

Michigan Law Review

Volume 119 | Issue 4

2021

Rethinking the Reasonable Response: Safeguarding the Promise of *Kingsley* for Conditions of Confinement

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Recommended Citation

Hanna Rutkowski, *Rethinking the Reasonable Response: Safeguarding the Promise of Kingsley for Conditions of Confinement*, 119 MICH. L. REV. 829 (2021).

Available at: <https://repository.law.umich.edu/mlr/vol119/iss4/5>

<https://doi.org/10.36644/mlr.119.4.rethinking>

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NOTE

RETHINKING THE REASONABLE RESPONSE: SAFEGUARDING THE PROMISE OF *KINGSLEY* FOR CONDITIONS OF CONFINEMENT

Hanna Rutkowski*

*Nearly five million individuals are admitted to America's jails each year, and at any given time, two-thirds of those held in jail have not been convicted of a crime. Under current Supreme Court doctrine, these pretrial detainees are functionally protected by the same standard as convicted prisoners, despite the fact that they are formally protected by different constitutional amendments. A 2015 decision, *Kingsley v. Hendrickson*, declared that a different standard would apply to pretrial detainees and convicted prisoners in the context of use of force: consistent with the Constitution's mandate that they not be punished at all, pretrial detainees would no longer need to demonstrate that officials subjectively intended to harm them, only that the force they applied was objectively unreasonable. Courts of appeals have begun to extend this shift to claims involving conditions of confinement, but the promise of that move is threatened by the availability of a cost defense for officials who respond reasonably to detainees' needs given the resource constraints they face. This Note argues that pretrial detainees can only be adequately protected from punishment if the reasonable response includes an affirmative duty to notify superiors of those constraints.*

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* J.D., May 2021, University of Michigan Law School. A heartfelt thank you to everyone who helped me throughout this process, whether by improving my writing or just keeping me balanced. That includes my family, friends, the Notes Editors from Volumes 118 and 119, and everyone else at *MLR*. I owe a special debt to Brian Remlinger, Keagan Potts, and Mollie Krent for their detailed, thoughtful, and supportive feedback, and I am honored to be published alongside my good friend, Pat McDonell—here's to making the second weekend.

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INTRODUCTION

Jeffrey Pendleton died of COVID-19 in early April 2020 while shackled to his bed at a Chicago hospital, after contracting the disease while awaiting trial at the Cook County Jail.¹ As of November 6, 2020, he is one of seven confirmed deaths in Cook County Jail custody, and one of over 500 positive cases.² While the COVID-19 pandemic has shed light on one life-threatening risk faced by incarcerated individuals, there are countless other risks that accompany the American system of pretrial detention. There are other people like Jeremy Laintz, whose failure to report for a drug test while out on bond ultimately cost him not only his liberty but also part of a lung and portions of six toes.³

Pendleton and Laintz are not alone. Over ten million admissions are made to America's jails every year, corresponding to at least 4.9 million individuals.⁴ At any given time, about two-thirds of those held in jails are pretrial

1. Pascal Sabino, *Family of Jailed Coronavirus Victim Sues Cook County Sheriff's Office: 'He Died in Shackles,'* BLOCK CLUB CHI. (Apr. 10, 2020, 10:03 AM), <https://blockclubchicago.org/2020/04/10/family-of-jailed-covid-19-victim-sues-cook-county-sheriffs-office-he-died-in-shackles/> [<https://perma.cc/8DPF-KK26>].

2. *COVID-19 Jail/Prison Confirmed Cases and Deaths*, UCLA L. COVID-19 BEHIND BARS DATA PROJECT, https://docs.google.com/spreadsheets/d/1X6uJkXXS-O6eePLxw2e4JeRtM41uPZ2eRcOA_HkpVTk (on file with the *Michigan Law Review*) (data pulled on Nov. 6, 2020). Nationally, there have been over 166,700 confirmed cases and 1,253 deaths from COVID-19 amongst residents of America's jails and prisons. *Id.*

3. Laintz had become addicted to prescription opioids and then to heroin after an injury to his wrist. Jail staff initially prescribed medications for withdrawal, but when his condition deteriorated over the following weeks, they refused to take him to the hospital. Only after a sergeant at the jail overruled the medical staff was he finally admitted; diagnosed with dehydration, sepsis, pneumonia, and acute renal and respiratory failure; and airlifted in a medically induced coma. Steve Coll, *The Jail Health-Care Crisis*, NEW YORKER (Feb. 25, 2019), <https://www.newyorker.com/magazine/2019/03/04/the-jail-health-care-crisis> [<https://perma.cc/RY6X-BYJX>].

4. ZHEN ZENG, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., NCJ 253044, JAIL INMATES IN 2018, at 2 tbl.1 (2020), <https://www.bjs.gov/content/pub/pdf/ji18.pdf> [<https://perma.cc/RQS9-YJT7>]; Alexi Jones & Wendy Sawyer, *Arrest, Release, Repeat: How Police and Jails Are*

detainees—individuals who have not yet been convicted of a crime.⁵ Many of these individuals suffer from underlying physical and mental health conditions that require ongoing treatment and care.⁶ The challenges pretrial detainees face are exacerbated by a persistent lack of funding for medical and mental healthcare; a 2019 article in the *Annals of Internal Medicine* describes “a growing epidemic of inadequate health care in U.S. prisons,” with shrinking budgets, huge populations, and for-profit healthcare contracts all contributing to the problem.⁷ Jails experience even greater challenges because of their high levels of detainee turnover.⁸ Each newly admitted detainee has the potential to pose a difficult-to-treat challenge for the facility’s meager healthcare staff.⁹ Moreover, the level of care available may depend on the fortuity of where the individual happens to be incarcerated, since states vary dramatically in the resources and staffing they devote to medical care.¹⁰

The COVID-19 crisis offers an important lesson in the tragedy that can result when facilities lack sufficient resources to provide adequate care to all those who need it.¹¹ This Note is about what happens when understaffed and underresourced jails fail to meet the medical needs of those in their care and the constitutional law that governs the resulting claims. While the need for constitutional protections for pretrial detainees is clear, the interpretation of the constitutional provision that provides protection remains unsettled.

Misused to Respond to Social Problems, PRISON POL’Y INITIATIVE (Aug. 2019), <https://www.prisonpolicy.org/reports/repeatarrests.html> [<https://perma.cc/3PZA-PU87>].

5. ZENG, *supra* note 4, at 6 tbl.4.

6. Coll, *supra* note 3, at 30 (“According to a study released in 2017 by the Bureau of Justice Statistics, nearly half the people held in jails suffer from some kind of mental illness, and more than a quarter have a severe condition, such as bipolar disorder.”).

7. Ashley Hurst, Brenda Castañeda & Erika Ramsdale, *Deliberate Indifference: Inadequate Health Care in U.S. Prisons*, 170 ANNALS INTERNAL MED. 563, 563–64 (2019); see also Jeffrey E. Keller, *Medical Jail Fails*, MEDPAGE TODAY (June 18, 2019), <https://www.medpagetoday.com/blogs/doing-time/80539> [<https://perma.cc/L3E9-SX28>].

8. Coll, *supra* note 3, at 30.

9. See *id.*

10. For example, a 2017 fifty-state survey from the Pew Charitable Trust found that average fiscal year spending on medical, dental, mental health, and substance abuse treatment was \$5,720 per inmate, but ranged from \$2,173 in Louisiana to \$19,796 in California. PEW CHARITABLE TRS., PRISON HEALTH CARE: COSTS AND QUALITY 6, 8 fig.2 (2017), http://www.pewtrusts.org/~media/assets/2017/10/sfh_prison_health_care_costs_and_quality_final.pdf [<https://perma.cc/BK8Z-UAEY>]. The average number of full-time medical employees per 1,000 inmates ranged from 19 in Oklahoma to 87 in New Mexico. *Id.* at 101 tbl.c.7.

11. See, e.g., Alice Park & Jeffrey Kluger, *The Coronavirus Pandemic Is Forcing U.S. Doctors to Ration Care for All Patients*, TIME (Apr. 22, 2020, 8:00 AM), <https://time.com/5825145/coronavirus-rationing-health-care/> [<https://perma.cc/NLV4-YACF>]; Eric Westervelt, ‘Shocking, Heartbreaking’ Coronavirus Outbreak in Calif. Prison Alarms Health Experts, NPR (June 27, 2020, 9:05 AM), <https://www.npr.org/2020/06/27/884149444/shocking-heartbreaking-coronavirus-outbreak-in-ca-prison-alarms-health-officials> [<https://perma.cc/CNB2-LL77>].

Convicted prisoners are protected by the Eighth Amendment's prohibition against cruel and unusual punishment.¹² Pretrial detainees, on the other hand, are protected by the general due process guarantees of the Fifth and Fourteenth Amendments.¹³ The cruelty of punishment is not a relevant consideration for pretrial detainees, because absent a conviction, they cannot be punished at all.¹⁴ The Supreme Court, however, has long imported the Eighth Amendment doctrine for convicted prisoners into the Fourteenth Amendment doctrine for pretrial detainees.¹⁵ Due process claims brought by pretrial detainees generally come in two forms: those concerning use of force and those concerning conditions of confinement.¹⁶ Prototypical conditions claims involve the environment and living situation behind bars (including medical care).¹⁷ Use-of-force claims typically involve the level or type of force employed to maintain safety and security, such as that needed to remove a noncompliant prisoner from their cell or to break up a fight.¹⁸

Under current Supreme Court doctrine, pretrial detainees effectively have the same rights when it comes to their conditions of confinement as those who have been convicted of a crime. They may be considered "innocent until proven guilty," but as long as officials do not act *wantonly* with respect to the conditions of their confinement, those officials cannot be found liable for the damages that result.¹⁹ Increased protection as to conditions may be on the horizon. In 2015, the Court decided *Kingsley v. Hendrickson*, a suit brought by a pretrial detainee alleging that officers used excessive force during a cell extraction.²⁰ The Court held that, in the context of use of force, pretrial detainees are protected by a higher standard than the standard applied to convicted prisoners, one in which wanton conduct or intent to harm the prisoner is not required for liability.²¹

The initial question, therefore, is whether and how the logic of *Kingsley* applies to conditions. There is reason to believe that the logic of the decision applies even more strongly in the context of claims challenging conditions of

12. U.S. CONST. amend. VIII.

13. *Bell v. Wolfish*, 441 U.S. 520, 579–80 (1979) (Stevens, J., dissenting).

