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ARTICLE

THE CONDITIONS OF PRETRIAL DETENTION

CATHERINE T. STRUVE[†]

The Supreme Court has set forth in detail the standards that govern convicted prisoners' Eighth Amendment claims concerning their conditions of confinement, but has left undefined the standards for comparable claims by pretrial detainees. The law articulated by the lower courts is unclear and inconsistent, but on the whole shows a trend toward assimilating pretrial detainees' claims to those of convicted prisoners. Based on a review of Supreme Court case law concerning related questions, this Article argues that, for claims arising after a judicial determination of probable cause, the tests now prevailing in the lower courts should be replaced by a substantive due process framework that requires a plaintiff to show, at most, either punitive intent or objective deliberate indifference by the defendant. For claims arising after a warrantless arrest and before a judicial determination of probable cause, the Fourth Amendment's objective reasonableness standard should govern. The Article further notes a strong argument that this objective reasonableness standard should govern prior to arraignment, even when the arrest took place upon a warrant.

[†] Professor, University of Pennsylvania Law School. I thank David Rudovsky and the participants in a workshop at the University of Pennsylvania Law School for very helpful comments on a prior draft. I am grateful to Kate Brownell, Luke Eldridge, Caroline Jones, Sean Metherell, and Leah Rabin for excellent research assistance, to Parker Rider-Longmaid, Rebecca Serbin, and Danielle Acker Susanj for first-rate editorial work, and to Timothy Von Dulm and the Biddle Law Library for assistance in obtaining sources. Although I serve as reporter to a committee that has drafted model jury instructions that address some of the topics discussed in this Article, the views expressed here are solely mine. I dedicate this Article to the memory of Judge Louis H. Pollak.

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INTRODUCTION

More than thirty years ago, the Supreme Court ushered in the modern jurisprudence of inmates' rights with its decisions in *Estelle v. Gamble*¹ and *Bell v. Wolfish*.² In *Estelle*, the Court held that "deliberate indifference" to a convicted prisoner's "serious medical needs" violates the Eighth Amendment's ban on cruel and unusual punishment.³ In *Wolfish*, focusing on the fact that detainees being held for trial cannot be punished (because they have not been convicted),⁴ the Court held that to discern impermissibly punitive conditions of detention, the courts must ask whether the challenged condition "is reasonably related [and proportionate] to a legitimate governmental objective."⁵

¹ 429 U.S. 97 (1976).

² 441 U.S. 520 (1979).

³ 429 U.S. at 104.

⁴ See 441 U.S. at 535-37.

⁵ *Id.* at 538-39.

In the years that followed, the Court returned repeatedly to the question of the Eighth Amendment standard for claims by convicted prisoners. It held that the Eighth Amendment requires a showing of subjective deliberate indifference for a convicted prisoner's claims concerning medical care, failure to protect from attack, or general conditions of confinement.⁶ For a convicted prisoner's claim that a guard used excessive force, the Court held that the Eighth Amendment requires a showing of malice and sadism,⁷ but does not require evidence of significant injury.⁸ And the Court recognized that the Eighth Amendment extends to conditions of confinement that create an unreasonable risk of serious future harm.⁹

During the same time period, the Court also clarified the standards that govern the front end of the criminal justice timeline. The Fourth Amendment, the Court held, sets a standard of objective reasonableness for the police's use of force during the course of an arrest.¹⁰ In addition to an overarching test of reasonableness under the circumstances, the Court specified particular tests for the use of deadly force against a fleeing suspect¹¹ and for intentional maneuvers designed to stop a suspect's car.¹²

⁶ See *Farmer v. Brennan*, 511 U.S. 825, 837 (1994); *Wilson v. Seiter*, 501 U.S. 294, 303 (1991) (extending *Estelle v. Gamble's* deliberate indifference test to conditions-of-confinement claims); see also Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 945 (2009) (criticizing *Farmer's* subjective deliberate indifference test on the ground that it "encourag[es] officials at all levels to take insufficient steps to guard against serious harm").

⁷ See *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986) ("Where a prison security measure is undertaken to resolve a disturbance . . . that indisputably poses significant risks to the safety of inmates and prison staff, we think the question [of excessive force] ultimately turns on 'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.'" (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973)); *Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992) (extending the *Whitley* analysis to all Eighth Amendment excessive force claims).

⁸ See *Wilkins v. Gaddy*, 130 S. Ct. 1175, 1178-79 (2010) (per curiam) ("An inmate who is gratuitously beaten by guards does not lose his ability to pursue an excessive force claim merely because he has the good fortune to escape without serious injury."); *Hudson*, 503 U.S. at 9 ("When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated. This is true whether or not significant injury is evident." (citation omitted)).

⁹ See *Helling v. McKinney*, 509 U.S. 25, 35 (1993) (holding that the prisoner "state[d] a cause of action under the Eighth Amendment by alleging that petitioners have, with deliberate indifference, exposed him to levels of [secondhand smoke] that pose an unreasonable risk of serious damage to his future health").

¹⁰ See *Graham v. Connor*, 490 U.S. 386, 388 (1989).

¹¹ See *Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985) ("[I]f the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.").

¹² See *Scott v. Harris*, 550 U.S. 372, 386 (2007) ("A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death.").

By contrast, the Court has provided no further articulation of the standards that govern similar claims by pretrial detainees.¹³ It has noted, without deciding, the question of whether the Fourth Amendment's reasonableness standard for the use of force extends beyond arrest and into pretrial detention.¹⁴ It has observed that an arrestee's right to medical care is "at least as great" as that of a convicted prisoner,¹⁵ but has twice avoided deciding whether "at least as great" means "greater than" or "equal to."¹⁶ And as case law in related areas has developed, it has become more and more questionable whether the *Wolfish* reasonable-relationship test adequately reflects the standards that should govern pretrial detainees' claims.

The lower courts, lacking the luxury of discretionary jurisdiction, have had to face these questions. In some instances, they have sought to distinguish the standards for the treatment of pretrial detainees from those that govern the treatment of convicted prisoners. In many instances, however, the lower courts have assimilated pretrial detainees' claims to those by convicted prisoners, applying the Eighth Amendment standards to both. I will argue that the state of the law in the lower courts is substantively undesirable, and, in a number of instances, chaotic. The law varies among circuits, by type of claim, and even (sometimes) as to the same type of claim in the same circuit.

Commentators have criticized a number of aspects of this body of case law. These critiques, however, have tended to assess only a subset of the relevant questions. For example, some critiques have focused only on standards governing the use of excessive force¹⁷ or only on standards

¹³ In *Block v. Rutherford*, the Court applied *Wolfish* in rejecting challenges to a jail's ban on contact visits and policy of cell searches in the detainees' absence. 468 U.S. 576, 588-90 (1984).

¹⁴ See *Graham*, 490 U.S. at 395 n.10.

¹⁵ *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983). *Massachusetts General Hospital* concerned medical care for a plaintiff who was shot while fleeing police and then hospitalized; the Court reasoned that "the due process rights of a person in [that] situation are at least as great as the Eighth Amendment protections available to a convicted prisoner." *Id.*

¹⁶ See *City of Canton v. Harris*, 489 U.S. 378, 388 n.8 (1989); *Mass. Gen. Hosp.*, 463 U.S. at 244-45.

¹⁷ See generally Irene M. Baker, Comment, *Wilson v. Spain: Will Pretrial Detainees Escape the Constitutional "Twilight Zone"?*, 75 ST. JOHN'S L. REV. 449 (2001); Diana E. Cole, Comment, *The Antithetical Definition of Personal Seizure: Filling the Supreme Court Gap in Analyzing Section 1983 Excessive-Force Claims Arising After Arrest and Before Pretrial Detention*, 59 CATH. U. L. REV. 493 (2010); Megan Shuba Glowacki, Comment, *The Fourth or Fourteenth? Untangling Constitutional Rights in Pretrial Detention Excessive Force Claims*, 78 U. CIN. L. REV. 1159 (2010); Erica Haber, Note, *Demystifying a Legal Twilight Zone: Resolving the Circuit Court Split on When Seizure Ends and Pretrial Detention Begins in § 1983 Excessive Force Cases*, 19 N.Y.L. SCH. J. HUM. RTS. 939 (2003); Mitchell W. Karsch, Note, *Excessive Force and the Fourth Amendment: When Does Seizure End?*, 58 FORDHAM L. REV. 823, 835-40 (1990) (arguing that the Fourth Amendment should govern excessive force claims arising before (1) the judicial determination of probable cause after a

concerning the provision of medical care.¹⁸ Often, commentators' proposals fail to account for the full period of pretrial detention; some commentators focus on the initial stages after arrest (and the question of the boundary between the Fourth and Fourteenth Amendment protections),¹⁹ while others neglect that initial period in order to focus on pretrial detention more generally (and the relationship between the Fourteenth and Eighth Amendment standards).²⁰ Further, the existing commentary largely predates the Supreme Court's most recent discussion of the treatment of pretrial detainees, in *Florence v. Board of Chosen Freeholders*.²¹

In this Article, I propose an overarching framework for claims by pretrial detainees. I address, in particular, how courts should treat the sorts of claims that, if brought by a convicted prisoner, would be analyzed under the Eighth Amendment: claims concerning general living conditions, inadequate medical care, suicide, failure to protect from attacks by other inmates, or the use of excessive force by guards. I argue that the familiar Fourth Amendment standard of reasonableness under the circumstances should govern the treatment of arrestees until there has been a judicial determination of probable cause. I also note that there is a strong argument for applying this

warrantless arrest or (2) the first appearance after an arrest on a warrant); Eamonn O'Hagan, Note, *Judicial Illumination of the Constitutional "Twilight Zone": Protecting Post-Arrest, Pretrial Suspects from Excessive Force at the Hands of Law Enforcement*, 44 B.C. L. REV. 1357 (2003); Tiffany Ritchie, Comment, *A Legal Twilight Zone: From the Fourth to the Fourteenth Amendment, What Constitutional Protection Is Afforded a Pretrial Detainee?*, 27 S. ILL. U. L.J. 613 (2003); Jeffrey Sturgeon, Comment, *A Constitutional Right to Reasonable Treatment: Excessive Force and the Plight of Warrantless Arrestees*, 77 TEMP. L. REV. 125, 134-40 (2004) (arguing that the Fourth Amendment standard should govern claims arising between a warrantless arrest and the subsequent probable cause hearing, but focusing solely on excessive force and failing to propose a standard that would govern claims arising subsequent to judicial determination of probable cause).

¹⁸ See DeAnna Pratt Swearingen, Comment, *Innocent Until Arrested?: Deliberate Indifference Toward Detainees' Due-Process Rights*, 62 ARK. L. REV. 101, 117 (2009) (advocating "a burden-shifting scheme [under which] a pretrial detainee would have the burden of establishing that he had been denied access to medical care for a serious medical need," after which "the burden would then shift to the state to demonstrate that the denial of access was the least-restrictive measure possible to achieve a legitimate government objective").

¹⁹ See, e.g., Cole, *supra* note 17, at 525; Glowacki, *supra* note 17, at 1176-80; Haber, *supra* note 17, at 960-62; Karsch, *supra* note 17, at 824; O'Hagan, *supra* note 17, at 1394-95; Sturgeon, *supra* note 17, at 140.

²⁰ See, e.g., David C. Gorlin, Note, *Evaluating Punishment in Purgatory: The Need to Separate Pretrial Detainees' Conditions-of-Confinement Claims from Inadequate Eighth Amendment Analysis*, 108 MICH. L. REV. 417 (2009) (making a thoughtful proposal for an objective deliberate indifference standard for treatment of pretrial detainees, but not discussing excessive force claims or addressing possible applicability of Fourth Amendment standards at the outset of detention).

²¹ 132 S. Ct. 1510 (2012); see *infra* text accompanying notes 256-67 (discussing *Florence*). For a discussion of *Florence* that focuses on the case's implications for strip searches, see Julian Simcock, Note, *Florence, Atwater, and the Erosion of Fourth Amendment Protections for Arrestees*, 65 STAN. L. REV. 599 (2013).

reasonableness standard to all claims that arise prior to arraignment, even when the plaintiff was arrested upon a warrant. After that initial point of demarcation, whether it is the judicial probable cause determination or the arraignment, I argue that the treatment of the detainee should be governed by an intermediate standard which, in most of its applications, would result in a test of objective deliberate indifference.

In Part I of this Article, I note that the Supreme Court has failed to specify adequately the standards for treatment of pretrial detainees, and I point out problems in the operation of *Wolfish's* reasonable-relationship test. Part II summarizes lower courts' approaches to pretrial detainees' claims. Part III reviews related Supreme Court doctrines and distills principles with which a framework for pretrial detainee claims should accord if it is to be adopted without alterations in existing Supreme Court precedent. Part IV sets out data concerning jails and those who are housed in them.²² In Part V, I sketch my proposed framework for pretrial detainees' claims and defend that framework against practical and conceptual objections.

I. THE PUZZLE OF PRETRIAL DETENTION

In *Wolfish*, the Court reviewed challenges by federal pretrial detainees to five practices: double-bunking, limits on books and magazines, limits on packages, searches of living areas, and strip searches after contact visits.²³ The Court commenced by addressing the double-bunking issue because the plaintiffs' challenge to that practice rested solely on the Due Process Clause.²⁴ Where a pretrial detainee's challenge rests solely on the Due Process Clause, the Court held, "the proper inquiry is whether those conditions amount to punishment of the detainee."²⁵ That inquiry led the Court to formulate the following test:

A court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose. Absent a showing of an expressed intent to punish on the part of detention facility officials, that determination generally will turn on "whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation

²² The term "jail" commonly denotes "[a] local government's detention center where persons awaiting trial or those convicted of misdemeanors are confined." BLACK'S LAW DICTIONARY 910 (9th ed. 2009). "Prison," by contrast, denotes "[a] state or federal facility of confinement for convicted criminals, esp[ecially] felons." *Id.* at 1314.

²³ *Bell v. Wolfish*, 441 U.S. 520, 530 (1979).

²⁴ *Id.* at 530.

²⁵ *Id.* at 535.

to the alternative purpose assigned [to it].” Thus, if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to “punishment.”²⁶

Applying this test, the Court held that the double-bunking practice did not cause hardship amounting to anything “even approaching” a due process violation.²⁷

The Court then turned to the other four practices, which the detainees had challenged under the First and Fourth Amendments as well as the Due Process Clause.²⁸ Noting its holdings that convicted prisoners retain constitutional protections during incarceration, the Court reasoned that “[a] *fortiori*, pretrial detainees, who have not been convicted of any crimes, retain at least those constitutional rights that we have held are enjoyed by convicted prisoners.”²⁹ But with respect to convicted prisoners and pretrial detainees alike, the Court held, courts must defer to the judgments of prison administrators when reviewing challenges to regulations that serve the goal of maintaining security—both because of administrators’ expertise on these issues and because security concerns are better addressed by the political branches than by judges.³⁰ The Court proceeded to uphold all four practices, including the practice of conducting strip searches after contact visits³¹ (which, of the four challenges, gave the Court “the most pause”³²). None of the practices violated due process, the Court held, because none was imposed for punitive reasons, each was “rationally related” to the government’s “legitimate nonpunitive” interest in security, and each was proportional to that interest (especially in light of the limited durations of the detainees’ stays).³³

The *Wolfish* Court’s rational-relationship-and-proportionality test mirrored a trend in the Court’s treatment of constitutional challenges by convicted prisoners. Eight years later, in *Turner v. Safley*—a case involving limits on convicted prisoners’ marriages and mail—the Court relied in part on *Wolfish* when it synthesized its prior case law to rule that “[w]hen a prison regulation impinges on inmates’ constitutional rights, the regulation

²⁶ *Id.* at 538-39 (alterations in original) (citations omitted) (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963)).

²⁷ *Id.* at 542.

²⁸ *Id.* at 544.

²⁹ *Id.* at 545.

³⁰ *See id.* at 548.

³¹ *See id.* at 548-62.

³² *Id.* at 558.

³³ *Id.* at 560-62.

is valid if it is reasonably related to legitimate penological interests.”³⁴ Since then, the Court has applied *Turner* to convicted prisoners’ assertions of rights to avoid treatment with antipsychotic drugs;³⁵ receive publications³⁶ and noncontact visits;³⁷ attend religious observances;³⁸ gain access to law libraries;³⁹ and provide legal help to fellow inmates.⁴⁰

Turner has not, however, guided the Court’s analysis of convicted prisoners’ Eighth Amendment challenges to their conditions of confinement.⁴¹ The Court, explaining in *Johnson v. California* why *Turner* is inapposite to convicted prisoners’ claims of race discrimination, drew a parallel to the Eighth Amendment context:

The right not to be discriminated against based on one’s race is not susceptible to the logic of *Turner*. . . . For similar reasons, we have not used *Turner* to evaluate Eighth Amendment claims of cruel and unusual punishment in prison. We judge violations of that Amendment under the “deliberate indifference” standard, rather than *Turner*’s “reasonably related” standard. This is because the integrity of the criminal justice system depends on full compliance with the Eighth Amendment.⁴²

A puzzle thus arises. The *Johnson* Court indicated that the *Turner* test is less protective of inmates than the Eighth Amendment’s deliberate indifference test.⁴³ The Court has also stated that pretrial detainees hold substantive

³⁴ 482 U.S. 78, 89 (1987).

³⁵ See *Washington v. Harper*, 494 U.S. 210, 223-27 (1990).

³⁶ See *Thornburgh v. Abbott*, 490 U.S. 401, 403-04 (1989).

³⁷ See *Overton v. Bazzetta*, 539 U.S. 126, 131-32 (2003).

³⁸ See *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 347-51 (1987).

³⁹ See *Lewis v. Casey*, 518 U.S. 343, 361-62 (1996).

⁴⁰ See *Shaw v. Murphy*, 532 U.S. 223, 229-32 (2001).

⁴¹ In *Overton v. Bazzetta*—the case in which the Court rejected challenges to restrictions on convicted prisoners’ noncontact visits—the Court did briefly address a facial Eighth Amendment challenge to a prison regulation that barred all visitors other than clergy and lawyers for inmates with multiple substance abuse infractions. See 539 U.S. at 136-37 (finding no Eighth Amendment violation “in the circumstances of this case”). Ruling that the time limit on this bar kept it within the neighborhood of “accepted standards for conditions of confinement,” the Court distinguished the challenge at hand from the sorts of claims that it had addressed in other Eighth Amendment conditions-of-confinement cases: the regulation, it explained, did not “create inhumane prison conditions, deprive inmates of basic necessities, or fail to protect their health or safety,” and did not “involve the infliction of pain or injury, or deliberate indifference to the risk that it might occur.” *Id.* at 137.

⁴² *Johnson v. California*, 543 U.S. 499, 510-11 (2005) (citation omitted).

⁴³ Justices Thomas and Scalia, dissenting in *Johnson*, argued both that *Turner* should govern the case and that the Eighth Amendment deliberate indifference standard is more defendant-friendly than the *Turner* test. See *id.* at 546 (Thomas, J., joined by Scalia, J., dissenting) (“[T]he ‘deliberate indifference’ standard does not bolster the majority’s argument. If anything, that standard is *more* deferential to the judgments of prison administrators than *Turner*’s reasonable-

“due process rights . . . at least as great as the Eighth Amendment protections available to a convicted prisoner.”⁴⁴ Yet the *Wolfish* Court’s articulation of the substantive due process standard for assessing pretrial detainees’ claims—rational relationship to a legitimate governmental objective—is hard to distinguish from the *Turner* test.⁴⁵ This suggests that the substantive due process test for pretrial detainees would benefit from further articulation, at least as it applies to the sorts of claims that convicted prisoners would bring under the Eighth Amendment.

The *Wolfish* test’s vagueness also makes it difficult to predict how the test would apply to new sets of facts. Though the *Wolfish* Court acknowledged that jail overcrowding, if sufficiently extreme, could violate substantive due process, it held that the facts at bar fell far short of that point, and it failed to indicate where the dividing line lies.⁴⁶ The Court observed that “loading a detainee with chains and shackles and throwing him in a dungeon” would violate substantive due process because many alternatives short of those

relationship test: It subjects prison officials to liability only when they are subjectively aware of the risk to the inmate, and they fail to take reasonable measures to abate the risk.”).

