REASONABLENESS AS CORRECTIONS REFORM IN *KINGSLEY V. HENDRICKSON*

"The degree of civilization in a society can be judged by entering its prisons."[1]

I. INTRODUCTION

In *Kingsley v. Hendrickson*, Kingsley brought an action against his jailers, alleging excessive force in violation of the Fourteenth Amendment and 42 U.S.C. § 1983.[2] Kingsley sought reversal of a verdict for respondents on the grounds that the district court's jury instruction incorrectly implied that the officers' use of force should be evaluated according to a subjective standard of reasonableness.[3] Ultimately, Kingsley's suit prompted the U.S. Supreme Court to resolve a circuit split regarding whether an objective or subjective standard should apply to due process claims involving unreasonable force against pretrial detainees.[4]

Section II of this note explains the facts of the case, the positions of the parties, and the lower court's holding. Section III describes the applicable law regarding claims of excessive force against free citizens versus convicted persons, and discusses the prior appellate court decisions concerning the relevant constitutional standard for pretrial detainees. Section IV sets

1. FYODOR DOSTOEVSKY, THE HOUSE OF THE DEAD (Constance Garnett trans. 1950) (1862).
2. Kingsley v. Hendrickson, 135 S. Ct. 2466, 2470 (2015).
3. *Id.* at 2471.
4. *Id.* at 2472.

forth the Supreme Court's holding and reasoning for its decision. Lastly, Section V examines the policy considerations underlying the detention of pretrial defendants and the need to hold corrections officers accountable for using unreasonable force, ultimately suggesting that an objective standard may increase accountability.

II. FACTS & HOLDING

Petitioner Michael Kingsley's § 1983 claim arose when he was held as a pretrial detainee in a Wisconsin county jail in 2010.[5] Kingsley's original suit was against multiple staff members, but the district court granted partial summary judgment, allowing only the excessive force claim against Sergeant Stan Hendrickson and Deputy Fritz Denger to proceed to trial.[6]

On May 20th, 2010, a deputy making rounds ordered petitioner to remove a piece of paper covering the light above his cell bunk.[7] Petitioner replied that he had not placed the paper there and refused the deputy's order.[8] The deputy continued his rounds, returning the same evening to repeat his order to petitioner, who again refused to comply.[9] The deputy issued petitioner a "minor violation" and reported the issue to Sergeant Hendrickson.[10] The following morning, a new deputy ordered petitioner to remove the paper.[11] Again, this deputy was met with petitioner's refusal.[12] Sergeant Hendrickson took the matter to his lieutenant, who determined that petitioner should be moved from his cell to allow deputies to remove the offending paper.[13]

Respondents and two other officers proceeded towards petitioner's cell and commanded him to approach the door with his hands behind his back.[14] When petitioner protested that he had done nothing wrong, Deputy Denger threatened to tase

5. *Kingsley*, 135 S. Ct. at 2468.
6. Kingsley v. Hendrickson, 744 F.3d 443, 447 (7th Cir. 2014).
7. *Kingsley*, 135 S. Ct. at 2470.
8. *Kingsley*, 744 F.3d at 445.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Kingsley*, 744 F.3d at 445.
14. *Id.*

him.[15] Petitioner remained facedown on his bunk, but did move his hands behind his back.[16] Sergeant Hendrickson and another deputy entered the cell and were able to handcuff petitioner, despite the allegation that petitioner held his arms apart.[17] Petitioner would not stand, so the officers forcibly moved him to his feet.[18] Petitioner asserted that the officers knocked his feet on the bedframe, causing severe pain that prevented him from standing or walking.[19] The officers accordingly carried him out and put him facedown on the bunk of a new cell.[20]

In the new cell, respondents attempted to remove petitioner's handcuffs.[21] Respondents claimed that petitioner resisted the removal of his handcuffs by pulling them apart and trying to get up.[22] However, petitioner denied resisting and explained that the difficulty in removing the handcuffs arose from their tightness and from the tension in petitioner's body caused by Sergeant Hendrickson kneeling on his back.[23] Sergeant Hendrickson agreed that he put his knee in petitioner's back and that petitioner impolitely told him to get off.[24] Petitioner alleged that Hendrickson and Denger then smashed his head into the concrete bunk, but both officers denied that this occurred.[25] Nevertheless, the parties agreed that Deputy Denger, taking direction from Sergeant Hendrickson, tased petitioner for five seconds and left him handcuffed in the cell.[26] After fifteen minutes, the officers returned and removed the handcuffs.[27]

In December of 2010, petitioner filed a § 1983 action pro se in the U.S. District Court for the Western District of Wisconsin, alleging a violation of his Fourteenth Amendment due process rights.[28] The district court granted partial summary judgment for all involved officers with respect to a procedural due process

15. *Kingsley*, 744 F.3d at 445.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at 446.
20. *Kingsley*, 744 F.3d at 446.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Kingsley*, 744 F.3d at 446.
26. *Id.*
27. *Id.*
28. *Id.*

claim concerning discipline by the jail staff.[29] However, the district court found genuine issues of material fact concerning whether respondents slammed petitioner's head into the concrete bed, and whether the use of the taser was purely punitive.[30]

Throughout the pretrial phase, the proposed jury instructions were repeatedly revised in response to the objections of both parties. At trial, both sides objected again, and the revised instructions were issued to 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 the 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.
>
> In deciding whether one or more defendants used "unreasonable" force against plaintiff, you must consider whether it was unreasonable from the perspective of a reasonable officer facing the same circumstances that defendants faced. You must make this decision based on what defendants knew at the time of the incident, not based on what you know now.
>
> Also, in deciding whether one or more defendants used unreasonable force and acted with reckless disregard of plaintiff's rights, you may consider such factors as:
>
> – The need to use force;
>
> – The relationship between the need to use force and the

29. *Kingsley*, 744 F.3d at 446. Petitioner's claim was that that the officers violated his Fourteenth Amendment right to procedural due process in disciplining him through the use of force without legal process.

30. *Id.*

amount of force used;

– The extent of the plaintiff's injury;

– Whether defendants reasonably believed there was a threat to the safety of staff or prisoners; and

– Any efforts made by defendant to limit the amount of force used.[31]

The jury returned a verdict in favor of the defendants.[32] Petitioner subsequently appealed to the United States Court of Appeals for the Seventh Circuit, arguing that the jury instructions misstated the law and confused the jury regarding the intent and harm elements of an excessive force claim brought by a pretrial detainee.[33] The Seventh Circuit correctly noted that the district court applied Eighth Amendment excessive force standards in assessing petitioner's claim, despite having agreed that, because of petitioner's status as a pretrial detainee, the relevant constitutional right was contained within the Fourteenth Amendment.[34]

In his Seventh Circuit appeal, petitioner urged that the district court conflated the standard for excessive force claims under the Eighth and Fourteenth Amendments, which apply to convicted prisoners and free citizens respectively.[35] According to petitioner, the resulting jury instruction erroneously required him to prove that respondents acted with reckless disregard for his safety, precluding an analysis on wholly objective factors.[36]

The Seventh Circuit found that the precedent of *Wilson v. Williams*[37] required proving intent—with recklessness as a minimum standard—in Fourteenth Amendment excessive force claims.[38] Consequently, the contested jury instructions appropriately reflected existing case law.[39] Ultimately, the

31. *Kingsley*, 744 F.3d at 447–48.
32. *Id.* at 448.
33. *Id.* Because the harm element was not at issue before the Supreme Court, this analysis does not explore plaintiff's objection to the jury instruction regarding harm. Ultimately, the district court issued an additional instruction that "a person can be harmed even if he did not suffer a severe injury." *Id.* at 454.
34. *Id.* at 449.
35. *See id.* at 448.
36. *Kingsley*, 744 F.3d at 453.
37. 83 F.3d 870 (7th Cir. 1996).
38. *Kingsley*, 744 F.3d at 451.
39. *Id.* at 453.

Seventh Circuit affirmed the district court's judgment for respondents, holding that the "jury instructions were neither erroneous nor confusing statements of the law of this circuit."[40]

On January 16, 2015, the U.S. Supreme Court granted certiorari in *Kingsley v. Hendrickson*.[41] Petitioner again contended that the jury instructions introduced a subjective element, and that the proper standard for excessive force against a pretrial detainee was an objective one, with no intent requirement.[42] Petitioner relied heavily on *Bell v. Wolfish* to argue that a plaintiff may prevail in a due process claim with purely objective evidence and without having to prove an "expressed intent to punish."[43] *Bell's* analysis looked to the legitimacy of the government's purpose and whether the government action was "reasonably related" to that purpose.[44] Petitioner maintained that both inquiries in *Bell* were objective and should be extended to due process claims involving excessive force against pretrial detainees.[45]

Petitioner also argued that: (a) the guard's use of force against him was a new seizure; and (b) "the established Fourth Amendment test of objective reasonableness should apply when a pretrial detainee is subjected to a new seizure in the form of objectively-unreasonable physical force while being confined and awaiting trial."[46] Thus petitioner contended that, because he had not passed into Eighth Amendment territory post-conviction, his Fourth Amendment freedom from unreasonable seizure continued to apply in this case.[47]

Respondents countered that "the fact of incarceration fundamentally changes the constitutional analysis."[48] Rather than distinguish between pretrial and post-conviction inmates,

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40. *Kingsley*, 744 F.3d at 455.