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

15. See *infra* Section I.A.

16. These two types of claims represent the analogues of claims brought by convicted prisoners under the Eighth Amendment. See *infra* notes 49–50 and accompanying text. Pretrial detainees can bring other claims under the Due Process Clause, but those other claims are not the focus of this Note. See, e.g., *Slade v. Hampton Rds. Reg'l Jail*, 407 F.3d 243 (4th Cir. 2005) (finding that a one-dollar-per-day charge to a pretrial detainee's account did not violate his procedural due process rights).

17. See, e.g., *Farmer v. Brennan*, 511 U.S. 825, 832 (1994).

18. See, e.g., *Gomez v. Randle*, 680 F.3d 859, 864 (7th Cir. 2012); *Iko v. Shreve*, 535 F.3d 225, 232–33 (4th Cir. 2008).

19. See *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

20. 135 S. Ct. 2466 (2015).

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

confinement than it does to claims involving use of force,²² but courts of appeals remain split on whether and exactly how to extend *Kingsley*.²³ Against that background, this Note argues that even if *Kingsley* is extended to conditions of confinement, it may not adequately protect the constitutional rights of pretrial detainees to be free from punishment. The gravamen of the *Kingsley* decision is that officials can be held accountable when they act unreasonably toward a detainee, regardless of whether they intended to harm the detainee. The problem is that officials who respond reasonably given the resource constraints they face may be able to assert a “cost defense,” leaving detainees with no one to sue when their injuries result from scarcity.²⁴

Part I provides a historical overview of the Court’s jurisprudence involving both pretrial detainees and convicted prisoners. It explains that, while these two groups are formally protected by different constitutional amendments, the claims they brought were largely treated as functionally equivalent prior to *Kingsley*. Part I also dives into the resurgent distinction after *Kingsley* and briefly introduces the potential cost defense. Part II considers the impact of *Kingsley* on conditions-of-confinement claims, covering whether and how it has been extended outside the context of use of force and analyzing its vulnerability to the cost defense. Part III explores and rejects two possible responses to that vulnerability before proposing an additional safeguard based on tort principles: an information-forcing affirmative duty to notify as part of any reasonable response.

I. HISTORICAL FOUNDATIONS AND THE *KINGSLEY* SCHISM

Though convicted prisoners file claims under the Eighth Amendment while pretrial detainees file claims under the Fifth or Fourteenth Amendment, courts have historically treated these two types of claims as largely interchangeable. *Kingsley* changed this for claims involving use of force, imposing heightened protections for pretrial detainees. It remains unclear whether these heightened protections will be extended to claims involving conditions of confinement. To understand how *Kingsley* may impact pretrial-conditions claims, it is necessary to understand how the standards for both use-of-force and conditions claims evolved over time. The case law pertaining to the two types of claims overlaps significantly, diverging at times before coming back together.

This Part begins by detailing the theoretical distinction between claims brought by pretrial detainees and convicted prisoners, as well as the ways the Supreme Court has collapsed that distinction. It then provides a historical overview of the standards governing claims for conditions and use of force, stopping just short of *Kingsley*. Finally, it introduces some of the obstacles to bringing a successful claim, including generally applicable challenges such as

22. See *infra* note 117 and accompanying text.

23. See *infra* Section II.A.

24. See *infra* Section I.C.

qualified immunity as well as the availability of a conditions-specific cost defense for officials who respond reasonably given substantial resource constraints.

A. Foundations of Modern Prison Litigation

Although they often reside side by side in our nation's penal institutions,²⁵ pretrial detainees and convicted prisoners are protected by different constitutional amendments. The Eighth Amendment protects convicted prisoners from cruel and unusual punishments, but the Supreme Court has consistently held that this protection applies only after a person has been convicted of a crime.²⁶ The Amendment places limits on the length and type of sentence a judge can impose,²⁷ as well as the treatment that convicted prisoners are subjected to during the term of that sentence.²⁸ Pretrial detainees, on the other hand, are protected only by the general guarantees of due process embodied in the Fifth and Fourteenth Amendments.²⁹

"Only" is a bit of a misnomer because, in theory, pretrial detainees should receive heightened protections. Justice Rehnquist articulated the constitutional distinction between the two groups in *Bell v. Wolfish*: pretrial detainees have not yet had an adjudication of guilt, and their due process rights require such an adjudication before any punishment can be imposed. Since the Eighth Amendment only applies to punishment, it does not apply to pretrial detainees.³⁰ *Bell* was a class action brought by pretrial detainees in New York City challenging the conditions of their confinement.³¹ Specifically, the suit challenged the practice of "double-bunking" detainees in rooms with a "total floor space of approximately 75 square feet,"³² which is less than the

25. Particularly in state jails, which hold both pretrial detainees and postconviction inmates serving short sentences. See NATALIE R. ORTIZ, NAT'L ASS'N OF CNTYS., COUNTY JAILS AT A CROSSROADS: AN EXAMINATION OF THE JAIL POPULATION AND PRETRIAL RELEASE 5 (2015), https://www.naco.org/sites/default/files/documents/Final%20paper_County%20Jails%20at%20a%20Crossroads_8.10.15.pdf [<https://perma.cc/AD8T-635F>].

26. See *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979).

27. Justice Thomas has stated that he believes this is all the Eighth Amendment protects. See, e.g., *Farmer v. Brennan*, 511 U.S. 825, 859 (1994) (Thomas, J., concurring in the judgment) ("As an original matter, therefore, this case would be an easy one for me: Because the unfortunate attack that befell petitioner was not part of his sentence, it did not constitute 'punishment' under the Eighth Amendment.").

28. *Id.* at 832 (majority opinion); *Estelle v. Gamble*, 429 U.S. 97, 102–04 (1976).

29. *Bell*, 441 U.S. at 535 n.16; cf. *Graham v. Connor*, 490 U.S. 386, 395 (1989) (explaining that for claims alleging that the police used excessive force against free citizens, the Fourth Amendment, rather than the Fourteenth Amendment, applies, because it "provides an explicit textual source of constitutional protection").

30. *Bell*, 441 U.S. at 535 & n.16.

31. *Id.* at 523.

32. *Id.* at 541.

area covered by two king beds.³³ Reasoning that the Fourteenth Amendment served as a bar to punishment for pretrial detainees, the Court established a key distinction between unconstitutional *punishments* and constitutional *regulatory restraints*, such as those needed to maintain security in a pretrial detention facility.³⁴ To determine which of those categories a particular condition of confinement falls within, a court must first consider whether the imposition can be explained by a legitimate governmental purpose other than punishment.³⁵ Conditions that cannot be justified by these legitimate goals create an inference of punishment, even when there is no direct evidence of penal intent.³⁶

After conceding that the right combination of particularly outrageous conditions might run afoul of the Fourteenth Amendment, the Court concluded that the “double-bunking” conditions in *Bell* did not constitute a violation.³⁷ The Court emphasized that detainees spent only seven or eight hours a day in their cells and that most detainees were released within sixty days.³⁸ The Court found that these conditions were neither intentionally imposed as punishment nor excessive in relation to the legitimate need to manage the facility.³⁹ Still, *Bell* stood for the important proposition that pretrial detainees were protected by a different standard than convicted prisoners, and under that standard, they could not be punished at all.

Even as courts recognized that *Bell* imposed a hierarchical relationship between the Eighth and Fourteenth Amendments—where protections for pretrial detainees must be at least as strong as for convicted prisoners—judges applied functionally the same test for decades.⁴⁰ Four years after *Bell*, the Supreme Court held in *City of Revere v. Massachusetts General Hospital* that the Eighth Amendment functioned as a floor for the Fourteenth.⁴¹ But the Court in *Revere* did not further define a standard for pretrial detainees, because it found that the care provided by the defendants was adequate un-

33. See *A Guide to Square Footage w/ Real Life Examples*, PLATINUM PROPS. (May 30, 2014), <https://www.platinumpropertiesnyc.com/blog/guide-square-footage-w-real-life-examples> [https://perma.cc/3FDB-3ZZ5].

34. *Bell*, 441 U.S. at 537.

35. *Id.* at 538.

36. *Id.* at 539.

37. *Id.* at 542 (“While confining a given number of people in . . . such a manner as to cause them to endure genuine privations and hardship over an extended period of time might raise serious questions under the Due Process Clause . . .”).

38. *Id.* at 543.

39. See *id.* at 540–43.

40. See Margo Schlanger, *The Constitutional Law of Incarceration, Reconfigured*, 103 CORNELL L. REV. 357, 364 (2018) (“Between 1979 (*Bell*) and 2015 (*Kingsley*), the Supreme Court offered little guidance on the difference between pretrial and post-conviction standards, instead offering only the comment that ‘due process rights . . . are at least as great as the Eighth Amendment protections available to a convicted prisoner.’” (quoting *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983))).