However, the Court’s more recent decision in *Brown v. Plata*, 131 S. Ct. 1910 (2011), illustrates that the Eighth Amendment test can have more bite than the *Turner* test. In *Brown*—which involved claims by two classes of prisoners, one with “serious mental disorders” and the other with “serious medical conditions,” *id.* at 1922—the majority upheld an injunction requiring dramatic reductions in California’s prison population in order to remedy Eighth Amendment violations stemming from drastic overcrowding. *See id.* at 1922, 1947. The *Brown* majority cited *Wolfish* in discussing the need for deference to prison administrators, *see id.* at 1928, but relied on *Farmer v. Brennan* as the authority for the injunction, *see id.* at 1925 n.3. By contrast, the two dissenting opinions in *Brown* both cited *Turner* in arguing that the injunction should be reversed. *See id.* at 1956 (Scalia, J., joined by Thomas, J., dissenting); *id.* at 1959 (Alito, J., joined by Roberts, C.J., dissenting) (“The Constitution does not give federal judges the authority to run state penal systems. Decisions regarding state prisons have profound public safety and financial implications, and the States are generally free to make these decisions as they choose.” (citing *Turner v. Safley*, 482 U.S. 78, 85 (1987))).

⁴⁴ *County of Sacramento v. Lewis*, 523 U.S. 833, 849-50 (1998) (quoting *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983)).

⁴⁵ One distinction is that the range of legitimate government objectives is narrower for detainees than for convicted prisoners. Retribution, rehabilitation, and deterrence are valid goals with respect to convicted prisoners but not with respect to detainees. *See Bell v. Wolfish*, 441 U.S. 520, 539 n.20 (1979) (“Retribution and deterrence are not legitimate nonpunitive governmental objectives.”); *McGarry v. Pallito*, 687 F.3d 505, 513 (2d Cir. 2012) (“[I]t is clearly established that a state may not ‘rehabilitate’ pretrial detainees.” (citing, inter alia, *McGinnis v. Royster*, 410 U.S. 263, 273 (1973) (“[I]t would hardly be appropriate for the State to undertake in the pretrial detention period programs to rehabilitate a man still clothed with a presumption of innocence.”))).

⁴⁶ *See* 441 U.S. at 542 (“While confining a given number of people in a given amount of space 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 as to whether those conditions amounted to punishment, nothing even approaching such hardship is shown by this record.”).

measures would suffice to “ensure [the defendant’s] presence at trial and preserve the security of the institution.”⁴⁷ But apart from this example and the Court’s emphasis on the brevity of the average detainee’s stay, the *Wolfish* Court’s discussion provided few details to guide future cases.⁴⁸

The need for further development of the substantive due process test is also evident when one considers how a court would instruct a jury concerning a pretrial detainee’s claim. A literal application of the *Wolfish* test would instruct the jury to ask, first, whether the defendant official’s acts were designed to punish the detainee. If the jury found no punitive intent, then the jury would be directed to ask whether the defendant’s acts were reasonably related to a legitimate government purpose and proportional in relation to that purpose. Even if the court instructed the jury, as a matter of law, regarding the range of legitimate government purposes, this instruction would assign the jury a somewhat unusual task. Writing in a different context, four Justices have commented on the inappropriateness of assigning this sort of substantive due process inquiry (concerning rational relationship to legitimate government interests) to a jury.⁴⁹ It is thus unsurprising that, as we shall see in Part II, the lower courts have abandoned the *Wolfish* test in favor of a more specific test for some of the typical categories of pretrial detainee claims.

II. THE LOWER COURTS’ CASE LAW

In addressing the constitutional standards that govern law enforcement officials’ treatment of people after arrest and prior to conviction, the lower courts have taken divergent paths, with case law varying both among and within circuits. In this Part, I attempt to summarize as concisely as possible the current state of the law in the lower courts.⁵⁰ To do full justice to this

⁴⁷ *Id.* at 539 n.20.

⁴⁸ *See id.* at 543 (“We simply do not believe that requiring a detainee to share toilet facilities and this admittedly rather small sleeping place with another person for generally a maximum period of 60 days violates the Constitution.”).

⁴⁹ *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 753-54 (1999) (Souter, J., joined by O’Connor, Ginsburg & Breyer, JJ., concurring in part and dissenting in part) (“Substantive due process claims are, of course, routinely reserved without question for the court. Thus, it would be far removed from usual practice to charge a jury with the duty to assess the constitutional legitimacy of the government’s objective or the constitutional adequacy of its relationship to the government’s chosen means.” (citations omitted)).

⁵⁰ In this discussion, I survey the law in the twelve circuits where pretrial detainee claims might be decided. The Federal Circuit, for obvious reasons, does not hear such claims. *See* 28 U.S.C. § 1295 (2006).

topic would require a treatise;⁵¹ space constraints permit only a sketch. Still, some patterns emerge with relative clarity. The early period of detention has received special treatment in some circuits, as discussed in Section II.A. As to the subsequent period of detention, courts take diverse approaches. Section II.B notes that many lower courts have tried to avoid deciding whether the constitutional standards for the treatment of pretrial detainees differ from those applicable to convicted prisoners. Section II.C observes that on the occasions when the lower courts have taken positions on the nature of those standards, their analyses have varied both over time and by type of claim.

A. *The Early Period of Detention*

The Fourth Amendment's ban on unreasonable seizures regulates the manner in which the police may make an arrest, but the Supreme Court has left unclear the point at which those Fourth Amendment standards cease to apply. Some circuits employ a "continuing arrest" theory, in which the Fourth Amendment standards extend for some period of time following the actual arrest. A partly overlapping set of circuits has adopted the view that Fourth Amendment standards govern the treatment of people whom the police have arrested without a warrant (or a prior indictment) until there is a judicial determination of probable cause to believe that the person committed a crime. I will refer to the period of detention prior to that judicial probable cause determination as the period of "pre-judicial detention."

Thus far, at least two circuits—the Ninth and Eighth—have adopted variants of the continuing-arrest theory, while two other circuits—the Seventh and Fourth—appear to have rejected it. The Ninth Circuit "employs a 'continuing seizure' rule, which provides that 'once a seizure has occurred, it continues throughout the time the arrestee is in the custody of the arresting officers'"⁵²—with the result that the Fourth Amendment governs excessive force and other claims of mistreatment arising during that time

⁵¹ For a treatise on prisoners' rights that includes sections addressing pretrial detainees' rights, see 1 MICHAEL B. MUSHLIN, *RIGHTS OF PRISONERS* § 3:25 (4th ed. 2012) (discussing the use of force against pretrial detainees and arguing that "for pre trial [sic] detainees, *Hudson* [*v. McMillian*, 503 U.S. 1 (1992)] is fully applicable in an excessive force case, but it is applicable by dint of the Fourteenth, not the Eighth, Amendment"); *id.* § 4:3 (arguing that "[t]here seems no real reason to distinguish the medical needs of inmates from those of detainees").

⁵² *Torres v. City of Madera*, 524 F.3d 1053, 1056 (9th Cir. 2008) (quoting *Robins v. Harum*, 773 F.2d 1004, 1010 (9th Cir. 1985)).

period.⁵³ Similarly, the Eighth Circuit takes the view that “it is appropriate to use a Fourth Amendment framework to analyze excessive force claims arising out of incidents occurring shortly after arrest, apparently because those incidents still occur ‘in [the] course of’ a seizure of a free citizen.”⁵⁴ By contrast, the Seventh Circuit has rejected the continuing-arrest theory when refusing to recognize a Fourth Amendment claim concerning the use of force during an interrogation at a police station.⁵⁵ The Fourth Circuit has also rejected the continuing-arrest concept on the theory that such an approach “would have Fourth Amendment coverage depend upon the fortuity of how long an arresting officer happens to remain with a suspect.”⁵⁶

With respect to warrantless arrests, the continuing-arrest question can be avoided altogether if one endorses the view that the Fourth Amendment should govern the conditions of confinement until there has been a judicial determination of probable cause. Two circuits have endorsed the application of Fourth Amendment standards to the period of pre-judicial detention; two other circuits have apparently rejected that approach in whole or in part; and the case law in two additional circuits is inconsistent.

The Sixth Circuit adopted the Fourth Amendment test for pre-judicial conditions claims (in the context of an excessive force case); it reasoned that “establishing the line between Fourth and Fourteenth Amendment protection at the probable-cause hearing creates an incentive to hold the hearing as soon as possible.”⁵⁷ After equivocating in one case concerning the conditions of pre-judicial confinement,⁵⁸ the Ninth Circuit, in an excessive force case, likewise held that “the Fourth Amendment sets the applicable constitutional limitations on the treatment of an arrestee detained without a

⁵³ See *id.* (employing a Fourth Amendment reasonableness analysis in evaluating an excessive force claim); *Fontana v. Haskin*, 262 F.3d 871, 878-82 (9th Cir. 2001) (holding that a claim of sexual harassment during transport to jail was governed by the Fourth Amendment).

⁵⁴ *Chambers v. Pennycook*, 641 F.3d 898, 905 (8th Cir. 2011) (alteration in original) (quoting *Moore v. Novak*, 146 F.3d 531, 535 (8th Cir. 1998)).

⁵⁵ See *Wilkins v. May*, 872 F.2d 190, 192-94 (7th Cir. 1989) (noting that “[a] natural though not inevitable interpretation of the word ‘seizure’ would limit it to the initial act of seizing” and setting forth “two practical objections to the use of the Fourth Amendment to determine the limits of permissible post-arrest pre-charge conduct”).

⁵⁶ *Riley v. Dorton*, 115 F.3d 1159, 1164 (4th Cir. 1997) (en banc), *abrogated on other grounds by Wilkins v. Gaddy*, 130 S. Ct. 1175 (2010) (per curiam).

⁵⁷ *Aldini v. Johnson*, 609 F.3d 858, 866-67 (6th Cir. 2010).

⁵⁸ See *Hallstrom v. City of Garden City*, 991 F.2d 1473, 1485 (9th Cir. 1993) (“Since the *Bell* Court was at pains to point out that a probable cause hearing had taken place for the detainees in question and thus that it did not find itself in a *Gerstein* context, we conclude that Hallstrom is entitled at least to the protections afforded pretrial detainees.” (citation omitted)).

warrant up until the time such arrestee is released or found to be legally in custody based upon probable cause for arrest.”⁵⁹

By contrast, the Fourth Circuit has refused to apply a Fourth Amendment reasonableness standard to claims arising during transport after what appear to have been warrantless arrests.⁶⁰ In a case arising from a death during transport after an apparently warrantless arrest, the Eleventh Circuit applied a substantive due process test (drawn from Eighth Amendment deliberate indifference case law) to the plaintiff’s “custodial mistreatment” claim, though it applied the Fourth Amendment reasonableness test to the plaintiff’s excessive force claim.⁶¹

The Seventh Circuit’s case law has taken inconsistent approaches to the conditions of pre-judicial detention. The court has explained that “the Fourth Amendment governs the period of confinement between arrest without a warrant and the preliminary hearing at which a determination of probable cause is made, while due process regulates the period of confinement after the initial determination of probable cause.”⁶² And the court has extended that approach to cases concerning the *conditions*, rather than the *duration*, of confinement, applying a Fourth Amendment reasonableness test to denial of medical care⁶³ and conditions-of-confinement claims⁶⁴ arising during pre-judicial detention. But, during the same recent period, the Seventh Circuit—without citing its cases applying Fourth Amendment standards during pre-judicial detention—refused to apply the Fourth

⁵⁹ *Pierce v. Multnomah County*, 76 F.3d 1032, 1043 (9th Cir. 1996).

⁶⁰ By “warrantless arrest,” I mean an arrest without a warrant (not an unwarranted arrest). See *Orem v. Rephann*, 523 F.3d 442, 443-44, 446 (4th Cir. 2008) (applying the Fourteenth Amendment, rather than the Fourth Amendment, in evaluating an excessive force claim arising during transport after arrest for “assaulting an officer after being served with a Family Protective Order”); *Parrish ex rel. Lee v. Cleveland*, 372 F.3d 294, 296, 302 n.10 (4th Cir. 2004) (opinion of Williams, J.) (stating that a claim arising from asphyxiation during transport from a substation to a detention center after an arrest “on suspicion of being drunk in public” did not implicate the Fourth Amendment, which “does not govern the treatment of pre-trial detainees”); *id.* at 312 (King, J., concurring in the judgment) (“[A]lthough the officers’ actions may well constitute negligence, they do not meet the stringent standard of deliberate indifference.”).

⁶¹ *Cottrell v. Caldwell*, 85 F.3d 1480, 1488-90, 1492 (11th Cir. 1996).

⁶² *Villanova v. Abrams*, 972 F.2d 792, 797 (7th Cir. 1992).

⁶³ See *Ortiz v. City of Chicago*, 656 F.3d 523, 530 (7th Cir. 2011) (applying a four-factor reasonableness test to evaluate “an officer’s response to [a detainee’s] medical needs”: “(1) whether the officer has notice of the detainee’s medical needs; (2) the seriousness of the medical need; (3) the scope of the requested treatment; and (4) police interests, including administrative, penological, or investigatory concerns”).

⁶⁴ See *Lopez v. City of Chicago*, 464 F.3d 711, 719 (7th Cir. 2006) (“[T]he Fourth Amendment should have been applied to [Lopez’s] claim relating to the treatment and conditions he endured during his four days and nights in warrantless detention.”).

Amendment standard to a claim arising from the excessive use of force at a jail after a warrantless arrest.⁶⁵

The Tenth Circuit has been somewhat more deliberate—but not necessarily more consistent—in developing its approach to pre-judicial detention. It applies a Fourth Amendment reasonableness test to excessive force claims that arise during pre-judicial detention, based on the idea that “just as the fourth amendment’s strictures continue in effect to set the applicable constitutional limitations regarding both duration . . . and legal justification . . . , its protections also persist to impose restrictions on the treatment of the arrestee detained without a warrant.”⁶⁶ But to claims for denial of medical care during pre-judicial detention, the Tenth Circuit applies a substantive due process test drawn from the Eighth Amendment (i.e., the subjective deliberate indifference standard).⁶⁷ The court has provided little explanation for this difference in treatment between excessive force and denial of medical care claims, other than citation to prior cases in which detainees’ medical care claims had been analyzed under substantive due process standards.⁶⁸ As one judge, writing separately, pointed out: “In looking to the nature of the injury to determine the standard to be applied, the majority ignores the principle that the standard comes not from the classification of the injury the plaintiff suffered, but from the constitutional provision which was violated to cause the injury.”⁶⁹

Thus far, my analysis has addressed only the initial period of detention. As to the ensuing weeks and months of detention, the lower courts’ case law is equally diverse.

⁶⁵ See *Forrest v. Prine*, 620 F.3d 739, 743 (7th Cir. 2010) (“Although we have not yet had occasion to define precisely the contours of [the] temporal limitations [on the Fourth Amendment], the events that unfolded in this case place Mr. Forrest’s claim outside the temporal bounds of the Fourth Amendment.”).

⁶⁶ *Austin v. Hamilton*, 945 F.2d 1155, 1160 (10th Cir. 1991), *abrogated on other grounds by* *Johnson v. Jones*, 515 U.S. 304 (1995); see also *Pride v. Does*, 997 F.2d 712, 714, 716 (10th Cir. 1993) (following *Austin* and applying the Fourth Amendment’s objective reasonableness standard to an excessive force claim arising from an incident at a highway patrol office after a warrantless arrest); *Frohman v. Wayne*, 958 F.2d 1024, 1026 (10th Cir. 1992) (per curiam) (applying the Fourth Amendment’s “objective reasonableness standard” to an excessive force claim arising from an incident at a jail after a warrantless arrest).

⁶⁷ See *Barrie v. Grand County*, 119 F.3d 862, 868-69 (10th Cir. 1997) (“[A] pre-trial detainee in a county jail[] does not have a claim against his custodian for failure to provide adequate medical attention unless the custodian knows of the risk involved, and is ‘deliberately indifferent’ thereto.”); *Frohman*, 958 F.2d at 1028 (“[P]retrial detainees . . . are entitled to the same degree of protection regarding medical attention as that afforded convicted inmates under the Eighth Amendment.”).

⁶⁸ See *Barrie*, 119 F.3d at 867-69 (citing, inter alia, *Frohman*).

⁶⁹ *Id.* at 870 (Briscoe, J., concurring).

B. *Equivocation*

In the lower court case law, there is a general consensus that at some point after arrest and prior to trial, the Fourth Amendment's protections cease and substantive due process principles begin to govern the treatment of pretrial detainees. Beyond that basic principle, however, the clarity dissipates. As I discussed in Part I, the Supreme Court has for decades avoided deciding whether the constitutional protections for pretrial detainees are greater than those for convicted prisoners. In many instances, the lower courts have followed suit; in almost every circuit, one can find cases noting that pretrial detainees' substantive due process rights are *at least as extensive as* convicted prisoners' Eighth Amendment rights. Such statements can be found in decisions concerning general conditions of confinement,⁷⁰ denial of adequate medical care,⁷¹ failure to prevent suicide (which is usually analyzed as a sort of medical care claim),⁷² failure to protect from attack,⁷³ and excessive force.⁷⁴ Sometimes courts have avoided determining whether a greater protection applies by holding that the plaintiff meets the relevant Eighth Amendment test⁷⁵ or by holding that even under a less demanding

⁷⁰ See, e.g., *Rice ex rel. Rice v. Corr. Med. Servs.*, 675 F.3d 650, 664 (7th Cir. 2012) ("protections . . . at least as broad"); *Spencer v. Bouchard*, 449 F.3d 721, 727 (6th Cir. 2006) ("similar if not greater protections"), *abrogated on other grounds by Jones v. Bock*, 549 U.S. 199, 217 (2007) (holding that the Prison Litigation Reform Act's exhaustion provision does not include "a 'name all defendants' requirement").

⁷¹ See, e.g., *A.M. ex rel. J.M.K. v. Luzerne Cnty. Juvenile Detention Ctr.*, 372 F.3d 572, 584 (3d Cir. 2004) ("no less protection"); *Gibson v. County of Washoe*, 290 F.3d 1175, 1187 (9th Cir. 2002) ("at a minimum, the same duty"); *Boswell v. County of Sherburne*, 849 F.2d 1117, 1121 (8th Cir. 1988) ("at least as great" (citation omitted)); *Anderson v. City of Atlanta*, 778 F.2d 678, 686 n.12 (11th Cir. 1985) ("the same, if not greater").

⁷² See, e.g., *Woloszyn v. County of Lawrence*, 396 F.3d 314, 320 n.5 (3d Cir. 2005) ("at least as great"); *Wever v. Lincoln County*, 388 F.3d 601, 606 n.6 (8th Cir. 2004) ("at least as great" (citation omitted)); *Buffington v. Baltimore County*, 913 F.2d 113, 119 (4th Cir. 1990) ("at least as great"); *Partridge v. Two Unknown Police Officers*, 791 F.2d 1182, 1187 (5th Cir. 1986) ("*at least as great*" (citation omitted)).

⁷³ See, e.g., *Washington v. LaPorte Cnty. Sheriff's Dep't*, 306 F.3d 515, 517 (7th Cir. 2002) ("at least as great" (citations omitted)); *Doe ex rel. Doe v. Washington County*, 150 F.3d 920, 922 (8th Cir. 1998) ("at least as great"); *Best v. Essex Cnty., N.J. Hall of Records*, 986 F.2d 54, 56 (3d Cir. 1993) ("at least the same protection").

⁷⁴ See *Forrest v. Prine*, 620 F.3d 739, 744 (7th Cir. 2010) ("at least as much, and probably more, protection").

⁷⁵ By "meets the relevant test," I mean that the court held that the plaintiff mustered sufficient evidence (either on summary judgment or at trial) to justify a finder of fact in finding liability under the Eighth Amendment standard. See, e.g., *Rice*, 675 F.3d at 665-66; *Conn v. City of Reno*, 591 F.3d 1081, 1094-98 (9th Cir. 2010), *vacated on other grounds*, 131 S. Ct. 1812 (2011), *opinion reinstated in relevant part*, 658 F.3d 897 (9th Cir. 2011); *Spencer*, 449 F.3d at 723; *J.M.K.*, 372 F.3d at 584-85; *Gibson*, 290 F.3d at 1187-89, 1193; *Doe*, 150 F.3d at 922; *Boswell*, 849 F.2d at 1121.

test the plaintiff would lose.⁷⁶ In a number of instances, courts have applied the Eighth Amendment test after observing that the plaintiff failed to proffer a more plaintiff-friendly standard.⁷⁷

C. *Differentiation and Assimilation*

We have seen that most of the courts of appeals have equivocated, at various times, concerning whether pretrial detainees receive greater protections under the substantive aspect of the Due Process Clause than convicted prisoners receive under the Eighth Amendment. But, unlike the Supreme Court, the courts of appeals have not always avoided the question. In this Section, I survey the lower courts' approaches to five types of substantive due process claims brought by pretrial detainees. As to general conditions-of-confinement claims (e.g., overcrowding claims), the case law is relatively evenly divided between continued application of the *Wolfish* test and application of the Eighth Amendment test that governs similar claims by convicted prisoners. As to claims of denial of medical care, failure to prevent suicide, and failure to protect from attack, the case law varies but the trend is toward applying the Eighth Amendment subjective deliberate indifference standard. Claims of excessive force have proven particularly thorny, with at least a three-way split in the case law.

