IV argues that the Eighth Circuit erred in deciding *Whitney* when it failed to adopt an objective standard to evaluate conditions of confinement cases brought by pretrial detainees.

II. BACKGROUND

When certain governmental actors deprive an individual of their constitutionally protected rights, 42 U.S.C. § 1983 provides a federal

see also, e.g., *Episode 06: You in the Red Shirt*, SERIAL, https://serialpodcast.org/season-three/6/transcript [https://perma.cc/VM4C-6JQ6] (last visited August 16, 2021) (telling the story of a man who had been placed in pretrial detention in a storage locker room with no toilet for two days but did not to file a lawsuit against the police department because of the low probability that the city would be able to afford to pay out a judgment).

15. Rachel Poser, *Why It's Nearly Impossible for Prisoners To Sue Prisons*, NEW YORKER (May 30, 2016), https://www.newyorker.com/news/news-desk/why-its-nearly-impossible-for-prisoners-to-sue-prisons [https://perma.cc/44TB-Z6D4] (describing the negative impact the Prisoner Litigation Reform Act (PLRA) has had on the ability of confined individuals to bring suit against correctional facilities and officers); *see also No Equal Justice*, HUM. RTS. WATCH (June 15, 2009), https://www.hrw.org/report/2009/06/16/no-equal-justice/prison-litigation-reform-act-united-states [https://perma.cc/F933-CAPJ] (describing the restrictions imposed by the PLRA on lawsuits brought by confined individuals).
16. *See infra* section II.C.
17. Kingsley v. Hendrickson, 576 U.S. 389 (2015).
18. Margo Schlanger, *The Constitutional Law of Incarceration, Reconfigured*, 103 CORNELL L. REV. 357, 412 (2018) ("[I]t is surely only a matter of time and full briefing before the other Courts of Appeals insist on an objective standard for jail conditions cases.").
19. *See infra* section II.C.
20. Whitney v. St. Louis, 887 F.3d 857, 858 (8th Cir. 2018).

cause of action for that individual.[21] Confined individuals[22] generally may bring two types of claims under § 1983—either challenging use of force or conditions of confinement.[23] Excessive use of force claims involve those where a prison official applies an excessive amount of physical exertion against a confined individual.[24] Inadequate conditions of confinement claims include those having to do with failure to prevent the suicide of a confined individual, unclean living quarters, inadequate medical care and mental health services, failure to protect confined individuals from other inmates, and the like.[25]

In assessing claims brought by confined individuals, courts first determine which constitutional provision is appropriate for the plaintiff's claim.[26] Current precedent provides three constitutional provisions under which plaintiffs may base such claims, the applicability of each depending on the plaintiff's status as either a convicted prisoner or a pretrial detainee.[27] The Eighth Amendment's prohibition of cruel and unusual punishment protects convicted prisoners,[28] whereas the Fifth and Fourteenth Amendments ensure pretrial detainees the right to "due process of law."[29] This distinction impacts which standard a court will apply to adjudicate a particular § 1983 lawsuit brought by a confined individual.[30]

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21. 42 U.S.C. § 1983 (2018).
22. This Note utilizes the term "confined individuals" in reference to both convicted prisoners and pretrial detainees.
23. Schlanger, *supra* note 18, at 362–63.
24. *See* Hudson v. McMillian, 503 U.S. 1, 1 (1992) (addressing a case where a prison inmate brought an excessive use of force claim against correctional security officers for physically beating him while he was handcuffed).
25. *See* Wilson v. Seiter, 501 U.S. 294, 303 (1991) ("[T]here is no significant distinction between claims alleging inadequate medical care and those alleging inadequate 'conditions of confinement.'"). Some courts have categorized certain claims traditionally regarded as conditions of confinement claims, such as those involving inadequate medical care, as "episodic acts or omissions" claims. *See* Hare v. City of Corinth, 74 F.3d 633, 645 (5th Cir. 1996). The distinction is based on whether a particular claim involves a rule, restriction, or intended practice. *Id.* If it does, it would be considered a conditions of confinement claim. *Id.* Otherwise, the claim is labeled an "episodic acts or omissions" claim and as a result, faces a standard that is more difficult to overcome. *Id.*
26. Graham v. Connor, 490 U.S. 386, 394 (1989). "'The first inquiry in any § 1983 suit' is 'to isolate the precise constitutional violation with which [the defendant] is charged.'" *Id*. (alteration in original) (footnote omitted) (quoting Baker v. McCollan, 443 U.S. 137, 140 (1979).
27. Schlanger, *supra* note 18, at 362–63.
28. U.S. CONST. amend. VIII; Helling v. McKinney, 509 U.S. 25, 31 (1993) ("[T]he treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment.").
29. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1; Bell v. Wolfish, 441 U.S. 520, 535 (1979); Ingraham v. Wright, 430 U.S. 651, 670–72 (1977) (recognizing that Eighth Amendment analysis is inappropriate for those who have not been convicted of any crime).
30. *See Ingraham*, 430 U.S. at 670–72.

The Supreme Court has expressed various liability standards, some of which are applied more uniformly in the lower courts than others.[31] For a convicted prisoner to prevail on an excessive use of force claim, they must show that the force was applied "maliciously and sadistically to cause harm" rather than "in a good-faith effort to maintain or restore discipline."[32] For conditions of confinement claims brought by convicted prisoners, courts apply the deliberate indifference test, which finds liability if the prison official "knows of and disregards an excessive risk to inmate health or safety" posed by inhumane prison conditions.[33]

Both types of claims require convicted prisoners to demonstrate the defendant's subjective intent.[34] Before *Kingsley*, which held that a pretrial detainee plaintiff only has to show that the challenged intentional use of force was objectively unreasonable,[35] lower courts required pretrial detainees to make the same showing of subjective intent in excessive force claims that they required of convicted prisoners.[36] Finally, under *Bell v. Wolfish*, the intent requirement for a pretrial detainee's inadequate conditions of confinement claim is satisfied by either an expressed intent to punish, a lack of a reasonable connection between the punishment and a legitimate governmental purpose, or a disproportionality of punishment in relation to a governmental purpose.[37]