41. *Id.*

der any standard.⁴² As a result, lower courts were left with virtually no guidance regarding the difference between the Amendments and treated them as if they imposed the same protections.⁴³

Early prison-litigation cases considered whether convicted prisoners⁴⁴ have any constitutional rights at all. In the 1871 case *Ruffin v. Commonwealth*, Virginia's highest court essentially answered in the negative, holding that a prisoner was civilly dead because he had forfeited his constitutional protections when he committed the crimes for which he was imprisoned.⁴⁵ The U.S. Supreme Court, however, began to chip away at this principle in 1941 in *Ex Parte Hull*, establishing that the government could not impede a prisoner's right to file a habeas petition in federal courts.⁴⁶ In 1962, the Court incorporated the Eighth Amendment against the states, extending its protections to state as well as federal prisoners.⁴⁷ Other constitutional protections for prisoners also began to be recognized during this time.⁴⁸

With a right to bring claims under the Constitution thus firmly established, doctrinal attention shifted to the content of those constitutional protections. Eighth Amendment claims fall largely into two distinct categories: claims involving conditions of confinement and claims involving use of force. A conditions claim can be based on almost any aspect of a prisoner's living situation, such as his cell's temperature, vermin, lack of sunlight, inability to access medical care, and the ability of officials to keep prisoners safe from sexual abuse and violence perpetrated by fellow inmates.⁴⁹ Use-of-force claims, on the other hand, might involve whether it was appropriate to use a taser in a cell extraction or deadly weapons in response to a riot.⁵⁰ Both types of claims can involve decisionmaking by individual actors, but the circumstances under which those actors make those decisions may vary greatly. The Court has given mixed signals about whether these distinctions are important.⁵¹

42. *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244–45 (1983).

43. Schlanger, *supra* note 40, at 364.

44. Because nearly all the major Supreme Court cases during this period of development involved convicted prisoners, this Section uses the term “prisoner” throughout. The salient differences between convicted prisoners and pretrial detainees will be reexamined in Section I.D.

45. 62 Va. (21 Gratt.) 790, 796 (1871) (“He is *civiliter mortuus*.”).

46. 312 U.S. 546 (1941).

47. *Robinson v. California*, 370 U.S. 660 (1962).

48. See, e.g., *Lee v. Washington*, 390 U.S. 333 (1968) (holding that racially segregated state prisons violate the Equal Protection Clause of the Fourteenth Amendment); *Cooper v. Pate*, 378 U.S. 546 (1964) (per curiam) (holding that a state prisoner could bring a claim asserting that his religious freedom was infringed in violation of the First Amendment).

49. Schlanger, *supra* note 40, at 363; see also, e.g., *Farmer v. Brennan*, 511 U.S. 825 (1994); *Hutto v. Finney*, 437 U.S. 678 (1978); *Estelle v. Gamble*, 429 U.S. 97 (1976).

50. See, e.g., *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015); *Whitley v. Albers*, 475 U.S. 312 (1986).

51. See *infra* text accompanying notes 62–72.

B. *Parallel Development of Standards for Conditions of Confinement and Use of Force*

The grounding principles for both conditions and use of force were established in *Jackson v. Bishop*, an Eighth Circuit decision authored by then-Judge Blackmun.⁵² In finding whipping to be per se unconstitutional, he wrote that it “offend[ed] contemporary concepts of decency and human dignity” as well as “good conscience and fundamental fairness.”⁵³ These principles became the touchstone of the Supreme Court’s modern Eighth Amendment jurisprudence, with layers of gloss depending on the specifics of the claim.

Nearly a decade later, the Supreme Court announced that a “deliberate indifference” standard governed whether conditions of confinement violated the Eighth Amendment. The Court established the standard in *Estelle v. Gamble*, a case in which a convicted prisoner brought a claim for inadequate medical care.⁵⁴ The Court first found that inmates had to rely on prison officials to meet their medical needs and that the failure of officials to meet those needs could result in torture or even death.⁵⁵ It then held that conditions claims like those involving inadequate medical care would fall under a new standard: *deliberate indifference*.⁵⁶ Proving deliberate indifference would require a plaintiff to demonstrate “wanton infliction of unnecessary pain”; mere negligence would not be enough to establish a violation.⁵⁷ After another two decades, the Court clarified in *Farmer v. Brennan* that deliberate indifference was akin to criminal recklessness.⁵⁸

The jurisprudence on the other side of the Eighth Amendment—use of force—evolved simultaneously, eventually coalescing into a two-part test. *Whitley v. Albers* was a case involving use of force in the context of a prison riot.⁵⁹ Mirroring the *Estelle* Court’s approach to conditions, the *Whitley* Court adopted the *wanton*-conduct standard announced in *Jackson v. Bishop* and held that a showing of wantonness was required to establish a constitutional violation involving excessive force.⁶⁰ The *Whitley* Court, however, rea-

52. 404 F.2d 571, 572 (8th Cir. 1968).

53. *Jackson*, 404 F.2d. at 579.

54. 429 U.S. 97 (1976).

55. *Estelle*, 429 U.S. at 103 (“An inmate must rely on prison authorities to treat his medical needs In the worst cases, such a failure may actually produce physical ‘torture or a lingering death’ In less serious cases, denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose.”).

56. *Id.* at 104.

57. *Id.* at 105.

58. 511 U.S. 825, 839–40 (1994) (“That said, subjective recklessness as used in the criminal law is a familiar and workable standard that is consistent with the Cruel and Unusual Punishments Clause as interpreted in our cases, and we adopt it as the test for ‘deliberate indifference’ under the Eighth Amendment.”).

59. 475 U.S. 312 (1986).

60. *Whitley*, 475 U.S. at 319.

soned that not all cases involving an objectively unnecessary use of force rose to the level of wantonness; a subjective intent to inflict harm was necessary.⁶¹

To illustrate its point, the Court contrasted the high-stakes, emergent-threat situation of a riot with the slow-moving medical conditions scenario in *Estelle*. The majority reasoned that, in urgent moments, prison staff frequently must make decisions to use force without a chance to fully consider the appropriate level of force to employ.⁶² In these high-pressure situations, staff might mistakenly use force that was not retrospectively justified.⁶³ Under the *Whitley* standard, these mistakes, while objectively unreasonable, would not constitute Eighth Amendment violations.⁶⁴ In cases involving urgency, therefore, the plaintiff would need to show not only that the force employed was objectively unreasonable but also that it was employed “maliciously and sadistically for the very purpose of causing harm.”⁶⁵

Whitley's heavy focus on exigency and the Court's use of *Estelle* to draw a distinction between a riot and general problems with prison conditions suggested the new subjective-intent requirement might not apply to conditions claims. But in 1991, the Court extended the two-part *Whitley* test to a conditions-of-confinement claim.⁶⁶ In *Wilson v. Seiter*, the majority found an intent requirement in the text of the Eighth Amendment.⁶⁷ Reasoning that the Amendment banned only *punishment*, the Court wrote that “[i]f the pain inflicted is not formally meted out *as punishment* by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify.”⁶⁸ In other words, officials cannot *punish* a prisoner unless they *mean* to. The deliberate-indifference standard for conditions claims, the Court wrote, already encompassed this subjective requirement;⁶⁹ indeed, the Court argued that the subjective element had been present ever since it announced the deliberate-indifference standard in *Estelle*.⁷⁰ Both use-of-force and conditions claims, therefore, would have a subjective and an objective component,⁷¹ but the nature of the subjective

61. *Id.* at 319–21.

62. *Id.* at 320.

63. *Id.* (“[A] deliberate indifference standard does not adequately capture the importance of such competing obligations, or convey the appropriate hesitancy to critique in hindsight decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance.”).

64. *See id.* at 322.

65. *Id.* at 320–21 (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973)).

66. *Wilson v. Seiter*, 501 U.S. 294, 303 (1991).

67. *Id.* at 300.

68. *Id.*

69. *Id.* at 302–03.

70. *Id.* at 297 (“We rejected, however, the inmate’s claim in [*Estelle*] that prison doctors had inflicted cruel and unusual punishment by inadequately attending to his medical needs—because he had failed to establish that they possessed a sufficiently culpable state of mind.”).

71. *See id.* at 297–300.

component would differ slightly between the two as a result of the heightened exigency present in use-of-force claims.⁷²

After *Wilson*, the deliberate-indifference standard limits Eighth Amendment liability for denying humane conditions of confinement to scenarios where a prison official “knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it.”⁷³ The subjective requirement is encompassed in the disregard of a known and substantial risk. The objective component is captured by the seriousness of the harm.⁷⁴

C. Obstacles to Bringing a Successful Conditions Claim

In addition to making an adequate showing of deliberate indifference, any prisoner bringing a claim must contend with both sovereign immunity for states and qualified immunity for individual state officials. Convicted prisoners and pretrial detainees cannot bring claims against the state itself because of the Eleventh Amendment’s grant of sovereign immunity.⁷⁵ Claims therefore must be brought against individual government officials under 42 U.S.C. § 1983, which provides a cause of action for constitutional violations perpetrated by officials while they are acting under the color of state law.⁷⁶ Even if a convicted prisoner or pretrial detainee brings a claim that would satisfy the legal standard under the Eighth Amendment or Fourteenth Amendment, recovery may still be denied under the doctrine of quali-

72. *Id.* at 302 (“[O]ur cases say that the offending conduct must be *wanton*. *Whitley* makes clear, however, that in this context wantonness does not have a fixed meaning but must be determined with ‘due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged.’” (quoting *Whitley v. Albers*, 475 U.S. 312, 320 (1986))). Around the same time as *Wilson*, the Court found that even much less intensive disruptions than a riot could provide the kind of exigent circumstances needed to justify a subjective standard in the use-of-force context. *Hudson v. McMillian*, 503 U.S. 1, 6–7 (1992). *Whitley* involved a riot in a cellblock with two hundred inmates, an official held hostage, and officers wielding shotguns. *Whitley v. Albers*, 475 U.S. 312, 314–16 (1986). *Hudson*, on the other hand, involved an inmate who was handcuffed and being escorted to lockdown by two guards when they punched him in the mouth, eyes, chest, and stomach. *Hudson*, 503 U.S. at 4. Nevertheless, the same standard applied. *Id.* at 6–7 (“Many of the concerns underlying our holding in *Whitley* arise whenever guards use force to keep order. Whether the prison disturbance is a riot or a lesser disruption, corrections officers must balance the need ‘to maintain or restore discipline’ through force against the risk of injury to inmates. Both situations may require prison officials to act quickly and decisively.”).

73. *Farmer vs. Brennan*, 511 U.S. 825, 847 (1994).

74. *Wilson*, 501 U.S. at 298.