1. General Conditions of Confinement

Wolfish itself presented a challenge to general conditions of pretrial detention: the detainees sought to challenge the crowded conditions in which they were being held. It may therefore be unsurprising that the *Wolfish* test appears to retain the most vitality on the topic of general conditions of confinement. The *Wolfish* test first looks for evidence of explicitly punitive intent. Failing that, the test asks whether the conditions are reasonably related to a legitimate government purpose and not excessive in relation to that purpose.⁷⁸ The main competing test in the lower court case law is the subjective deliberate indifference standard that applies to similar claims by convicted prisoners.⁷⁹ Under this test, the plaintiff must show that the

⁷⁶ See, e.g., *Leary v. Livingston County*, 528 F.3d 438, 443 (6th Cir. 2008); *Woloszyn*, 396 F.3d at 321; *Best*, 986 F.2d at 57.

⁷⁷ See, e.g., *Griffin v. Hardrick*, 604 F.3d 949, 953 (6th Cir. 2010); *Forrest*, 620 F.3d at 744; *Natale v. Camden Cnty. Corr. Facility*, 318 F.3d 575, 581 n.5 (3d Cir. 2003); *Calderon-Ortiz v. LaBoy-Alvarado*, 300 F.3d 60, 63 (1st Cir. 2002); *Washington*, 306 F.3d at 517.

⁷⁸ See *supra* text accompanying notes 23-26.

⁷⁹ For the Eighth Amendment deliberate indifference test that governs convicted prisoners' conditions-of-confinement claims, see *Wilson v. Seiter*, 501 U.S. 294, 303 (1991).

conditions posed a substantial risk of serious harm to the inmate and that the defendant actually knew of and disregarded that risk.⁸⁰ For pretrial detainees' claims, some circuits seem to have chosen one or the other of these standards; in other circuits, the two standards coexist.

In the Third,⁸¹ Fourth,⁸² and D.C.⁸³ Circuits (and perhaps the Sixth Circuit⁸⁴) the *Wolfish* test appears to govern pretrial detainees' conditions-of-confinement claims. In the Tenth Circuit, the subjective deliberate indifference test appears to govern.⁸⁵ In the First,⁸⁶ Eighth,⁸⁷ and Eleventh⁸⁸ Circuits (and perhaps the Ninth Circuit⁸⁹), the *Wolfish* test coexists uneasily with the

⁸⁰ See *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

⁸¹ See *Hubbard v. Taylor*, 538 F.3d 229, 231-32 (3d Cir. 2008). A pre-*Farmer* case from the Third Circuit had adopted the Eighth Amendment standard for pretrial detainees' conditions-of-confinement claims. See *Kost v. Kozakiewicz*, 1 F.3d 176, 188 (3d Cir. 1993) (stating that *Wilson v. Seiter*'s "standard for violations of the Eighth Amendment based on nonmedical conditions of confinement . . . would also apply to appellants as pretrial detainees through the Due Process Clause"). At the time the Third Circuit decided *Kost*, the Supreme Court had not yet held that the scienter for Eighth Amendment claims is subjective deliberate indifference. In deciding the first appeal in *Hubbard*, the Third Circuit termed *Kost* "somewhat misleading" and decided that while pretrial detainees' medical care claims trigger the Eighth Amendment deliberate indifference test, pretrial detainees' conditions-of-confinement claims trigger the *Wolfish* test. See *Hubbard v. Taylor*, 399 F.3d 150, 165-66 & n.22 (3d Cir. 2005).

⁸² See, e.g., *Robles v. Prince George's County*, 302 F.3d 262, 269 (4th Cir. 2002).

⁸³ See *Jones v. Horne*, 634 F.3d 588, 598 (D.C. Cir. 2011).

⁸⁴ See *Turner v. Stumbo*, 701 F.2d 567, 568, 572-73 (6th Cir. 1983) (applying *Wolfish* to claims by criminal defendants who had been committed to a psychiatric unit). A more recent opinion from the Sixth Circuit is ambiguous on the question of the relationship between the Eighth and Fourteenth Amendment tests for conditions of confinement. In *Thompson v. County of Medina*, the court both asserted that pretrial detainees have "the same Eighth Amendment rights as other inmates" and stated that "conditions of pretrial detention that implicate only the protection against deprivation of liberty without the due process of law, and no other express guarantee of the Constitution," trigger the *Wolfish* test; but the court then proceeded to uphold the dismissal of plaintiffs' conditions-of-confinement claims by reference to Eighth Amendment standards. See 29 F.3d 238, 242-44 (6th Cir. 1994).

⁸⁵ See *Craig v. Eberly*, 164 F.3d 490, 495 (10th Cir. 1998).

⁸⁶ The court in *Surprenant v. Rivas*, 424 F.3d 5, 18-19 (1st Cir. 2005), adopted the Eighth Amendment standard without mentioning *Lyons v. Powell*, 838 F.2d 28, 29 (1st Cir. 1988) (per curiam), in which it had instead applied the *Wolfish* test.

⁸⁷ *Morris v. Zefferi*, 601 F.3d 805, 809 (8th Cir. 2010), in which the court applied *Wolfish*, made no mention of *Butler v. Fletcher*, 465 F.3d 340, 345 (8th Cir. 2006), in which it had applied the subjective deliberate indifference test.

⁸⁸ In *Magluta v. Samples*, 375 F.3d 1269, 1273 (11th Cir. 2004), the court applied *Wolfish* without mentioning *Jordan v. Doe*, 38 F.3d 1559, 1564-65 (11th Cir. 1994) (in which it had cited *Wolfish* but applied the subjective deliberate indifference test) or similar cases.

⁸⁹ There does not appear to be any recent Ninth Circuit case law in which the court applied *Wolfish* to a pretrial detainee's conditions-of-confinement claim, but the court in one recent case applied *Wolfish* to such a claim by a person who had served his sentence and was "awaiting civil commitment proceedings." *Jones v. Blanas*, 393 F.3d 918, 931 (9th Cir. 2004). By contrast, in *Frost*

subjective deliberate indifference test. Some decisions from the Second Circuit rejected the subjective deliberate indifference test,⁹⁰ but those cases appear to have been either narrowed or overruled.⁹¹ The Seventh Circuit has—variously—adopted the deliberate indifference test for pretrial detainee claims but suggested that the “objective” (seriousness-of-harm) component might differ for pretrial detainees;⁹² employed the *Wolfish* test;⁹³ and, most recently, asserted that the *Wolfish* and Eighth Amendment tests “merge.”⁹⁴ The Fifth Circuit distinguishes between conditions-of-confinement claims and claims arising from an individual officer’s “episodic acts or omissions”; for the former, but not the latter, the Fifth Circuit applies the *Wolfish* test.⁹⁵

2. Medical Care, Suicide, and Attack

A somewhat more consistent trend can be seen in the lower court case law concerning pretrial detainee claims for denial of adequate medical care,

v. Agnos, the court applied the Eighth Amendment deliberate indifference test to a pretrial detainee’s conditions-of-confinement claim. 152 F.3d 1124, 1128 (9th Cir. 1998).

⁹⁰ See *Iqbal v. Hasty*, 490 F.3d 143, 168-69 (2d Cir. 2007) (retaining *Wolfish*’s rule that conditions cannot be imposed for punitive purposes, but replacing *Wolfish*’s reasonable-relationship test with an objective deliberate indifference test), *rev’d on other grounds sub nom.* *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). An earlier case on which the *Iqbal* court relied had reasoned that the subjective deliberate indifference test is “unique to Eighth Amendment claims,” *Benjamin v. Fraser*, 343 F.3d 35, 51 (2d Cir. 2003), and had decided that “although a pretrial inmate mounting a constitutional challenge to environmental conditions must show deliberate indifference, it may generally be presumed from an absence of reasonable care,” *id.* at 50.

⁹¹ *Caiozzo v. Koreman*, 581 F.3d 63, 70-72 (2d Cir. 2009), which concerned a medical care claim, could be taken to have overruled *Benjamin*, 343 F.3d at 51, because *Caiozzo* states flatly that “[c]laims for deliberate indifference to a serious medical condition or other serious threat to the health or safety of a person in custody should be analyzed under the same standard irrespective of whether they are brought under the Eighth or Fourteenth Amendment,” *Caiozzo*, 581 F.3d at 72. On the other hand, *Caiozzo* might instead have narrowed *Benjamin*; the *Caiozzo* court stressed that *Benjamin* concerned “a challenge by pretrial detainees asserting a *protracted* failure to provide safe prison conditions.” *Id.* at 70 (quoting *Benjamin*, 343 F.3d at 51).

⁹² See *Tesch v. County of Green Lake*, 157 F.3d 465, 474 n.3 (7th Cir. 1998).

⁹³ See *May v. Sheahan*, 226 F.3d 876, 884 (7th Cir. 2000).

⁹⁴ *Hart v. Sheahan*, 396 F.3d 887, 892 (7th Cir. 2005).

⁹⁵ See, e.g., *Shepherd v. Dallas County*, 591 F.3d 445, 452 (5th Cir. 2009). Determining whether to classify a claim as a conditions-of-confinement claim or an “episodic acts” claim is not always straightforward. See, e.g., *Scott v. Moore*, 114 F.3d 51, 53-54 (5th Cir. 1997) (en banc) (holding that the “episodic act” branch of the doctrine governed a detainee’s claim arising out of sexual assault by a guard); *id.* at 56 (Wisdom, J., dissenting) (arguing that the assault was traceable to “regular and systematic” staffing policies that were “the antithesis of episodic”).

The Seventh Circuit has expressed approval of the Fifth Circuit’s distinction between general conditions and episodic occurrences. See *Tesch*, 157 F.3d at 475-76 (stating that while the *Wolfish* test “works well to assess constitutional attacks on general practices, rules, and restrictions of pretrial confinement when the jail official’s state of mind is not a disputed issue,” it was not a good fit for a claim that a jail cell’s toilet, bed, and sink were not accessible to a detainee who used a wheelchair).

failure to prevent suicide, and failure to protect from attack. Almost across the board, the lower courts apply the subjective deliberate indifference test to medical care claims. Not all circuits have yet applied the subjective deliberate indifference test to suicide or attack claims, but despite the presence of older case law applying an objective test, it seems likely that the subjective deliberate indifference test will eventually prevail in these remaining circuits as well.

All circuits (except for the D.C. Circuit) have issued decisions applying the Eighth Amendment's subjective deliberate indifference test to pretrial detainees' medical care claims.⁹⁶ Post-*Wolfish* precedents applying a distinctive test to pretrial detainees' medical care claims are relatively sparse and (except in the Fifth Circuit) such precedents exist at best in desuetude. The Fourth Circuit applied aspects of the *Wolfish* test to pretrial detainees' medical care claims in the early years following that decision,⁹⁷ but has not done so more recently. Two Seventh Circuit cases that applied a distinctive test for pretrial detainees' medical care claims appear to have been overruled.⁹⁸ The Eighth Circuit once applied an "intent to punish" standard without explaining whether that standard differed from the Eighth Amendment deliberate indifference test,⁹⁹ but has since applied the Eighth Amendment standard.¹⁰⁰ The Fifth Circuit applies its dichotomy (between "episodic" causes and general conditions) to medical care claims as well;

⁹⁶ See, e.g., *Smith v. Knox Cnty. Jail*, 666 F.3d 1037, 1039 (7th Cir. 2012) (per curiam); *Pourmoghani-Esfahani v. Gee*, 625 F.3d 1313, 1317 (11th Cir. 2010) (per curiam); *Brown v. Callahan*, 623 F.3d 249, 253 (5th Cir. 2010); *Spears v. Ruth*, 589 F.3d 249, 254 (6th Cir. 2009); *Krout v. Goemer*, 583 F.3d 557, 567 (8th Cir. 2009); *Caiozzo*, 581 F.3d at 72; *Ruiz-Rosa v. Rullán*, 485 F.3d 150, 155-56 (1st Cir. 2007); *Lolli v. County of Orange*, 351 F.3d 410, 419 & n.6 (9th Cir. 2003) (applying "traditional Eighth Amendment standards" and noting that the plaintiff "has not argued for a more demanding standard of care"); *Olsen v. Layton Hills Mall*, 312 F.3d 1304, 1315 (10th Cir. 2002); *Brown v. Harris*, 240 F.3d 383, 388-90 (4th Cir. 2001); *Groman v. Township of Manalapan*, 47 F.3d 628, 637 (3d Cir. 1995).

⁹⁷ See, e.g., *Fredericks v. Huggins*, 711 F.2d 31, 33 (4th Cir. 1983) (denial of methadone).

⁹⁸ The court in *Davis v. Jones*, 936 F.2d 971, 972 (7th Cir. 1991), apparently applied an "objective standard[]" to a pretrial detainee's medical care claim and relied for this standard on *Matzker v. Herr*, 748 F.2d 1142, 1147 n.3 (7th Cir. 1984). *Matzker* recognized a due process duty "to promptly and reasonably procure competent medical aid," *id.* at 1147, for "injuries which are serious or which the jail authorities have reason to suspect may be serious," *id.* at 1147 n.3. But the Seventh Circuit later abandoned *Matzker* for a deliberate indifference approach, see *Salazar v. City of Chicago*, 940 F.2d 233, 240-41 (7th Cir. 1991), and more recent cases have employed a subjective deliberate indifference test, see, e.g., *Smith*, 666 F.3d at 1039.

⁹⁹ *Davis v. Dorsey*, 167 F.3d 411, 412 (8th Cir. 1999).

¹⁰⁰ See, e.g., *Krout*, 583 F.3d at 567.

thus, most recent cases apply the Eighth Amendment test to medical care claims, but a few apply *Wolfish* instead.¹⁰¹

Six or seven circuits apply the subjective deliberate indifference test to claims that jail officials failed to prevent a pretrial detainee suicide; the law in three other circuits is less clear. The Sixth,¹⁰² Seventh,¹⁰³ Eighth,¹⁰⁴ Ninth,¹⁰⁵ Tenth,¹⁰⁶ and Eleventh¹⁰⁷ Circuits have applied the Eighth Amendment deliberate indifference test to pretrial detainee suicide claims. The Fifth Circuit applies that test when it deems that the plaintiff's claim concerns an "episodic act or omission."¹⁰⁸ Older cases in the First,¹⁰⁹ Third,¹¹⁰ and Fourth¹¹¹ Circuits applied a deliberate indifference standard to

¹⁰¹ See, e.g., *Duvall v. Dallas County*, 631 F.3d 203, 207 (5th Cir. 2011) (per curiam) (applying the *Wolfish* test to a pretrial detainee's claim that he contracted a methicillin-resistant *Staphylococcus aureus* infection in jail because the claim was "grounded in unconstitutional conditions of confinement"), cert. denied, 132 S. Ct. 111 (2011); *Shepherd v. Dallas County*, 591 F.3d 445, 453 (5th Cir. 2009) (approving the use of the *Wolfish* test where the plaintiff claimed that "[t]he jail's evaluation, monitoring, and treatment of inmates with chronic illness was, at the time of [the plaintiff's] stroke, grossly inadequate due to poor or non-existent procedures and understaffing of guards and medical personnel, and these deficiencies caused his injury").

¹⁰² See, e.g., *Gray v. City of Detroit*, 399 F.3d 612, 616 (6th Cir. 2005).

¹⁰³ See, e.g., *Minix v. Canarecci*, 597 F.3d 824, 831 (7th Cir. 2010).

¹⁰⁴ See, e.g., *Drake ex rel. Cotton v. Koss*, 445 F.3d 1038, 1042 (8th Cir. 2006).

¹⁰⁵ See, e.g., *Clouthier v. County of Contra Costa*, 591 F.3d 1232, 1241-44 (9th Cir. 2010).

¹⁰⁶ See, e.g., *Barrie v. Grand County*, 119 F.3d 862, 869 (10th Cir. 1997).

¹⁰⁷ See, e.g., *Gish v. Thomas*, 516 F.3d 952, 954-55 (11th Cir. 2008).

¹⁰⁸ See *Jacobs v. W. Feliciana Sheriff's Dep't*, 228 F.3d 388, 393 (5th Cir. 2000) (citation omitted).

In the 1990s, the Fifth Circuit applied an objective test to such a claim, but that line of case law appears to have been displaced by the Fifth Circuit's episodic causes-general conditions dichotomy. See *Rhyne v. Henderson County*, 973 F.2d 386, 391 (5th Cir. 1992) (stating, in a suicide case, that pretrial detainees "must be provided with 'reasonable medical care, unless the failure to supply it is reasonably related to a legitimate government objective'" (quoting *Cupit v. Jones*, 835 F.2d 82, 85 (5th Cir. 1987))). But *Cupit*—the case on which *Rhyne* relied—has been overruled to the extent that it is inconsistent with the episodic causes-general conditions distinction. See *Hare v. City of Corinth*, 74 F.3d 633, 646 (5th Cir. 1996) (discussing *Cupit*).

¹⁰⁹ See *Bowen v. City of Manchester*, 966 F.2d 13, 17 (1st Cir. 1992) (holding that, for purposes of qualified immunity analysis, the plaintiff must show that the defendant "had actual knowledge, or was willfully blind, to the serious risk that a detainee would commit suicide"); *Elliott v. Cheshire County*, 940 F.2d 7, 10-11 (1st Cir. 1991) ("The key to deliberate indifference in a prison suicide case is whether the defendants knew, or reasonably should have known, of the detainee's suicidal tendencies.").

¹¹⁰ See *Colburn v. Upper Darby Township*, 838 F.2d 663, 669 (3d Cir. 1988) ("[I]f . . . officials know or should know of the particular vulnerability to suicide of an inmate, then the Fourteenth Amendment imposes on them an obligation not to act with reckless indifference to that vulnerability."), abrogated on other grounds by *Leatherman v. Tarrant Cnty. Narcotics Intel. & Coordination Unit*, 507 U.S. 163, 168 (1993) (rejecting a heightened pleading standard for § 1983 claims against municipalities as "impossible to square . . . with the liberal system of 'notice pleading' set up by the Federal Rules"); *Williams v. Borough of West Chester*, 891 F.2d 458, 464 & n.10 (3d Cir. 1989)

pretrial detainee suicide claims, thereby leaving unclear whether these courts would decide to make that test subjective (rather than objective) now that the Eighth Amendment deliberate indifference test is known to be subjective.¹¹² Given that the courts tend to analyze suicide cases as a subset of medical care cases,¹¹³ and that these three circuits apply a subjective deliberate indifference test to medical care claims, it seems probable that they will eventually apply the same test to suicide claims.

A somewhat similar pattern emerges from the case law on failure to protect from attack: Seven circuits apply a subjective deliberate indifference test, and the law in two other circuits is less distinct. The First,¹¹⁴ Sixth,¹¹⁵ Eighth,¹¹⁶ Tenth,¹¹⁷ and Eleventh¹¹⁸ Circuits have applied the Eighth Amendment deliberate indifference test to claims that jail officials failed to protect pretrial detainees from attacks by other inmates. Two older decisions from the Seventh Circuit could be read to apply an objective test,¹¹⁹ but those decisions have since been eclipsed by a long line of cases applying the subjective Eighth Amendment test.¹²⁰ An early case from the Third Circuit applied the *Wolfish* test to a claim that an inmate attack resulted from, inter

(opinion of Becker, J.) (citing *Colburn*); *id.* at 473-74 (Garth, J., concurring in the judgment) (advocating a “knowledge and ‘deliberate indifference’” standard).

¹¹¹ See *Hill v. Nicodemus*, 979 F.2d 987, 990-91 (4th Cir. 1992) (approving a jury instruction that “adopted the standard of ‘deliberate indifference’ with respect to the level of care due a pretrial detainee under the due process clause of the fourteenth amendment”).