41. 135 S. Ct. 1039 (2015).

42. Brief of Petitioner at 13, *Kingsley*, 135 S. Ct. 2466 (2015) (No. 14-6368).

43. *Id*. at 18 (citing Bell v. Wolfish, 441 U.S. 520, 535 (1979)). It should be noted that *Bell* was a "conditions of confinement" case rather than a "use of force" case, but the Supreme Court agreed with petitioner that the due process standard in *Bell* applied to the case at bar. *See Kingsley*, 135 S. Ct. at 2472–74 ("Several considerations have led us to conclude that the appropriate standard for a pretrial detainee's excessive force claim is solely an objective one.").

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

45. *See* Brief of Petitioner, *supra* note 42, at 21.

46. *Bell*, 441 U.S. at 561.

47. *See* Brief of Petitioner, *supra* note 42, at 36.

48. Brief of Respondents at 24, *Kingsley*, 135 S. Ct. 2466 (2015) (No. 14-6368).

respondents asserted that the material distinction is between free and incarcerated persons.[49] They called for deference to corrections officials charged with the difficult task of prison administration and pointed to a series of cases advocating such deference.[50] Corrections officers, respondents argued, inevitably need to use force for a legitimate government purpose, so the relevant constitutional inquiry must be "whether the force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm."[51] Hence respondent's reading of *Bell* emphasized the Court's interest in the state actor's intent to punish.

Respondents cautioned that the petitioner's proposed objective standard would open the floodgates for frivolous litigation and subject law enforcement officers to the 20/20 hindsight of juries.[52] And since respondents argued that only a subjective standard was consistent with precedent, respondents concluded that the officers would be entitled to qualified immunity if the Court adopted an objective standard because the applicable law would not have been clearly established at the time of the use of force.[53]

In a 5-4 decision, the Court held that a pretrial detainee must show only that the force purposely or knowingly used against him was *objectively* unreasonable, in order to prevail in an excessive force claim under 42 U.S.C. § 1983.[54] In turn, the court of appeals' finding for respondents was vacated and the case was remanded to the Seventh Circuit to determine whether petitioner had been harmed by the erroneously applied standard.[55]

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49. *See* Brief of Respondents, *supra* note 48, at 33–34 ("In short, while the fact of incarceration fundamentally alters the constitutional analysis, nothing about the precise status of a detainee makes a material difference to the analysis.").

50. *See id.* at 38; *see also Bell,* 441 U.S. at 547; Jones v. N.C. Prisoners' Labor Union, Inc., 433 U.S. 119, 128 (1977); Meachum v. Fano, 427 U.S. 215, 229 (1976); Pell v. Procunier, 417 U.S. 817, 827 (1974); Cruz v. Beto, 405 U.S. 319, 321 (1972).

51. Brief of Respondents, *supra* note 48, at 28–29 (quoting Johnson v. Glick, 481 F.2d 1028, 1029 (2d Cir. 1973)).

52. *Id.* at 48–49.

53. *Id.* at 83–84.

54. *Kingsley*, 135 S. Ct. at 2468.

55. *Id.* at 2477.

III. BACKGROUND

The Court's decision in *Kingsley v. Hendrickson* draws distinctions between the rights of free citizens, incarcerated persons, and pretrial detainees. Accordingly, a nuanced understanding of the Fourth, Eighth, and Fourteenth Amendments is critical to analysis of the case. Section B explains how pretrial detainees might have vindicated their right to freedom from excessive force under the Fourteenth Amendment's Due Process Clause prior to *Kingsley*. Section C describes how the Fourth Amendment uses an objective reasonableness standard to protect free citizens from excessive force. Section D clarifies that the Eighth Amendment protects convicted persons under a subjective standard from force used maliciously and sadistically to cause harm. Section E focuses on *Bell v. Wolfish*, which created a murky "rational relation to non-punitive governmental purpose" standard for pretrial detainees that the Court sought to clarify in *Kingsley*. Section F explains how the circuit courts previously employed different standards to decide excessive force cases involving pretrial detainees. First, however, section A offers legal and historical context for petitioner's 42 U.S.C. § 1983 civil rights action against his jailers.

A. 42 U.S.C. § 1983 PROVIDES THE BASIS FOR CIVIL LIABILITY BY LAW ENFORCEMENT FOR ACTIONS THAT VIOLATE A PERSON'S CONSTITUTIONAL RIGHTS

Section 1983 in Title 42 of the U.S. Code, and its case law, provide the basis of civil liability on the part of law enforcement for actions that violate a person's constitutional rights. The relevant portion of § 1983 provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Colombia, 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 . . . .[56]

Passed in 1871 as the "Ku Klux Klan Act," § 1983 was revised in 1961 to create the present day codal provision.[57] That

56. 42 U.S.C. § 1983 (2012).

57. *See* Monroe v. Pape, 365 U.S. 167, 204 (1961), *overruled on other grounds by*

same year, in *Monroe v. Pape* the Supreme Court decided that liability under § 1983 could attach where a state actor acted *outside* the scope of authority granted to him under state law.[58] However, the section's power had been whittled away by adverse summary judgments until the Supreme Court's recent decision in *Tolan v. Cotton*.[59] There, the Court reversed the Fifth Circuit's grant of summary judgment to a police officer who shot an unarmed black man on the grounds that issues of material fact remained because the lower court failed to evaluate evidence in the light most favorable to the non-moving party.[60] The opinion was understood by some civil rights attorneys as a call to the circuit courts to be more discerning in their practice of granting qualified immunity to law enforcement via summary judgment.[61]

Significantly, § 1983 is not a source of substantive rights but rather a means of vindicating rights conferred by the U.S. Constitution.[62] A civil action brought against a law enforcement officer under § 1983 must allege that the officer's conduct was under color of state law, and that such conduct deprived the plaintiff of rights, privileges, and immunities secured by the Constitution or by federal law.[63] Individual officers acting under color of law are ordinarily protected by qualified immunity.[64] In order to defeat an affirmative defense of qualified immunity in a § 1983 claim, a plaintiff must show that the officer's conduct violated "clearly established statutory or constitutional rights of which a reasonable person would have known."[65] Thus, an officer will not be held responsible when the applicable law is unclear, in flux, or applied retroactively.[66]

Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658 (1978).

58. *Monroe*, 365 U.S. at 172.

59. 134 S. Ct. 1861, 1868 (2014).

60. *Id.*

61. Telephone Interview with Mary E. Howell, Attorney at Law (June 24, 2014) (on file with author).

62. *See* Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 617–18 (1979) ("Section 1983 . . . does not provide any rights at all."); Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979).

63. *See* Barbara J. Van Arsdale, et al., *Action Taken Under Color of Federal Law*, 15 AM. JUR. 2D CIV. RTS. § 76 (2016).

64. *See* Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2080 (2011).

65. *See* Harlow v. Fitzgerald, 457 U.S. 800, 817 (1982).

66. *See* Plumhoff v. Rickard, 134 S. Ct. 2012, 2023 (2014); Anderson v. Creighton, 483 U.S. 635, 646 (1987).

B. PRETRIAL DETAINEES MAY VINDICATE THEIR RIGHT TO FREEDOM FROM EXCESSIVE FORCE UNDER THE FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE

For individuals subject to force that is arguably excessive or unreasonable, the applicable constitutional amendment prior to the victim's "formal adjudication of guilt in an accordance with due process of law" is not the Eighth Amendment, but rather the Due Process Clause of the Fourteenth Amendment.[67] Section I of the Fourteenth Amendment provides that:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[68]

In the case of detained persons, most frequently their interest in liberty is at stake. Under the Due Process Clause, a pretrial detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.[69]

Since the Fourteenth Amendment makes no explicit reference to use of force, this application only arose through twentieth-century case law. The Court first applied a substantive due process analysis to an excessive force claim in *Rochin v. California.*[70] There, the Court held that forcibly pumping the stomach of an arrestee in order to use his stomach contents as evidence "shock[ed] the conscience," and thereby violated the Due Process Clause of the Fourteenth Amendment.[71] In *Johnson v. Glick,* the Second Circuit expanded the *Rochin* ruling and created a balancing test to evaluate what "shocks the conscience."[72] Writing for the majority, Justice Friendly considered the following factors relevant:

> [(1)] the need for application of force, [(2)] the relationship between the need and the amount of force that was used, [(3)]

67. Ingraham v. Wright, 430 U.S. 651, 671 n.40 (1977).
68. U.S. CONST. amend. XIV, § 1.
69. *Ingraham*, 430 U.S. at 671 n.40.
70. *See* 342 U.S. 165, 168 (1952).
71. *See id.* at 172.
72. *See* 481 F.2d 1028, 1033 (2d Cir. 1973).

> the extent of the injury inflicted, and [(4)] whether the force was applied in a good faith effort to maintain or restore discipline, or maliciously and sadistically for the very purpose of causing harm.[73]

The fourth consideration has been widely adopted at the appellate level. Justice Friendly's approach was also cited heavily by respondents in *Kingsley* as evidence of a subjective standard because of the need to assess elements like "good faith" and malice.[74]

The Supreme Court has previously demonstrated some aversion to reliance on the Fourteenth Amendment's Due Process Clause when other protections are available.[75] For example, in *Albright v. Oliver*, the Court ruled that Albright's § 1983 claim for malicious prosecution should have been brought under the Fourth Amendment, not the Fourteenth.[76] Quoting a prior opinion, the majority wrote that "[a]s a general matter, the Court has always been reluctant to expand the concept of substantive due process because the guideposts for responsible decision-making in this unchartered area are scarce and open-ended."[77] In the context of *Kingsley*, it is important to recall that when the Court articulates a preference for the specificity of the Fourth Amendment, it translates to a preference for an objective standard.