75. See generally 2 IVAN E. BODENSTEINER & ROSALIE BERGER LEVINSON, STATE & LOCAL GOVERNMENT CIVIL RIGHTS LIABILITY § 2:21(A), Westlaw (July 2020 update). The Eleventh Amendment bars suits against a state by citizens of another state. U.S. CONST. amend. XI. The Supreme Court has interpreted it, however, as also encompassing suits against a state by its own citizens. BODENSTEINER & LEVINSON, *supra*.

76. 42 U.S.C. § 1983; see also BODENSTEINER & LEVINSON, *supra* note 75.

fied immunity, which protects officials from liability unless the constitutional violation is clearly established under existing law.⁷⁷

While sovereign immunity for states and qualified immunity for individuals apply with equal force to all Eighth Amendment claims, an additional, potentially insurmountable, hurdle stands in the way of conditions claims: the availability of a “cost defense.” *Peralta v. Dillard*, a 2014 en banc decision from the Ninth Circuit, established the rule that officials cannot be held liable in conditions-of-confinement claims brought under the Eighth Amendment when they respond reasonably to scarce resources.⁷⁸ Cion Adonis Peralta was a convicted prisoner, housed in the California state prison system, at a facility that had approximately one dentist for every two thousand inmates, more than double the ratio outlined in state policy.⁷⁹ Despite suffering from severe pain, bleeding gums, and a number of cavities, Peralta spent months on a waiting list before seeing a dentist. During that wait, Peralta periodically received ibuprofen, but not antibiotics, to treat his periodontal disease.⁸⁰ By the time he finally had his teeth cleaned, eighteen months after he first requested care, Peralta had sustained severe bone loss in his jaw.⁸¹

Peralta brought a § 1983 claim for damages against the prison’s chief dental officer, its chief medical officer, and the dentist who provided care, Doctor Brooks.⁸² The claim against Brooks is most relevant because it established the cost defense. Relying on the Eighth Amendment conditions-of-confinement precedents, the *Peralta* majority explained that prison officials must “act wantonly” to meet the standard of deliberate indifference, and whether an official acted wantonly depends on the “constraints” he faced.⁸³ Given the serious understaffing and particular challenges of providing dental care in prison,⁸⁴ the court rejected what it called Peralta’s attempt to “hold Brooks personally liable for failing to give Peralta care that Brooks would have found impossible to provide.”⁸⁵ In short, Brooks was insulated from liability because he responded reasonably given the inadequate funding available from the state.

77. See, e.g., *Hope v. Pelzer*, 536 U.S. 730, 738–39 (2002) (finding an Eighth Amendment violation and going on to consider whether the right was clearly established). Another major obstacle is the Prison Litigation Reform Act. See generally Darryl M. James, Comment, *Reforming Prison Litigation Reform: Reclaiming Equal Access to Justice for Incarcerated Persons in America*, 12 LOY. J. PUB. INT. L. 465 (2011).

78. *Peralta v. Dillard*, 744 F.3d 1076, 1084 (9th Cir. 2014) (en banc).

79. *Id.* at 1081.

80. *Id.*; *id.* at 1090 (Christen, J., dissenting in part and concurring in part).

81. *Id.* at 1090 (Christen, J., dissenting in part and concurring in part).

82. *Id.* at 1081 (majority opinion).

83. *Id.* at 1082 (quoting *Wilson v. Seiter*, 501 U.S. 294, 303 (1991)).

84. *Id.* (noting that among other factors, “[s]ecurity concerns dictate that only one prisoner be in the examination room at a time, even if there’s more than one chair, and that no prisoner be left alone, lest he try to use dental tools as weapons”).

85. *Id.* at 1082–83.

In dissent, Judge Christen took issue with the majority's application of precedent⁸⁶ and argued that the rule announced would create an insurmountable obstacle for prisoners seeking damages.⁸⁷ She explained that the new rule removed an important incentive for state officials (who typically indemnify their employees),⁸⁸ and that injunctive relief would be an insufficient remedy for prisoners who had already suffered irreparable harm. After all, "what good is prospective injunctive relief to a prisoner whose appendix has burst?"⁸⁹ Judge Hurwitz, dissenting separately, explained that the rule might entirely foreclose recovery for injuries and death caused by inadequate funding.⁹⁰

Peralta created a problem: if state actors can be saved from liability for conditions claims by asserting a cost defense, and practically all jails have major resource issues, then detainees injured by unconstitutionally poor jail conditions can never recover. *Peralta* remains largely confined to the Ninth Circuit, though district courts in at least the Fourth and Eighth Circuits have applied it to conditions claims.⁹¹ Given the systemic underfunding of medical care in jails and prisons⁹² and the resource gaps exposed by COVID-19, it also seems likely that the Supreme Court will have to reckon with the cost defense at some point in the near future. Funding concerns are typically not involved in claims involving excessive force, so the issue was not on table in *Kingsley*. However, the cost defense could radically alter the application of *Kingsley* to conditions claims.

86. Judge Christen pointed to *Jones v. Johnson* as standing for the proposition that "[b]udgetary constraints . . . do not justify cruel and unusual punishment." *Id.* at 1092 (Christen, J., dissenting in part and concurring in part) (quoting 781 F.2d 769, 771–72 (9th Cir. 1986)). She also cited *Snow v. McDaniel* as evidence of the fact that this proposition was equally applicable in suits for damages as it was for suits seeking injunctive relief. *Id.* (citing 681 F.3d 978, 985–87 (9th Cir. 2012)). The majority had held that *Peralta* was protected by his ability to seek a forward-looking injunction, but that the cost defense precluded liability for backward-looking damages. *Id.* at 1083 (majority opinion).

87. *Id.* at 1092–93 (Christen, J., dissenting in part and concurring in part) ("The majority's decision will effectively prevent prisoners from bringing suits for damages against prison officials who have violated their Eighth Amendment rights . . . those who actually control prison budgets are immune from damage suits [under sovereign immunity] . . . and prison officials responsible for substandard care or conditions will be shielded by the newly-announced 'lack-of-resources' defense.").

88. *Id.* at 1093.

89. *Id.*; see also *id.* at 1098 (Hurwitz, J., dissenting in part and concurring in part) ("[I]njunctive relief provides no comfort to an inmate who loses a limb because of untreated diabetes.").

90. *Id.* at 1101. Both dissents argued that the state's choice to fully indemnify prison officials insulated those officials from any unfairness in denying a cost defense. *Id.* at 1100; *id.* at 1093 (Christen, J., dissenting in part and concurring in part).

91. *McPartlin v. Roache-McDonald*, No. 2:11cv620, 2015 WL 11110947, at *4 (E.D. Va. Mar. 31, 2015); *Cullor v. Baldwin*, No. 4:12-cv-00116-JEG-CFB, 2014 WL 12691612, at *11 (S.D. Iowa July 31, 2014). As of August 20, 2020, a total of fourteen cases have adopted the *Peralta* cost defense. Eleven of these are from district courts in the Ninth Circuit.

92. See *supra* note 7.

Before the Supreme Court decided *Kingsley* in 2015, pretrial detainees were formally protected by the Fourteenth Amendment and thus could not be punished at all, while convicted prisoners were protected by the Eighth Amendment's ban on cruel and unusual punishments. Functionally, however, courts applied Eighth Amendment standards to both groups. The Court had determined that use-of-force claims and claims challenging conditions of confinement both had objective and subjective components, though the specific subjective standards were different. And the Court had grounded those subjective components in the text of the Eighth Amendment itself—specifically, in the word *punishment*.⁹³ When a pretrial detainee brought a use-of-force claim in *Kingsley*, the stage was set for a collision of two key principles: pretrial detainees could not be punished, but the existing standard was built on a foundation of punishment.

D. *Kingsley v. Hendrickson*

In 2010, Michael Kingsley, a pretrial detainee, was being held in a Wisconsin county jail on a drug charge.⁹⁴ After Kingsley repeatedly refused officer requests to remove a paper covering the light above his bed, a group of four officers forcefully executed a cell extraction.⁹⁵ After the officers forcibly removed him from his cell, they carried him to a different cell and placed him face down on a bunk with his hands handcuffed behind his back.⁹⁶ Before the officers left the cell, they tased the handcuffed Kingsley for five seconds.⁹⁷

Kingsley brought a § 1983 claim, alleging that the officers' use of excessive force during the incident violated his Fourteenth Amendment due process rights.⁹⁸ The jury was instructed that in order to convict, they must find that the officers conducting the cell extraction *knew* there was an unreasonable risk that their conduct would injure Kingsley and then *recklessly disregarded* his safety by failing to take reasonable measures to protect him.⁹⁹ The two-part test included both subjective (knowledge plus reckless disregard) and objective (failure to take reasonable measures) components.¹⁰⁰ The jury

93. *Wilson v. Seiter*, 501 U.S. 294, 300 (1991).

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

95. *Id.*

96. *Id.* The jury instruction, rather than the specific facts, was at issue before the Supreme Court. *Id.* at 2471. Kingsley also testified, however, that two officers slammed his head into the concrete bunk before tasing him, though the officers denied doing so. The officers did not dispute the other material facts, including the tasing. *Id.* at 2470.

97. *Id.*

98. *Id.* at 2470.

99. *Id.* at 2471.