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31. The circuit courts uniformly apply the "malicious and sadistic force" standard to assess excessive use of force claims brought by convicted prisoners. *See* Staples v. Gerry, 923 F.3d 7, 13 (1st Cir. 2019); McCottrell v. White, 933 F.3d 651, 663 (7th Cir. 2019); Perez v. Cox, 788 F. App'x 438, 442 (9th Cir. 2019); Thompson v. Commonwealth, 878 F.3d 89, 98 (4th Cir. 2017); Harris v. Miller, 818 F.3d 49, 64 (2d Cir. 2016); Cordell v. McKinney, 759 F.3d 573, 580 (6th Cir. 2014); Matthews v. Villella, 381 F. App'x 137, 139 (3d Cir. 2010) (per curiam); Gruenwald v. Maddox, 274 F. App'x 667, 672 (10th Cir. 2008); Payne v. Parnell, 246 F. App'x 884, 886 (5th Cir. 2007) (per curiam); Johnson v. Breeden, 280 F.3d 1308, 1315 (11th Cir. 2002); Howard v. Barnett, 21 F.3d 868, 871 (8th Cir. 1994). However, the circuit courts differ on whether to apply a subjective or objective standard for conditions of confinement claims brought by pretrial detainees. *See infra* section II.C.

32. Hudson v. McMillian, 503 U.S. 1, 6 (1992); Whitley v. Albers, 475 U.S. 312, 320–21 (1986).

33. Farmer v. Brennan, 511 U.S. 825, 837 (1994).

34. *See id.* at 828–29; *Hudson*, 503 U.S. at 9.

35. Kingsley v. Hendrickson, 576 U.S. 389, 391–92 (2015).

36. *See* Spaulding v. Poitier, 548 F. App'x 587, 593 (11th Cir. 2013) (per curiam) (applying the "malicious and sadistic" force standard to a pretrial detainee's excessive force claim).

37. Bell v. Wolfish, 441 U.S. 520, 538–39 (1979) (citing Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69 (1963)).

A. The Evolution of Prisoner and Pretrial Detainee Litigation

To understand pretrial detainee litigation, some exploration of the doctrines governing the claims of confined individuals is necessary. Prisoner litigation is still young in terms of its doctrinal development because such cases did not frequently appear on court dockets until the 1970s, when an increase in prisoner litigation provided the Supreme Court with opportunities to develop relevant doctrine.[38] In 1976, the Court decided *Estelle v. Gamble*, a case involving inadequate medical care, where it crystalized a liability standard that had been developing in the lower courts for conditions of confinement claims brought by convicted prisoners.[39] In *Estelle*, the Court confirmed that cruel and unusual punishments proscribed by the Eighth Amendment included those that render "unnecessary and wanton infliction of pain" onto prisoners.[40] Such infliction of pain could come from prison officials' "deliberate indifference" to a prisoner's medical needs.[41] The court reasoned that because a prisoner's ability to access medical services independently is cut off by their confinement, the state must ensure that prisoners receive adequate medical care.[42] The Court in *Estelle* did not provide significant meaning to the deliberate indifference standard.

Three years after *Estelle*, the Court decided *Bell v. Wolfish*, where it addressed a conditions of confinement claim brought by a pretrial detainee.[43] The Court distinguished claims brought by convicted prisoners from those brought by pretrial detainees.[44] It stated that claims brought by pretrial detainees are governed by the Due Process Clause because detainees, having not yet been convicted of any violation of law, may not be punished at all.[45] Thus, adjudication of such cases turns on whether the conditions of confinement constitute punishment.[46] The majority invoked the factors set out in *Kennedy v. Mendoza-Martinez* in determining whether a restriction may be

38. Schlanger, *supra* note 18 (describing the Supreme Court's gradual removal of barriers to prisoner litigation, which led to an influx in prisoner litigation in the 1970s); *see also* Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153, 158 fig.A (2015) (demonstrating the gradual increase in civil rights filings by prisoners in the 1970s, which began outpacing the growth in the national prison population by the 1980s).

39. Estelle v. Gamble, 429 U.S. 97, 102–03 (1976).

40. *Id.* (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976)).

41. *Id.* at 103–04.

42. *Id.* at 103.

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

44. *See id.* at 535–36.

45. *Id.*

46. *See id.* at 537.

characterized as punishment.[47] The *Mendoza-Martinez* factors are as follows:

> "Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned . . . ."[48]

In *Bell*, the Court indicated that the above factors were useful in determining whether a challenged restriction was imposed with the intent to punish. [49] Specifically, it honed in on the last two factors.[50] A detention facility's punitive intent for imposing the restriction may be express, or it may be inferred by the absence of a reasonable relation to a legitimate, nonpunitive government objective or if the restriction is excessive in relation to that government objective.[51] Here, the Court ultimately found that a detention facility's challenged restrictive practices did not amount to punishment violative of the Due Process Clause because the policies were justified by a legitimate government purpose and were not disproportionate to that purpose.[52] The Court largely deferred to the detention facility in finding that the detention facility's policies were constitutional.[53]

In a dissenting opinion, Justice Marshall criticized the punitive intent analysis endorsed by the majority, arguing that it was ineffective and inappropriate for a due process challenge.[54] Marshall theorized that hinging a conditions of confinement claim on the intent of detention facilities would not adequately protect detainees from excessive restrictions imposed in good faith.[55] Even if the majority's standard protected detainees, the standard was inconsistent with the Constitution[56] because the Due Process Clause focuses on the actual effects of governmental action, not the intent behind the action.[57] Thus,

47. *See id.* at 537–38.

48. *Id.* (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69 (1963)).

49. *See id.* at 538.

50. *Id.*

51. *Id.*

52. *See id.* at 541.

53. *See id.* at 548.

54. *See id.* at 567 (Marshall, J., dissenting).

55. *Id.* at 566.

56. *Id.* at 567.