C. THE FOURTH AMENDMENT PROTECTS FREE CITIZENS UNDER AN OBJECTIVE STANDARD FROM THE USE OF UNREASONABLE FORCE

The Fourth Amendment established that "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . . ."[78] A Fourth Amendment "seizure" occurs when government actors have, "by means of physical force or show of authority,"

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73. *Johnson*, 481 F. 2d at 1033.

74. Kingsley v. Hendrickson, 135 S. Ct. 2466, 2475 (2015).

75. *See* Collins v. Harker Heights, 503 U.S. 115, 125 (1992); *see also* Albright v. Oliver, 510 U.S. 266, 271 (1994) ("The first step in any [§ 1983] claim is to identify the specific constitutional right allegedly infringed.").

76. *Albright*, 510 U.S. at 271.

77. *Id.* (quoting *Collins,* 503 U.S. at 125) (internal quotations omitted).

78. U.S. CONST. amend. IV. Generally, a search or seizure is reasonable if conducted pursuant to probable cause. In other words, a reasonable officer, taking into account the totality of the circumstances, must believe the person seized has committed, or is committing, a criminal offense. Illinois v. Gates, 462 U.S. 213, 230–31 (1983).

restrained the liberty of a citizen.[79] A use of deadly force that does not result in custody is also considered a seizure.[80]

More relevant to *Kingsley* is the fact that the circuits differ on how long the seizure continues after the initial arrest. The Supreme Court has stated that "seizure" is "a single act, and not a continuous fact."[81] Justice Ginsburg's concurrence in *Albright* nevertheless posits that the original purpose of the Fourth Amendment supports an understanding that seizure continues throughout pretrial detention and even during pretrial release.[82] For example, the Eighth Circuit applied a Fourth Amendment analysis to a jailhouse tasing that occurred during the booking process after arrest. Similarly, the Ninth Circuit has ruled that once a seizure begins, it continues while the arrestee remains in the custody of an arresting officer.[83] Nonetheless, the Supreme Court has not defined seizure in such a continuous manner, which leaves open the question of when Fourth Amendment protection ends and when Fourteenth Amendment protection commences. Indeed, the Eighth Circuit has referred to the time between arrest and the commencement of judicial proceedings as a "legal twilight zone."[84] As a pretrial detainee, petitioner Kingsley sought the Court's application of an objective reasonableness standard in this twilight zone when he argued that his jailers subjected him to an ongoing seizure.

Although the Supreme Court ultimately did not embrace petitioner's Fourth Amendment argument, the evolution of Fourth Amendment case law on excessive force nevertheless

79. Terry v. Ohio, 392 U.S. 1, 20 n.16 (1968). The test for whether an individual has been seized is whether a reasonable person under the circumstances would feel free to terminate the encounter and leave. U.S. v. Mendenhall, 446 U.S. 544, 554 (1980).

80. Tennessee v. Garner, 471 U.S. 1, 7 (1985). In *Garner*, after police shot a fleeing suspect, the Court established that "there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." *Id.*

81. California v. Hodari D., 499 U.S. 621, 625 (1991).

82. *Albright*, 510 U.S. at 277–79 (Ginsburg, J., concurring) (relying on the common law tradition, and pointing out that the purpose of an arrest was originally to compel an appearance at court, and that bail served the same purpose). Thus Justice Ginsburg recognized that "the difference between pretrial incarceration and other ways to secure a defendant's court attendance as a distinction between methods of retaining control over a defendant's person, not one between seizure and its opposite." *Id*. at 278.

83. Moore v. Novak, 146 F.3d 531, 535 (8th Cir. 1998); Fontana v. Haskin, 262 F.3d 871, 879–80 (9th Cir. 2001).

84. Wilson v. Spain, 209 F.3d 713, 715 (8th Cir. 2000).

illuminates how the Court arrived at its Fourteenth Amendment approach in *Kingsley*. The seminal case regarding Fourth Amendment claims of unreasonable force is *Graham v. Connor*.[85] In *Graham*, a diabetic plaintiff brought a § 1983 claim against officers who used excessive force to seize him during an insulin emergency.[86] The Court rejected Justice Friendly's four-factor balancing test from *Glick* and reasoned that, for excessive force claims, the more specific constitutional right delineated by the Fourth Amendment was preferable to a substantive due process analysis.[87] Thus, the Court held that "[a]ll claims that law enforcement officials have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen are properly analyzed under the Fourth Amendment's 'objective reasonableness' standard, rather than a substantive due process standard."[88]

The Court has repeatedly insisted that the Fourth Amendment reasonableness standard is an objective one. For instance, in *Whren v. United States*, petitioner sought to consider "whether a police officer, acting reasonably, would have made the stop for the reason given."[89] The Court found that this line of inquiry, which petitioner posited as objective, was "plainly and indisputably driven by subjective considerations."[90] Likewise, when Jerome Alford was arrested under the police officer's erroneous belief that state law required the officer's consent for Alford to record him, the Court affirmed that the "subjective intent of the arresting officer . . . is simply no basis for invalidating an arrest."[91] Hence, if the Court in *Kingsley* had applied a Fourth Amendment reasonableness standard, subjective considerations like intent would not have been relevant.

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85. 490 U.S. 386 (1989).

86. *Id.* at 388–89.

87. *See id.* at 393, 395. In other words, the Supreme Court found that the right to be free from unreasonable searches and seizures was more concrete than the right to be free from a liberty deprivation without due process.

88. *Id.* at 395. In so holding, the Court reminded the lower courts that § 1983 is not a source of substantive rights. *Id.* at 394. Therefore, the Court eschewed an approach that in practice looked for substantive due process violations without inquiry into other specific constitutional rights implicated by a use of force.

89. 517 U.S. 806, 810 (1996).

90. *Id.* at 814.

91. Devenpeck v. Alford, 543 U.S. 146, 154–55 (2004).

D. THE EIGHTH AMENDMENT PROTECTS CONVICTED PERSONS UNDER A SUBJECTIVE STANDARD FROM FORCE USED MALICIOUSLY AND SADISTICALLY TO CAUSE HARM

While the Fourth Amendment protects free persons and non-custodial detained persons, incarcerated individuals must instead avail themselves of the Eighth Amendment.[92] Though an incarcerated person clearly has been seized, the courts have severely restricted the Fourth Amendment rights of convicted persons; even if a prison regulation impinges upon an inmate's constitutional rights, a court must uphold the regulation "if it is reasonably related to legitimate penological interests."[93] Prison security and inmate/guard safety are among the oft-cited policy justifications for the restriction.[94] The Eighth Amendment affords some limited protection to convicted prisoners, mandating that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."[95] *Ingraham v. Wright* details the history of the Eighth Amendment, emphasizing that it was designed to protect persons *convicted* of crimes.[96] Regarding the punishment of post-conviction inmates, the Court in *Gregg v. Georgia* found that the Eighth Amendment prohibits the "unnecessary and wanton infliction of pain," and "the punishment must not be grossly out of proportion with the severity of the crime."[97] However, Eighth Amendment case law has also recognized that "cruel and unusual" is an evolving standard that reflects society's norms of decency at any given historical moment.[98]

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92. The term "non-custodial detained person" refers to those individuals who are still subject to detention but are not in custody because they have been granted pretrial release.

93. Turner v. Safley, 482 U.S. 78, 89 (1987).

94. *See* Florence v. Bd. of Chosen Freeholders of Burlington, 132 S. Ct. 1510, 1515 (2012) (citing *Safley*, 482 U.S. at 84–85) ("The difficulties of operating a detention center must not be underestimated by the courts.").

95. U.S. CONST. amend. VIII.

96. *See* Ingraham v. Wright, 430 U.S. 651, 670–71 (1977) (holding that the paddling of students as a form of school discipline did not entitle the students to Eighth Amendment protection from cruel and unusual punishment because the students were neither accused nor convicted of criminal activity).

97. Gregg v. Georgia, 428 U.S. 153, 173 (1976).

98. *See* Estelle v. Gamble, 429 U.S. 97, 102–03 (1976) (considering whether denial of medical care to petitioner could constitute "cruel and unusual" punishment). Although Gamble was deemed to have received too much medical attention to qualify, the Court agreed that "deliberate indifference to serious medical needs of prisoners . . . is proscribed by the Eight Amendment." *Id.* at 104. *See also* Rhodes v. Chapman, 452 U.S. 337, 346 (1981) ("No static test can exist by which courts

As the Eighth Amendment pertains to excessive force claims, "cruel and unusual punishment" has been interpreted subjectively to mean "malicious and sadistic."[99] The controlling cases prior to *Kingsley* were *Whitley v. Albers* and *Hudson v. McMillian*.[100] In the former, the Court held that, because the shooting of a convicted inmate was part of a "good-faith effort to restore prison security," it did not violate the Eighth Amendment's prohibition against cruel and unusual punishment.[101] Nevertheless, the Court in *Hudson* held that the injury incurred need not be serious for a convicted inmate to prevail on an excessive force claim brought under the Eighth Amendment.[102] The Court further held that the proper judicial inquiry was "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm."[103] Hence, this test, derived from force against *convicted* prisoners, became an alternative to *Bell* for circuits unwilling to award additional protection to pretrial detainees. Most importantly, the test requires inquiry into the officer's mental state and allows an officer to be legally absolved of wrongdoing if he or she acted in good faith.