100. While the two-part nature of the test in some ways mimicked the Eighth Amendment standard announced in *Whitley*, the jury instruction did not use the "malicious and sadistic" language, opting instead for "reckless[] disregard[]." *See id.*; *supra* text accompanying

acquitted the officers.¹⁰¹ On certiorari, the Supreme Court sought to determine whether a subjective or objective standard applied to excessive-force claims brought by pretrial detainees under the Fourteenth Amendment—that is, whether it was necessary that the defendants subjectively recognized that the amount of force they employed was unreasonable.¹⁰²

Writing for the majority, Justice Breyer rejected the use of *Whitley*'s subjective "malicious and sadistic" standard in pretrial-detainee cases.¹⁰³ The holding built upon the doctrine announced in *Bell*: under the Fourteenth Amendment, pretrial detainees cannot be punished at all.¹⁰⁴ In *Bell*, the Court explained that a pretrial detainee can prevail on a Fourteenth Amendment due process claim by demonstrating either that officials had an express intent to inflict punishment or that the officials' actions were unrelated to or in excess of what was required to achieve a legitimate, nonpunitive purpose.¹⁰⁵ The *Kingsley* court affirmed that the general inquiry into whether the allegedly punitive actions were justified by a legitimate purpose can be conducted on the basis of objective evidence alone.¹⁰⁶

But the *Kingsley* court did not entirely divorce a pretrial detainee's due process claim from the subjective intentions of prison officials. Justice Breyer emphasized that the official must have actually intended to use force against the pretrial detainee; an accident could not create liability.¹⁰⁷ In *Kingsley*'s case, if the prison guards removing *Kingsley* from his cell had *unintentionally* tased him, *Kingsley* would not have had a constitutional claim.¹⁰⁸ Once a pretrial detainee has demonstrated that the application of force was in fact intentional, however, the test for whether that force was excessive becomes an objective inquiry: "[A] pretrial detainee must show only that the force purposely or knowingly used against him was objectively unreasonable."¹⁰⁹ In making this objective determination, the factfinder should consider "the perspective of a reasonable officer on the scene . . . at the time," the legitimate need to manage the facility in a safe and secure manner, and other fac-

note 65. However, in its brief to the Supreme Court, the state did argue that the "malicious and sadistic" standard should apply. *Kingsley*, 135 S. Ct. at 2475. The Court rejected this test. *Id.*

101. *Id.* at 2471.

102. *Id.* at 2470.

103. *Id.* at 2475.

104. *Id.* at 2473–75; *see also supra* notes 36–40 and accompanying text. Whether the punishment could be considered cruel and unusual was likewise irrelevant. *Kingsley*, 135 S. Ct. at 2475 ("[T]here is no need here, as there might be in an Eighth Amendment case, to determine when punishment is unconstitutional.").

105. *Id.* at 2473; *see also supra* notes 34–36 and accompanying text.

106. 135 S. Ct. at 2473–74.

107. *Kingsley*, 135 S. Ct. at 2472. Note that the Court explicitly reserved the question of whether recklessly applied force would constitute grounds for a constitutional claim. *Id.*

108. *Id.*

109. *Id.* at 2472–73.

tors designed to capture the relationship between the level of force used and the nature of the threat.¹¹⁰

Kingsley announced an objective standard but left several questions unresolved. While the opinion drew heavily on *Bell*—a conditions case involving a pretrial detainee—the holding in *Kingsley* was limited to the use-of-force context.¹¹¹ The Court did not directly speak to the implications for its historic treatment of Fourteenth Amendment and Eighth Amendment conditions claims as functionally equivalent.¹¹² Even if a different standard was required for conditions claims brought by pretrial detainees (compared to the standard for convicted prisoners), it was unclear what that standard would be. One lesson from *Wilson* was that while subjective and objective components were required for both conditions and use-of-force claims brought by convicted prisoners, the precise contours of those standards varied by type of claim.¹¹³ How should courts modify the *Kingsley* use-of-force standard to apply to claims challenging conditions of confinement? Section II.A explores the way courts have begun to answer this question.

II. KINGSLEY AND CONDITIONS

While *Kingsley* held that pretrial detainees need not prove subjective intent to punish in the use-of-force context, courts of appeals have not uniformly applied this new standard to conditions claims.¹¹⁴ Even those courts that do extend *Kingsley* to conditions claims brought by pretrial detainees have interpreted the standard differently. Section II.A provides an overview of those differences, as well as the courts of appeals cases that decline to extend *Kingsley*. Section II.B argues that even if those discrepancies are resolved in the best possible way for pretrial detainees, they will not be adequately protected in light of the *Peralta* cost defense.¹¹⁵

110. *Id.* at 2473 (“Considerations such as the following may bear on the reasonableness or unreasonableness of the force used: the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff’s injury; any effort made by the officer to temper or to limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting.”).

111. *Id.* at 2473.

112. See *supra* note 40 and accompanying text.

113. See *supra* note 71–72 and accompanying text.

114. *Kingsley* also has the potential to unsettle Eighth Amendment use-of-force law for convicted prisoners. Justice Breyer acknowledged this question in the opinion:

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. We are not confronted with such a claim, however, so we need not address that issue today.

Kingsley, 135 S. Ct. at 2476. For a normative and doctrinal case that an objective standard should apply to use-of-force and conditions claims brought by both pretrial detainees and convicted prisoners, see Schlanger, *supra* note 40.

115. See *supra* text accompanying notes 78–85.

A. *Kingsley and Conditions in the Courts of Appeals*

Since *Kingsley* was decided in 2015, commentators have predicted that the extension of *Kingsley* would positively impact the chances of recovery for pretrial detainees in conditions-of-confinement cases.¹¹⁶ Professor Schlanger has suggested that the logic of *Kingsley* straightforwardly applies to conditions-of-confinement claims—indeed, that any arguments related to use of force apply even more strongly to conditions claims because officials have more time for deliberation before acting.¹¹⁷ *Kingsley* itself strongly supports that conclusion; much of the argument for an objective standard in *Kingsley* focuses on the no-punishment rule announced in *Bell*, a *conditions* case.¹¹⁸

Despite the logic of that argument, however, courts of appeals have not been uniform in whether and how to extend *Kingsley* to conditions claims brought by pretrial detainees.¹¹⁹ Two recent cases concerning inadequate medical care illustrate the split. The Eleventh Circuit in *Dang ex rel Dang v. Sheriff* declined to apply *Kingsley* in a case where a pretrial detainee's health deteriorated before he was ultimately diagnosed with meningitis and suffered a series of strokes, resulting in permanent injuries.¹²⁰ When *Dang* brought a § 1983 claim against the medical staff at the jail, the Eleventh Circuit dismissed *Kingsley* in a cursory note, declining to extend it beyond the use-of-force context.¹²¹ The court also concluded that the staff had at most behaved negligently, which it found would have been exculpatory of liability even if *Kingsley* applied.¹²²

116. See, e.g., Kyla Magun, Note, *A Changing Landscape for Pretrial Detainees? The Potential Impact of Kingsley v. Hendrickson on Jail-Suicide Litigation*, 116 COLUM. L. REV. 2059 (2016) (discussing the implications of *Kingsley* for suicide in jails); Deema Nagib, Note, *Jail Isolation After Kingsley: Abolishing Solitary Confinement at the Intersection of Pretrial Incarceration and Emerging Adulthood*, 85 FORDHAM L. REV. 2915 (2017) (discussing the implications for solitary confinement of young adults in jails).

117. Schlanger, *supra* note 40, at 410.

118. See *supra* notes 104–106 and accompanying text.

119. Compare *Castro v. Cnty of Los Angeles*, 833 F.3d 1060 (9th Cir. 2016) (en banc) (*Kingsley* applies to a failure-to-protect claim when the inmate was assaulted by other inmates), *Darnell v. Pineiro*, 849 F.3d 17 (2nd Cir. 2017) (*Kingsley* applies to general conditions of confinement such as overcrowding, sanitation, and nutrition), and *Gordon v. Cnty. of Orange*, 888 F.3d 1118 (9th Cir. 2018) (*Kingsley* applies to the provision of medical care), with *Alderson v. Concordia Par. Corr. Facility*, 848 F.3d 415 (5th Cir. 2017), *Dang ex rel Dang v. Sheriff*, 871 F.3d 1272 (11th Cir. 2017), and *Whitney v. City of St. Louis*, 887 F.3d 857 (8th Cir. 2018).

120. *Dang*, 871 F.3d at 1276.

121. *Id.* at 1279 n.2 (“First, *Kingsley* involved an excessive-force claim, not a claim of inadequate medical treatment due to deliberate indifference. Therefore, it is not squarely on point with and ‘does not actually abrogate or directly conflict with’ our prior precedent identifying the standard we apply in this opinion to *Dang*’s claim.” (citation omitted) (quoting *United States v. Kaley*, 579 F.3d 1246, 1255 (11th Cir. 2009))).

122. *Id.* Other courts declining to extend *Kingsley* have also faced cases of mere negligence, which may explain their hesitance, but also points to the continuing lack of clarity around the standard. See Schlanger, *supra* note 40, at 411–12.

The Ninth Circuit's approach in *Gordon v. County of Orange* stands in contrast to *Dang*.¹²³ *Gordon* brought suit on behalf of a pretrial detainee who died of complications from opioid withdrawal within thirty hours of entering detention.¹²⁴ The court determined that the *Kingsley* standard applied to conditions claims brought by pretrial detainees, overturning a grant of summary judgment for the defendants because the district court had applied a standard that required subjective intent.¹²⁵ The court reasoned that claims for conditions and use of force were both brought under the Fourteenth Amendment and that there was no reason to treat conditions claims differently.¹²⁶ In terms of the specific standard, the court interpreted *Kingsley* to require the plaintiff to "prove more than negligence but less than subjective intent—something akin to reckless disregard."¹²⁷

More specifically, the *Gordon* court outlined four elements of a successful conditions claim by a pretrial detainee: (1) as in *Kingsley*, the defendant must have undertaken some intentional act; (2) the actions by the defendant must have put the plaintiff at substantial risk of serious harm; (3) the defendant must have failed to take "reasonable available measures to abate that risk, even though a reasonable official in the circumstances would have appreciated the high degree of risk involved"; and (4) that failure must have caused the plaintiff's injuries.¹²⁸ According to the *Gordon* court, the officer did not need to subjectively appreciate the risk, but the consequences of their action must have been "obvious."¹²⁹

The Second Circuit has also extended *Kingsley* to pretrial detainees' claims challenging their conditions of confinement, but it applied a slightly different standard than the Ninth Circuit. In *Darnell v. Pineiro*, the court held that defendants could be liable if they either intentionally imposed the dangerous condition or "recklessly failed to act with reasonable care to mitigate the risk . . . even though [they] knew, or should have known, that the condition posed an excessive risk to health or safety."¹³⁰ While subjective intent to punish *could* satisfy the standard, the court followed the logic of *Kingsley* in finding that it was not required.¹³¹ The court also agreed with the

123. *Gordon*, 888 F.3d 1118.