57. *Id.* ("By its terms, the Due Process Clause focuses on the nature of deprivations, not on the persons inflicting them. If this concern is to be vindicated, it is the effect of conditions of confinement, not the intent behind them, that must be the focal point of constitutional analysis.").

Marshall would have preferred a standard that emphasized the resulting deprivation of liberty on the pretrial detainee.[58]

In a separate dissent, Justice Stevens began by agreeing with the majority that the case before them was not an Eighth Amendment case but a due process case.[59] He then pointed out that the court failed to understand the deeper implications of this distinction when it required a finding of punitive intent on the part of detention facilities.[60] Punitive intent, he argued, may be *sufficient*, but it should not be *necessary* for finding that a pretrial detainee was punished.[61] Defining punishment in terms of intent prohibits "nothing more than . . . irrational classifications or barbaric treatment."[62] Instead, he argued, the definition of punishment should include both restrictions imposed with punitive intent and restrictions that would objectively result in the punishment of detainees.[63]

B. *Kingsley v. Hendrickson*

In the three decades following *Bell*, the Supreme Court did not elaborate much on the standard governing the claims of pretrial detainees, leaving the lower courts with little direction on how to address such claims.[64] Finally, in 2015, thirty-six years after the Court handed down the *Bell* opinion, the Court addressed this area of law in *Kingsley v. Hendrickson*, where it endorsed an objective standard for evaluating use of force claims brought by pretrial detainees.[65]

Plaintiff Michael Kingsley, a pretrial detainee, filed a § 1983 claim against several officers, alleging that they had violated his substantive due process right to be free of punishment when they used excessive force against him.[66] Some of the facts were controverted, but all

58. *See id.* at 569–70 ("A test that balances the deprivations involved against the state interests assertedly served would be more consistent with the import of the Due Process Clause." (footnote omitted)).
59. *Id.* at 579–80. (Stevens, J., dissenting).
60. *See id.* at 586 ("Having recognized in theory that the source of [the pretrial detainee's] protection [from punishment] is the Due Process Clause, the Court has in practice defined its scope in the far more permissive terms of equal protection and Eighth Amendment analysis.").
61. *Id.* at 585–86 (emphasis added).
62. *Id.* at 586.
63. *See id.* at 586–87.
64. Although the Court did not refine the standard in *Bell*, it did on occasion employ *Bell*'s reasoning in the years preceding *Kingsley*. *See* Block v. Rutherford, 468 U.S. 576 (1984) (applying *Bell* to find that a jail policy denying pretrial detainees contact visits with their family and friends was a reasonable, nonpunitive restriction); Schall v. Martin, 467 U.S. 253 (1984) (applying *Bell* to find that a statute permitting preventative detention of juveniles was not violative of the Fourteenth Amendment because there was no punitive intent behind the statute).
65. Kingsley v. Hendrickson, 576 U.S. 389, 391–92 (2015).
66. *Id* at 392.

parties agreed that after Kingsley refused to follow various orders,[67] the officers forcibly removed him from his cell and placed him on his stomach with his hands cuffed behind his back in a different cell.[68] It was disputed whether Kingsley resisted the officers' attempts to uncuff him and whether two officers slammed Kingsley's head into a concrete bunk;[69] however, the parties agreed that one of the officers put his knee on Kingsley's back.[70] When Kingsley asked the officer to remove his knee, the officer applied a taser to Kingsley's back for five seconds.[71] The officers then left Kingsley in the cell and returned to uncuff him fifteen minutes later.[72]

At trial, the district court instructed the jury that to find the use of force excessive, the force must have been unreasonable under the circumstances and the officers must have known but recklessly disregarded the risk of harm to the plaintiff the force presented.[73] The jury found for the officers, and on appeal, Kingsley challenged the instruction requiring a finding of subjective intent on the part of the officers.[74] The Seventh Circuit found that the instruction was proper, and Kingsley filed a petition for certiorari, which the Supreme Court granted.[75]

Writing for the majority, Justice Breyer opened his analysis by explaining the two state of mind questions involved in an excessive force claim.[76] The first has to do with the defendant's intent to apply physical force, and the second addresses whether or not the force was excessive.[77] The former is satisfied if the use of force is intentional, or in some instances, reckless, but it is not satisfied by mere negligence.[78] This first state of mind requirement was not at issue in *Kingsley*, as the parties agreed that the officers intentionally applied force.[79] Rather, the question before the Court was whether the second element requires a detainee to demonstrate that the defendant subjectively

67. *Id.* Several officers independently ordered Kingsley to remove a piece of paper that was covering the light fixture above his bed, and each time Kingsley refused to comply. *Id.* Officers notified Kingsley that they would remove the paper themselves but would have to move him to another cell to do so and then ordered Kingsley to back up to the door with his hands behind his back, which Kingsley refused to do. *Id.*
68. *Id.* at 392.
69. *Id.*
70. *Id.*
71. *Id.* at 392–93.
72. *Id.* at 393.
73. *Id.* at 393–94.
74. *Id.* at 394.
75. *Id.* at 394–95.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*

knew the force applied was unreasonable or if it is sufficient to show that the force was objectively unreasonable.[80] The Court ultimately adopted an objective standard.[81]

The Court pointed out that an objective standard is consistent with existing precedent, noting that it had been established that the Eighth Amendment provides a basis for claims brought by convicted prisoners, not pretrial detainees.[82] Rather, it is the Due Process Clause that governs pretrial detainees' cases, as it protects them from *any* governmental conduct that amounts to punishment.[83] Further, in *Bell*, the Supreme Court found that punishment included actions taken with an express intent to punish and actions that have no rational connection to a legitimate, nonpunitive governmental purpose or are in excess of such a purpose.[84] The *Bell* Court's endorsement of the logical inference of punishment provided an objective framework for analyzing various detention practices without considering or even mentioning the defendants' subjective intent.[85] The Court in *Kingsley* reasoned that this application demonstrated that the focus in *Bell* on punishment was not meant to make subjective punitive intent a necessary element.[86]