E. *BELL V. WOLFISH* CREATED A MURKY "RATIONAL RELATION TO NONPUNITIVE GOVERNMENTAL PURPOSE" STANDARD FOR PRETRIAL DETAINEES

Bell is essential in discussing *Kingsley* because the briefs of both the petitioner and respondents in the latter case relied on distinct, and sometimes conflicting, language from the *Bell* opinion. In *Bell*, pretrial detainees brought a class action suit challenging their conditions of confinement, including the practices of visual body-cavity inspections and the double-bunking of inmates in an overcrowded short-term custodial facility.[104] The Court analyzed the detainees' claims under the Fifth Amendment's Due Process Clause and the Fourth

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determine whether conditions of confinement are cruel and unusual, for the Fourth Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.") (internal quotations and citations omitted).

99. Whitley v. Albers, 475 U.S. 312, 320 (1986).
100. *Id.*; 503 U.S. 1 (1991).
101. *Whitley*, 475 U.S. at 326.
102. *Hudson*, 503 U.S. at 7–8.
103. *Id.*
104. Bell v. Wolfish, 441 U.S. 520, 523, 530, 558 (1979).

Amendment.[105]

Like the Monroe County Jail at issue in *Kingsley*, the Metropolitan Correction Center in New York City also housed some post-conviction inmates.[106] The Court assumed arguendo that both the pretrial and convicted persons retained their Fourth Amendment rights, and concluded that the no-contact body cavity searches were not unreasonable.[107] In analyzing the substantive due process claim, the Court in *Bell* began with its holding in *Ingraham* that "under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt."[108] To determine what constitutes punishment, the Court in *Bell* analyzed the government's purpose for the conditions and restrictions in question.[109] Specifically, the majority asked whether the practices in question were "rationally related to a legitimate non-punitive governmental purpose and whether they appear[ed] excessive in relation to that purpose."[110] The Court held that the contested restrictions were reasonable responses to genuine security concerns.[111]

For the purpose of understanding *Kingsley,* the most significant piece of *Bell* was the Court's approach to ascertaining the government's purpose. The Court in *Bell* suggested that the factors enumerated in *Kennedy v. Mendoza-Martinez* would serve as a useful guide in assessing whether particular restrictions on pretrial detainees constitute punishment.[112] These factors included:

> 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

105. *Bell*, 441 U.S. at 530, 557. The Court's Fifth Amendment due process analysis reads much like a Fourteenth Amendment due process analysis, and any distinction between them for the purposes of *Bell* is beyond the scope of this note.

106. *Id.* at 524.

107. *Id.* at 560.

108. *Id.* at 535.

109. *See id.* at 561.

110. *Bell*, 441 U.S. at 561.

111. *Id.* at 561–62. The Metropolitan Correction Center testified that its visual body cavity searches were designed to deter and detect the introduction of contraband such as drugs and weapons; however, officers reported only one instance of discovery. *Id.* at 558.

112. 372 U.S. 144, 168–69 (1963).

> 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.[113]

Bell did not explicitly address whether intent to punish was a separate element, but what this extensive list of considerations made clear is that intent to punish may be inferred.[114] Thus *Bell* concluded that "if a restriction or condition is not reasonably related to a legitimate goal—i.e., if it is arbitrary or purposeless—a court may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees."[115]

F. THE CIRCUIT COURTS WERE EMPLOYING DIFFERENT STANDARDS TO DECIDE EXCESSIVE FORCE CASES INVOLVING PRETRIAL DETAINEES

First and foremost, *Kingsley* was an effort to clarify the proper standard by which a court may evaluate a Fourteenth Amendment claim of excessive force used against a pretrial detainee. A review of appellate level case law reveals that the circuits were split on this issue. While the Second, Third, and Fifth Circuits applied a subjective good faith standard from the Eighth Amendment, the Ninth Circuit applied an objective standard derived from the Fourth Amendment. The circuits also disagreed on whether an intent element should be part of the analysis, and whether *Bell* or *Hudson* and *Whitley* should provide the decisive test.

The Seventh Circuit, where *Kingsley* arose, determined that *Bell v. Wolfish* was the "primary touchstone," and that the proper rule for a due process claim was "whether the treatment of the detainee 'amount[ed] to punishment.'"[116] The Seventh Circuit "recognize[d], quite clearly, the need for a subjective inquiry into the defendant's state of mind," requiring "at least recklessness" in addition to the Fourth Amendment's objective criteria.[117] Thus, in the Seventh Circuit, there must have been an intent to punish in order to trigger the Fourteenth Amendment analysis put forth

113. *Mendoza-Martinez*, 372 U.S. 168–69.
114. *Bell*, 441 U.S. at 539.
115. *Id.*
116. Kingsley v. Hendrickson, 744 F.3d 443, 449 (7th Cir. 2014) (citing *Bell*, 441 U.S. at 535 (1979)).
117. *Id.* at 452.

in *Bell*, which in turn decided whether punishment in fact occurred.[118]

Despite distinguishing between post-conviction inmates and pretrial detainees, other circuits nevertheless applied a standard derived from the Eighth Amendment to Fourteenth Amendment cases. The Second, Third, Fifth, and Eleventh Circuits applied the "malicious and sadistic" standard as a countervailing intent-based analysis of "good faith." For instance, in *Murray v. Johnson* the Second Circuit wrote that "the subjective condition [for a due process claim] is satisfied by showing that the defendant had a 'sufficiently culpable state of mind'—the core inquiry being whether force was applied in a good-faith effort to maintain or restore discipline or maliciously and sadistically to cause harm."[119] The Sixth Circuit also insisted that a Fourteenth Amendment claim required more than the Fourth Amendment objective reasonableness, though the language in this circuit seemed more concerned with the egregiousness of the force and less with a subjective intent element.[120] For example, in *Shreve v. Franklin County*, the Sixth Circuit asserted that "[g]enerally, to constitute a Fourteenth Amendment violation, an official's conduct must 'shock the conscience,'" and that this standard was "a 'substantially higher hurdle' for the plaintiff to meet than the objective reasonableness test of *Graham*."[121] All of these circuits eschewed reliance on *Bell*, preferring to rely on the subjective standard of *Hudson* and *Whitley*.

By contrast, the Ninth Circuit opted to apply *Graham's* Fourth Amendment-derived reasonableness test to Fourteenth Amendment claims of pretrial detainees. The Ninth Circuit clearly articulated its rule in *Gibson v. County of Washoe,* stating

118. *See Kingsley*, 744 F.3d at 452.

119. 367 F. App'x. 196, 198 (2d Cir. 2010) (citing Hudson v. McMillian, 503 U.S. 1, 7–8 (2002)). *See* United States v. Walsh, 194 F.3d 37, 48–49 (2d Cir. 1999) (applying the malicious and sadistic standard to *all* prison uses of force); *see also* Bozeman v. Orum, 422 F.3d 1265, 1271 (11th Cir. 2005) (applying *Glick's* "malicious and sadistic" standard); Fuentes v. Wagner, 206 F.3d 335, 344–45 (3d Cir. 2000) (applying the malicious and sadistic standard, and adding an "objective" element that the injury not be *de minimis)*; Valencia v. Wiggins, 981 F.2d 1440, 1446–47 (5th Cir. 1993) (rejecting the *Bell* standard and applying *Hudson*).

120. *See* Ewolski v. City of Brunswick, 287 F.3d 492, 510 (6th Cir. 2002) (requiring action so "egregious" as to be "arbitrary in the constitutional sense").

121. 743 F.3d 126, 134, 137 (6th Cir. 2014) (citing Burgess v. Fischer, 735 F.3d 462, 473 (6th Cir. 2013); Darrah v. City of Oak Park, 255 F.3d 301, 305 (6th Cir. 2001)). Recall that the "shocks the conscience" language derives from the Fourteenth Amendment analysis in Rochin v. California, 342 U.S. 165, 172 (1952).

that:

> The Due Process clause protects pretrial detainees from the use of excessive force that amounts to punishment. Although the Supreme Court has not expressly decided whether the Fourth Amendment's prohibition on unreasonable searches and seizures continues to protect individuals during pretrial detention, we have determined that the Fourth Amendment sets the "applicable constitutional limitations" for considering claims of excessive force during pretrial detention. [The Fourth Amendment case law] therefore explicates the standards applicable to a pretrial detention excessive force claim in this circuit.[122]

The holding in *Gibson* relies on the precedent of *Pierce v. Multonomah County*, in which the Ninth Circuit applied the objective standard from *Graham* to a use of force against a mentally ill pretrial detainee. The Ninth Circuit required that the analysis be conducted from the viewpoint of a reasonable officer.[123]

The Ninth Circuit standard was the most objective one, but the Ninth was not the only appellate court to dispense with the intent requirement. The Tenth Circuit has permitted consideration of intent but did not require it as a separate element.[124] The Tenth Circuit opined that "an excessive force claim brought under the Fourth Amendment depends on the objective reasonableness of the defendants' actions, the same claim brought under the Fourteenth Amendment turns on additional factors, including 'the motives of the state actor.'"[125] When detailing the various types of excessive force claims, the Eighth Circuit wrote that "[t]he evaluation of excessive-force claims brought by pre-trial detainees, although grounded in the Fifth and Fourteenth Amendments rather than the Fourth Amendment, also relies on an objective reasonableness standard."[126] Though not in the context of a pretrial detainee, the Eighth Circuit has also conflated the objective and subjective approaches when it authored a somewhat paradoxical holding in *Dale v. Janklow* that "officers were objectively acting in good

122. Gibson v. Cty. of Washoe, 290 F.3d 1175, 1197 (9th Cir. 2002) (quoting Pierce v. Multnomah Cty., 76 F.3d 1032, 1043 (9th Cir. 1996)).