124. *Id.* at 1121–22.

125. *Id.* at 1125.

126. *Id.* at 1124 ("Notably, the 'broad wording of *Kingsley* . . . did not limit its holding to 'force' but spoke to 'the challenged governmental action' generally." (quoting *Castro v. Cnty. of Los Angeles*, 833 F.3d 1060, 1070 (9th Cir. 2016) (en banc))).

127. *Id.* at 1125 (quoting *Castro v. Cnty. of Los Angeles*, 833 F.3d 1060, 1071 (9th Cir. 2016) (en banc)). *Castro* was reheard en banc after *Kingsley* and was the first case in the Ninth Circuit to apply its standard to conditions. See *Castro v. Cnty. of Los Angeles*, 833 F.3d 1060 (9th Cir. 2016) (en banc).

128. *Gordon*, 888 F.3d at 1125.

129. *Id.*

130. 849 F.3d 17, 35 (2d Cir. 2017).

131. See *supra* text accompanying note 105–106.

Gordon court that negligence was not sufficient.¹³² As more courts of appeals consider the issue, additional variations may come to the fore.

B. *The Threat of Peralta's Cost Defense*

Even if all the courts of appeals ultimately extend *Kingsley* to conditions claims brought by pretrial detainees, those detainees may still be vulnerable to punishment due to the availability of the *Peralta* cost defense. *Peralta* involved a convicted prisoner and, applying the *Wilson* precedent, relied on ideas about subjective intent to punish.¹³³ However, *Peralta's* logic just as easily applies when courts employ an objective standard. *Kingsley* allows factfinders to consider the circumstances faced by guards in determining whether the force applied was objectively unreasonable.¹³⁴ It follows that factfinders would similarly be able to consider resource constraints when evaluating whether medical officials responded in an objectively reasonable way to a detainee's serious medical needs.

As a result, *Peralta's* cost defense remains viable even if *Kingsley* is extended to conditions; removing the requirement of subjective awareness does nothing to alter what constitutes an objectively reasonable response. Applying the *Gordon* standard to the facts of *Peralta* illustrates the problem. The first element of *Gordon* is satisfied by the defendant dentist's choice not to provide treatment—an intentional act that carried a substantial risk of harm, namely the danger of severe pain and potential bone loss.¹³⁵ The claim, however, flounders in the same place as *Peralta's* actual claim; the *Peralta* court found that the dentist responded reasonably given the constraints he faced—there simply were not enough dentists to provide adequate care.¹³⁶ As interpreted by the *Gordon* court in the context of conditions, the logic of *Kingsley* relaxes the standard from one in which the official *knows* that the inmate faces a substantial risk (deliberate indifference) to one in which a reasonable official *should have known* (civil recklessness).¹³⁷ But an official who responds reasonably can be insulated from liability under either standard.

132. See *Darnell*, 849 F.3d at 36.

133. See *supra* note 83 and accompanying text. Interestingly, a “cost defense” was briefly discussed in *Wilson*—a conditions case involving a convicted prisoner. Justice Scalia refused to consider whether such a defense might be valid because it had not been raised by the parties. *Wilson v. Seiter*, 501 U.S. 294, 301–02 (1991). He noted, however, his strong skepticism about whether policy-driven concerns about a cost defense could control the meaning of punishment in the Eighth Amendment. *Id.* at 302. A possible implication is that policy concerns might be viable outside of the Eighth Amendment context, but the opinion does not speak to that.

134. See *supra* note 110 and accompanying text.

135. *Peralta v. Dillard*, 744 F.3d 1076, 1081 (9th Cir. 2014) (en banc); *id.* at 1090 (Christen, J., dissenting in part and concurring in part).

136. *Id.* at 1082 (majority opinion).

137. See *Farmer v. Brennan*, 511 U.S. 825, 836–37 (1994) (“The civil law generally calls a person reckless who acts or (if the person has a duty to act) fails to act in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known. The crimi-

At least one district court in the Ninth Circuit has applied the *Peralta* cost defense while recognizing that *Kingsley* governs conditions. The plaintiff in *Dat Thanh Luong v. Napa State Hospital* brought a § 1983 claim against the state hospital and hospital officials, alleging that they were responsible for her husband's death in jail.¹³⁸ Mr. Luong was a pretrial detainee who was schizophrenic and had been found mentally incompetent to stand trial.¹³⁹ In July 2016, the court ordered that he be transferred from the state jail to a hospital, but officials failed to do so.¹⁴⁰ In October 2016, three months after the transfer was ordered, Mr. Luong was strangled by his cellmate.¹⁴¹ The court granted summary judgment for the individual defendants after finding that they had no ability to expand capacity at the hospital, and thus could not be held liable under *Peralta*.¹⁴² In a footnote, the court recognized that, unlike in *Peralta*, an objective standard governed claims by pretrial detainees but found this difference to be insignificant.¹⁴³

The cost defense was not raised in *Kingsley* because of its focus on use of force, and for now, *Peralta*'s cost defense has not been broadly extended outside of the Ninth Circuit.¹⁴⁴ But the defense remains a viable option for governments defending conditions claims across the country. And the COVID-19 crisis, in exposing overburdened medical systems nationwide,¹⁴⁵ makes it more likely that defendants will emphasize their resource constraints in future litigation over prison and jail conditions. While much of the early COVID-19 related litigation has focused on the release of low-risk individuals in order to reduce the spread of the disease,¹⁴⁶ the mounting loss of health and life suggests that actions for damages may be prevalent in years to come.

For example, shortages of personal protective equipment (PPE) and even basic cleaning supplies have been well-documented at jails and pris-

nal law, however, generally permits a finding of recklessness only when a person disregards a risk of harm of which he is aware." (citation omitted)).

138. 411 F. Supp. 3d 615 (N.D. Cal. 2019).

139. *Dat Thanh Luong*, 411 F. Supp. at 626–27.

140. *Id.* at 627–30.

141. *Id.* at 630.

142. *Id.* at 636–37.

143. *Id.* at 637 n.15 (“*Peralta* is an Eighth Amendment case about the rights of a convicted prisoner, and not (as here) a Fourteenth Amendment case about the rights of a pretrial detainee. Nevertheless, that distinction—while relevant in other contexts (e.g., objective or subjective deliberate indifference)—is not relevant here.”).

144. See *supra* note 91 and accompanying text.

145. See, e.g., Sarah Kliff, Adam Satariano, Jessica Silver-Greenberg & Nicholas Kulish, *There Aren't Enough Ventilators to Cope with the Coronavirus*, N.Y. TIMES (Mar. 18, 2020), <https://www.nytimes.com/2020/03/18/business/coronavirus-ventilator-shortage.html> [<https://perma.cc/2SKR-YV5C>].

146. See, e.g., Ariane de Vogue, *Covid-19 Cases Concerning Prisoners' Rights Hit the Supreme Court*, CNN POL. (May 21, 2020, 7:01 AM), <https://www.cnn.com/2020/05/21/politics/covid-19-supreme-court-prisoners-rights/index.html> [<https://perma.cc/NG3F-VJNS>]. *Peralta* is clear that injunctive relief is available to detainees despite resource constraints—the cost defense only applies to damages. *Peralta v. Dillard*, 744 F.3d 1076, 1083 (9th Cir. 2014) (en banc).

ons,¹⁴⁷ and an obvious course for government defendants in these suits would be to raise the cost defense. With even top hospital systems struggling to obtain adequate PPE,¹⁴⁸ courts may at the very least look for ways to constrain liability for similar failures in jails.¹⁴⁹ But in dealing with the extreme circumstances presented by COVID-19, there is a real danger that courts will foreclose relief to a whole group of detainees, those for whom resource constraints are caused not by a global pandemic but by everyday dysfunction in the criminal justice system.¹⁵⁰ The crisis, however, also presents an opportunity to build in additional safeguards.

III. PROTECTING DETAINEES IN LIGHT OF *PERALTA*

Dat Thanh Luong illustrates that even if *Kingsley* is applied to conditions, pretrial detainees can still suffer objectively terrible outcomes without remedy if a cost defense is available.¹⁵¹ As discussed in Section II.A, the courts that have extended *Kingsley* to conditions apply slightly different standards. This Part explains that, in light of *Peralta*, whether or not any of these proffered standards can adequately protect pretrial detainees will ultimately depend on how the standard handles issues of individual versus system-wide liability (in other words, does it maintain a focus on individual actors or allow for the aggregation of actions by multiple jail officials?).

The question of individual versus system-wide liability is important because of a pervasive problem in detention facilities—responsibility and

147. See, e.g., Luke Barr, *Federal Prisons Facing Shortages of Resources Amid Coronavirus Outbreak*, ABC NEWS (Apr. 1, 2020, 4:16 PM), <https://abcnews.go.com/Health/federal-prisons-facing-shortages-resources-amid-coronavirus-outbreak/story?id=69920966> [https://perma.cc/H4T3-FCHN]; Alene Tchekmedyan & Matt Hamilton, *L.A. Jail Inmates Say Lack of Soap and Toilet Paper Heightens Coronavirus Fear: 'Like Slow Torture'*, L.A. TIMES (Mar. 30, 2020, 6:00 AM), <https://www.latimes.com/california/story/2020-03-30/coronavirus-inmates-hygiene-supply-shortage-la-jails> [https://perma.cc/JX2Z-JWF3].

148. See, e.g., Robert King, *Mayo Clinic CEO Blasts 'Just-in-Time' Ordering as Pandemic Changes Supply Chain*, FIERCE HEALTHCARE (July 7, 2020, 1:19 PM), <https://www.fiercehealthcare.com/hospitals/mayo-clinic-ceo-blasts-just-time-ordering-as-pandemic-changes-supply-chain> [https://perma.cc/S9D2-E9BB].

149. Cf. *Strauss v. Belle Realty Co.*, 482 N.E.2d 34 (N.Y. 1985) (using privity to limit the liability of a public utility following widespread blackouts in New York City).