¹¹² See *Farmer v. Brennan*, 511 U.S. 825, 837-38 (1994) (“[T]he official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.”).

¹¹³ See, e.g., *Barrie v. Grand County*, 119 F.3d 862, 866 (10th Cir. 1997).

¹¹⁴ See, e.g., *Burrell v. Hampshire County*, 307 F.3d 1, 7 (1st Cir. 2002).

¹¹⁵ See, e.g., *Leary v. Livingston County*, 528 F.3d 438, 442 (6th Cir. 2008).

¹¹⁶ See, e.g., *Schoelch v. Mitchell*, 625 F.3d 1041, 1046 (8th Cir. 2010).

¹¹⁷ See, e.g., *Lopez v. LeMaster*, 172 F.3d 756, 759 & n.2 (10th Cir. 1999).

¹¹⁸ See, e.g., *Purcell ex rel. Estate of Morgan v. Toombs County*, 400 F.3d 1313, 1318 n.13, 1319-20 (11th Cir. 2005).

¹¹⁹ In *Matzker v. Herr*, the court held that a pretrial detainee could recover if a defendant “[k]nowingly expos[ed] an inmate to violence or act[ed] in reckless disregard of his right to be free from violent attacks or sexual assaults by fellow inmates.” 748 F.2d 1142, 1149 (7th Cir. 1984). But the *Matzker* court indicated that it viewed this test as the Eighth Amendment standard. *Id.* A few years later, citing *Matzker*, the court stated that a pretrial detainee must show that the defendant “acted deliberately or with callous indifference, evidenced by an actual intent to violate [the detainee’s] rights or reckless disregard for his rights.” *Anderson v. Gutschenritter*, 836 F.2d 346, 349 (7th Cir. 1988). In each of these cases, the court’s language indicated that a plaintiff could succeed by showing actual knowledge of (and disregard for) the relevant risk; but the court’s language also offered the alternative possibility of showing merely “reckless disregard.”

¹²⁰ See, e.g., *Shields v. Dart*, 664 F.3d 178, 181 (7th Cir. 2011) (per curiam) (holding that the plaintiff must “show that the defendants knew of a substantial risk of serious injury to him and failed to protect him from that danger”).

alia, jail overcrowding;¹²¹ but without citing that case, the Third Circuit more recently applied the subjective deliberate indifference test to a pretrial detainee's failure-to-protect claims.¹²² The Second and Ninth Circuits have older case law applying deliberate indifference tests that were not necessarily subjective.¹²³

3. Force

The Supreme Court has adopted a very deferential test for convicted prisoners' claims that a guard used excessive force. In *Whitley v. Albers*, the Court held that the use of force against a convicted prisoner during a prison disturbance violates the Eighth Amendment only if it was "applied . . . maliciously and sadistically for the very purpose of causing harm,"¹²⁴ and in *Hudson v. McMillian*, the Court extended that test to all Eighth Amendment excessive force claims, whether or not they arose in the context of a disturbance.¹²⁵ Although eight circuits have applied the *Whitley* test to excessive force claims by pretrial detainees, not all of them have been willing to do so outside the context of a disturbance. Two other circuits appear to apply a reasonableness test, and one circuit employs a distinctive multi-factor test.

The Second,¹²⁶ Fourth,¹²⁷ and Eleventh¹²⁸ Circuits (and perhaps the D.C. Circuit¹²⁹) have applied the Eighth Amendment test—as set forth in *Whitley*

¹²¹ *Ryan v. Burlington County*, 889 F.2d 1286, 1292 (3d Cir. 1989).

¹²² *See Bistrrian v. Levi*, 696 F.3d 352, 367 (3d Cir. 2012). *Bistrrian* may not definitively settle the question of the applicable test because that case involved damages claims against defendants who asserted qualified immunity, and the plaintiff thus could only rely on a standard that was "clearly established" at the time of the relevant events. *Id.* at 366.

¹²³ An early case from the Second Circuit applied a deliberate indifference test without explicitly specifying whether it was objective or subjective. *See Bass v. Jackson*, 790 F.2d 260, 262-63 (2d Cir. 1986). And the Ninth Circuit held a deliberate indifference test applicable to pretrial detainee claims but employed language suggesting that the test might be objective rather than subjective. *See Redman v. County of San Diego*, 942 F.2d 1435, 1443 (9th Cir. 1991) (en banc) (noting that Eighth Amendment claims require "an inquiry into the state of mind of the official"; declining to decide whether this requirement also applies to claims by pretrial detainees; and finding the defendants had actual knowledge); *id.* (stating that officials who "know or should know of the particular vulnerability" have a Fourteenth Amendment duty "not to act with reckless indifference to that vulnerability") (quoting *Colburn v. Upper Darby Township*, 838 F.2d 663, 669 (3d Cir. 1988)).

¹²⁴ 475 U.S. 312, 320-21 (1986) (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973)).

¹²⁵ *See* 503 U.S. 1, 6-7 (1992).

¹²⁶ *See United States v. Walsh*, 194 F.3d 37, 48 (2d Cir. 1999); *id.* at 53 (holding that, while the trial court's failure to use the terms "due process" and "shocks the conscience" in the jury charge "was technically error," there was no prejudice because "[t]he factors used to evaluate the 'shocks the conscience' and the 'unnecessary and wanton' standards in the context of excessive force claims in the prison context are identical"). In another case, the Second Circuit used general

and *Hudson*—to pretrial detainees' excessive force claims, apparently without regard to the context in which the claims arose. The Third,¹³⁰ Sixth,¹³¹ and Seventh¹³² Circuits (and perhaps the Fifth Circuit¹³³) have

language, reminiscent of *Wolfish*, in referring to “force amounting to punishment,” *United States v. Coté*, 544 F.3d 88, 98 (2d Cir. 2008), but then proceeded to specify the same factors as *Whitley*: “the need for the application of force, the relationship between the need and amount of force that was used, the extent of the injury inflicted, and whether the force was applied in a good-faith effort to restore discipline or sadistically for the purpose of causing harm,” *id.* at 99 (quoting *Walsh*, 194 F.3d at 53); *see also* *United States v. Cobb*, 905 F.2d 784, 788-89 (4th Cir. 1990) (taking a similar approach).

¹²⁷ *See Carr v. Deeds*, 453 F.3d 593, 605-06 (4th Cir. 2006) (applying the *Whitley* test). The Fourth Circuit has an early precedent that directed that “[o]nly reasonable force under the circumstances may . . . be employed” (at least when no disturbance is ongoing). *Ridley v. Leavitt*, 631 F.2d 358, 360 (4th Cir. 1980) (per curiam). But although the Fourth Circuit has never explicitly overruled that case, its more recent cases apply the *Whitley* test without apparent regard to whether a disturbance was ongoing during the relevant events.

¹²⁸ *See Fennell v. Gilstrap*, 559 F.3d 1212, 1217 (11th Cir. 2009) (per curiam) (quoting *Hudson*).

¹²⁹ In an early excessive force case, *Norris v. District of Columbia*, 737 F.2d 1148, 1150 (D.C. Cir. 1984), the D.C. Circuit cited with approval the test from *Johnson*, 481 F.2d 1028. The *Johnson* test served as the basis for the test set out in *Whitley*. *See Whitley*, 475 U.S. at 320-21.

¹³⁰ *See Fuentes v. Wagner*, 206 F.3d 335, 347-48 (3d Cir. 2000).

¹³¹ For the Sixth Circuit's test, *see United States v. Budd*, in which the court explained that the “maliciously and sadistically for the very purpose of causing harm” . . . formulation applies only in emergency-type situations such as a prison riot or a high-speed police chase.” 496 F.3d 517, 530 n.9 (6th Cir. 2007). On the other hand, the Sixth Circuit has also observed that the due process test for excessive force, which it conceptualizes under the “shock[] the conscience” standard, is “more difficult . . . for the plaintiff to meet” than the objective Fourth Amendment test for excessive force. *Harris v. City of Circleville*, 583 F.3d 356, 365-66 (6th Cir. 2009).

¹³² In *Rice ex rel. Rice v. Correctional Medical Services*, the court approved the use of the Eighth Amendment test for force “employed in the course of resolving a disturbance.” 675 F.3d 650, 668 (7th Cir. 2012). Likewise, in *Wilson v. Williams*, the court assumed that the *Whitley* test could be appropriate for detainees' force claims arising in the context of a disturbance. 83 F.3d 870, 876-77 (7th Cir. 1996). For other excessive force claims, the court noted that the due process standard would usually mirror the Fourth Amendment reasonableness standard, but that “because the due process clause does not proscribe negligence or even gross negligence, ‘the search for “punishment” cannot be wholly objective.’” *Id.* at 875 (citation omitted) (quoting *Titran v. Ackman*, 893 F.2d 145, 147 (7th Cir. 1990)).

One Seventh Circuit case asserted that pretrial detainees' excessive force claims are subject to the same test as convicted prisoners' claims without limiting that statement to force used during a disturbance. *See Proffitt v. Ridgway*, 279 F.3d 503, 506 (7th Cir. 2002) (asserting that deliberate indifference “is the applicable standard in a section 1983 suit charging excessive force against a pretrial detainee, as against other prisoners”). However, *Proffitt*'s facts actually did involve a violent struggle initiated by the detainee, and in any event, the *Proffitt* court was operating under the erroneous assumption that the scienter element for Eighth Amendment excessive force claims is deliberate indifference. *See id.*

¹³³ In *Valencia v. Wiggins*, the court focused on the use of force in connection with a disturbance. *See* 981 F.2d 1440, 1446 (5th Cir. 1993). But subsequent Fifth Circuit cases citing *Valencia* for the proposition that the *Whitley-Hudson* standard governs pretrial detainee claims do not always seem to limit that proposition to cases involving an ongoing disturbance. *See, e.g.*, *Jackson v.*

approved the use of the Eighth Amendment test for force with an apparent limitation to claims that arise during a disturbance, presumably on the theory that guards responding under exigent circumstances cannot be expected to distinguish among different types of inmates.¹³⁴

Three other circuits apply tests that include objective standards. The Eighth Circuit has an older case that sets intent to punish as the touchstone but provides that the unreasonableness of the force employed can be evidence of punitive intent.¹³⁵ A more recent Eighth Circuit case, moreover, states in dictum that the test is “an objective reasonableness standard.”¹³⁶ The Ninth Circuit applies the Fourth Amendment objective reasonableness test to force used against pretrial detainees, though it is unclear if these precedents would apply after the initial period of detention.¹³⁷ The Tenth Circuit appears to employ a multi-factor test that includes both objective and subjective factors.¹³⁸

III. GUIDEPOSTS FROM RELATED AREAS OF SUPREME COURT CASE LAW

Part II established that the law concerning the conditions of pretrial confinement needs clarification. In particular, to what extent should that law reflect Fourth Amendment principles, on the one hand, or Eighth Amendment principles, on the other? In Part III, I attempt to shed light on these questions by examining related areas of Supreme Court case law. In Section III.A, I note the Court’s repeated emphasis on the fact of conviction as a justification for its choice of Eighth Amendment standards. Section III.B

Culbertson, 984 F.2d 699, 700 (5th Cir. 1993) (per curiam) (discussing an action taken in response to a fire alarm but after “[t]he fire had already gone out”).

¹³⁴ The Third Circuit has explicitly reasoned that “prison guards [cannot] be expected to draw such precise distinctions between classes of inmates when those guards are trying to stop a prison disturbance.” *Fuentes*, 206 F.3d at 347-48.

¹³⁵ See *Putman v. Gerloff*, 639 F.2d 415, 421 (8th Cir. 1981).

¹³⁶ *Andrews v. Neer*, 253 F.3d 1052, 1060 (8th Cir. 2001).

¹³⁷ See *Lolli v. County of Orange*, 351 F.3d 410, 415 (9th Cir. 2003); *Gibson v. County of Washoe*, 290 F.3d 1175, 1197-98 (9th Cir. 2002). Both *Lolli* and *Gibson* relied for this proposition on *Pierce v. Multnomah County*, 76 F.3d 1032 (9th Cir. 1996), which had limited its holding to “the treatment of an arrestee detained without a warrant up until the time such arrestee is released or found to be legally in custody based upon probable cause for arrest,” *id.* at 1043. But *Lolli* extended *Pierce*’s rule beyond pre-judicial detention, because the plaintiff in *Lolli* had been arrested on “an outstanding warrant.” *Lolli*, 351 F.3d at 412.

¹³⁸ See *Porro v. Barnes*, 624 F.3d 1322, 1326 (10th Cir. 2010) (stating that the use of force against “an arraigned pretrial detainee” should be assessed by “focus[ing] on three factors: ‘(1) the relationship between the amount of force used and the need presented; (2) the extent of the injury inflicted; and (3) the motives of the state actor’” (quoting *Roska v. Peterson*, 328 F.3d 1230, 1243 (10th Cir. 2003))).

recounts the significant latitude the Court has accorded police to make warrantless arrests, and describes the concerns expressed by various Justices about the risks of that latitude. In Section III.C, I discuss opinions that might be read to support the application of Fourth Amendment standards to the entire period from arrest until trial. And Section III.D documents the Court's consistent, cross-cutting emphasis on the need for deference to official judgments in situations that pose security concerns.

A. *Constitutional Law for the Guilty*

Deeply embedded in the Court's Eighth Amendment jurisprudence is the notion of adjudicated guilt as a justification for some level of harshness in prison conditions. This notion is sometimes framed as a matter of "just deserts," sometimes as an assumption that society is unwilling to pamper criminals, and sometimes as a reflection of the fact that the Eighth Amendment limits punishment only if it is "cruel and unusual." To the extent that such notions have shaped the Court's Eighth Amendment conditions-of-confinement decisions, the resulting jurisprudence may be inappropriate for—or at least require adjustment before it is applied to—claims by pretrial detainees.

However, a few signposts in the Court's decisions might be read to point in a different direction: First, the Court has rejected the notion that the presumption of innocence should control the conditions of pretrial detention. Second, it has sometimes focused its textual analysis of the Cruel and Unusual Punishments Clause on the word "punishment" rather than the word "cruel." In this Section, I will examine both of these strands in the case law.

The just-deserts and no-pampering rationales often coincide. Soon after the Court's decision in *Wolfish*, Justice Rehnquist, sitting as a Circuit Justice in *Atiyeh v. Capps*, stayed an injunction concerning prison conditions for convicted prisoners.¹³⁹ Despite the fact that the *Wolfish* Court had justified the double celling in that case partly on the basis of its limited duration, Justice Rehnquist roundly rejected the district court's attempt to distinguish *Wolfish* from the situation in *Atiyeh* on the ground that the convicted prisoners had to endure their conditions of confinement for a longer period of time. As he noted, the distinction between convicted prisoners and pretrial detainees "cuts both ways."¹⁴⁰ From the inmate's perspective, serving a long sentence may make onerous conditions that would be bearable for a

¹³⁹ 449 U.S. 1312, 1318 (Rehnquist, Circuit Justice 1981).

¹⁴⁰ *Id.* at 1315.

short period of pretrial detention. But from “society’s perspective,” Justice Rehnquist argued, the fact of conviction justifies harsh conditions:

[T]he legislature has spoken through its penal statutes and its conferring of authority on the parole authorities to seriously penalize those duly convicted of crimes which it has defined as such. In short, nobody promised them a rose garden; and I know of nothing in the Eighth Amendment which requires that they be housed in a manner most pleasing to them, or considered even by most knowledgeable penal authorities to be likely to avoid confrontations, psychological depression, and the like. They have been convicted of crime, and there is nothing in the Constitution which forbids their being penalized as a result of that conviction.¹⁴¹

Though Justice Rehnquist wrote only for himself in *Atiyeh*, he was likely aware that his views were shared by a number of his brethren. Later that Term, in *Rhodes v. Chapman*, the Court held that double celling convicted prisoners did not violate the Eighth Amendment.¹⁴² Under the circumstances of the case, the Court found “no evidence that double celling . . . either inflicts unnecessary or wanton pain or is grossly disproportionate to the severity of crimes warranting imprisonment.”¹⁴³ After analyzing its decisions in two prior Eighth Amendment cases—*Estelle v. Gamble*¹⁴⁴ and *Hutto v. Finney*¹⁴⁵—the *Rhodes* Court explained: “[C]onditions that cannot be said to be cruel and unusual under contemporary standards are not unconstitutional. To the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society.”¹⁴⁶

The *Rhodes* Court’s notion of harsh conditions as a legitimate penalty reverberated through the Court’s ensuing Eighth Amendment decisions. When the Court first articulated the Eighth Amendment standard for excessive force in *Whitley v. Albers*,¹⁴⁷ it quoted *Rhodes*’s “part of the penalty” language concerning conditions of confinement,¹⁴⁸ and it stressed that the claims in *Whitley* concerned “prison inmates rather than pretrial detainees or

¹⁴¹ *Id.* at 1315-16.

¹⁴² 452 U.S. 337, 347-52 (1981).

¹⁴³ *Id.* at 348.

¹⁴⁴ 429 U.S. 97 (1976).

¹⁴⁵ 437 U.S. 678 (1978).

¹⁴⁶ *Rhodes*, 452 U.S. at 347.

¹⁴⁷ 475 U.S. 312 (1986). *Whitley* involved the use of force during a prison riot, *id.* at 314-18; the Court later extended *Whitley* to cover all excessive force claims by convicted prisoners, *Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992).

¹⁴⁸ *Whitley*, 475 U.S. at 319.

persons enjoying unrestricted liberty.”¹⁴⁹ In *Hudson v. McMillian*, the Court discussed the “objective component” of the Eighth Amendment conditions-of-confinement test—i.e., how grave the injury or risk of injury must be in order to ground an Eighth Amendment claim.¹⁵⁰ The Court characterized prior cases as resting in part on notions concerning societal expectations about the treatment of those who have committed crimes:

The objective component of an Eighth Amendment claim is therefore contextual and responsive to “contemporary standards of decency.” *Estelle v. Gamble*, 429 U.S. 97, 103 (1976)]. For instance, extreme deprivations are required to make out a conditions-of-confinement claim. Because routine discomfort is “part of the penalty that criminal offenders pay for their offenses against society,” *Rhodes*, [452 U.S. at] 347, “only those deprivations denying ‘the minimal civilized measure of life’s necessities’ are sufficiently grave to form the basis of an Eighth Amendment violation.” *Wilson v. Seiter*, 501 U.S. 294, 298 (1991) (quoting *Rhodes*, [452 U.S.] at 347). A similar analysis applies to medical needs. Because society does not expect that prisoners will have unqualified access to health care, deliberate indifference to medical needs amounts to an Eighth Amendment violation only if those needs are “serious.” See *Estelle v. Gamble*, 429 U.S., at 103–104.¹⁵¹

The Court’s treatment of substantive due process claims by “involuntarily committed mentally retarded persons”¹⁵² is likewise founded on the assumption that those convicted of crimes have less of a claim on government solicitude.¹⁵³ In *Youngberg v. Romeo*, the Court held that it was error to employ a “deliberate indifference” instruction (drawn from the Eighth Amendment case law) to the claims of a plaintiff who had been committed to a state institution due to his intellectual disability.¹⁵⁴ The Court explained: “Persons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish.”¹⁵⁵

¹⁴⁹ *Id.* at 327. The Court explained that the Due Process Clause provided the convicted-prisoner plaintiffs no greater protection against uses of force than the Eighth Amendment, but emphasized that this ruling did not apply “outside the prison security context.” *Id.*

¹⁵⁰ See 503 U.S. at 8–9.

¹⁵¹ *Id.*

¹⁵² *Youngberg v. Romeo*, 457 U.S. 307, 314 (1982).

¹⁵³ See Gorlin, *supra* note 20, at 438 (arguing that the Court’s reasoning in *Youngberg* “implies that detainees, like the involuntarily committed, are at least entitled to more considerate treatment and conditions than convicted prisoners”).

¹⁵⁴ *Youngberg*, 457 U.S. at 309, 312 & n.11, 325.

¹⁵⁵ *Id.* at 321–22 (citing *Estelle v. Gamble*, 429 U.S. 97, 104 (1976), with a “*cf.*”).