123. *Pierce*, 76 F.3d at 1037–38.

124. *See* Estate of Booker v. Gomez, 745 F.3d 405, 419 (10th Cir. 2014).

125. *Id.* (quoting Porro v. Barnes, 624 F.3d 1322, 1325 (10th Cir. 2010).

126. Andrews v. Neer, 253 F.3d 1052, 1060 (8th Cir. 2001).

faith."[127]

The lack of consensus at the appellate level created ambiguity regarding the proper standard to apply to pretrial detainees alleging excessive force under the Fourteenth Amendment. While respondents later argued that this circuit split would be resolved without the Supreme Court's intervention, the Court granted certiorari in *Kingsley v. Hendrickson* on January 16, 2015.[128]

IV. THE COURT'S DECISION

Since the parties agreed that the officers' use of force was knowing and purposeful, the Court explained that the issue to be decided was whether the question of excessiveness should be assessed using an objective or subjective standard. Ultimately, the Court embraced an objective reasonableness standard.[129] In deciding whether respondent's actions constituted unreasonable force, the majority developed an illustrative five-factor test that combines the holdings of *Glick* and *Graham*. The Court held that a reasonableness inquiry includes:

> [(1)] The relationship between the need for the use of force and the amount of force used; the extent of the plaintiff's injury; [(2)] any effort made by the officer to temper or limit the amount of force; [(3)] the severity of the security problem at issue; [(4)] the threat reasonably perceived by the officer; and [(5)] whether the plaintiff was actively resisting.[130]

The Court also emphasized that an objective standard depends on the facts of each case, as assessed by a reasonable officer with the knowledge available at the time.[131] The majority pointed out that an objective analysis would necessarily include appropriate deference to the "'policies and practices that in th[e] judgment' of jail officials 'are needed to preserve internal order and discipline and to maintain institutional security.'"[132] The majority then advanced three reasons why an objective standard is the correct standard to apply in determining whether an

127. 828 F.2d 481, 487 (8th Cir. 1987).

128. *See Kingsley*, 135 S. Ct. at 2472; Respondent's Brief in Opposition at 16–17, Kingsley v. Hendrickson, 135 S. Ct. 2466 (2015) (No. 14-6368).

129. *Kingsley*, 135 S. Ct. at 2473.

130. *Id.* at 2473 (citing Graham v. Connor, 490 U.S. 386, 396 (1989)); *see* Johnson v. Glick, 481 F.2d 1028, 1033 (1973).

131. *Kingsley*, 135 S. Ct. at 2473.

132. *Id.* (citing Bell v. Wolfish, 441 U.S. 520, 547 (1979)).

officer's use of force against a pretrial detainee is excessive for Fourteenth Amendment due process purposes. The Court reasoned that (A) an objective standard is consistent with precedent and training, (B) officers acting in good faith are adequately protected by an objective standard, and (C) the cases relied on by respondents were either distinguishable or worrisome.[133] In the instant case, the Court found that the jury instructions provided a subjective standard, amounting to reversible error. Justice Scalia nevertheless wrote a scathing dissent.

A. AN OBJECTIVE STANDARD IS CONSISTENT WITH PRECEDENT AND OFFICER TRAINING

First, the majority argued that an objective standard is consistent with precedent.[134] The majority explained that the rule articulated in *Bell* operates disjunctively, such that "absent an expressed intent to punish, a pretrial detainee can nevertheless prevail by showing that the actions are not 'rationally related to a legitimate non-punitive governmental purpose' or that the actions 'appear excessive in relation to that purpose.'"[135] Thus, proof of punitive intent is a sufficient but not necessary condition to evaluate a Fourteenth Amendment due process claim. The Court further explained that, under *Bell,* the government actor's behavior, the legitimacy of the governmental purpose, and the relationship between them were to be evaluated on purely objective considerations.[136] According to the majority, the Court's decisions in *Block v. Rutherford* and *United States v. Salerno* followed this objective approach.[137] Moreover, the majority stated that the pattern jury instructions in multiple circuits use an objective standard, and that numerous detention centers, including the Monroe County jail, train officers using an

133. *Kingsley*, 135 S. Ct. at 2473–75.

134. *Id.* at 2473.

135. *Id.* (citing *Bell*, 441 U.S. at 561).

136. *Id.*

137. *See* Block v. Rutherford, 468 U.S. 576, 586 (1984) (finding that, when plaintiff does not allege that a jail policy denying visitors harbors punitive intent, the court need only consider whether the policy is "reasonably related to legitimate governmental objectives" and whether it appears excessive in relation); *see also* United States v. Salerno, 481 U.S. 739, 747 (1987) (mandating that "the punitive/regulatory distinction turns on whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned") (citations omitted).

objective standard of reasonableness.[138]

B. THE USE OF AN OBJECTIVE STANDARD ADEQUATELY PROTECTS AN OFFICER WHO ACTS IN GOOD FAITH

The majority's other main argument was that the use of an objective standard adequately protects an officer who acted in good faith.[139] Having received amicus briefs from the law enforcement community and government stakeholders, the Court recognized their concerns by rebutting them.[140] The majority acknowledged the difficulty of operating a prison and the need for discretion on the part of corrections officials to respond to rapidly changing circumstances, but explained that these were reasons for applying an objective standard based on the knowledge of the officer at the time, rather than in hindsight.[141] Furthermore, the Court asserted that an objective analysis nevertheless included deference to policies designed to preserve order and security.[142] The majority also emphasized that the instant opinion concerned intentional and knowing uses of force, though it was careful to leave open the possibility of applying an objective standard to reckless acts.[143] Finally, the Court reminded concerned parties that officers enjoy qualified immunity and would not be held liable under § 1983 unless the right violated was "clearly established" by existing law.[144]

C. THE CASES CITED BY RESPONDENTS ARE DISTINGUISHABLE OR RAISE BASELESS CONCERNS

Next, the majority addressed the case law put forth by respondents, primarily by distinguishing the facts of *Kingsley*. The Court quickly disposed of *Whitley* and *Hudson* on the grounds that both cases concerned Eighth Amendment claims by convicted persons.[145] Since pretrial detainees cannot be punished, the Court reasoned that the constitutionality of the

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

139. *Id.*

140. *Id.* ("[D]eference to policies and practices needed to maintain order and institutional security is appropriate . . . Additionally, an officer [usually] enjoys qualified immunity and is [usually] not liable for excessive force . . . It is unlikely (though theoretically possible) that a plaintiff could overcome these hurdles where an officer acted in good faith.").

141. *Id.*

142. *Id.*

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

144. *Id.* at 2474 (citing Saucier v. Katz, 533 U.S. 194, 202 (2001)).

145. *Id.* at 2475.

punishment at issue in those cases was inapplicable to *Kingsley*.[146] However, the majority opinion did note that these two cases were correct regarding the need to account for the safety concerns of prison administrators.[147] The Court also distinguished its ruling from *County of Sacramento v. Lewis*, which respondents cited for its reliance on subjective considerations.[148] The Court found that the subjective approach in *Lewis* concerned whether the officer had purposefully or knowingly committed the act in question, rather than whether his act was reasonable.[149]

The majority finally turned to the much-cited Second Circuit opinion in *Glick*, where Judge Friendly wrote that one of the factors that a court should consider when evaluating a pretrial detainee's Fourteenth Amendment claim was "whether the force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm."[150] The majority emphasized that Judge Friendly's factor test is exemplary in nature and not a conjunctive rule.[151] Thus, a pretrial detainee could prevail on an excessive force claim without addressing the officer's subjective intent. The Court noted that respondents relied on *Glick* as part of a larger argument that a subjective standard would protect officers from a flood of unfounded excessive force suits by pretrial detainees, but the Court also noted that those circuits currently using an objective standard had not experienced such a flood.[152] In addition, the Court suggested that the Prison Litigation Reform Act of 1996 provided an adequate deterrent against frivolous claims by both

146. *Kingsley*, 135 S. Ct. at 2475 ("Thus, there is no need here, as there might be in an Eighth Amendment case, to determine when punishment is unconstitutional.").

147. *Id.* ("*Whitley* and *Hudson* are relevant here only insofar as they address the practical importance of taking into account the legitimate safety-related concerns of those who run jails.").

148. *See Kingsley*, 135 S. Ct. at 2475; Brief of Respondents, *supra* note 48, at 30–31 (citing *Lewis*, 523 U.S. 833 (1998)). In *Lewis*, a police officer ran over and killed a passenger who fell from a motorcycle after its driver engaged police in a high speed chase. *See Kingsley*, 135 S. Ct. at 2475*; Lewis*, 523 U.S. at 836–37. A unanimous Supreme Court found that the plaintiff's Fourteenth Amendment claim could not be sustained because the officers did not intend to kill or injure the plaintiff. *See Lewis*, 523 U.S. at 855–65.