Laying out its justifications for reaching this conclusion, the Court stated that an objective standard would be workable for both lower courts and detention facilities.[87] Many circuits already utilized this standard in their pattern jury instructions[88] and applied the standard without seeing a flood of unfounded claims.[89] Detention facilities would also have to make little adaptation because they already trained officers to conduct themselves in a manner that would not subject them to liability under an objective standard.[90] Additionally, an objective reasonableness standard would be cognizant of the complicated and strenuous nature of managing a correctional facility.[91] The reasonableness of a use of force is to be judged "from the perspective and with the knowledge of the defendant officer."[92] Any exigent circumstances would be taken into account and deference would be given to detention facilities regarding the "policies and practices needed to

80. *Id.* at 394–96.
81. *Id.* at 397.
82. *Id.*
83. *Id.* at 397–98.
84. *Id.* at 398.
85. *Id.* at 398–99.
86. *Id.* at 398.
87. *Id.* at 399.
88. *Id.*
89. *Id.* at 402.
90. *See id.* at 399.
91. *Id.*
92. *Id.*

maintain order."[93] Thus, officers acting in good faith receive adequate protection by both this nuanced approach and qualified immunity.[94] Ultimately, the Court found that the jury instructions were erroneous and remanded the case to the Seventh Circuit.[95]

In his dissent, Justice Scalia argued that the majority misinterpreted *Bell* as providing an objective means of finding punitive intent in use of force cases, as *Bell* only allowed for an inference of punitive intent in the context of conditions of confinement cases.[96] Justice Scalia contended that an objective standard was not appropriate for use of force cases because officers making split-second decisions might inadvertently apply force that is excessive in degree.[97] Thus, an objectively excessive use of force may *evidence* punitive intent, but it should not be determinative in itself.[98]

C. The Post-*Kingsley* Split

The Supreme Court in *Kingsley* did not explicitly state whether its logic was confined to use of force claims or if it applied broadly to all claims brought by pretrial detainees.[99] This lack of instruction led the lower courts to believe that the question was left open, and a circuit split quickly developed.[100]

Just a year after *Kingsley* was decided, in *Castro v. County of Los Angeles*, the Ninth Circuit decided en banc that *Kingsley* applied to a conditions of confinement claim involving a jailer who failed to protect a pretrial detainee from another inmate.[101] The court found for the pretrial detainee, who sustained serious and lasting injuries upon being confined with an individual known to be enraged and combative.[102] The court noted that excessive force claims differ from failure to protect claims in that excessive force claims require an affirmative

93. *Id.* at 399–400.
94. *Id.* Qualified immunity is a judicially created doctrine that confers immunity from civil liability to government officials, unless the official has violated a statutory or constitutional right that was *clearly established* at the time of the challenged conduct. *See* Taylor v. Barkes, 575 U.S. 822, 825 (2015).
95. *Kingsley*, 576 U.S. at 403–04.
96. *Id.* at 405–06 (Scalia, J., dissenting).
97. *Id.* at 406.
98. *Id.*
99. Suman Malempati, *The* Kingsley *Conundrum: Does the Fourteenth Amendment Protect the Rights of Pretrial Detainee[ ]s More than the Eighth Amendment Protects Prisoners?*, SUNDAY SPLITS (Feb. 3, 2019), http://sundaysplits.com/2019/02/03/the-kingsley-conundrum-does-the-fourteenth-amendment-protect-the-rights-of-pretrial-detaineers-more-than-the-eighth-amendment-protects-prisoners/ [https://perma.cc/J8J5-6EEJ].
100. *Id.*
101. Castro v. County of Los Angeles, 833 F.3d 1060, 1070 (9th Cir. 2016).
102. *Id.* at 1081.

act, whereas failure to protect claims do not.[103] Nevertheless, both types of claims arise under the Fourteenth Amendment's Due Process Clause,[104] and the *Kingsley* Court "did not limit its holding to 'force' but spoke to 'the challenged governmental action' generally."[105] After *Castro*, the Ninth Circuit also applied *Kingsley* to a pretrial detainee's inadequate medical care claim.[106]

In 2017, other circuits weighed in on the issue. The Second Circuit adopted *Kingsley*'s objective standard in a conditions of confinement claim, echoing the Ninth Circuit's reasoning.[107] It later applied the objective standard to an inadequate medical care claim as well.[108] The Fifth Circuit broke from the emerging trend in *Alderson v. Concordia Parish Correctional Facility*, where it maintained a subjective standard in reviewing a pretrial detainee's claims of inadequate medical care and inadequate security.[109] It based its analysis on existing precedent that requires detainees to show subjective deliberate indifference on the part of jailers.[110] In a special concurrence, Judge Graves questioned the majority's reasoning because its opinion had not even mentioned *Kingsley* despite the serious doubt it cast on prior Fifth Circuit precedent.[111] In *Nam Dang v. Sherriff of Seminole County*, the Eleventh Circuit also applied a subjective standard in affirming a lower court's grant of summary judgment against a pretrial detainee's inadequate medical care claim.[112] The court rejected the plaintiff's position that the court should adopt the objective standard set forth in *Kingsley* on the ground that *Kingsley* was not "squarely on point."[113]

In 2018, the Seventh Circuit held that the objective standard applied to inadequate medical care claims.[114] In reaching this decision, the court paid particular attention to the Supreme Court's differentia-

103. *Id.* at 1072–73.
104. *Id.*
105. *Id.* at 1070.
106. Gordon v. County of Orange, 888 F.3d 1118, 1120, 1122–25 (9th Cir. 2018) (holding that inadequate medical care claims brought by pretrial detainees must be evaluated under an objective standard because all § 1983 claims brought by pretrial detainees arise under the Fourteenth Amendment and because there "is no significant distinction between" inadequate medical care claims and conditions of confinement claims).
107. Darnell v. Pineiro, 849 F.3d 17, 35–36 (2d Cir. 2017).
108. Bruno v. City of Schenectady, 727 F. App'x. 717, 720 (2d Cir. 2018).
109. Alderson v. Concordia Par. Corr. Facility, 848 F.3d 415, 418–19 (5th Cir. 2017) (per curiam).
110. *Id.*
111. *Id.* at 424–25 (Graves, J., concurring).
112. Nam Dang v. Sheriff of Seminole Cnty., 871 F.3d 1272, 1280 (11th Cir. 2017).
113. *Id.* at 1283 n.2 (asserting that *Kingsley* did not apply to *Nam Dang* because *Kingsley* was a case involving excessive use of force, whereas *Nam Dang* involved inadequate provision of medical care).
114. Miranda v. County of Lake, 900 F.3d 352, 352 (7th Cir. 2018).