The Court has also recognized that the language of the Eighth Amendment distinguishes claims by convicted prisoners, though the Court's linguistic focus has shifted over time from the word "cruel" to the word "punishment." In *Graham v. Connor*, the Court held that it was error to apply the excessive force test that it had adopted for convicted prisoners' claims to a case concerning the use of force during the course of an arrest.¹⁵⁶ The applicable test, the Court ruled, was one of objective reasonableness under the Fourth Amendment. The Court justified the difference in standards based on the significance of a criminal conviction and the words "unreasonable" (in the Fourth Amendment) and "cruel" and "punishment" (in the Eighth Amendment). It explained, "Differing standards under the Fourth and Eighth Amendments are hardly surprising; the terms 'cruel' and 'punishments' clearly suggest some inquiry into subjective state of mind, whereas the term 'unreasonable' does not."¹⁵⁷ (The Court also noted that "the less protective Eighth Amendment standard applies 'only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions.'")¹⁵⁸

By contrast, when the Court extended *Estelle v. Gamble's* "deliberate indifference" test to all Eighth Amendment conditions-of-confinement claims in *Wilson v. Seiter*,¹⁵⁹ it relied on the word "punishment," rather than on the word "cruel," to justify the imposition of a state-of-mind requirement.¹⁶⁰ The "intent requirement," it explained, arose from "the Eighth Amendment itself, which bans only cruel and unusual *punishment*. If the pain inflicted is not formally meted out *as punishment* by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify."¹⁶¹

The Court took this line of reasoning a step further in *Farmer v. Brennan*, in which it held that the Eighth Amendment deliberate indifference test is subjective rather than objective:

[A] prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw

¹⁵⁶ 490 U.S. 386, 397-98 & n.11 (1989).

¹⁵⁷ *Id.* at 398.

¹⁵⁸ *Id.* (quoting *Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977)).

¹⁵⁹ 501 U.S. 294, 303 (1991).

¹⁶⁰ *Id.* at 299-300.

¹⁶¹ *Id.* at 300.

the inference. This approach comports best with the text of the Amendment as our cases have interpreted it. The Eighth Amendment does not outlaw cruel and unusual “conditions”; it outlaws cruel and unusual “punishments.”¹⁶²

The Court’s willingness to focus on guilt when determining the Eighth Amendment standards for claims by convicted prisoners has not been matched by an equal focus on presumed innocence when determining the constitutional standards for the treatment of pretrial detainees. The presumption of innocence does appear as a theme in the cases concerning treatment of pretrial detainees, but that theme surfaces in dissents rather than in majority opinions. *Houchins v. KQED, Inc.*¹⁶³ provides an early example. In that case, a plurality of the Court concluded that the media had “no special right of access” to a county jail.¹⁶⁴ The three dissenting Justices relied in part on the status of the jail inmates to underscore the importance of press access:

Some inmates . . . are pretrial detainees. Though confined pending trial, they have not been convicted of an offense against society and are entitled to the presumption of innocence. Certain penological objectives, *i. e.*, punishment, deterrence, and rehabilitation, which are legitimate in regard to convicted prisoners, are inapplicable to pretrial detainees. Society has a special interest in ensuring that unconvicted citizens are treated in accord with their status.¹⁶⁵

Likewise, three dissenting Justices in *Wolfish* stressed the significance of the presumption of innocence. Justice Marshall’s dissent characterized the majority’s approach as “unsupportable, given that all of these detainees are presumptively innocent and many are confined solely because they cannot afford bail.”¹⁶⁶ Justice Stevens, joined by Justice Brennan, argued that the Court had previously “relied upon this presumption [of innocence] as a justification for shielding a person awaiting trial from potentially oppressive governmental actions.”¹⁶⁷ The *Wolfish* majority, however, viewed the presumption of innocence as a principle having “no application to a determination of the

¹⁶² 511 U.S. 825, 837 (1994).

¹⁶³ 438 U.S. 1 (1978).

¹⁶⁴ *Id.* at 16 (plurality opinion).

¹⁶⁵ *Id.* at 37-38 (Stevens, J., dissenting) (footnote omitted).

¹⁶⁶ *Bell v. Wolfish*, 441 U.S. 520, 563 (1979) (Marshall, J., dissenting).

¹⁶⁷ *Id.* at 582 n.11 (Stevens, J., dissenting).

rights of a pretrial detainee during confinement before his trial has even begun.”¹⁶⁸

But if the Court was unwilling to give weight in *Wolfish* to the presumption of innocence when selecting a standard to govern the conditions of pretrial detention, it has more recently recognized the significance of that presumption when adopting protections to ensure that the fact of detention itself is subject to judicial supervision. In *County of Riverside v. McLaughlin*, when the Court set a forty-eight-hour cutoff after which detention following a warrantless arrest is presumptively unreasonable,¹⁶⁹ it observed that there is consensus concerning the need “to minimize the time a presumptively innocent individual spends in jail.”¹⁷⁰ Justice Scalia, in dissent, advocated a more rigorous approach in order to protect the innocent:

One hears the complaint, nowadays, that the Fourth Amendment has become constitutional law for the guilty; that it benefits the career criminal (through the exclusionary rule) often and directly, but the ordinary citizen remotely if at all. By failing to protect the innocent arrestee, today’s opinion reinforces that view. The common-law rule of *prompt* hearing had as its primary beneficiaries the innocent—not those whose fully justified convictions must be overturned to scold the police; nor those who avoid conviction because the evidence, while convincing, does not establish guilt beyond a reasonable doubt; but those so blameless that there was not even good reason to arrest them.¹⁷¹

Though *McLaughlin* had nothing to do with the Eighth Amendment, Justice Scalia’s dissent in that case suggests a way to understand the Court’s Eighth Amendment conditions-of-confinement jurisprudence. The recurrent emphasis, in the cases discussed above, on the fact of criminal conviction suggests that this Eighth Amendment jurisprudence was viewed by those who crafted it as a form of “constitutional law for the guilty”—a perspective that may have made the Court more grudging in its provision of constitutional protections to the claimants in those cases.

The *McLaughlin* discussion also highlights another relevant theme—namely, the Court’s expansion of police discretion to conduct warrantless arrests and its recognition of the concomitant need to mitigate the potential risks of that discretion. I turn to those questions in Section III.B.

¹⁶⁸ *Id.* at 533 (majority opinion).

¹⁶⁹ 500 U.S. 44, 56-57 (1991).

¹⁷⁰ *Id.* at 58.

¹⁷¹ *Id.* at 71 (Scalia, J., dissenting).

B. *Expanding and Confining Police Discretion*

Since the time that it decided *Wolfish*, the Court has explicitly empowered police to make warrantless arrests under a wide range of circumstances—a fact that renders all the more pressing the need for a judicial determination of probable cause. When it made its most recent pronouncement on the latter topic in *County of Riverside v. McLaughlin*, the Court was closely divided, with four dissenting Justices arguing for a test that would give less latitude to the government.¹⁷²

In *Gerstein v. Pugh*, the Court held that “the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest.”¹⁷³ The *Gerstein* Court did not mandate a “full panoply of adversary safeguards” for this probable cause ruling,¹⁷⁴ but held that the government “must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest.”¹⁷⁵ As this formulation suggests, no postarrest probable cause determination is required if the arrest is made pursuant to a warrant¹⁷⁶ or if the detainee is arrested after having been indicted.¹⁷⁷

Gerstein left open the meaning of “prompt.” As noted in Section III.A, the Court ultimately addressed that question in *County of Riverside v. McLaughlin*. Acknowledging the need for a numerical test that would “provide some degree of certainty” for law enforcement agencies, the Court stated that “a jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein*.”¹⁷⁸ Yet the Court—stressing both the importance of accommodating the needs of varying state justice systems and the goal of protecting arrestees from unwarranted detention—was unwilling to set the forty-eight-hour limit as a bright-line rule. Rather, a judicial determination of probable cause within forty-eight hours after arrest

¹⁷² See *id.* at 56-58 (majority opinion) (Court’s holding); *id.* at 59 (Marshall, J., joined by Blackmun & Stevens, JJ., dissenting); *id.* at 59-71 (Scalia, J., dissenting).

¹⁷³ 420 U.S. 103, 114 (1975).

¹⁷⁴ *Id.* at 119-20.

¹⁷⁵ *Id.* at 125 (footnote omitted).

¹⁷⁶ See *id.* at 116 n.18 (“A person arrested under a warrant would have received a prior judicial determination of probable cause.”).

¹⁷⁷ See *id.* at 117 n.19 (“[T]he Court has held that an indictment, ‘fair upon its face,’ and returned by a ‘properly constituted grand jury,’ conclusively determines the existence of probable cause and requires issuance of an arrest warrant without further inquiry.” (quoting *Ex parte United States*, 287 U.S. 241, 250 (1932))).

¹⁷⁸ *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991).

immunizes the government from “systemic challenges” but leaves open the possibility of individual challenges in which the arrestee has the burden of showing that a delay shorter than forty-eight hours was unreasonable.¹⁷⁹

To the four dissenting Justices in *McLaughlin*, the majority’s forty-eight-hour presumption was too permissive. Justices Marshall, Blackmun, and Stevens would have held that “a probable-cause hearing is sufficiently ‘prompt’ under *Gerstein* only when provided immediately upon completion of the ‘administrative steps incident to arrest.’”¹⁸⁰ Justice Scalia would have held it presumptively unreasonable “to delay a determination of probable cause for the arrest either (1) for reasons unrelated to arrangement of the probable-cause determination or completion of the steps incident to arrest, or (2) beyond 24 hours after the arrest.”¹⁸¹ As noted above, Justice Scalia’s dissent emphasized the importance of protecting the innocent. Under the majority’s approach, he warned, “a law-abiding citizen wrongfully arrested may be compelled to await the grace of a Dickensian bureaucratic machine, as it churns its cycle for up to two days—never once given the opportunity to show a judge that there is absolutely no reason to hold him.”¹⁸²

Meanwhile, the Court has declined to impose Fourth Amendment limits on the sorts of offenses for which police can make arrests. In *Atwater v. City of Lago Vista*, the Court—once again, closely divided—held that “[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.”¹⁸³ The majority conceded that Ms. Atwater’s arrest (in front of her frightened toddlers) for seatbelt violations was a “pointless indignity,” but stressed the need for a “readily administrable rule[]”¹⁸⁴ and argued that *McLaughlin* provided sufficient protection for the wrongly arrested, since “anyone arrested for a crime without formal process, whether for felony or misdemeanor, is entitled to a magistrate’s review of probable cause within 48 hours.”¹⁸⁵ To the dissenting Justices, this ruling gave “officers constitutional carte blanche to effect an arrest whenever there is probable cause to believe a fine-only misdemeanor has been committed,”¹⁸⁶

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 59 (Marshall, J., dissenting) (quoting *Gerstein*, 420 U.S. at 114).

¹⁸¹ *Id.* at 70 (Scalia, J., dissenting).

¹⁸² *Id.* at 71.

¹⁸³ 532 U.S. 318, 354 (2001); see also *Virginia v. Moore*, 553 U.S. 164, 176 (2008) (holding that “warrantless arrests for crimes committed in the presence of an arresting officer are reasonable under the Constitution,” even if the offense is one for which the relevant state’s law does not authorize arrest).

¹⁸⁴ *Atwater*, 532 U.S. at 347.

¹⁸⁵ *Id.* at 352.

¹⁸⁶ *Id.* at 365-66 (O’Connor, J., dissenting).

thereby opening up “grave potential for abuse.”¹⁸⁷ The conditions of confinement during the period prior to the probable cause determination deepened the dissenters’ concerns: “Because people arrested for all types of violent and nonviolent offenses may be housed together awaiting such review, this detention period is potentially dangerous.”¹⁸⁸

In Section V.A, I propose that these aspects of the law of arrest and detention weigh in favor of Fourth Amendment scrutiny of the treatment of arrestees prior to a judicial determination of probable cause. A Fourth Amendment objective reasonableness standard for conditions of arrestees’ confinement, I will argue, accommodates the government’s law enforcement interests while protecting the interests of arrestees. But how far into the period of pretrial detention should this Fourth Amendment standard continue to govern? As I discuss in the next Section, the Court’s case law, while suggestive on this point, does not provide a clear answer.

C. *The Temporal Reach of the Fourth Amendment*

In *Gerstein v. Pugh*, the Court rejected the contention that due process principles should govern the requirements for a probable cause determination in connection with arrest: “The Fourth Amendment,” the Court explained, “was tailored explicitly for the criminal justice system, and its balance between individual and public interests always has been thought to define the ‘process that is due’ for seizures of person or property in criminal cases, including the detention of suspects pending trial.”¹⁸⁹ Because that balance is affected by the extent of the government’s incursion on the individual’s interests, the Court has ruled that Fourth Amendment “reasonableness depends on not only when a seizure is made, but also how it is carried out.”¹⁹⁰ Thus, in *Graham v. Connor*, the Court held that “the Fourth Amendment’s ‘objective reasonableness’ standard” applies to “a free citizen’s claim that law enforcement officials used excessive force in the course of making an arrest, investigatory stop, or other ‘seizure’ of his person.”¹⁹¹

The *Graham* Court framed its analysis by emphasizing the need to tailor the excessive force standard to the constitutional provision that was in play. A few years earlier, in *Whitley v. Albers*, the Court had held that convicted prisoners’ Eighth Amendment claims concerning guards’ use of force during

¹⁸⁷ *Id.* at 372. For a thoughtful discussion of this potential for abuse, see Simcock, *supra* note 21, at 626-30.

¹⁸⁸ *Atwater*, 532 U.S. at 364 (O’Connor, J., dissenting).

¹⁸⁹ 420 U.S. 103, 125 n.27 (1975) (citation omitted).

¹⁹⁰ *Tennessee v. Garner*, 471 U.S. 1, 8 (1985).

¹⁹¹ 490 U.S. 386, 388 (1989).

a prison riot must fail unless the force in question was used “maliciously and sadistically for the very purpose of causing harm”—a standard that the Court drew from a lower court decision (*Johnson v. Glick*) addressing substantive due process claims by pretrial detainees.¹⁹² But, as noted above, the *Whitley* Court was careful to specify that its ruling governed only Eighth Amendment claims by convicted prisoners,¹⁹³ and in *Graham*, the Court rebuked the lower courts for “indiscriminately” extending the *Johnson v. Glick* test “to all excessive force claims lodged against law enforcement and prison officials . . . without considering whether the particular application of force might implicate a more specific constitutional right governed by a different standard.”¹⁹⁴ The *Graham* Court noted that the Eighth Amendment applies after conviction and that the Fourth Amendment governed the case before it (concerning the process of arrest), but—apart from a citation to *Bell v. Wolfish*¹⁹⁵—the Court declined to articulate further the standard or standards that govern after arrest and prior to conviction:

Our cases have not resolved the question whether the Fourth Amendment continues to provide individuals with protection against the deliberate use of excessive physical force beyond the point at which arrest ends and pretrial detention begins, and we do not attempt to answer that question today. It is clear, however, that the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment. See *Bell v. Wolfish*, 441 [U.S. at 535-39]. After conviction, the Eighth Amendment “serves as the primary source of substantive protection . . . in cases . . . where the deliberate use of force is challenged as excessive and unjustified.” *Whitley v. Albers*, 475 [U.S. at 327]. Any protection that “substantive due process” affords convicted prisoners against excessive force is, we have held, at best redundant of that provided by the Eighth Amendment. *Ibid.*¹⁹⁶

At this point, it is worth observing that the *Wolfish* Court was not asked to—and did not—consider the possibility that the pretrial detainees’ general conditions of confinement (such as overcrowding) might give rise to claims under the Fourth Amendment. The briefing to the Court mentioned the Fourth Amendment solely in connection with the *Wolfish* plaintiffs’ challenges

¹⁹² *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986) (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973)).

¹⁹³ See *supra* note 149 and accompanying text.

¹⁹⁴ *Graham*, 490 U.S. at 393.

¹⁹⁵ 441 U.S. 520 (1979).

¹⁹⁶ *Graham*, 490 U.S. at 395 n.10 (ellipses in original) (citations omitted).

to cell-search and strip-search practices,¹⁹⁷ and the Court noted that the plaintiffs' challenge to the double-bunking practice was made "only" under the Due Process Clause.¹⁹⁸ So if the Court's statement (with respect to the double-bunking claim) that it was "evaluating the constitutionality of conditions or restrictions of pretrial detention that implicate only the protection against deprivation of liberty without due process of law"¹⁹⁹ represented a ruling that pretrial detainees' conditions-of-confinement claims do not sound in the Fourth Amendment, that ruling was made without the benefit of briefing or argument. In any event, the Court's characterization of the plaintiffs in *Wolfish* made clear that it was addressing only the conditions of detention subsequent to a "judicial determination of probable cause."²⁰⁰

More recently, when a fractured Court in *Albright v. Oliver* rejected an attempt to assert a § 1983 malicious prosecution claim under a substantive due process theory,²⁰¹ the plurality explained the ruling in terms that might suggest the Fourth Amendment's broad applicability to the period of pretrial detention. Chief Justice Rehnquist, writing for the plurality, reasoned that the Court should not recognize a substantive due process claim in an area to which a more specific provision of the Bill of Rights applies.²⁰² In *Albright*, that view led the plurality to reject the plaintiff's substantive due process claim on the ground that "[t]he Framers considered the matter of pretrial deprivations of liberty and drafted the Fourth Amendment to address it."²⁰³ Although the plurality "express[ed] no view as to whether petitioner's claim would succeed under the Fourth Amendment,"²⁰⁴ Justice Ginsburg's concurrence explained her reasons for thinking that Mr. Albright should have a valid Fourth Amendment claim against the police officer who arrested him. Reasoning that, at common law, the concept of "seizure" encompassed the full period from arrest to trial, Justice Ginsburg concluded that the Fourth Amendment "seizure" of a criminal defendant

¹⁹⁷ See, e.g., Brief for Respondents at 54-63, *Wolfish*, 441 U.S. 520 (No. 77-1829), 1978 WL 207133.

¹⁹⁸ *Wolfish*, 441 U.S. at 530.

¹⁹⁹ *Id.* at 535.

²⁰⁰ *Id.* at 536 (quoting *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975)); accord *Sturgeon*, *supra* note 17, at 133.

²⁰¹ 510 U.S. 266, 268 (1994) (plurality opinion); see *id.* at 283-85 (Kennedy, J., concurring in the judgment).

²⁰² *Id.* at 273 (plurality opinion).

²⁰³ *Id.* at 274.

²⁰⁴ *Id.* at 275.

covers that same period,²⁰⁵ whether or not the defendant is detained or released pending trial: “A defendant incarcerated until trial no doubt suffers greater burdens. That difference, however, should not lead to the conclusion that a defendant released pretrial is not still ‘seized’ in the constitutionally relevant sense.”²⁰⁶ Justices Stevens and Blackmun—dissenting in *Albright* because they would have held that “the Due Process Clause of the Fourteenth Amendment constrains the power of state governments to accuse a citizen of an infamous crime”²⁰⁷—expressed agreement with Justice Ginsburg’s “explanation of why the initial seizure of petitioner continued until his discharge and why the seizure was constitutionally unreasonable.”²⁰⁸

Although some commentators have suggested that the “continuing seizure” theory articulated by Justice Ginsburg in *Albright* was undermined by the Court in *Wallace v. Kato*,²⁰⁹ such a contention misreads *Wallace*. In *Wallace*, the Court held that the plaintiff’s Fourth Amendment false imprisonment claim (arising from his warrantless arrest on murder charges) accrued “when he appeared before the examining magistrate and was bound over for trial.”²¹⁰ The Court reached this conclusion by applying the common law principle that the limitations period for bringing a false imprisonment claim begins to run “when the alleged false imprisonment ends”²¹¹:

Reflective of the fact that false imprisonment consists of detention without legal process, a false imprisonment ends once the victim becomes held *pursuant to such process*—when, for example, he is bound over by a magistrate or arraigned on charges. Thereafter, unlawful detention forms part of the damages for the “entirely distinct” tort of malicious prosecution, which remedies detention accompanied, not by absence of legal process, but by *wrongful institution* of legal process.²¹²

The *Wallace* Court made clear that it was deciding when the constitutional tort of false imprisonment ends, and not when the protections of the

²⁰⁵ *Id.* at 278 (Ginsburg, J., concurring); see also Glowacki, *supra* note 17, at 1163–64 (discussing Justice Ginsburg’s concurrence); Haber, *supra* note 17, at 963 (same).

²⁰⁶ *Albright*, 510 U.S. at 279 (Ginsburg, J., concurring).