150. If the issue reaches the Supreme Court, it will find a changed majority that may be particularly interested in cabining the reach of *Kingsley*. *Kingsley* was a 5–4 decision, with Chief Justice Roberts authoring the dissent on behalf of Justices Scalia, Thomas, and Alito. Justices Kennedy and Ginsburg, who joined the majority, have since been replaced by Justices Kavanaugh and Barrett, both of whom seem less likely to cast a vote for extending *Kingsley* to conditions than their predecessors. See Priya Raghavan, *Open Questions: Brett Kavanaugh and Criminal Justice*, BRENNAN CTR. (July 26, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/open-questions-brett-kavanaugh-and-criminal-justice> [https://perma.cc/UHM7-EWHB]; Joshua Vaughn, *Amy Coney Barrett's Record on Criminal Justice Is 'Deeply Troubling,' Reform Advocates Say*, APPEAL (Oct. 22, 2020), <https://theappeal.org/amy-coney-barretts-record-on-criminal-justice-is-deeply-troubling-reform-advocates-say/> [https://perma.cc/9M4D-CE4H].

151. See *supra* text accompanying notes 138–144.

knowledge are often fragmented.¹⁵² At best, jails and prisons are inefficient bureaucracies where those who make budgetary decisions do not have the information available to on-the-ground actors; at worst, the current liability scheme incentivizes administrators to intentionally maintain this disconnect.¹⁵³ In either interpretation, those who have the information about the risks to detainees often do not have the power to control the resources necessary to address those risks.

In cases involving officials responsible for the day-to-day conditions faced by pretrial detainees, then, whether *Kingsley* applies may make little difference. If *Kingsley* merely shifts from a subjective individual-liability standard like *criminal* recklessness to an objective individual-liability standard akin to *civil* recklessness, it will not protect detainees from officials (like those in *Peralta*) who respond reasonably given the constraints they face. Solving the *Peralta* problem requires a standard that encompasses liability for higher-level officials who are not themselves aware of the risks to detainees but do have the ability to make resources available to address them. This might mean employing a system-wide standard that divorces the intentional actions of officials from the unreasonable conditions that result, or it might mean expanding the circumstances under which courts are willing to say that officials “should have known” about a risk.

The remainder of this Section considers these two approaches to safeguarding *Kingsley*’s promise in light of *Peralta* and finds both to be insufficient. Section III.B then proposes a third approach that addresses the shortcomings of the first two, drawing on tort principles to impose an affirmative duty to notify as part of any reasonable response to a lack of resources.

A. *Evaluating Potential Solutions to the Peralta Problem*

One possible system-wide approach comes from *Kingsley*’s distinction between the official’s mental state as to his own actions and his mental state as to the reasonableness of the force applied.¹⁵⁴ Applying this distinction in the conditions context, Schlanger likens an official’s decision to use force to the decision to intentionally design the sanitation system for detainee housing and then argues that “[w]hen intentional decisions create objectively unreasonable conditions—whether or not anyone in particular exhibits recklessness—*Kingsley* dictates that the conditions are unconstitutional.”¹⁵⁵

152. Schlanger, *supra* note 40, at 420.

153. *Id.* If high-level officials can avoid liability for risks of which they are not aware, they do not have an incentive to design better information-sharing systems.

154. *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2472 (2015) (“In a case like this one, there are, in a sense, two separate state-of-mind questions. The first concerns the defendant’s state of mind with respect to his physical acts The second question concerns the defendant’s state of mind with respect to whether his use of force was ‘excessive.’”).

155. Schlanger, *supra* note 40, at 415.

She then draws an analogy to products liability to illustrate the standard.¹⁵⁶ Just as a manufacturer is liable when it intentionally sells a product that has an objectively unreasonable risk (defect), prison officials should be liable when they intentionally provide an underfunded, overworked (defective) medical system and injury results.¹⁵⁷

Unlike the *Kingsley* standard, Schlanger's approach divorces the person acting intentionally from the unreasonable effect of their action. In *Kingsley*, the same official who undertook the intentional act of using the taser was in a position to gauge whether that application of force was unreasonable given the circumstances.¹⁵⁸ When making the decision to act, he had all the information that the factfinder would have in evaluating whether the action was objectively unreasonable. In the conditions context, however, two different actors could be involved—for example, the doctor who fails to provide adequate treatment and the official who designs and administers the medical system for pretrial detainees. Unlike the single-actor situation in *Kingsley*, these two actors could have very different information. Specifically, the architect of the system might not have information about the conditions creating an unreasonable risk on the ground. The only way such a liability scheme could operate is if Schlanger is correct that recklessness by any particular individual is not required.¹⁵⁹

There is little in the decisions that have extended *Kingsley* to conditions to suggest that courts are contemplating an approach that dispenses with a focus on individual actors. The *Gordon* court referred to “the defendant” throughout: the *defendant* must have acted in a way that put the plaintiff at risk of harm; the *defendant* must have failed to take reasonable measures to abate the risk; the risk would have been obvious to a reasonable person in the *defendant's* position.¹⁶⁰ The language is focused on the actions of individual actors and does not appear to leave room for system-wide liability. The *Darnell* standard at first appears more workable because it specifically allows plaintiffs to bring claims if the defendant imposed the dangerous condition *intentionally* or was reckless in doing so.¹⁶¹ But this reference to intent instead seems to reflect the statement in *Kingsley* (drawing on *Bell*) that officials violate the Fourteenth Amendment when they intentionally act to punish pretrial detainees.¹⁶² In other words, the language in *Darnell* refers

156. *Id.* at 416–17.

157. *Id.* at 417.

158. *Kingsley*, 135 S. Ct. at 2470, 2472.

159. Schlanger, *supra* note 40, at 415.

160. *See supra* text accompanying notes 128–129.

161. *Darnell v. Pineiro*, 849 F.3d 17, 35 (2d Cir. 2017) (“[T]he pretrial detainee must prove that the defendant-official acted intentionally to impose the alleged condition, or recklessly failed to act with reasonable care to mitigate the risk that the condition posed to the pretrial detainee even though the defendant-official knew, or should have known, that the condition posed an excessive risk to health or safety.”).

162. *See supra* note 105 and accompanying text.

not to any intentional act but to an intentional act to punish. It is unclear that the administrator who sets up the medical system *intentionally* imposes the condition of inadequate care if he is not aware of the constraints on the ground that might lead to an unreasonable result.

If a claim that relies on the actions of multiple actors is precluded, a plaintiff could instead bring claims against the high-level officials who control resource allocation. In the case of medical care, such a claim would ignore the doctor who must operate within defined constraints and focus on administrators who oversee the budget or healthcare system. Again, information-sharing problems have the potential to be quite prevalent under this approach. *Kingsley* helps in some respect, because it eliminates the requirement that the defendant *know* about the serious risk,¹⁶³ but any objective standard short of strict liability will still require that the defendant *should have known* about that risk. *Kingsley* itself says that the objective determination must be made based on “what the officer knew at the time, not with the 20/20 vision of hindsight.”¹⁶⁴

There will presumably be situations where the plaintiff can show that high-level officials should indeed have been aware of the risk and still responded unreasonably. But if jails do have severe information asymmetries, high-level officials may simply be unaware of a risk, foreclosing any analysis of whether they responded reasonably. In *Peralta*, for example, the plaintiff also brought a claim against the prison’s chief medical officer, Doctor Fitter,¹⁶⁵ but the majority found that there was no reason he should have been aware of the danger under the circumstances.¹⁶⁶ The court added that, despite the fact that Fitter supervised the dental department, his role was “largely administrative,” and he did not have the training to “second guess[]” the medical judgments of the dentists on staff.¹⁶⁷

Focusing on these high-level officials, then, puts a great deal of pressure on the word “should.” Does it require, for example, that the official not only respond reasonably to the information before them but also design a better system to share information? If staff do not make officials aware of resource shortages, are officials required to second-guess their judgments? As long as these questions are left unanswered, pretrial detainees will remain vulnerable to permanent injuries and even death, with “no one left to sue.”¹⁶⁸

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

164. *Id.* at 2473.

165. *Peralta v. Dillard*, 744 F.3d 1076, 1081 (9th Cir. 2014) (en banc).

166. *Id.* at 1086 (“*Peralta* [hadn’t] shown that Fitter should have been aware of any risk to *Peralta*’s health, let alone that Fitter actually was aware.”).

167. *Id.*

168. *Id.* at 1098 (Hurwitz, J., dissenting in part and concurring in part).

B. *Rethinking the Reasonable Response*

The language in *Kingsley* and the cases decided in its wake suggests that courts are not ready to step away from an individual-focused standard of liability. When combined with the logic of *Peralta*, this implies that, even if *Kingsley* is fully extended to conditions claims brought by pretrial detainees, any individual-liability standard (other than strict liability) will leave gaps in protection. Under *Bell*, there is no constitutional mandate that pretrial detainees be made as comfortable as possible, only that they not be made to endure “genuine privation[] and hardship.”¹⁶⁹ But if the loss of a limb¹⁷⁰ does not constitute such an imposition, it is hard to imagine what would.

In order to increase protections for pretrial detainees while maintaining the focus on individual actors, courts should impose an affirmative duty on prison officials—such as on-the-ground medical staff—to notify their superiors when they become aware of a risk to detainees due to inadequate resources. Rather than putting the burden on detainees, who may not know where to turn when they have serious unmet needs, courts should place the burden on officials to demonstrate that they took reasonable measures to escalate their concerns. By rethinking what it means to respond reasonably, courts could improve information sharing in detention facilities, while lessening the threat of *Peralta*’s cost defense.

Under this system, individuals who are or should be aware of a substantial risk of harm to pretrial detainees would still be required to take reasonable actions to address the risk using their existing resources. However, they would also be required to notify those who are in a position to relax their resources constraints. To further safeguard the rights of detainees, courts should combine this affirmative duty to notify with a burden-shifting device requiring the defendant to prove they took all reasonable steps to perform that duty.