tion between pretrial detainees and convicted prisoners[115] and emphasized the Court's frequently quoted statement that "[p]retrial detainees (unlike convicted prisoners) cannot be punished at all, much less 'maliciously and sadistically.'"[116]

III. *WHITNEY V. ST. LOUIS*

In 2018, the Eighth Circuit addressed this issue in *Whitney v. City of St. Louis*.[117] After Norman Whitney Jr. died by suicide while a pretrial detainee at the Justice Center, his father, Norman Whitney Sr., filed suit against the City of St. Louis, Missouri, and Shelley Sharp, a corrections officer at the St. Louis City Justice Center.[118] Prior to his death, Whitney Jr. had been arrested and then hospitalized for an irregular heartbeat.[119] During his time in the hospital, medical staff found Whitney Jr. to be suicidal after he attempted to escape and expressed a desire to have the police take his life.[120] Whitney Jr. received four days of psychiatric treatment and was transferred back to the Justice Center.[121] Two days later, correctional staff placed him in a medical unit for a variety of medical conditions,[122] where he was permitted bedsheets and clothing because he was not on suicide watch.[123] Whitney Jr. hanged himself with a ligature made from his hospital gown despite the fact that Sharp was assigned to monitor him through closed-circuit television.[124] It was later discovered that Whitney Jr. had informed a medical practitioner that he was having suicidal ideation, but Sharp asserted that she never received this information and the court found no evidence that she or other jail officials were informed.[125]

115. *Id.*
116. *Id.* (quoting Kingsley v. Hendrickson, 576 U.S. 389, 400–01 (2015)).
117. Whitney v. City of St. Louis, 887 F.3d 857, 858 (8th Cir. 2018). In 2017, an Eighth Circuit panel applied an objective standard in *Ingram v. Cole County*, a conditions of confinement case. Some believed that this meant the Eighth Circuit would ultimately adopt an objective standard. *See* Schlanger, *supra* note 18, at 412. However, the Eighth Circuit, sitting en banc, reversed the decision in 2018 after it had decided *Whitney*. *See* Ingram v. Cole County, 846 F.3d 282, 286 (8th Cir. 2017), *rev'd en banc*, 732 F. App'x 496 (8th Cir. 2018) (per curiam).
118. *Whitney*, 887 F.3d at 859. The St. Louis City Justice Center is a correctional facility for the City of St. Louis, Missouri, with an 860-inmate capacity. *City Justice Center*, ST. LOUIS, https://www.stlouis-mo.gov/government/departments/public-safety/corrections/city-justice-center.cfm [https://perma.cc/JA3S-544C] (last visited Dec. 30, 2021).
119. *Whitney*, 887 F.3d at 859.
120. *Id.*
121. *Id.*
122. *Id.*
123. Whitney v. City of St. Louis, No. 4:16-CV-1372, 2017 U.S. Dist. LEXIS 52863, at *3 (E.D. Mo. Apr. 6, 2017).
124. *Whitney*, 887 F.3d at 859.
125. *Id.*

In his complaint, Whitney Sr. alleged that Whitney Jr. had died because of Sharp's deliberate indifference when she failed to "(1) 'adequately monitor Whitney;' (2) 'timely provide adequate medical care to his serious suicidal medical condition and need;' and/or (3) 'timely intervene to rescue Whitney.'"[126] The district court dismissed the § 1983 claims against both defendants with prejudice,[127] finding that Whitney Sr. had failed to allege facts establishing that Sharp subjectively knew of and disregarded the substantial risk Whitney Jr.'s suicidal condition posed to his safety.[128] To satisfy this subjective intent requirement, Whitney Sr. must have alleged that the defendants knew Whitney Jr. was having suicidal ideation or were aware that he was actively hanging himself.[129] Whitney Sr. appealed to the Eighth Circuit, claiming the district court erred when it found the City could not be liable "in the absence of a constitutional violation by Sharp" and that the complaint did not adequately plead deliberate indifference for the claim against Sharp.[130]

The Eighth Circuit affirmed the district court's judgment in a three-page opinion, holding that according to circuit precedent, "[w]hether an official was deliberately indifferent requires both an objective and a subjective analysis."[131] Illustrating its view that *Kingsley* was irrelevant, the court only mentioned *Kingsley* in a single footnote[132] that simply explained that the objective standard utilized in *Kingsley*, an excessive force case, did not apply in *Whitney*, a deliberate indifference case.[133] Applying the subjective standard, the court found that the district court had correctly reached its conclusion.[134] Whitney Sr.'s petitions for rehearing and rehearing en banc were both denied.[135]

IV. THE EIGHTH CIRCUIT ERRED IN DECIDING *WHITNEY*

It is a well-established principle that the federal courts of appeals must follow Supreme Court precedent.[136] As such, the Eighth Circuit in *Whitney* should have followed binding precedent established in

126. *Id.*
127. *Id.*
128. *See id.* at 858–60.
129. *Id.* at 861.
130. *Id.* at 859.
131. *Id.* at 860 (quoting Jackson v. Buckman, 756 F.3d 1060, 1065 (8th Cir. 2014) (alteration in original) (footnote omitted)).
132. *Id.* at 860 n.4.
133. *Id.*
134. *Id.* at 860.
135. Whitney v. City of St. Louis, No. 17-2019, 2018 U.S. App. LEXIS 16117, at *1 (8th Cir. June 14, 2018). Judges Kelly and Grasz expressed that they would have granted a petition for rehearing en banc. *Id.*
136. *See* Bertrand v. Maram, 495 F.3d 452, 456–57 (7th Cir. 2007).