149. *See Kingsley*, 135 S. Ct. at 2475.

150. *Id.* at 2476 (citing Johnson v. Glick, 481 U.S. 1028, 1033 (1973)).

151. *Id.*

152. *Id.* ("[T]here [is no] evidence of a rash of unfounded filings in Circuits that use an objective standard.").

pretrial detainees and convicted prisoners.[153]

D. THE JURY INSTRUCTIONS CALLED FOR A SUBJECTIVE ANALYSIS OF RESPONDENT'S USE OF FORCE

Having determined that the appropriate standard by which to evaluate a claim of purposeful or knowing excessive force against a pretrial detainee was an objective standard of reasonableness, the Court then evaluated whether the jury instructions were consistent with an objective analysis.[154] The Court held that they were not.[155]

In determining that the jury instructions were inconsistent with an objective standard, the majority pointed to several specific clauses within the instructions.[156] First, the Court found that the jury instructions conveyed a need for two conjunctive elements—reckless disregard of the plaintiff's rights *and* use of unreasonable force.[157] Second, the Court noted that the district court had instructed the jury to "consider . . . [w]hether [respondents] reasonably *believed* there was a threat to the safety of staff or prisoners."[158] Taken together, the majority opined that the jury had been instructed to consider the respondents' subjective reasons for the use of force and their subjective evaluation as to whether it was excessive.[159] Nevertheless, the Court believed that the issue of whether this error was harmless might be fact-specific and thus remanded to the Seventh Circuit to resolve the question of prejudice.[160]

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153. *See Kingsley*, 135 S. Ct. at 2476; *see also* 42 U.S.C. § 1997e (2012). Among many provisions designed to limit § 1983 by pro se litigants, the Prison Litigation Reform Act requires that prisoners exhaust administrative remedies before filing a civil suit and prohibits plaintiffs from alleging mental or emotional harm without physical harm. § 1997e(a).

154. *See Kingsley*, 135 S. Ct. at 2476 ("We now consider the lawfulness of the jury instruction given in this case in light of our adoption of an objective standard for pretrial detainees' excessive force claims.").

155. *Id.* ("We agree with Kingsley that the instructions were erroneous.").

156. *Id.*

157. *Id.* (citations omitted) ("[R]eckless disregard of [Kingsley's] safety was listed as an additional requirement, beyond the need to find that [respondents'] use of force was unreasonable in light of the facts and circumstances at the time.").

158. *Id.* at 2477 ("In determining whether respondents acted with reckless disregard of [Kingsley's] rights, the jury was instructed to consider . . . [w]hether [respondents] reasonably *believed* there was a threat to the safety of staff or prisoners.") (emphasis in original).

159. *See Kingsley*, 135 S. Ct. at 2477.

160. *Id.*

E. JUSTICE SCALIA'S DISSENT

Justice Scalia authored the dissenting opinion, joined by Chief Justice Roberts and Justice Thomas, while Justice Alito wrote a separate dissent.[161] In his own dissenting opinion, Justice Scalia asserted that the objective reasonableness of the force in question was relevant but insufficient to assess whether the force was applied punitively and thereby in violation of the Due Process Clause.[162] Justice Scalia maintained that a pretrial detainee's due process rights are not violated "when the force purposefully or knowingly used against him [is] objectively unreasonable" because that is insufficient to show intentional infliction of punishment.[163] The dissent's principal disagreement with the majority was the dissent's contention that *Bell's* punishment test implicitly included an intent element.[164] Justice Scalia was clear that the Eighth Amendment standard was inapplicable, but he argued that the "objective reasonableness of the force used is nothing more than a heuristic for identifying [the] intent [to punish]."[165] Hence, Justice Scalia read the reasonable relationship *Bell* required between the legitimate state interest and the policy or condition in question as a tool to assess a state actor's intent, rather than as a distinct means of assessing reasonableness. While acknowledging that intent could be inferred from the circumstances, Justice Scalia pointed out that *Bell* concerned detention policy determinations, often developed after careful deliberation, whereas the decision concerning the appropriate level of force is made as circumstances evolve in real time.[166] Thus, the use of more force than necessary might be the result of a miscalculation rather

161. *See Kingsley*, 135 S. Ct. at 2477–79 (Scalia, J., dissenting). Justice Alito explained that he would prefer to dismiss the case as "improvidently granted." *Id.* at 2479 (Alito, J., dissenting). He argued that the majority was premature in deciding what standard should apply to a pretrial detainee's due process claim because the Court had not yet ruled on the question of whether a pretrial detainee can bring a Fourth Amendment claim based on excessive force by jail or prison staff. *Id.* Justice Alito further wrote that, because the Fourth Amendment standard of reasonableness is an objective one, allowing a pretrial detainee to bring an unreasonable seizure claim could render unnecessary the majority's due process ruling in *Kingsley*. *See id.*

162. *See id*. at 2478 (Scalia, J., dissenting). For Justice Scalia, the Fourteenth Amendment was the only applicable constitutional provision because Kingsley did not raise a Fourth Amendment claim in the lower courts. *Id.* at 2478–79.

163. *Id.* at 2477 (internal quotations omitted).

164. *Id.* ("The Court in *Bell* recognized that intent to punish need not be expressed . . . but may be established with circumstantial evidence.").

165. *Id.* at 2478.

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

than punitive intent.[167] Ultimately, Justice Scalia concluded that the majority had gone beyond the applicable context of *Bell* in holding that "any intentional application of force that is objectively unreasonable in degree . . . amounts to punishment."[168]

Moreover, Justice Scalia contended that "Kingsley's interest [was] not one of the fundamental liberty interests that substantive due process protects."[169] Citing *Washington v. Glucksberg*, Justice Scalia suggested that because Kingsley's liberty interest is an interest in freedom from force beyond what would be objectively reasonable to support a legitimate governmental interest, the specificity of his interest exceeds what *Glucksberg* was prepared to recognize as fundamental.[170] Specifically, Justice Scalia noted that the Court in *Glucksberg* found that the right to substantive due process entailed those liberty interests that were "objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed."[171] According to Justice Scalia, petitioner could not pass the *Glucksberg* test because his dissent defined petitioner's interest as "the right of pretrial detainees to be free from the application of force that is more than is objectively required to further some legitimate, nonpunitive governmental interest."[172] Justice Scalia further found that the majority's holding was more than our national tradition is prepared to offer.[173] Finally, Justice Scalia concluded by pointing out that petitioner could avail himself of unspecified state statutes and the common law as a means of redress in lieu of relying upon the Fourteenth Amendment for protection.[174] The "tender-hearted" majority, Scalia asserted, was "tortify[ing]" the Due Process

167. *Kingsley*, 135 S. Ct. at 2478 (Scalia, J., dissenting) ("That an officer used more force than necessary might be *evidence* that he acted with intent to punish, but it is no more than that.") (emphasis in original).

168. *Id.* (citing Bell v. Wolfish, 441 U.S. 520, 535 (1979)).

169. *Id.* at 2479 (citing Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997)).

170. *See id.* (citing 521 U.S. 702 (1997) (holding that the Due Process Clause did not protect the right to physician assisted suicide because, historically, the common law had prohibited it and had consistently found the practice at odds with our national values)).

171. *Id.* (citing *Glucksberg*, 521 U.S. at 720–21).

172. *Kingsley*, 135 S. Ct. at 2479 (Scalia, J., dissenting).

173. *Id.*

174. *Id.* ("I conclude by emphasizing that our Constitution is not the only source of American law. There is an immense body of state statutory and common law under which individuals abused by state officials can seek relief.").

Clause.[175]

V. ANALYSIS

Though some may have expected the Court to decide *Kingsley* on narrow grounds, the case offers an unequivocal vindication of the rights of un-convicted detained persons to seek redress for unnecessary and excessive force. This is an important clarification not only because of the circuit split, but principally for policy reasons. Many of these policy considerations were identified in the amicus briefs filed by, among others: the United States of America, the National League of Cities, the U.S. Conference of Mayors, the National Sheriff's Association, Former Corrections Administrators and Experts, the National Association of Criminal Defense Lawyers, and the American Civil Liberties Union (ACLU).[176] In light of the concerns raised by these various stakeholders, the Court's decision in *Kingsley* is a sensible rule that combines their various perspectives.

The Analysis portion of this Note explores the policy justifications for *Kingsley's* holding. Section A discusses how *Kingsley* addresses inequities in the bail system that create an unjust double standard for use of force claims. Section B posits that *Kingsley* may serve to reorient corrections institutions where a culture of excessive force corrodes administrators' subjective judgment. Section C argues that *Kingsley's* objective standard is already in place in many jurisdictions and is better suited to enhance accountability by corrections officers. Finally, section D suggests that the heightened national discourse around use of force by law enforcement create an opportunity for the Court to require a higher standard.

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175. *Kingsley*, 135 S. Ct. at 2479 (Scalia, J., dissenting).