In the best-case scenario, the duty to notify would induce state actors to allocate more resources to address poor conditions, avoiding the constitutional violation entirely. A prison doctor working at capacity may not have the power to provide additional care. But if he promptly and systematically notifies administrators that detainees are not receiving adequate care, those higher-level officials may be able to make adjustments even before the conditions become so poor as to violate detainees’ constitutional rights.

But even if that is not possible, the plaintiff may still recover in situations where, under current doctrine, he could not. In a world where low-level actors have an incentive to increase information sharing, high-level officials will lose their ability to invoke the defense of ignorance.¹⁷¹ It will be much harder for an official like Doctor Fitter to argue that there was no reason he *should* have known about *Peralta*’s risk when the dentist he supervises

169. *Bell v. Wolfish*, 441 U.S. 520, 542 (1979).

170. *Peralta*, 744 F.3d at 1098 (Hurwitz, J., dissenting in part and concurring in part).

171. See, e.g., *supra* notes 166–168 and accompanying text.

has expressly informed him of that risk. There will be no need to second-guess his physicians when the information is provided in the first instance. The plaintiff will be able to systematically shift liability up the chain of responsible individuals, until he reaches the officials who had the power to act but failed to do so.

The approach would be consistent with prison litigation and broader legal principles. Prison litigation is a rare realm where courts are willing to impose affirmative duties.¹⁷² The logic for this exception is straightforward: because of their incarceration, detainees are unable to freely act to meet their own needs.¹⁷³ As Justice Stevens argued fervently in his *Estelle* dissent, the state has a duty to protect pretrial detainees because it has stripped them of their ability to protect themselves.¹⁷⁴

Justice Stevens's argument is similar to tort law's "voluntary undertaking" exception to the lack of a duty to rescue. There is generally no affirmative duty to intervene to save someone's life, even if it is possible to do so without taking on any individual risk.¹⁷⁵ Once a person takes steps to get involved, however, the situation changes, and from that point forward, they have a duty to take reasonable actions to protect the victim from future harm.¹⁷⁶ Many voluntary-undertaking cases hinge on whether the defendant removed the plaintiff from the scene or otherwise isolated them from help.¹⁷⁷ For example, in *Farwell v. Keaton*, a teenager left his friend, who was badly beaten, alone in the car in his grandparents' driveway.¹⁷⁸ When the friend died of his injuries, the Michigan Supreme Court applied the voluntary-undertaking exception and found that the defendant had an affirmative duty to take reasonable measures to obtain medical care for his friend.¹⁷⁹ The Court reasoned that the defendant should have known that the plaintiff

172. Schlanger, *supra* note 40, at 418 ("[J]ail and prison are exceptions to the general rule against constitutionalization of affirmative duties. Jail and prison render inmates unable to protect themselves without state participation; they are unable to lock their doors, unable to exit a threatening situation, unable to seek medical treatment, unable to buy food, and so on.").

173. *Id.*

174. *Estelle v. Gamble*, 429 U.S. 97, 116 n.13 (1976) (Stevens, J., dissenting) ("If a State elects to impose imprisonment as a punishment for crime, I believe it has an obligation to provide the persons in its custody with a health care system which meets minimal standards of adequacy.").

175. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARMS §§ 37, 42 (AM. L. INST. 2012).

176. See, e.g., *Hurd v. United States*, 134 F. Supp. 2d 745, 771–72 (D.S.C. 2001) (holding that the Coast Guard owes a duty to exercise reasonable care once it has commenced a rescue).

177. Affirmative duties also exist where there is a preexisting special relationship between the defendant and the victim, such as a parent-child relationship, where the child is dependent on the parent for its basic needs. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARMS § 40.

178. 240 N.W.2d 217, 219 (Mich. 1976).

179. *Farwell*, 240 N.W.2d at 222.

would not receive help from any other source.¹⁸⁰ Likewise, jail officials and staff should know that a pretrial detainee will not receive “help”—for example, dental and medical care—from any source other than the jail itself.

Burden-shifting approaches are also common in tort and are appropriate where there are information asymmetries.¹⁸¹ A newly incarcerated pretrial detainee is unlikely to know how to escalate his concerns when he does not receive proper medical care and similarly is at a disadvantage in proving officials failed to escalate those concerns properly in after-the-fact litigation. But a jailhouse doctor knows who he should talk to when he is unable to meet the urgent needs of all his patients and is likewise in the best position to demonstrate that he did so. This approach puts the obligation to notify on the individuals with the best ability to do so and creates an incentive for jail officials to facilitate, rather than impede, information sharing.

There are limits to the level of protection provided by this solution. The natural limit to any funding challenge is the sovereign immunity provided by the Eleventh Amendment.¹⁸² Section 1983 provides a cause of action against state officials—it does not permit a detainee to sue the state itself.¹⁸³ At some point, funding is outside of the control even of senior administrators, who must rely on state legislatures for their budget.¹⁸⁴ In those cases where officials at every step of the chain can demonstrate that they both acted reasonably given the constraints they faced and fulfilled their duty to notify, the plaintiff may still be left without a remedy.

For cases like *Peralta*, however, where Dr. Fitter was able to claim ignorance, this change in the standard makes a significant difference. The duty to notify ensures that all those responsible in the chain of command are held accountable for what is reasonably within their control and does not allow ignorance to swallow the protections of the Fourteenth Amendment. It incentivizes information sharing, rather than information fragmentation, remedying the disconnect between those who have the power to act and those who are aware of the risk.

180. *Id.* (“Siegrist knew or should have known when he left Farwell, who was badly beaten and unconscious, in the back seat of his car that no one would find him before morning.”).

181. For example, the doctrine of *res ipsa loquitur* is available in medical malpractice cases when the defendant had exclusive control over the thing that caused the harm and the injury is the kind of injury that does not normally occur without negligence. In these cases, the jury may infer the element of breach without direct proof by the plaintiff. *See, e.g.,* *Kambat v. St. Francis Hosp.*, 678 N.E.2d 456 (N.Y. 1997). When there are multiple possible defendants, the doctrine puts the burden on each defendant to demonstrate that they were not responsible for the injury. *See, e.g.,* *Ybarra v. Spangard*, 154 P.2d 687 (Cal. 1944) (“Without the aid of the doctrine a patient who received permanent injuries of a serious character, obviously the result of some one’s negligence, would be entirely unable to recover unless the doctors and nurses in attendance voluntarily chose to disclose the identity of the negligent person and the facts establishing liability.”).

182. U.S. CONST. amend. XI.

183. BODENSTEINER & LEVINSON, *supra* note 75.

184. *Peralta v. Dillard*, 744 F.3d 1076, 1098 (9th Cir. 2014) (en banc) (Hurwitz, J., dissenting in part and concurring in part).

Even when high-level officials are truly at the limits of their budgets, this approach shifts the focus to elected officials who actually have the power to change the constraints. While those officials cannot themselves be held liable due to sovereign immunity under the Eleventh Amendment, they can be subject to increased public attention and accountability once the causes of injuries are removed from the black box of bureaucracy.¹⁸⁵ The criminal justice system has previously undergone significant reform when it became clear that change could only come from the legislature.¹⁸⁶ A doctrinal shift that makes clear who is responsible when detainees die would allow advocates to focus their attention on the actors who have the power to address the root cause of those deaths.

CONCLUSION

While pretrial detainees are considered innocent until proven guilty, that foundational principle does not guarantee them protection from serious injuries or even death during the time they spend incarcerated prior to their adjudication of guilt. In 1979, the Supreme Court declared that, far from cruel and unusual punishments, pretrial detainees could not be punished at all. And yet despite acknowledging this formal difference, courts functionally treated these groups as interchangeable for decades.

That changed in 2015, when the Court decided *Kingsley* and determined that, in the context of claims involving use of force, pretrial detainees need only show that the force employed against them was objectively unreasonable. Since *Kingsley*, some courts of appeals have begun to extend its logic to claims by pretrial detainees challenging the conditions of their confinement. Still, not all courts have adopted it.

185. On a more positive front, there is no reason this solution could not be available to convicted prisoners as well. While we know that the provisions for pretrial detainees must be higher than those provided to convicted prisoners, the dissents in *Peralta* make a strong argument that a cost defense also undermines protections for convicted prisoners. See *supra* notes 86–90. Jail administrators who house both pretrial and convicted detainees might welcome uniformity, and there is no reason why an affirmative duty to notify could not be introduced in the context of the subjective deliberate-indifference standard. If medical officials do not have the resources to prevent “torture or a lingering death,” *Estelle v. Gamble*, 429 U.S. 97, 103 (1976), it does not much matter whether they knew or *should* have known about that risk. What matters is that they have an incentive to do something about it.

186. The Prison Rape Elimination Act was passed in 2003 after a report by Human Rights Watch drew attention to the issue and the inadequacy of judge-made legal protections. Brenda V. Smith, *The Prison Rape Elimination Act: Implementation and Unresolved Issues*, AM. U. CRIM. L. BRIEF, Spring 2008, at 10; *No Escape: Male Rape in U.S. Prisons*, HUM. RTS. WATCH, <https://www.hrw.org/reports/2001/prison/report.html> [<https://perma.cc/4PEZ-N2XM>]. More recently, the FIRST STEP Act was passed to help rectify the damage caused by mandatory minimums in sentencing—a problem that the judiciary had been unable to solve on its own. See Ames Grawert & Tim Lau, *How the FIRST STEP Act Became Law—And What Happens Next*, BRENNAN CTR. (Jan. 4, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/how-first-step-act-became-law-and-what-happens-next> [<https://perma.cc/P74L-H58W>].

Whether *Kingsley* applies to conditions may make little difference in light of the cost defense recognized by the Ninth Circuit in *Peralta*. If officials cannot be held liable when they do not have the resources to provide adequate care, it matters little if they knew or should have known about the detainee's serious medical needs. Adequately protecting those needs means changing the way courts think about the reasonable response. If the Court recognizes the *Peralta* cost defense, it must impose an affirmative duty to notify superior officials of resource constraints as part of the objectively reasonable response required by *Kingsley*. This would eliminate the defense of ignorance for high-level officials, while simultaneously ensuring that the state makes available any additional capacity that exists.