Kingsley and *Bell*. Those cases set out the proper framework that lower courts must utilize to analyze claims brought by pretrial detainees. *Whitney* addressed a failure to protect claim brought by a pretrial detainee, but the Eighth Circuit barely acknowledged *Kingsley*, basing its decision entirely on Eighth Circuit precedent.[137] The court also failed to mention *Bell*.[138] Had the Eighth Circuit correctly adopted an objective standard as dictated by *Kingsley* and *Bell*, it would not have dismissed Whitney Sr.'s claim.

A. Pretrial Detainees' Claims Must Be Reviewed Through an Objective Lens

This section demonstrates that all § 1983 claims brought by pretrial detainees must be evaluated by an objective standard. First, analysis of the majority and dissenting opinions in *Kingsley* and *Bell* in light of the Due Process Clause establishes that an objective standard is necessary. Next, a review of *Bell* shows why the Supreme Court's opinion in that case correctly set forth an objective standard for conditions of confinement claims. Finally, an examination of *Kingsley* verifies that the objective standard applies to all claims brought by pretrial detainees.

1. An Objective Standard Is Appropriate and Desirable for Pretrial Detainees' Due Process Claims

The Supreme Court correctly decided *Kingsley* when it held that an objective standard is appropriate for due process claims brought by pretrial detainees. Importantly, pretrial detainees' claims are brought under the Fourteenth and Fifth Amendments' Due Process Clauses, not under the Eighth Amendment's Cruel and Unusual Punishment Clause.[139] This is because pretrial detainees have not been convicted of any crime but are simply placed in state custody for the purpose of

137. *Whitney*, 887 F.3d at 860 ("Our precedent establishes that '[w]hether an official was deliberately indifferent requires both an objective and a subjective analysis.' To prevail on his deliberate indifference claim, Whitney Sr. must show that (1) Sharp had actual knowledge that Whitney had a substantial risk of suicide and (2) Sharp failed to take reasonable measures to abate that risk." (quoting Jackson v. Buckman, 756 F.3d 1060, 1065 (8th Cir. 2014))).

138. *Id.* at 857–61.

139. *See* Ingraham v. Wright, 430 U.S. 651, 670–72 (1977) (stating that the Eighth Amendment had no place in analyzing the claims of those not convicted of crimes); *see also* Rosalie Berger Levinson, Kingsley *Breathes New Life into Substantive Due Process as a Check on Abuse of Government Power*, 93 NOTRE DAME L. REV. 357, 360 (2017) (explaining that the liberty interests of pretrial detainees are protected by substantive due process because they are no longer protected by the Fourth Amendment but also "have not been convicted so as to trigger the Eighth Amendment").

ensuring their presence at trial.[140] Pretrial detention must be narrowly tailored for this purpose so as to not impinge on the due process rights of detainees.[141] As such, individuals may only be placed in pretrial detention upon a finding of probable cause,[142] and they may not be subjected to any treatment or conditions that amount to punishment.[143]

Analysis of due process claims brought by pretrial detainees must be objective. The Due Process Clause focuses on the actual consequences of governmental action, stating that "[n]o State . . . shall *deprive* any person of life, liberty, or property, without due process of law."[144] The Clause does not merely prohibit states from *intentionally* depriving individuals of liberty; rather, it prohibits the deprivation of liberty altogether. Thus, any governmental action resulting in the actual deprivation of liberty, including punishment, is unconstitutional.

It is impossible to apply a subjective standard and also honor the Due Process Clause's intent to protect against the deprivation of liberty that punishment prior to conviction represents. Under such a standard, jailers' decisions that functionally result in overly restrictive—or worse yet, inhumane—conditions are permissible so long as the jailer did not impose the condition with the subjective intent to punish. For example, under a subjective standard, a jailer would be permitted to employ the use of "chains and shackles" to ensure a pretrial detainee's presence at trial, despite the availability of better alternative means to achieve this objective.[145] Allowing detention facilities to escape liability in such cases simply by pointing to a nonpunitive governmental purpose is wholly ineffective and defies the purpose of the Due Process Clause.

On the other hand, an objective standard both protects detainees from punishment and shields jailers from liability when they act in good faith. This is a function of the fact-specific analysis required to

140. *See* Gerstein v. Pugh, 420 U.S. 103, 113–14 (1975); *see also* United States v. Marion, 404 U.S. 307, 320 (1971) (analyzing the rights of pretrial detainees to a speedy trial provision of the Sixth Amendment). For a discussion of the effectuality and constitutionality of pretrial detention for non-dangerous but impoverished individuals, see Samuel R. Wiseman, *Pretrial Detention and the Right To Be Monitored*, 123 YALE L.J. 1344 (2014).

141. *See* United States v. Salerno, 481 U.S. 739, 755 (1987) ("In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.").

142. *Marion*, 404 U.S. at 320.

143. Bell v. Wolfish, 441 U.S. 520, 535 n.16 (1979) ("Due process requires that a pretrial detainee not be punished. A sentenced inmate, on the other hand, may be punished, although that punishment may not be 'cruel and unusual' under the Eighth Amendment.").

144. U.S. CONST. amend. XIV, § 1 (emphasis added).

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

determine the objective reasonableness of a particular decision.[146] The fact finder must judge whether the imposition of a condition is objectively unreasonable from the perspective of the jailer, based on what the jailer knew at the time and without the benefit of hindsight.[147] Thus, it is unlikely that a jailer acting in good faith and with the rights of detainees in mind will be subject to liability. This incentivizes jailers to consider the well-being of detainees when making decisions regarding detention facility conditions. Concededly, this nuanced approach may be more laborious for jurors; however, it is certainly a worthwhile cost to protect the fundamental liberties at stake for pretrial detainees.