²⁰⁷ *Id.* at 316 (Stevens, J., dissenting).

²⁰⁸ *Id.* at 307.

²⁰⁹ 549 U.S. 384 (2007). For the suggestion that *Wallace* “may well be the death knell for the ‘continuing seizure’ theory,” see Lawrence Rosenthal, *Second Thoughts on Damages for Wrongful Convictions*, 85 CHI.-KENT L. REV. 127, 141 n.56 (2010).

²¹⁰ 549 U.S. at 391.

²¹¹ *Id.* at 389 (quoting 2 H.G. WOOD, A TREATISE ON THE LIMITATION OF ACTIONS AT LAW AND IN EQUITY § 187d(4), at 878 (Dewitt C. Moore ed., rev. 4th ed. 1916)).

²¹² *Id.* at 389–90 (citations omitted) (quoting PROSSER AND KEETON ON THE LAW OF TORTS § 119, at 885–86 (W. Page Keeton et al. eds., 5th ed. 1984)).

Fourth Amendment end. Citing the plurality opinion in *Albright*, the *Wallace* Court noted, “We have never explored the contours of a Fourth Amendment malicious-prosecution suit under § 1983, and we do not do so here. Assuming without deciding that such a claim is cognizable under § 1983, petitioner has not made one.”²¹³

Based on existing case law, it is not possible to predict whether the Court would adopt Justice Ginsburg’s continuing seizure theory and apply it to pretrial conditions-of-confinement claims. Although six Justices in *Albright* wrote or joined opinions that could be taken to support the notion that the Fourth Amendment applies broadly to pretrial detention,²¹⁴ two of the six were writing in dissent. And ruling—as the plurality did—that the Fourth Amendment supplants substantive due process claims arising from malicious prosecution is different from ruling that claims concerning the conditions of pretrial confinement can be asserted under the Fourth Amendment.

Thus, the Court’s decisions leave undefined the Fourth Amendment’s implications, if any, for the conditions of pretrial detainees’ confinement. By contrast, as I discuss in Section III.D, the Court’s decisions leave no doubt that the standards for pretrial detainees’ claims—like the standards for similar claims under both the Fourth and Eighth Amendments—will be constructed in a way that takes account of the need for deference to officials’ judgments in situations that raise security concerns.

D. *Deference and Security Concerns*

Whatever distinctions may be drawn among the constitutional standards for the treatment of arrestees, pretrial detainees, and convicted prisoners, the standards share a common concern for the need to give weight to the judgments of government officials on security issues. The Court’s frequent citations of *Wolfish* for this principle underscore the fact that the Court views this need for deference as a crosscutting issue that shapes the tests for the treatment of convicted prisoners and pretrial detainees alike. Even in the context of police pursuits and seizures, the Court’s decisions stress the need to provide room for police judgments in fast-moving situations.

The *Wolfish* Court held that jail administrators “should be accorded wide-ranging deference in the adoption and execution of policies and

²¹³ *Id.* at 390 n.2 (citations omitted).

²¹⁴ As noted in the text, Justice Ginsburg (concurring) and Justices Stevens and Blackmun (dissenting) made clear that they share this view. In addition, the plurality’s statement that the Framers designed the Fourth Amendment to address “pretrial deprivations of liberty,” *Albright v. Oliver*, 510 U.S. 266, 274 (1994) (plurality opinion), could be taken in the same vein.

practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.”²¹⁵ Though *Wolfish* involved pretrial detainees, the Court relied for this proposition on cases involving convicted prisoners; it explained that the governing considerations applied equally to both types of inmates: “[T]he realities of running a corrections institution are complex and difficult, courts are ill equipped to deal with these problems, and the management of these facilities is confided to the Executive and Legislative Branches.”²¹⁶ Further, the Court reasoned that pretrial detainees may pose at least as much of a security challenge as convicted prisoners:

There is no basis for concluding that pretrial detainees pose any lesser security risk than convicted inmates. Indeed, it may be that in certain circumstances they present a greater risk to jail security and order. In the federal system, a detainee is committed to the detention facility only because no other less drastic means can reasonably assure his presence at trial. As a result, those who are detained prior to trial may in many cases be individuals who are charged with serious crimes or who have prior records. They also may pose a greater risk of escape than convicted inmates.²¹⁷

A few years later, in *Block v. Rutherford*, the Court applied *Wolfish* in rejecting pretrial detainees’ challenges to a jail’s ban on contact visits and policy of searching cells in the occupants’ absence.²¹⁸ The Court in *Block* opened its analysis by citing “the ease with which one can obtain release on bail or personal recognizance.”²¹⁹ Based on that premise, the Court reasoned that “[t]he very fact of nonrelease pending trial thus is a significant factor bearing on the security measures that are imperative to proper administration of a detention facility.”²²⁰ Upholding the jail’s across-the-board ban on contact visits, the Court reiterated and elaborated on the *Wolfish* Court’s comments concerning the dangerousness of pretrial detainees: “Detainees—by definition persons unable to meet bail—often are awaiting trial for serious, violent offenses, and many have prior criminal convictions.”²²¹

In light of the *Wolfish* Court’s reliance on precedents involving convicted prisoners, it is unsurprising that its discussion of deference quickly migrated into the case law concerning the treatment of such prisoners. As noted in

²¹⁵ *Bell v. Wolfish*, 441 U.S. 520, 547 (1979).

²¹⁶ *Id.* at 547 n.29.

²¹⁷ *Id.* at 546 n.28 (citations omitted).

²¹⁸ *See* 468 U.S. 576, 585-91 (1984).

²¹⁹ *Id.* at 583.

²²⁰ *Id.*

²²¹ *Id.* at 586.

Section III.A, the Court in *Rhodes v. Chapman* relied heavily on the notion of just deserts for convicted criminals when it ruled that a double-celling practice did not violate the Eighth Amendment.²²² But the *Rhodes* Court also asserted the need for deference; for example, it rebuffed the plaintiffs' argument that crowding would lead to violence by citing *Wolfish* for the proposition that "a prison's internal security is peculiarly a matter normally left to the discretion of prison administrators."²²³

The *Wolfish* Court's deference principles also informed the Court's articulation, in *Turner v. Safley*, of a more general framework for addressing "prisoners' constitutional claims."²²⁴ Noting that it had left open in *Procunier v. Martinez* the question of the standard that governs such claims,²²⁵ the Court summarized four post-*Martinez* cases in which it had discussed "prisoners' rights."²²⁶ Two of those cases, involving convicted prisoners' claims, had been cited in *Wolfish*;²²⁷ the two additional cases were *Block* and *Wolfish* itself. The *Turner* Court did not mention that *Wolfish* and *Block* had involved claims by pretrial detainees rather than convicted prisoners. Rather, the Court labeled all four of these cases "'prisoners' rights' cases," and drew from them the following test: "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."²²⁸ Subsequent decisions applying *Turner* to constitutional challenges by convicted prisoners have followed suit by citing *Wolfish* as well as *Turner* in support of this deferential standard.²²⁹

As I discussed in Part I, the Court has applied *Turner* to a broad range of constitutional challenges to prison regulations, but not to Eighth Amendment claims.²³⁰ However, the Court's Eighth Amendment decisions do sometimes cite *Wolfish* to underscore the need for deference to prison administrators.

²²² See *supra* notes 142-46 and accompanying text.

²²³ *Rhodes v. Chapman*, 452 U.S. 337, 349 n.14 (1981).

²²⁴ *Turner v. Safley*, 482 U.S. 78, 85 (1987).

²²⁵ See *id.* at 85-86 (citing *Procunier v. Martinez*, 416 U.S. 396, 409 (1974), *overruled in part by Thornburgh v. Abbott*, 490 U.S. 401, 413-14 (1989)).

²²⁶ *Id.* at 86-87 (discussing *Pell v. Procunier*, 417 U.S. 817 (1974), *Jones v. N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977), *Bell v. Wolfish*, 441 U.S. 520 (1979), and *Block*, 468 U.S. 576).

²²⁷ See *Wolfish*, 441 U.S. at 547 n.29 (citing *Pell* and *Jones*).

²²⁸ *Turner*, 482 U.S. at 87, 89.

²²⁹ See, e.g., *Overton v. Bazzetta*, 539 U.S. 126, 128, 132 (2003) (applying *Turner* to First Amendment and substantive due process challenges to prison visitation restrictions, and citing *Wolfish* among the precedents supporting deference); *Thornburgh*, 490 U.S. at 410 n.9, 414-19 (analyzing prisoners' right to receive publications under *Turner*, with citations to *Wolfish*); *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349-53 (1987) (rejecting a free exercise challenge to prison regulations and citing both *Turner* and *Wolfish*).

²³⁰ See *supra* text accompanying notes 41-42.

The citations to *Wolfish* have been particularly prominent in the Court's Eighth Amendment decisions concerning excessive force.²³¹ In *Whitley v. Albers*, the Court addressed the standard that "governs a prison inmate's claim that prison officials subjected him to cruel and unusual punishment by shooting him during the course of their attempt to quell a prison riot."²³² The Court stressed that during a riot, officials must urgently balance competing concerns; they "must take into account the very real threats the unrest presents to inmates and prison officials alike, in addition to the possible harms to inmates against whom force might be used."²³³ To account for this balancing, the *Whitley* Court held that the use of force against a convicted prisoner during a prison disturbance violates the Eighth Amendment only if it is "applied . . . maliciously and sadistically for the very purpose of causing harm."²³⁴ Citing *Wolfish* and other cases, the Court explained that it gave "special weight" to the need for deference in cases involving "actual unrest and conflict."²³⁵

Although the *Whitley* Court thus justified the malicious-and-sadistic test on a theory of exigent circumstances, in *Hudson v. McMillian* the Court extended that test to cover all Eighth Amendment excessive force claims by convicted prisoners.²³⁶ Regardless of the circumstances, the Court reasoned, guards face the same task of weighing the need for force against the risk to the inmate.²³⁷ Repeating *Whitley's* quote from *Wolfish*, the *Hudson* Court explained that riot and nonriot situations share key commonalities:

Both situations may require prison officials to act quickly and decisively. Likewise, both implicate the principle that "[p]rison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security."²³⁸

²³¹ As noted above, the Court relied on *Wolfish* in *Rhodes v. Chapman*—which is unsurprising given that *Rhodes*, like *Wolfish*, concerned a challenge to the practice of double celling and that *Rhodes* was decided just over two years after *Wolfish*. More recently, the Court cited *Wolfish* to note "the need for deference" in *Brown v. Plata*, 131 S. Ct. 1910, 1928 (2011), although it then went on to uphold the massive structural relief ordered by the lower court as "necessary to remedy the violation of prisoners' constitutional rights," *id.* at 1923.

²³² 475 U.S. 312, 314 (1986).

²³³ *Id.* at 320.

²³⁴ *Id.* at 320-21 (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973)).

²³⁵ *Id.* at 321.

²³⁶ 503 U.S. 1, 6-7 (1992).

²³⁷ *Id.* at 6.

²³⁸ *Id.* (quoting *Whitley*, 475 U.S. at 321-22 (quoting *Bell v. Wolfish*, 441 U.S. 520, 547 (1979))).

Four Justices questioned this extension of *Whitley*. The use of force during a riot, Justice Stevens pointed out, differed significantly from the beating inflicted by two of the defendants upon the shackled plaintiff in *Hudson*.²³⁹ *Whitley*'s "particularly high standard of proof," Justice Stevens argued, should apply only when justified by "the exigencies present during a serious prison disturbance."²⁴⁰ Justice Blackmun noted that he had dissented in *Whitley*, and objected to its extension.²⁴¹ Justice Thomas, joined by Justice Scalia, dissented from the majority's holding that Eighth Amendment excessive force claims do not require serious injury.²⁴² That holding, he argued, improperly "eliminat[ed] the objective component" for Eighth Amendment excessive force claims (that the harm or risk of harm imposed by the defendant's action be sufficiently serious).²⁴³ Conversely, he faulted the majority for setting the subjective requirement for Eighth Amendment excessive force claims unduly high:

Many excessive force cases do not arise from guards' attempts to "keep order." . . . The use of excessive physical force is by no means invariably (in fact, perhaps not even predominantly) accompanied by a "malicious and sadistic" state of mind. I see no justification for applying the extraordinary *Whitley* standard to *all* excessive force cases, without regard to the constraints facing prison officials.²⁴⁴

In contrast to this debate over whether to extend *Whitley*'s test to all Eighth Amendment excessive force claims, all the Justices agreed, in *Graham v. Connor*, that the *Whitley* test is inappropriate for Fourth Amendment claims arising from the use of force during an arrest.²⁴⁵ The Fourth Amendment test, the *Graham* Court explained, is one of objective reasonableness under the circumstances.²⁴⁶ But even this reasonableness standard, the Court ruled, must make allowances for exigent circumstances: in applying the standard, courts must eschew "the 20/20 vision of hindsight"

²³⁹ *Id.* at 12-13 (Stevens, J., concurring in part and concurring in the judgment).

²⁴⁰ *Id.* at 12.

²⁴¹ *Id.* at 14 (Blackmun, J., concurring in the judgment).

²⁴² *Id.* at 29 (Thomas, J., dissenting).

²⁴³ *Id.* at 22-24.

²⁴⁴ *Id.* at 24.

²⁴⁵ See 490 U.S. 386, 397 (1989) ("[T]he 'malicious and sadistic' factor puts in issue the subjective motivations of the individual officers, which . . . has [sic] no bearing on whether a particular seizure is 'unreasonable' under the Fourth Amendment."); *id.* at 399 (Blackmun, J., concurring in part and concurring in the judgment) (reasoning that "the Fourth Amendment is the primary tool for analyzing claims of excessive force in the prearrest context" and concurring in a remand for application of "a reasonableness standard").

²⁴⁶ *Id.* at 397 (majority opinion).

and bear in mind “that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.”²⁴⁷

Crashes during high-speed vehicular chases provide a revealing setting in which to study the Court’s views on deference to officers’ judgments, because the same factual setting can generate the application of different constitutional tests depending on whether the police did or did not intend to stop the plaintiff’s vehicle. If the police intended to stop the vehicle, then their actions in stopping it will be considered a seizure and reviewed under *Graham*’s Fourth Amendment reasonableness test. If instead the plaintiff’s injuries resulted from police actions that did not constitute an intentional seizure of the vehicle, the police actions will be analyzed under a substantive due process “shocks the conscience” test. The latter analysis guided the Court in *County of Sacramento v. Lewis*, which arose when a police car hit and killed the passenger of a motorcycle that tipped over during a police pursuit.²⁴⁸ The Court concluded that, for this substantive due process claim, a negligence test was inappropriate.²⁴⁹ In choosing between a deliberate indifference test and an intent-to-harm test, the Court quoted *Whitley*’s language concerning the need for deference to officers’ judgments during a prison disturbance and concluded: “Just as a purpose to cause harm is needed for Eighth Amendment liability in a riot case, so it ought to be needed for due process liability in a pursuit case.”²⁵⁰ Illustrating that there is some connection between *Whitley* deference and the *Graham* Court’s caution about hindsight, the *Lewis* Court also referenced *Graham*’s language about “split-second judgments.”²⁵¹

The injuries to the plaintiff in *Scott v. Harris*, by contrast, arose from an intentional decision by the police to stop Harris’s fleeing car.²⁵² The *Scott* Court therefore applied *Graham*’s Fourth Amendment standard rather than the *Lewis* substantive due process standard.²⁵³ Although this might have seemed a logical case in which to quote *Graham*’s warning against 20/20 hindsight, the *Scott* Court did not explicitly rely upon that language. Rather, the majority opinion gives the impression that, even in hindsight, the Justices viewed the officer’s action as fully justified under the reasonableness

²⁴⁷ *Id.* at 396-97.

²⁴⁸ 523 U.S. 833, 837 (1998).

²⁴⁹ *See id.* at 849 (“[L]iability for negligently inflicted harm is categorically beneath the threshold of constitutional due process.”).

²⁵⁰ *Id.* at 852-54.

²⁵¹ *Id.* at 853 (quoting *Graham*, 490 U.S. at 397).

²⁵² *See* 550 U.S. 372, 381 (2007).

²⁵³ *Id.*

test.²⁵⁴ In any event, though the Court did not explicitly rely upon the notion of deference, the Court's conclusion that "[a] police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death"²⁵⁵ may well have been motivated in part by the need to make allowances for time-pressured judgments by the police in dangerous situations.

In sum, cases involving the use of force in a prison, during an arrest, and during a police pursuit trigger different formal tests. But in all three contexts, the Court has designed the test to warn against second-guessing difficult judgments made by law enforcement officers during exigent circumstances. More generally, the Court has repeatedly stressed the need to defer to jail and prison officials on matters that affect institutional security—a proposition for which it has cited *Wolfish* in cases brought by convicted prisoners and pretrial detainees alike. In the context of claims by convicted prisoners, the Court's emphasis on deference has extended beyond cases presenting exigent circumstances or strong security concerns, but that extension has been subject to criticism.

* * *

I noted in Part I that the Court's precedents concerning the treatment of pretrial detainees leave important questions unanswered. In Part III, I demonstrated that the Court's precedents in related areas provide some guideposts for the analysis of pretrial detainees' claims. With *Florence v. Board of Chosen Freeholders*, a class action in which the lead plaintiff, Mr. Florence, asserted claims concerning strip searches conducted (without any particularized suspicion) after his arrest and during his week-long detention in jail,²⁵⁶ it seemed possible that the Court would break its long silence concerning the standards for the treatment of pretrial detainees.

As it turned out, the *Florence* Court addressed only the question of strip searches, holding that jail officials did not violate Mr. Florence's Fourth Amendment rights²⁵⁷ by subjecting him to "a close visual inspection while undressed" (including requiring him to lift his genitals, squat, and cough) before admitting him to the general jail population where he was held

²⁵⁴ See *id.* at 384 ("[W]eighing the perhaps lesser probability of injuring or killing numerous bystanders against the perhaps larger probability of injuring or killing a single person . . . [the Court] ha[s] little difficulty in concluding it was reasonable for Scott to take the action that he did.").

²⁵⁵ *Id.* at 386.

²⁵⁶ 132 S. Ct. 1510, 1514-15 (2012).

²⁵⁷ *Id.* at 1518, 1523.

subsequent to his arrest on an (erroneously) outstanding warrant after a traffic stop.²⁵⁸ Even with respect to strip searches, the Court's decision was narrowly drawn, premised on the fact that the searches challenged by Mr. Florence occurred in connection with his placement in the general jail population.²⁵⁹

Nonetheless, *Florence* highlights a number of the themes discussed in Part III. Relying upon both *Wolfish* and *Turner*, the *Florence* Court emphasized the need for deference to officials' judgments concerning jail security.²⁶⁰ Given the fact that—as noted in Section III.D—the Court has often cited *Wolfish* when asserting the need for deference concerning security issues in cases brought by convicted prisoners and pretrial detainees alike, it is unsurprising that the *Florence* Court relied not only on *Wolfish* and *Block* but also on the line of cases concerning security measures involving convicted prisoners.²⁶¹ And in light of the fact that the *Turner* line of cases concerning constitutional challenges to prison regulations has developed on a separate track from the Eighth Amendment line of cases concerning conditions of confinement, it should not be surprising that the *Florence* Court did not address the constitutional test for pretrial detainees' conditions of confinement.

As Julian Simcock notes, the invasive nature of the suspicionless searches upheld in *Florence* underscores the concerns—canvassed in Section III.B—about the authority of the police to make warrantless arrests for even minor offenses.²⁶² Eight Justices in *Florence* acknowledged the important protective role of the judicial determination of probable cause for an arrest and asserted or suggested that differing standards of treatment should apply

²⁵⁸ See *id.* at 1513-14.

²⁵⁹ See *id.* at 1522 (plurality opinion) (“This case does not require the Court to rule on the types of searches that would be reasonable in instances where, for example, a detainee will be held without assignment to the general jail population and without substantial contact with other detainees.”); *id.* at 1523 (Roberts, C.J., concurring) (arguing that the Court was “wise to leave open the possibility of exceptions”); *id.* at 1524 (Alito, J., concurring) (stressing the “limits of [the Court’s] holding”).

²⁶⁰ See *id.* at 1515 (majority opinion) (citing *Turner v. Safley*, 482 U.S. 78, 84-85 (1987)); *id.* at 1516 (citing *Bell v. Wolfish*, 441 U.S. 520, 558-59 (1979)).