176. *See* Brief for the United States as Amicus Curiae Supporting Affirmance, *Kingsley*, 135 S. Ct. 2466 (2015) (No. 14-6368); Brief for the Nat'l Ass'n of Ctys., et al., as Amici Curiae Supporting Respondents, *Kingsley*, 135 S. Ct. 2466 (No. 14-6368); Brief for the Nat'l Sheriff's Ass'n, et al., as Amicus Curiae, *Kingsley*, 135 S. Ct. 2466 (No. 14-6368) [herinafter Sheriff's Ass'n Brief]; Brief for Amici Curiae Am. Civil Liberties Union & Am. Civil Liberties Union of Wis. in Support of Petitioner, *Kingsley*, 135 S. Ct. 2466 (No. 14-6368) [hereinafter ACLU Brief]; Brief for the Nat'l Ass'n of Criminal Def. Lawyers as Amici Curiae in Support of Petitioner, *Kingsley*, 135 S. Ct. 2466 (No. 14-6368); Brief of Former Corr. Adm'rs and Experts as Amici Curiae in Support of Petitioner, *Kingsley*, 135 S. Ct. 2466 (No. 14-6368) [hereinafter Corrections Brief].

A. *KINGSLEY* ADDRESSES INEQUITIES IN THE BAIL SYSTEM THAT CREATE AN UNJUST DOUBLE STANDARD FOR USE OF FORCE CLAIMS

Kingsley is a just decision because all persons presumed innocent should be afforded the same level of protection from unreasonable force. Like persons released on bail, pretrial detainees are entitled to a presumption of innocence.[177] However, those released to await trial are protected by the Fourth Amendment's reasonableness standard.[178] It is critical to understand that the ability to post bail is not a reflection of a pretrial detainee's proclivity to violent behavior.[179] As explained by the ACLU, the notion that individuals are held pretrial because they pose either a flight risk or a danger to society is a misconception in the majority of cases.[180] In fact, the greatest predictor of pretrial detention is indigence.[181] Moreover, the majority of pretrial detainees—some 75%—are accused of non-violent crimes.[182] Thus, the idea that jail is full of violent people is not supported by the numbers; in fact, it is likely that the conditions of jail cause non-violent people to act violently, in part because of the unnatural stress of living in a cage, but also because of the culture of inflicting unnecessary violence by prison staff.[183] The existing bail system disadvantages poor and

177. *See* Coffin v. United States, 156 U.S. 432, 453 (1895) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.").

178. *See* Graham v. Connor, 490 U.S. 386, 388 (1989).

179. *See State Policy Implementation Project*, *Criminal Justice Section*, AM. BAR ASS'N., http://www.americanbar.org/groups/criminal_justice/spip.html (last visited Sept. 5, 2016) ("Two thirds of the 500,000 individuals incarcerated in jail and awaiting trial are low bail risk, meaning they have been deemed by a magistrate to pose no significant risk to themselves or the community, as well as representing a low risk of flight.").

180. *See id.*; *see also* ACLU Brief, *supra* note 176, at 4–5.

181. ACLU Brief, *supra* note 176, at 5 (citations omitted) ("[T]he chief factor distinguishing most pretrial detainees from defendants who have been released to await trial on bail is . . . simply indigence.").

182. *Id.* at 4–5 ("Most pretrial detainees have not been confined out of concern for possible dangerousness or risk of flight [and] only a fraction of pretrial detainees face charges for violent crimes.").

183. For more on the "criminogenic" aspects of jails, see Brown v. Plata, 131 S. Ct. 1910, 1942 n.10 (2011). In determining whether overcrowding in California prisons was unconstitutional, Justice Kennedy noted,

> The former head of correctional systems in Washington, Maine, and Pennsylvania . . . referred to California's prisons as "criminogenic." The Yolo County chief probation officer testified that "it seems like [the prisons] produce additional criminal behavior." A former professor of sociology at George

minority defendants such that they are frequently unable to secure release, despite being charged with low-level offenses.[184] Therefore, it is unjust to subject these individuals to a higher Eighth Amendment standard of "cruel and unusual punishment" simply because they lack the resources to await trial among free persons, where Fourth Amendment protections are stronger.[185] In a system where inequity is built into the bail process, the *Kingsley* decision affords an ounce of justice by allowing those jailed in debtors' prisons across the nation to at least vindicate their right to be free from unreasonable force without having to show malice or sadism by jail staff.[186]

B. *KINGSLEY* MAY SERVE TO REORIENT CORRECTIONS INSTITUTIONS WHERE A CULTURE OF EXCESSIVE FORCE CORRODES ADMINISTRATORS' SUBJECTIVE JUDGMENT

A second compelling reason why the *Kingsley* decision is sound policy is that endemic guard-on-detainee violence in some jails corrodes administrators' subjective judgment, making a subjective standard particularly inapt. Citing studies of Rikers, Los' Angeles County, and Cook County, Illinois, the ACLU suggested that many jails suffer from a culture of excessive force, and that existing oversight and accountability mechanisms are insufficient.[187] The ACLU posited that, over time, the tendency to resort to force to resolve verbal conflict with detainees eroded the guards' sense of proportional response.[188] As one study wrote,

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> Washington University, reported that California's present recidivism rate is among the highest in the Nation. And the three-judge court noted the report of California's Little Hoover Commission, which stated that "[e]ach year, California communities are burdened with absorbing 123,000 offenders returning from prison, often more dangerous than when they left."

Plata, 131 S. Ct. 1942 n.10 (citations omitted).

184. ACLU Brief, *supra* note 176, at 9 ("Black men in particular are disproportionately detained before trial due to an inability to post bail their white counterparts can more often afford.").

185. U.S. CONST. amend. VIII.

186. Historically, a debtors' prison is a prison, jail, or detention center in which individuals are incarcerated for their failure to pay a debt. The term has been adopted by criminal justice reform advocates in reference to the practice of detaining indigent persons who lack sufficient funds to post bond or pay court costs, fines, and fees. Eli Hager, *Debtors' Prisons, Then and Now: FAQ*, THE MARSHALL PROJECT (Feb. 24, 2015, 7:15 AM), https://www.themarshallproject.org/2015/02/24/debtors-prisons-then-and-now-faq?utm_medium=email&utm_campaign=share-tools&utm_source=email&utm_content=post-top.

187. ACLU Brief, *supra* note 176, at 15 ("Inadequacy of oversight and accountability compounds the problem of rampant jailhouse violence and further distorts subjective understandings of the proper use of force.").

188. *See id.* at 14–15 ("[L.A. County Sheriff's Department] personnel used force

"tolerance for excessive force used by at least some deputies . . . has the danger of leading to . . . abuses of force [that become] . . . so 'normalized' that deputies can no longer perceive them as abusive."[189] This finding points not only to the importance of holding prison administrators accountable for their unreasonable uses of force, but also suggests that many jails have lost touch with what is reasonable. The implications for a due process claim are clear: if malice or even recklessness is required for a detainee to prevail, certain objectively unreasonable uses of force would not pass muster precisely because these excessive uses of force have become routine.

Monroe County, as well as the nation as a whole, has a compelling interest in curbing jail violence by administrators.[190] Limiting use of force will afford officers and detention facilities protection from further § 1983 claims. Moreover, given that most prisoners will eventually be released back into the community, it is in our national interest to dehumanize such persons less.[191] Subjecting human beings to unreasonable force at the hands of their government is unlikely to improve their capacity to act as parents and spouses, unlikely to increase their civic engagement, and may contribute to recidivism.[192] The rehabilitative value of pretrial detention is already dubious, but it is unlikely to be enhanced by unreasonable force.[193] While the practical consequences of *Kingsley* are yet to be determined, it is more likely than not that an objective reasonableness standard will

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against an inmate who was *not* engaged in an assault and who may have done nothing more than passively disobey an instruction.") (emphasis in original).

189. ACLU Brief, *supra* note 176, at 14 (citations omitted).

190. The arguments that follow in this paragraph were not part of the amicus briefs referenced throughout the analysis section.

191. According to the Department of Justice, at least 95% of all state prisoners will be released from prison. BUREAU OF JUSTICE STAT., REENTRY TRENDS IN THE UNITED STATES, U.S. DEP'T OF JUSTICE, (2003) *available at* http://www.bjs.gov/content/pub/pdf/reentry.pdf. While this data point is not specific to pretrial detainees, it would be illogical that the figure be any lower for them.

192. The Vera Institute has similarly argued that "[j]ust a few days in jail can increase the likelihood of a sentence of incarceration and the harshness of that sentence, reduce economic viability, promote future criminal behavior, and worsen the health of those who enter . . . ." RAM SUBRAMANIAN, ET AL., INCARCERATION'S FRONT DOOR: THE MISUSE OF JAILS IN AMERICA 5, THE VERA INST. OF JUSTICE (2015) *available at* http://www.vera.org/sites/default/files/resources/downloads/incarcerations-front-door-report.pdf.

193. *See* CHRISTOPHER T. LOWENKAMP, ET AL., THE HIDDEN COSTS OF PRETRIAL DETENTION 4, THE ARNOLD FOUND. (2013) *available at* http://www.pretrial.org/download/research/The%20Hidden%20Costs%20of%20Pretrial%20Detention%20-%20LJAF%202013.pdf.

assist detainees in holding abusive deputies accountable while serving as a deterrent to unreasonable force by corrections staff.