2. Bell *(Correctly) Sets Out an Objective Standard*

In *Bell*, the Supreme Court held that conditions amounting to punishment are those imposed with punitive intent.[148] At first glance, it may seem that this makes subjective intent an element of due process claims for pretrial detainees; however, upon a closer reading of the majority's opinion, it is evident that the Court provided both a subjective *and* an objective means for finding punitive intent.[149] The subjective means simply requires a finding of "expressed intent to punish on the part of detention facility officials."[150] In the absence of such expressed intent, the objective means allows for an inference of punitive intent either if there is no rational, non-punitive purpose for the condition or treatment, or if the restriction is excessive relative to such a purpose.[151] Thus, *Bell* does not actually require personal knowledge on the part of a jailer for a conditions of confinement claim because it allows for an inference based on objective findings. This conforms with the formulation of an objective standard, which is one that is based on external factual findings.[152]

One might question the purpose of Justice Stevens's and Justice Marshall's dissenting opinions if the *Bell* majority were indeed espousing an objective standard. However, such a line of questioning misses the underlying concern in their dissents. Justices Marshall and Stevens did not believe the majority to have adopted a purely subjective standard—they simply opposed the punitive intent requirement

146. Kingsley v. Hendrickson, 576 U.S. 389, 397 (2015) (explaining that in order to determine whether a particular use of force is objectively reasonable, the court must conduct an analysis of the particular facts and circumstances in the case).
147. *Id.*
148. *Bell*, 441 U.S. at 537–38.
149. *Id.* at 538.
150. *Id.*
151. *Id.* at 538–39.
152. An objective standard is a "legal standard that is based on conduct and perceptions external to a particular person." *Objective Standard*, BLACK'S LAW DICTIONARY (10th ed. 2014).

because it was not *sufficiently* objective in their view.[153] They also believed that the majority had allowed for too much deference to jailers.[154] Although Justice Stevens characterized the majority's use of the term "intent" as meaning "subjective intent," he seems to have done this rhetorically to criticize the majority's overemphasis of punitive intent generally.[155] Justice Stevens himself conceded that the majority did not disclaim the objective factors in *Mendoza-Martinez*.[156] Justice Stevens's main concern was that the ambiguity of the punitive intent language made it misleading in a way that would ultimately result in the lower courts believing that subjective intent is not only sufficient, but necessary for pretrial detainees to prevail on due process claims.[157]

Because Justice Stevens worried that a punitive intent requirement would be misinterpreted, what he proposed was not so much a different standard but a different *phrasing* of the majority's standard.[158] Justice Stevens stated that a particular condition constitutes unconstitutional punishment if it is imposed with the intent to punish[159] or if it functionally results in punishment.[160] As Justice Stevens explained, determining if a condition essentially amounts to punishment must take into account the historical use of a particular condition as punishment, the application of hyper-restrictive conditions designed for the most violent and dangerous few to all detainees, and the use of overly severe restrictions that serve a comparatively unimportant regulatory purpose.[161] Many of these considerations mirror those in the *Mendoza-Martinez* factors, which the majority suggested may serve as guideposts in determining whether a condition amounts to punishment.[162] Thus, Justice Stevens's standard is very similar, if not effectively the same as that of the majority.

Even if Justices Stevens and Marshall perceived the majority as endorsing too subjective a standard, their perception does not detract from the fact that the majority ultimately utilized objective criteria to

153. *Bell*, 441 U.S. at 563 (Marshall, J., dissenting); *id.* at 579 (Stevens, J., dissenting).
154. *Id.* at 563, 568 (Marshall, J., dissenting); *id.* at 584, 593–96 (Stevens, J., dissenting).
155. *Id.* at 585 (Stevens, J., dissenting).
156. *Id.* at 587.
157. *Id.* at 585–86.
158. *Id.* at 583–84, 585–86.
159. *See id.* at 585–86 ("[A] subjective intent may provide a sufficient reason for finding that punishment has been inflicted . . . .").
160. *See id.* at 583–84 ("Nor can [a pretrial detainee] be subject . . . to onerous restraints that might properly be considered regulatory with respect to particularly obstreperous or dangerous arrestees. . . . For [a non-violent pretrial detainee], such treatment amounts to punishment.").
161. *See id.* at 588.
162. *See id.* at 538 (majority opinion).

conduct its factual analysis in *Bell*.[163] In assessing the detainees' claim that double-bunking[164] violated their due process rights, the Court considered the size of the jail cells, the period of time detainees must actually spend in their jail cells, the types of amenities available to detainees, and the availability of privacy.[165] If the majority's standard had been purely subjective, its analysis would have begun and ended with the fact that there was no indication that the jailer's subjective intent in imposing the challenged conditions was punitive in nature. However, the majority never even mentioned the jailer's subjective intent in its factual analysis.[166] Indeed, through its subsequent application of *Bell* in several cases, the Supreme Court confirmed that the focus on punitive intent in *Bell* did not create a subjective intent requirement.[167]

3. Kingsley *Requires an Objective Analysis of Use of Force Claims and Conditions of Confinement Claims*

Logic dictates that conditions of confinement claims brought by pretrial detainees be reviewed by an objective standard. In *Kingsley*, the Supreme Court confirmed that the *Bell* standard is an objective one. Additionally, the Court made the objective standard uniformly applicable to all claims brought by pretrial detainees by expanding application of the standard set out in *Bell* to use of force claims. Because conditions of confinement claims were already governed by the *Bell* objective standard, the Court did not have to explicitly state that the standard used in *Kingsley* was to apply to conditions of confinement claims.