²⁶¹ See, e.g., *id.* at 1516-18, 1521 (citing *Block v. Rutherford*, 468 U.S. 576, 584-87 (1984)); *id.* at 1516-17 (citing *Hudson v. Palmer*, 468 U.S. 517, 522-23, 528 (1984)).

²⁶² Simcock argues that

the Court's 2001 holding in *Atwater v. City of Lago Vista* expanded the range of offenses that may merit arrest. Now that *Atwater* has been augmented by the Court's endorsement of blanket strip-search policies, the combination allows for an elevated degree of police power and, in turn, increases the risk of abuse by police officers.

Simcock, *supra* note 21, at 621 (footnote omitted).

prior to such a determination.²⁶³ The four dissenting Justices pointed out that *Wolfish* did not address the treatment of “those arrested for minor crimes, prior to a judicial officer’s determination that they should be committed to prison,” and expressed strong doubt “that officials would be justified . . . in admitting to the dangerous world of the general jail population and subjecting to a strip search someone with no criminal background arrested for jaywalking or another similarly minor crime.”²⁶⁴ Justice Alito joined the opinion for the Court, but wrote separately to emphasize that “the Court does not hold that it is *always* reasonable to conduct a full strip search of an arrestee whose detention has not been reviewed by a judicial officer and who could be held in available facilities apart from the general population.”²⁶⁵ Chief Justice Roberts similarly joined the Court’s opinion but stressed in his concurrence the importance (to the Court’s holding) of the facts “that Florence was detained not for a minor traffic offense but instead pursuant to a warrant for his arrest, and that there was apparently no alternative, if Florence were to be detained, to holding him in the general jail population.”²⁶⁶ And Justice Kennedy, joined by the Chief Justice and Justices Scalia and Alito, pointed out that the Court was not deciding whether the Constitution “might restrict whether an arrestee whose detention has not yet been reviewed by a magistrate or other judicial officer, and who can be held in available facilities removed from the general population, may be subjected to the types of searches at issue here.”²⁶⁷

Thus, *Florence*—the Court’s latest word on the treatment of pretrial detainees—appears consistent with the themes outlined in Part III. But the case left unaddressed the standards that should govern claims by pretrial detainees that, if brought by convicted prisoners, would be analyzed under the Eighth Amendment. In Part V, I sketch a proposed approach to that question. First, however, I will turn to a brief description of the people to whom (and institutions to which) that approach would be applied.

²⁶³ The sole exception was Justice Thomas, who did not join the relevant portion of Justice Kennedy’s opinion.

²⁶⁴ *Florence*, 132 S. Ct. at 1531-32 (Breyer, J., dissenting).

²⁶⁵ *Id.* at 1524 (Alito, J., concurring).

²⁶⁶ *Id.* at 1523 (Roberts, C.J., concurring).

²⁶⁷ *Id.* at 1523 (plurality opinion).

IV. JAILS AND THEIR INMATES

In 2012, as in 1979, the Court upheld jail security measures based on its view of jails²⁶⁸ and their inmates. The *Florence* Court observed that “[p]eople detained for minor offenses can turn out to be the most devious and dangerous criminals,”²⁶⁹ and warned that “[j]ails can be even more dangerous than prisons because officials there know so little about the people they admit at the outset.”²⁷⁰ These observations echo the *Wolfish* Court’s reliance on the fact that “those who are detained prior to trial may in many cases be individuals who are charged with serious crimes or who have prior records.”²⁷¹ Because these and similar factual assumptions are likely to shape (at least implicitly) courts’ articulation of the standards that govern the treatment of pretrial detainees, I review in this Part some of the available data concerning jails and those confined in them.

Jails in the U.S. house a huge number of inmates (though the number has declined somewhat in recent years).²⁷² From July 2010 through June 2011, roughly 11.8 million people passed through local jail facilities,²⁷³ and at midyear 2011 those facilities held about 736,000 inmates.²⁷⁴ Most jails are government-operated municipal facilities; jails operated by private contractors appear to be relatively rare, and the federal government only operates a small number of jail facilities.²⁷⁵ While most of the inmates held in jails are

²⁶⁸ As noted in footnote 22 (and as I discuss further in this Section), jails typically hold a mix of pretrial detainees and persons convicted of relatively minor crimes.

²⁶⁹ 132 S. Ct. at 1520 (majority opinion).

²⁷⁰ *Id.* at 1521.

²⁷¹ *Bell v. Wolfish*, 441 U.S. 520, 546 n.28 (1979).

²⁷² See TODD D. MINTON, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NO. NCJ 237961, JAIL INMATES AT MIDYEAR 2011—STATISTICAL TABLES 1 & fig.1 (2012), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/jim11st.pdf>.

²⁷³ *Id.* at 3. This figure is taken from the Bureau of Justice Statistics’ Annual Survey of Jails—a study that, for 2011, employed a statistical sampling method. See *id.* at 11.

²⁷⁴ *Id.* at 3.

²⁷⁵ The Bureau of Justice Statistics’ 2006 Census of Jail Facilities lists 3283 local and federal jail facilities, of which only 12 were federal. See JAMES STEPHAN & GEORGETTE WALSH, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NO. NCJ 230188, CENSUS OF JAIL FACILITIES, 2006, at 3 tbl.1 (2011), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cjfo6.pdf>; see also *id.* at 4 (“Local jails held about 98% of all confined jail inmates in 1999 and 2006, while the federal jurisdiction held less than 2% in both years.”). Contractors—which the Census defined as “private or public entities authorized by city or county governments”—operated only 37 jail facilities in 2006. *Id.* at 10. On the other hand, this figure would not include private contractors hired by jails, for example to provide medical care. See, e.g., *King v. Kramer*, 680 F.3d 1013, 1015 (7th Cir. 2012) (noting that the county hired a private contractor to provide medical care to county jail inmates).

The 2006 Census of Jail Facilities excluded short-term facilities. See STEPHAN & WALSH, *supra*, at 26 (noting that the Census encompassed “all jail detention facilities holding inmates

pretrial detainees, a very sizeable minority are convicted prisoners; for example, in midyear 2011, 39.4% of jail inmates were convicted prisoners and 60.6% were pretrial detainees.²⁷⁶ It seems possible that the number of convicted prisoners held in jails may rise in the coming years. For example, the Court noted in *Brown v. Plata* that California—in response to the lower court’s landmark order requiring a decrease in the state’s prison population—had decided to move large numbers of convicted prisoners from state prisons to county jails.²⁷⁷

Compared with state prisons, jails have higher inmate turnover,²⁷⁸ a lower overall mortality rate, a lower rate of mortality due to illness, and a higher rate of suicide.²⁷⁹ The rate of jail suicides has been decreasing in recent years but is still markedly higher than in the general U.S. population.²⁸⁰ Among jail inmates, the mortality rate for pretrial detainees appears to be considerably higher than that for convicted prisoners.²⁸¹

Jails vary widely in size and resources. In 2006, estimated staffing ratios (by state) ranged from two staff members per inmate to nearly five inmates

beyond arraignment, a period normally exceeding 72 hours,” and that among the facilities excluded were “physically separate temporary holding facilities, such as drunk tanks and police lockups that do not hold persons after [they are] formally charged in court”).

²⁷⁶ MINTON, *supra* note 272, at 7 tbl.7.

²⁷⁷ 131 S. Ct. 1910, 1943-44 (2011).

²⁷⁸ See MARGARET NOONAN, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NO. NCJ 222988, DEATHS IN CUSTODY REPORTING PROGRAM: MORTALITY IN LOCAL JAILS, 2000–2007, at 7 (rev. 2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/mlj07.pdf> (noting that “[t]he mean time served in local jails is about 21 days” while the mean time served in state prisons was 32 months).

²⁷⁹ See *id.* at 7 tbl.8 (providing the “[a]verage annual mortality rate per 100,000” state prison and jail inmates by cause for the years 2001 through 2007). As used in this report, “illness” is “a heterogeneous category for natural causes of death associated with an underlying illness.” *Id.* at 14. In this study, “[m]ortality rates were calculated as the number of deaths per year divided by the annual average daily population (ADP) of jail inmates and expressed in terms of deaths per 100,000 jail inmates.” *Id.*

²⁸⁰ Compare *id.* at 3 (“While suicide has been the leading cause of death in local jails since the 1980s, it has declined over time. . . . From 2000 to 2007, the suicide rate declined by about a quarter, from 48 to 36 suicide deaths per 100,000 jail inmates.”), with *id.* at 12 (“Suicide rates for all age groups were at least 3 times higher among local jail inmates than the general population.”). For more on the debate over methods for calculating the suicide rate among jail inmates, see also LINDSAY M. HAYES, NAT’L INST. OF CORR., U.S. DEP’T OF JUSTICE, NIC ACCESSION NO. 024308, NATIONAL STUDY OF JAIL SUICIDE: 20 YEARS LATER 43-46 (2010), available at <http://nicic.gov/Library/Files/024308.pdf>.

²⁸¹ One report listed the average annual mortality rate per 100,000 inmates during the period from 2001 to 2007 at 88 for “convicted” inmates and 179 for “unconvicted” inmates and defined “unconvicted” to include “inmates who were returned to jail on a probation or parole violation.” NOONAN, *supra* note 278, at 8 tbl.9. When the mortality rates were broken down by leading causes of death, the rates for “unconvicted” inmates were in all cases higher than those for “convicted” inmates. See *id.* at 9 tbl.10.

per staff member—with more than half of the surveyed states reporting ratios of more than three inmates per staff member.²⁸² Most jails are small, but almost half of all inmates held in jail are held in large jails.²⁸³ Compared with large jails, small jails have higher turnover rates,²⁸⁴ higher rates of suicide and of death from intoxication, and lower rates of homicide.²⁸⁵ A study of suicide in jails and short-term holding facilities found that more than one-fifth of suicides in such facilities occurred within the first twenty-four hours of detention and that nearly three-fifths occurred during the first two weeks.²⁸⁶ The study also identified a lack of appropriate suicide-prevention training,²⁸⁷ resources,²⁸⁸ and screening.²⁸⁹ Such deficiencies may be especially serious in small jails²⁹⁰ and holding facilities.²⁹¹

²⁸² STEPHAN & WALSH, *supra* note 275, at 25 tbl.13. These figures “[e]xclude[] combined prison-jail systems in Alaska, Connecticut, Delaware, Hawaii, Rhode Island, and Vermont.” *Id.*; see also *id.* at 27 (explaining the methodology used for estimates in “the 14 states where the number of staff was incompletely reported”).

²⁸³ See MINTON, *supra* note 272, at 2 (“The largest jails held a disproportionately large number of inmates, accounting for 48% of the jail population at midyear 2011.”); STEPHAN & WALSH, *supra* note 275, at 14 (“Most jail jurisdictions were small with nearly 40% holding fewer than 50 inmates in 2006.” (citation omitted)); *id.* at 18 (reporting that in 2006, “[n]ationwide, about 3% of confined jail inmates were housed in the smallest jail jurisdictions, or those holding less than 50 inmates”). The figures provided by Stephan and Walsh on these points concern “jail jurisdictions”—meaning government entities—rather than “jail facilities.” See STEPHAN & WALSH, *supra* note 275, at 2-3 (explaining terminology). Thus, because a single jail jurisdiction may operate multiple jail facilities, it is possible that the “nearly 40%” figure underestimates the number of small facilities, but that possibility seems unlikely to skew the count very much.

²⁸⁴ See MINTON, *supra* note 272, at 5 tbl.4 (showing a weekly turnover rate in 2011 of 131.9% for jurisdictions holding fewer than fifty inmates and a rate of 50.5% for jurisdictions holding one thousand or more inmates).

²⁸⁵ See NOONAN, *supra* note 278, at 5 (collecting statistics on causes of death in jails of different sizes).

²⁸⁶ In the initial phase of this study, surveys concerning suicides in 2005 and 2006 “were mailed to 15,978 facilities across the United States, including 3,173 county jails and 12,805 law enforcement agencies that administered short-term lockups.” See HAYES, *supra* note 280, at 7. The responses indicated that “[t]he vast majority (89 percent) of suicides occurred in detention facilities,” *id.* at 9—facilities holding inmates for more than seventy-two hours—rather than in “holding facilities”—facilities holding inmates for less than seventy-two hours, *id.* at 9 tbl.2; see also *id.* at 32 (noting that “[t]he average population of most detention facilities that sustained suicides was about 550 inmates, whereas holding facilities averaged 5 inmates”). Follow-up surveys sent to the 696 facilities where suicides had occurred yielded 464 responses. *Id.* at 10. The results that investigators derived using those 464 responses indicate that 23.5% of suicides (109) occurred during the first twenty-four hours of confinement and that 59.7% of suicides (277) occurred during the first two weeks of confinement. See *id.* at 22 tbl.16 (reflecting the combined percentage of suicides occurring in either holding or detention facilities).

²⁸⁷ See *id.* at 34-35 (“[A]most two-thirds (63.3 percent) of all facilities that sustained a suicide either did not provide suicide-prevention training or did not provide the training annually.”).

²⁸⁸ See *id.* at 38 (reporting that among facilities in which suicides occurred, 67.9% “reported that they did not maintain a protocol by which suicidal inmates would be assigned to a safe, suicide-resistant, and protrusion-free cell”).

Analyzing data from existing studies, Margo Schlanger has found that “while it is clear that jail inmates often sue their jailers, they appear to sue at a substantially lower rate than prison inmates.”²⁹² But when jail inmates sue, they may stand a better chance of recovering than prison inmates.²⁹³ As Professor Schlanger observes, the strictures of the Prison Litigation Reform Act (PLRA) (such as its exhaustion requirement²⁹⁴ and its limitation on actions “for mental or emotional injury”²⁹⁵) apply to pretrial detainee suits filed while the plaintiff is in custody, but generally²⁹⁶ do not apply to such suits if they are filed after the plaintiff’s release.²⁹⁷ Professor Schlanger also notes that smaller jails are less likely than large jails and prisons to have a systematic structure in place to deal with litigation.²⁹⁸ She explores a number of the above-listed features concerning jails and their inmates as possible reasons why cases brought by jail inmates might result in more wins and larger payouts than cases brought by prison inmates:

[J]ails are more dangerous than prisons, in large part because of the primary operational difference between the two types of facilities: prisons take and hold inmates while jails take and release them. This extremely fast turnover makes jails inherently more chaotic. More generally comparing jails to prisons, classification of jail inmates is more haphazard, jail routines are less regular, jail time is more idle, and jail inmates are more likely to be in some kind of crisis. Jail inmates are also more likely to be vulnerable to harm in

²⁸⁹ The study noted that

although a high percentage of facilities that sustained inmate suicides had a screening process to identify potentially suicidal behavior at intake, the process was flawed in that most facilities did not verify whether the newly arrived inmate was on suicide precautions during any prior confinement in the jail facility, nor whether the arresting and/or transporting officer(s) believed that the inmate was at risk for suicide.

Id. at 34.

²⁹⁰ See NOONAN, *supra* note 278, at 5 (“The lower rate of suicide in large jails may reflect the capacity of these jails to provide a variety of suicide prevention measures.”).

²⁹¹ See HAYES, *supra* note 280, at 35 (“[H]olding facilities provided far less [suicide-prevention] training (48.3 percent) than detention facilities (63.7 percent).”).

²⁹² Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1581 (2003).

²⁹³ See *id.* at 1689 (“[C]hecks of all damage awards from cases filed in 1993 show that one-third are from jail cases, which is probably quite disproportionate to the portion of cases filed by jail inmates.”).

²⁹⁴ 42 U.S.C. § 1997e(a) (2006).

²⁹⁵ *Id.* § 1997e(e).

²⁹⁶ Professor Schlanger notes that the PLRA’s provision concerning sua sponte dismissals of suits filed in forma pauperis does appear to apply without regard to the plaintiff’s status. See Schlanger, *supra* note 292, at 1641 (citing 28 U.S.C. § 1915(e)(2) (2000)).

²⁹⁷ See *id.* (citing 42 U.S.C. § 1997e(a), (d)(1), (e) & 28 U.S.C. § 1915(h)).

²⁹⁸ See *id.* at 1669-70.

many ways—mentally ill, inexperienced with incarceration, drunk or high, or suicidal.²⁹⁹

In the federal system (and in many state systems), the defendant's initial appearance provides the first opportunity for the judge to order release, with or without conditions such as bail.³⁰⁰ Many people who are arrested are detained only until their first appearance in court, after which they are released.³⁰¹

In determining whether, and on what terms, to release a defendant prior to trial, judges typically are authorized to consider both whether the defendant is a flight risk and whether the defendant would endanger witnesses or the community while on pretrial release. For example, the Bail Reform Act of 1984 mandates pretrial detention of federal defendants under specified circumstances³⁰² if the court finds "that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community."³⁰³ In *United States v. Salerno*, the Court upheld this feature of the Bail Reform Act against facial challenges based on the Due Process Clause and the Eighth Amendment's Excessive Bail Clause.³⁰⁴ In *Schall v. Martin*, the Court likewise rejected a due process challenge to a state statute that permitted

²⁹⁹ *Id.* at 1686-87 (footnotes omitted).

³⁰⁰ Federal law enforcement officers are required by rule to bring the arrestee before a judicial officer "without unnecessary delay," and some defendants will be released at the time of that initial appearance. *See* FED. R. CRIM. P. 5(a)(1)(A) ("A person making an arrest within the United States must take the defendant without unnecessary delay before a magistrate judge, or before a state or local judicial officer as Rule 5(c) provides, unless a statute provides otherwise."); *id.* 5(d)(3) (providing, as to felony defendants, that at the initial appearance "[t]he judge must detain or release the defendant as provided by statute or these rules"); *id.* 58(b)(2)(G) (providing, as to petty offense or misdemeanor defendants, that at the initial appearance the magistrate judge must inform the defendant of "the general circumstances, if any, under which the defendant may secure pretrial release"); 18 U.S.C. § 3142(f) (2006) (authorizing brief continuances of hearings on motions for detention).

³⁰¹ For example, a study of a sample of state court felony defendants found that "[f]ifty-two percent of all pretrial releases occurred either on the day of arrest or on the following day." BRIAN A. REAVES & JACOB PEREZ, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NO. NCJ 148818, PRETRIAL RELEASE OF FELONY DEFENDANTS, 1992, at 7 (1994), available at <http://bjsdata.ojp.usdoj.gov/content/pub/pdf/NPRP92.PDF>.

³⁰² *See* 18 U.S.C. § 3142(f) (setting forth the circumstances under which the court is to hold a hearing to consider detention under 18 U.S.C. § 3142(e)).

³⁰³ *Id.* § 3142(e).

³⁰⁴ *See* 481 U.S. 739, 748 (1987) ("[T]he pretrial detention contemplated by the Bail Reform Act is regulatory in nature, and does not constitute punishment before trial in violation of the Due Process Clause."); *id.* at 754-55 ("[W]hen Congress has mandated detention on the basis of a compelling interest other than prevention of flight, as it has [in the Bail Reform Act], the Eighth Amendment does not require release on bail.").

pretrial detention of juveniles based on dangerousness.³⁰⁵ A recent analysis found that “[t]o date, forty-eight states and the District of Columbia have enacted laws permitting courts to either detain or conditionally release defendants determined to be dangerous.”³⁰⁶

There is substantial local variation in pretrial detention policy, with some jurisdictions detaining a much greater percentage of defendants than others.³⁰⁷ Despite this variation, judges across jurisdictions appear to consider dangerousness when determining whether to release a defendant pending trial. For example, using data on state court felony defendants in a sample of urban counties from 1990 to 2006, Shima Baradaran and Frank McIntyre calculated that the persons detained pending trial were more likely to present a danger to the community than persons released pending trial.³⁰⁸ They also found that indications of dangerousness were better predictors of detention than indications of flight risk.³⁰⁹ However, Baradaran and McIntyre assert that there appear to be significant systematic errors in judges’ detention decisions: using statistical modeling, they find indications “that judges often overhold older defendants, people with clean prior records, and people who commit fraud and public-order violations.”³¹⁰

In addition to dangerousness, indigence plays a substantial role (whether intended or not) in determining whether a defendant will be detained pending trial. In the data employed by Baradaran and McIntyre, “detention” evidently included the detention of persons for whom bail was set but who did not post the bail.³¹¹ It seems quite possible that some of the defendants

³⁰⁵ See 467 U.S. 253, 256-57 (1984) (“[P]reventive detention under the [New York Family Court Act] serves a legitimate state objective, and . . . the procedural protections afforded pretrial detainees by the New York statute satisfy the requirements of the Due Process Clause . . .”).