C. *KINGSLEY'S* OBJECTIVE STANDARD IS ALREADY IN PLACE IN MANY JURISDICTIONS AND IS BETTER SUITED TO ENHANCE ACCOUNTABILITY OF CORRECTIONS OFFICERS

While *Kingsley's* objective standard is the response to a legal question, the Court's answer is also a nod to the corrections facilities across the country that have recognized the benefits of implementing objective use-of-force policies. The concerns raised by the respondent's amici largely address the practicalities of jail administration, or, more specifically, the inherent difficulty of maintaining two different standards when pretrial detainees and post-conviction inmates are housed together. As the National Sheriff's Association pointed out, inmates are classified and assigned living quarters according to a number of criteria, in order to enhance safety and protect vulnerable populations.[194] Furthermore, any given incident requiring intervention by jail staff is likely to involve both pretrial detainees and post-conviction inmates.[195] The National League of Cities, National Association of Counties, and U.S. Conference of Mayors similarly argued that jails experience rapid population turnover such that it would be difficult for officers to memorize the conviction status of each prisoner.[196] Although certainly in Kingsley's case there was time to check, guards must respond to emergencies with urgency.[197]

Kingsley implicitly sides with those corrections administrators who informed the Court that many jurisdictions already have an objective standard embedded in their policies and training, and that reform efforts invariably impose

194. Sherriff's Ass'n Brief, *supra* note 176, at 6–7 ("The purpose of inmate classification is to ensure that housing protects the vulnerable from the predatory, the weak from the strong and the potential perpetrator from the potential victim.").

195. *Id*. at 3 ("Pretrial and convicted inmates are housed together in jails, [and] [b]oth types of inmates may be involved in a single incident that may require correctional deputies to use force to enforce the safety and procedures of a jail.").

196. Brief for the Nat'l Ass'n of Ctys., et al. as Amici Curiae Supporting Respondents, *supra* note 176, at 5 ("[A]n officer often cannot even make an educated guess about the conviction status of any particular inmate . . . [T]his roughly equal split between pre-trial detainees and post-conviction detainees means that officers have no basis for quickly deducing the conviction status of jail inmates.").

197. *Id*. at 6 ("There is no time to stop and check the records to determine what standard should govern the use of force against the offending inmates.").

an objective standard when local practice is to the contrary.[198] Although the National Sheriff's Association argued that the uniform standard should be the Eighth Amendment subjective standard articulated in *Whitley* and *Hudson*, the brief by Former Corrections Administrators and Experts suggested the opposite.[199] These corrections experts wrote that "the near uniformity of objective standards for use of force in the written policies of jails throughout the country means that adopting the petitioner's proposed objective standard will not upset the operation of local correctional facilities."[200]

Significantly, the brief by Former Corrections Administrators and Experts was expressly concerned with holding prison staff accountable for misconduct and abuse.[201] According to these amici, "The introduction of subjective standards governing the use of force invites uncertainty and individualized discretion, which is fertile ground for unchecked abuses. Objective standards, by contrast, are a bulwark against the repeated use of excessive force."[202] In our own local jail, the Orleans Parish Prison, the Department of Justice identified a pattern and practice of excessive force.[203] The DOJ warned that "[jail] staff are left to their own subjective interpretations, which results in inconsistent use and reporting on use of force."[204] Now under consent decree, part of the reform effort has been the

198. Corrections Brief, *supra* note 176, at 16 ("A natural consequence of the promulgation of objective written policies governing the use of force against detainees is that jailers who must use force are already trained, supervised, and disciplined based on objective standards. They are taught to constrain their use of force to the minimum amount necessary based on the facts before them.").

199. Sheriff's Ass'n Brief, *supra* note 176, at 4. *See* Whitley v. Albers, 475 U.S. 312, 326 (1985) (holding that, because the shooting of a convicted inmate was part of a "good-faith effort to restore prison security" it did not violate the Eighth Amendment's prohibition of cruel and unusual punishment); *see also* Hudson v. McMillian, 501 U.S. 1, 6 (1991) (holding that, for excessive force claims brought under the Eighth Amendment, the proper judicial inquiry is "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm").

200. Corrections Brief, *supra* note 176, at 18.

201. *Id.* ("Monitors charged with reforming jails where excessive force is endemic routinely implement objective use-of-force standards to bring about improvements.").

202. *Id.* at 19.

203. Letter from Loretta King, Acting Assistant Attorney Gen., Civil Rights Div. of the U.S. Dep't of Justice, to Marlin N. Gusman, Orleans Parish Criminal Sheriff 6 (Sept. 11, 2009) *available at* https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/parish_findlet.pdf.

204. Corrections Brief, *supra* note 176, at 18 (citing Letter from Loretta King, *supra* note 203).

imposition of an objective standard under which any force imposed must be proportionate to the threat posed.[205] Thus, to the extent that an objective standard supports efforts to curb the culture of violence in jails, the Court's decision in *Kingsley* is a good one.

D. THE TIME FOR A HIGHER STANDARD IS NOW—PERHAPS THE COURT WILL FOLLOW SUIT

Beyond its discussion of pretrial detainees, the *Kingsley* majority implied its willingness to revisit the standard for post-conviction inmates currently governed by the Eighth Amendment's "cruel and unusual" malice rule. The Court opined:

> We acknowledge that our view that an objective standard is appropriate in the context of excessive force claims brought by pretrial detainees pursuant to the Fourteenth Amendment may raise questions about the use of a subjective standard in the context of excessive force claims brought by convicted prisoners.[206]

Here the majority appears moved by the need to have a single standard, even as it insisted that that standard should be an objective one. This is a positive signal coming from the Court. It remains to be seen what sort of Eighth Amendment challenge might overturn *Gregg v. Georgia* and bring the standard back into mutual alignment.[207]

The timing of *Kingsley* is striking in that it aligns with a national imperative of increased accountability from law enforcement.[208] As communities in Ferguson, Baltimore, Chicago, and beyond have risen up against unreasonable, fatal force on the part of police, the public has also developed a heightened awareness of applicable law.[209] For some, the defense of qualified immunity is too broadly applicable to ensure that law enforcement fulfills its mission to protect and serve.[210] As the

205. Corrections Brief, *supra* note 176, at 16. (citations omitted).

206. *Kingsley*, 135 S. Ct. at 2476 (2015).

207. *See* 428 U.S. 153, 173 (1976).

208. *See* Michael S. Schmidt, *Scant Data Frustrates Efforts to Assess Number of Shootings by Police*, N.Y. TIMES (Apr. 8, 2015), http://www.nytimes.com/2015/04/09/us/us-has-limited-data-on-shootings-involving-police.html.

209. *See* Elizabeth Day, *#Blacklivesmatter: the Birth of a New Civil Rights Movement*, GUARDIAN (July 19, 2015, 5:00 AM), https://www.theguardian.com/world/2015/jul/19/blacklivesmatter-birth-civil-rights-movement.

210. *See, e.g.*, Susan Bendlin, *Qualified Immunity: Protecting All but the Plainly*

Black Lives Matter movement has forced the officer-involved shootings and in-custody deaths of young black men and women upon the national consciousness, many have come to understand that law enforcement has no binding legal obligation to deescalate conflict and preserve civilian life.[211] Accordingly, the legal standard by which courts evaluate use of force by law enforcement has become a new subject of public debate.[212] The *Kingsley* decision may foreshadow concern on the part of the Court that the scales of justice have tipped too far in favor of officers. Though certainly we cannot expect that the law will lead society in a direction that it is unprepared to follow, there is reason to feel encouraged. In the meantime, the circuit courts have their marching orders: an objective standard governs Fourteenth Amendment due process claims of unreasonable force against pretrial detainees.

VI. CONCLUSION

In the end, an objective standard for due process claims by pretrial detainees who allege excessive force means that increased accountability may come to jails and correctional facilities. Though certainly more is required than a clarification of the applicable standard, the fact that the Court signaled the possibility of removing the malice requirement for convicted prisoners is a positive sign. Ultimately, the way the nation treats incarcerated persons is a reflection of its own humanity. When we permit force as a first response to conflict, rehabilitation fails. Although more unreasonable acts occur in jail than will ever be

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Incompetent (and Maybe Some of Them, Too), 45 J. MARSHALL L. REV. 1023, 1046 (2012). Professor Bendlin observes, "It appears that all but the plainly incompetent are shielded from personal liability, and there is generous leeway for mistakes before an officer would be deemed incompetent. The Court will withhold the shield of qualified immunity only if the actions of the officers were so extreme that no competent officer could possibly have done such a thing." *Id.*

211. *But see* Tennessee v. Garner, 471 U.S. 1, 11 (1985) (recognizing that the killing of a fleeing suspect is a seizure and that the "use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable"). However, so long as the officer has probable cause to believe that the civilian "poses a threat of serious physical harm, either to the officer or to others," deadly force is constitutionally permissible. *Id.*

212. *See* Trevor Burras, *Set a Higher Standard for Police Use of Force*, N.Y. TIMES (Dec. 4, 2014, 3:03 PM), http://www.nytimes.com/roomfordebate/2014/12/04/do-cases-like-eric-garners-require-a-special-prosecutor/set-a-higher-standard-for-police-use-of-force; Brittany Horn, *Delaware Black Caucus: Change Police 'Use of Force' Code*, DEL. ONLINE (June 6, 2016 5:03 PM), http://www.delawareonline.com/story/news/crime/2016/06/06/delaware-black-caucus-change-police-use-force-code/85512412/.

heard in a court of law, a proliferation of use of force policies based on an objective standard will engender more accountability and reasonable behavior than an intent requirement can yield. And since we have a long way towards reasonable, that seems like a good place to start.

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