It would make little sense to apply an objective standard to use of force claims but not to conditions of confinement claims under *Kingsley*. After all, the Court relied almost entirely on *Bell*, a *conditions of confinement case*, to reach its conclusion on the use of force claim in *Kingsley*.[168] In justifying its decision, the Court pointed out that an objective standard is "consistent with our precedent."[169] Even Justice Scalia acknowledged in his dissent that *Bell* set out an objective

163. *Id.* at 541–43.
164. "Double-bunking" is the practice of housing two confined individuals in a single cell designed for single-occupancy through the provision of a bunkbed. *See id.* at 520.
165. *Id.* at 541–43.
166. *Id.*
167. *See* Block v. Rutherford, 468 U. S. 576, 585–86 (1984) (where there was no expressed punitive intent, the Court evaluated whether a detention facility's policy was reasonably related to legitimate governmental objectives and whether it appeared excessive in relation to that objective); Schall v. Martin, 467 U. S. 253, 269–71 (1984).
168. Kingsley v. Hendrickson, 576 U.S. 389, 398 (2015).
169. *Id.* at 397.

means of inferring punitive intent on the part of jailers in conditions of confinement claims.[170] In fact, he argued that an objective standard is better suited for conditions of confinement cases than use of force cases.[171] Additionally, as the Ninth Circuit pointed out,[172] the general language of the *Kingsley* opinion indicates that its framework was not meant to be confined to use of force claims.[173] In first describing the "rationally related" inference, *Kingsley* referred to "challenged governmental action" generally.[174] Thus, *Kingsley* and *Bell* require objective review of both use of force and conditions of confinement cases.

B. The Eighth Circuit Improperly Disregarded *Kingsley*'s Application to *Whitney*

The Eighth Circuit erred when it failed to follow directly applicable Supreme Court precedent in *Whitney*. Its reliance on distinguishing *Kingsley* as an excessive force case is at best superficial and at worst a pretextual reason presented to escape application of clear precedent. This error had grievous implications on Whitney Sr.'s case—if the court had correctly applied an objective standard in *Whitney*, it would have found in favor of Whitney Sr. Instead, the Eighth Circuit referred to its own precedent and applied the subjective deliberate indifference standard of the Eighth Amendment to a claim brought under the Fourteenth Amendment.[175] As established above, it is inappropriate to review the claims of pretrial detainees under an Eighth Amendment framework.

C. Application of *Kingsley*'s Objective Standard to the Facts of *Whitney*

The district court found that Whitney Sr. failed to state a claim upon which relief could be granted because he did not allege that Sharp had personal knowledge of Whitney Jr.'s suicidal ideation or knowledge that he was actively hanging himself.[176] Because the court found that Sharp had not violated Whitney Jr.'s constitutional rights, the claim against the city was also dismissed.[177] The court utilized a subjective deliberate indifference standard, which requires a finding

170. *Id.* at 405 (Scalia, J., dissenting).
171. *Id.* at 406.
172. Castro v. County of Los Angeles, 833 F.3d 1060, 1070 (9th Cir. 2016).
173. *Kingsley*, 576 U.S. at 398.
174. *Id.*
175. Whitney v. City of St. Louis, 887 F.3d 857, 860 (8th Cir. 2018) ("Our precedent establishes that '[w]hether an official was deliberately indifferent requires both an objective and a subjective analysis.'" (quoting Jackson v. Buckman, 756 F.3d 1060, 1065 (8th Cir. 2014) (alteration in original) (footnote omitted))).
176. *Id.*
177. *Id.* at 860–61.

that the jailer had actual knowledge of a high risk of harm.[178] This is inappropriate, as the "deliberate indifference standard" governs conditions of confinement claims brought by convicted *prisoners*, not pretrial detainees. The court should have instead adopted an objective standard.

The Eighth Circuit could have formulated its own test under *Kingsley*, or it could have simply employed the test put forth by the Ninth Circuit in *Castro*.[179] Under the *Castro* test, the elements of a failure to protect claim are as follows:

> (1) The defendant made an intentional decision with respect to the conditions under which the plaintiff was confined;
> (2) Those conditions put the plaintiff at substantial risk of suffering serious harm;
> (3) The defendant did not take reasonable available measures to abate that risk, even though a reasonable officer in the circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant's conduct obvious; and
> 4) By not taking such measures, the defendant caused the plaintiff's injuries.[180]

Under the suggested approach, Whitney Sr.'s complaint likely would have survived the motion to dismiss because Whitney Sr. would not have had to provide facts that, if true, established Sharp was personally aware that Whitney Jr. was suicidal or that he was hanging himself.[181] Rather, Whitney Sr.'s allegations that Sharp failed to properly monitor Whitney Jr., give sufficient medical attention to his serious mental health condition, and "timely intervene to rescue Whitney while he was hanging himself"[182] would have been enough.[183] Further, since this would have been sufficient to state a constitutional violation claim against Sharp, Whitney Sr.'s claim against the city also would have survived the motion to dismiss.

V. CONCLUSION

The Supreme Court, through various precedents, has set out an objective standard that lower courts must apply when evaluating the § 1983 lawsuits of pretrial detainees. In *Bell*, the Court initially set forth this objective standard, and in *Kingsley*, it confirmed that the standard applied to all claims brought by pretrial detainees. Thus, the

178. *Id.*
179. Castro v. County of Los Angeles, 833 F.3d 1060, 1071 (9th Cir. 2016); *see also* Berger Levinson, *supra* note 139, at 386–87 (2017) (suggesting that courts adopt *Castro*'s approach to evaluating failure to protect from suicide claims).
180. *Castro*, 833 F.3d at 1071 (footnote omitted).
181. To survive a 12(b)(6) motion to dismiss, the complaint simply must *allege* facts, if accepted as true, that would establish a claim. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). The complaint need not prove the facts alleged. *See id.*
182. Whitney v. City of St. Louis, 887 F.3d 857, 859 (8th Cir. 2018).
183. *Id.* at 859 & n.3.

Eighth Circuit errantly decided *Whitney* when it simply ignored existing Supreme Court precedents. Had it adopted an objective standard, Whitney Sr. would have had the opportunity to have his claim adjudicated on the merits. Unfortunately, because of the Eighth Circuit's decision to adopt an unnecessarily burdensome standard, neither Whitney Sr. nor other similarly situated individuals within the Eighth Circuit are likely to find meaningful recourse for conditions of confinement that violate the Due Process Clause's protection against the deprivation of liberty. To prevent further injustice, the Eighth Circuit should revisit this issue and adopt an objective standard when next presented with the opportunity.