³⁰⁶ Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 507 (2012). Those laws may limit the circumstances under which dangerousness may be considered. See, e.g., *id.* at 509 (noting that some state laws “creat[e] a presumption of detention or release based on the nature of the crime”).

³⁰⁷ See *id.* at 540 (reporting that the Bureau of Justice Statistics’ State Court Processing Statistics for the period from 1990 to 2006 show that “[a] few [counties] release only 30% or fewer of those arrested, while about 40% of counties release 50%–70% of those arrested” and some “counties release almost all of those arrested”).

³⁰⁸ See *id.* at 538 (reporting that defendants detained pending trial “appear systematically to have observable characteristics that are associated with higher violent-crime rearrest rates”).

³⁰⁹ See *id.* at 547 (calculating the degree to which observable characteristics suggesting flight risk or dangerousness affect the likelihood of detention and concluding that “it appears that judges are basing their decisions far more on predicted violence than on predicted flight”).

³¹⁰ *Id.* at 554.

³¹¹ Baradaran and McIntyre used the Bureau of Justice Statistics’ State Court Processing Statistics. *Id.* at 524. A Bureau of Justice Statistics report employing that dataset (albeit for only one year during the period analyzed by Baradaran and McIntyre) explained that the term “[d]etained defendant” “[i]ncludes any defendant who remained in custody from the time of arrest

in Baradaran and McIntyre's study ended up in pretrial detention not because of a considered judicial determination that they should be detained but rather because of their poverty. An analysis of a sample of state court felony cases filed in 1992 found that in the subset of felony defendants for whom bail was set at less than \$2500, 34% remained in detention until the disposition of their case.³¹² For nonfelony defendants, there is even stronger evidence of a connection between poverty and detention. A recent Human Rights Watch study of nonfelony defendants in New York City found that many such defendants were detained because they could not post even a low bail.³¹³

Jails are tough to run. They hold a mix of pretrial detainees and convicted prisoners. The pretrial detainee population has high turnover and poses distinctive challenges, such as an elevated risk of suicide. The challenges vary with jail size; larger jails are more likely to be professionalized, while small facilities are less likely to have adequate resources and training. The pretrial detainee population varies as well. Many people are released within a day or two of their arrest. Of those who remain in detention, some are there because of a finding of dangerousness or flight risk, but others are there because they cannot afford to post bail. With these facts in mind, I turn in Part V to my proposed framework for assessing substantive due process claims by pretrial detainees.

V. A PROPOSED FRAMEWORK FOR PRETRIAL DETAINEES' CLAIMS

As we have seen, the Supreme Court has developed a clear framework for addressing convicted prisoners' claims concerning general living conditions,³¹⁴ medical care, suicide prevention, protection from attack, and

until the disposition of his or her case by the court." BRIAN A. REAVES & PHENY Z. SMITH, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NO. NCJ 148826, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 1992, at 39 (1995), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/Feldef92.pdf>.

³¹² REAVES & PEREZ, *supra* note 301, at 4 tbl.3.

³¹³ See HUMAN RIGHTS WATCH, THE PRICE OF FREEDOM: BAIL AND PRETRIAL DETENTION OF LOW INCOME NONFELONY DEFENDANTS IN NEW YORK CITY 20-24 (2010), available at http://www.hrw.org/sites/default/files/reports/us1210webwcover_0.pdf ("Among defendants arrested in 2008 on nonfelony charges and given bail of \$1,000 or less, only 13 percent were able to post bail at arraignment The mean length of pretrial detention was 15.7 days"); *id.* at 2 (noting that 71% of these defendants "were accused of nonviolent, nonweapons-related crimes").

³¹⁴ Concededly, the Court's precedents raise the question of what counts as a conditions-of-confinement claim to which the Eighth Amendment standard applies, and what instead counts as a constitutional challenge to a prison regulation to which the *Turner* test applies. See *supra* note 41. But that question arises at the margins.

excessive force. The first four of these categories are analyzed under the subjective deliberate indifference test: the defendant must have actual knowledge of a substantial risk of serious harm to the inmate and must have failed to respond reasonably to that risk. The fifth category—excessive force—triggers an even more deferential standard. Although various factors are relevant to an Eighth Amendment excessive force claim, the ultimate inquiry is whether the defendant acted maliciously and sadistically for the purpose of harming the plaintiff.³¹⁵

In this Part, I argue that these Eighth Amendment standards are inappropriate for claims by pretrial detainees. In Section V.A, I suggest that claims arising before a judicial determination of probable cause—the period I call pre-judicial detention—should be analyzed under a Fourth Amendment objective reasonableness test. I note in Section V.B that there is a strong argument in favor of extending the reach of that reasonableness test to cover claims arising prior to arraignment, even when the detainee was arrested upon a warrant. In Section V.C, I turn more generally to the period of detention after the judicial determination of probable cause—what I call the period of judicial detention.³¹⁶ During judicial detention, I propose that the Court refine the *Wolfish* test. Under my proposed test, as under *Wolfish*, it would suffice to show that a condition of confinement (or a denial of medical care, use of force, or the like) was imposed for punitive reasons—i.e., out of a desire to punish the plaintiff for a crime for which the plaintiff has not been convicted. Most cases, though, will not present evidence of explicit intent to punish. For all other cases arising during judicial detention, I propose that the courts apply an objective deliberate indifference test (with some specific modifications to address claims of excessive force).

In Section V.D, I address possible objections to my proposed approach. Although the proposal is subject to some practical and conceptual objections, I argue that, on balance, it is preferable to the alternatives.

A. *Pre-Judicial Detention*

The Court has said the least regarding the legal standard governing conditions of confinement during the period between a warrantless arrest and a judicial determination of probable cause. *Wolfish* addressed the treatment of detainees between the probable cause determination and trial.³¹⁷ *City of*

³¹⁵ For citations to the case law, see *supra* notes 7-9.

³¹⁶ If the argument sketched in Section V.B were accepted, then the analysis in Section V.C would apply only after arraignment because the Fourth Amendment's reasonableness standard would always govern before arraignment, even when the arrest took place pursuant to a warrant.

³¹⁷ See *supra* note 200 and accompanying text.

Revere v. Massachusetts General Hospital concerned hospital care provided over a nine-day period to a person shot by police; the first six days preceded the issuance of an arrest warrant.³¹⁸ Thus, *Massachusetts General Hospital* did concern the period prior to a judicial determination of probable cause, but the Court avoided resolving the standard of government care that applied during that period: it merely observed that “the due process rights of a person in [the arrestee’s] situation are at least as great as the Eighth Amendment protections available to a convicted prisoner.”³¹⁹ In short, the Court has left almost entirely open the question of the constitutional standards for conditions of pre-judicial detention. Relying upon the Supreme Court cases discussed in Section III.B, I argue here that conditions during this period of detention should be governed by the Fourth Amendment’s prohibition on unreasonable seizures—a position that, as we saw in Section II.A, a few circuits have already adopted.

Repeatedly, and as recently as the past Term, Justices have voiced special solicitude for persons arrested without a prior judicial determination of probable cause. In *Florence*, for instance, a number of Justices went out of their way to suggest that one subjected to a warrantless arrest should, if possible, be held separately from the general jail population pending the probable cause determination.³²⁰ The dissenters in *Atwater*, decrying the majority’s holding that the Fourth Amendment permits warrantless arrests for minor offenses, warned that the ruling exposed such arrestees to a “potentially dangerous” period of detention.³²¹ Justice Scalia, arguing in *McLaughlin* for a shorter presumptive deadline for the judicial determination of probable cause, urged that one of the Fourth Amendment’s “core applications” was to protect “those so blameless that there was not even good reason to arrest them.”³²²

On the other hand, the Court has also tried not to deprive the government of effective law enforcement tools. When the Court in *Gerstein v. Pugh* left open the question of what constituted a prompt determination of probable cause, it explained that local law enforcement systems should be allowed to experiment with procedures that fit their criminal justice systems.³²³ In *McLaughlin*, the Court set a presumptive cutoff of forty-eight

³¹⁸ 463 U.S. 239, 240-41 (1983).

³¹⁹ *Id.* at 244.

³²⁰ See *supra* notes 263-67 and accompanying text.

³²¹ *Atwater v. City of Lago Vista*, 532 U.S. 318, 364 (2001) (O’Connor, J., dissenting); see also *supra* notes 183-88 and accompanying text.

³²² *County of Riverside v. McLaughlin*, 500 U.S. 44, 71 (1991) (Scalia, J., dissenting); see also *supra* notes 178-82 and accompanying text.

³²³ See 420 U.S. 103, 123-25 (1975) (noting several possible approaches states might adopt).

hours after arrest in part because of concerns that a tighter deadline could hamstring law enforcement.³²⁴ In *Atwater*, when the Court determined that the Fourth Amendment permitted warrantless arrest for any crime (however minor) committed in the officer's presence, it cited the difficulties police would encounter in complying with a more demanding test.³²⁵ And when, in *Virginia v. Moore*, the Court held that *Atwater* applied even to arrests not authorized under state law, it explained that to hold otherwise would be to invoke the drastic remedy of the exclusionary rule.³²⁶

Applying the Fourth Amendment's objective reasonableness test to the conditions of confinement of arrestees who have not yet had a judicial determination of probable cause³²⁷ would address the Justices' concerns for warrantless arrestees without unduly impeding law enforcement efforts. Such a course would leave states free to decide (within the presumptive outer limit set in *McLaughlin*) how quickly to bring a warrantless arrestee before a judicial officer for a probable cause determination;³²⁸ it would simply require them, pending that determination, to exercise reasonable care³²⁹ for the arrestee's basic needs and to refrain from using unreasonable force on the arrestee.

³²⁴ See 500 U.S. at 55 (reasoning that "the Fourth Amendment permits a reasonable postponement of a probable cause determination while the police cope with the everyday problems of processing suspects through an overly burdened criminal justice system").

³²⁵ See *Atwater*, 532 U.S. at 347-50 (rejecting, in part on "administrability" grounds, a proposed rule "that the Fourth Amendment generally forbids warrantless arrests for minor crimes not accompanied by violence or some demonstrable threat of it").

³²⁶ See 553 U.S. 164, 174 (2008) (rejecting a proposed rule that "would allow Virginia to accord enhanced protection against arrest only on pain of accompanying that protection with federal remedies for Fourth Amendment violations, which often include the exclusionary rule").

³²⁷ Cf. Karsch, *supra* note 17, at 837 ("The probable cause hearing indicates that the individual's continuing detention is dependent less upon an individual officer's assessment and more upon the routines and protections of the criminal justice system."); O'Hagan, *supra* note 17, at 1394-95 ("[I]n the period before a probable cause hearing . . . a suspect's custody may be based solely on the discretion of a single police officer.").

³²⁸ Cf. O'Hagan, *supra* note 17, at 1385 (arguing that applying the Fourth Amendment to excessive force claims arising prior to a judicial determination of probable cause "supplies a bright line of constitutional demarcation [and,] by making use of already required judicial proceedings, it imposes no additional procedural barriers on law enforcement officials").

³²⁹ At this point it is worthwhile to observe that when the Court in *Daniels v. Williams* confronted the question of negligence in jails, it did so in the context of an inmate's attempt to raise a due process claim, not a claim under the Fourth Amendment. See 474 U.S. 327, 328 (1986). There, the Court addressed Mr. Daniels's due process claim that "while an inmate at the city jail . . . he slipped on a pillow negligently left on the stairs by . . . a correctional deputy stationed at the jail." *Id.* It is not possible to ascertain from the opinion, briefs, or argument transcript whether Mr. Daniels was a convicted prisoner or a pretrial detainee at the time of the incident: Mr. Daniels's brief stated that he was "a prisoner in the Richmond city jail." Brief for Petitioner at 2, *Daniels*, 474 U.S. 327 (No. 84-5872). Later in the brief, Mr. Daniels argued that a state "cannot escape its responsibility for protecting the person of a prisoner who is involuntarily confined as a punishment

Applying an objective reasonableness standard to the government's duty to provide medical care and protection from attack or suicide attempts would not only provide an incentive to schedule a prompt probable cause determination, it would also provide an incentive for law enforcement officials to exercise reasonable care in determining whether the detainee was at risk of a medical problem or a suicide attempt. This duty of reasonable inquiry could help to address some of the problems identified in Part IV—such as the concern that jails know little about detainees when they first arrive and that (as one study found) jail personnel may fail to debrief the officers who transport the detainee to the jail concerning possible suicide risks.³³⁰

Excessive force claims arising out of pre-judicial detention would be governed by the test from *Graham v. Connor*. That test—objective reasonableness under the circumstances—is sufficiently flexible to account for any security issues that might arise during this early period of detention. As the *Graham* Court instructed, the standard eschews hindsight and factors in any exigent circumstances.³³¹

Setting a reasonableness standard for the treatment of detainees prior to a judicial determination of probable cause would essentially continue the concept of Fourth Amendment “seizure” up to the point when that judicial determination occurs. Placing someone under warrantless arrest while failing to exercise due care for his or her treatment, in this view, constitutes an unreasonable seizure in violation of the Fourth Amendment. In essence, I argue here for a specialized type of negligence test—one drawn from the Fourth Amendment. My proposal tracks the approach adopted by the Sixth and Ninth Circuits (but rejected, as we saw, by at least two other circuits).

B. *Judicial Detention Prior to Arraignment*

Even if we leave aside the theory of pre-judicial detention that I discussed in Section V.A, the circuits are divided as to whether the period of “seizure” governed by the Fourth Amendment should extend for some period beyond the actual arrest.³³² The guideposts discussed in Part III shed

for criminal acts,” *id.* at 21—a statement suggesting that Mr. Daniels had been convicted and was serving his sentence. Thus, the *Daniels* Court's holding that “the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty, or property,” 474 U.S. at 328, does not foreclose the application of an objective reasonableness test to Fourth Amendment claims by pre-judicial detainees.

³³⁰ See *supra* note 289.

³³¹ See *supra* note 247 and accompanying text.

³³² See *supra* Section II.A.

little direct light on that question. But there is a strong practical argument that, even when an arrest was preceded by a judicial probable cause determination, Fourth Amendment standards should continue to govern the treatment of the detainee until the arraignment.³³³ The Court's precedents do not require a particularly searching inquiry in connection with the issuance of arrest warrants;³³⁴ and the use (or not) of an arrest warrant is not tied to the seriousness of the crime.³³⁵ Thus, the presence or absence of a judicial determination of probable cause may be a somewhat less substantial basis for distinctions than it at first appears. In addition, during the period prior to arraignment, detainees may be held at police stations or in other places where it may be particularly difficult for those interacting with the detainees to distinguish between detainees arrested upon a warrant and those arrested without a warrant.³³⁶ Applying the Fourth Amendment reasonableness test to all claims arising prior to arraignment would provide a clear and readily applicable standard. And, as I noted in Section III.C, the opinions in *Albright* provide some doctrinal support for an extension of the

³³³ See Glowacki, *supra* note 17, at 1176 (arguing that defining “the scope of arrest . . . as ending at the time of initial arraignment . . . protects arrested citizens in police custody from unreasonable police actions, and decreases both confusion among circuit courts and arbitrary decisionmaking”); Haber, *supra* note 17, at 960-62 (arguing that the Supreme Court should “adopt[] the continuing seizure approach” and should “extend the definition of ‘seizure’ until the post-arrest, pre-charge detainee has had his first judicial appearance”); Karsch, *supra* note 17, at 838-39 (arguing that courts should consider an “individual arrested with a warrant [to be] under seizure until his first appearance before a judicial officer”).

³³⁴ “[A] warrant affidavit must set forth particular facts and circumstances underlying the existence of probable cause, so as to allow the magistrate to make an independent evaluation of the matter.” *Franks v. Delaware*, 438 U.S. 154, 165 (1978). Though the affiant must not knowingly or recklessly include false statements in the affidavit, the Court has held that the Fourth Amendment does not require “that every fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant’s own knowledge that sometimes must be garnered hastily.” *Id.*

³³⁵ Warrantless arrests are permissible, under appropriate circumstances, for both felonies and misdemeanors. See *Maryland v. Pringle*, 540 U.S. 366, 370 (2003) (“A warrantless arrest of an individual in a public place for a felony, or a misdemeanor committed in the officer’s presence, is consistent with the Fourth Amendment if the arrest is supported by probable cause.”).

³³⁶ During pre-arraignment detention, arrestees may be held in short-term detention facilities that hold large numbers of inmates for short periods of time. Although practices vary across facilities, it seems likely that the officers staffing those facilities will not be the same officers who made the arrests.

During the postarraignment period of pretrial detention, officials could distinguish between pretrial detainees and convicted prisoners by issuing them different-colored uniforms. (This method might be less feasible, though, to the extent that the facility uses color-coded uniforms to highlight other distinctions such as security or behavioral issues.) But it is unrealistic to think that a police holding facility could employ such a system to distinguish persons arrested on warrants from those arrested without a warrant.

Fourth Amendment reasonableness test beyond the time of arrest itself and into the period of pretrial detention.³³⁷

However, there are counterarguments. The *Wolfish* Court did not mention the possibility of a Fourth Amendment standard for pretrial conditions of confinement. Perhaps this was because it was not asked to do so. Still, this omission suggests at least an assumption that the Fourth Amendment does not provide a source of claims concerning the period of pretrial detention addressed in *Wolfish*—namely, the period subsequent to a “judicial determination of probable cause.”³³⁸ Moreover, to the extent that any of the Justices are inclined to give special protections to arrestees who have not yet received a judicial determination of probable cause, the implication is that the standards applicable *after* such a judicial determination may be somewhat less protective than the Fourth Amendment standard. And unless the Court is willing to apply the Fourth Amendment to the period of judicial detention, it will be applying principles of substantive due process—a type of claim that, it has held, requires more than mere negligence.³³⁹

Thus, in the event that the Supreme Court revisits the question of the standards for the treatment of pretrial detainees in the period soon after arrest, it seems possible that it might apply the Fourth Amendment standard only to the period of pre-judicial detention—despite the existence of good policy arguments for applying that standard to all claims that arise prior to arraignment.

C. *Judicial Detention More Generally*

As to the period that postdates both the arrest and a judicial determination of probable cause,³⁴⁰ I argue in this Section for the adoption of an intermediate standard—one that is somewhat more demanding than a Fourth Amendment objective reasonableness standard³⁴¹ but also somewhat

³³⁷ See *supra* text accompanying notes 201-08.

³³⁸ *Bell v. Wolfish*, 441 U.S. 520, 536 (1979) (quoting *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975)).

³³⁹ See *supra* note 329.

³⁴⁰ Defining the events that would constitute a judicial determination of probable cause is a relatively straightforward exercise. They include an indictment, an arrest warrant, and a probable cause determination at a *Gerstein* proceeding. See *supra* notes 175-77 and accompanying text.

³⁴¹ It is possible to argue that the Fourth Amendment's reasonableness standard should continue to govern the conditions of confinement until arraignment (as I argued in Section V.B) or even throughout the period of pretrial detention. See *Baker, supra* note 17, at 480 (“[I]t is the ‘objective reasonableness’ standard of the Fourth Amendment that strikes the most appropriate balance between the rights of a pretrial detainee and the governmental interest in maintaining order.”). As I discussed in Section III.C, some Justices have suggested support for the notion that the entire period of detention prior to a judgment of conviction constitutes a “seizure” governed by the Fourth Amendment. However, as noted in Section V.B, there are reasons to doubt that the

more protective than an Eighth Amendment standard. In most (though not all) instances, my proposed test will result in the application of a standard of objective deliberate indifference.

There are a number of reasons why the standard for pretrial conditions of confinement—even after the judicial determination of probable cause—should be more protective than the Court’s Eighth Amendment tests. As outlined in Section III.A, the Court has justified its selection of the Eighth Amendment standards for convicted prisoners’ claims partly on the ground that some level of harshness is implicit in a prison sentence. Obviously, no such rationale is available with respect to pretrial detainees, because they cannot legally be punished.³⁴² And the Court’s unwillingness to simply assimilate pretrial detainees’ claims to Eighth Amendment claims suggests a recognition that the standards for treatment of pretrial detainees should diverge somewhat from those applicable to convicted prisoners. Moreover, the Court has explicitly left open the question “whether something less than intentional conduct, such as recklessness or ‘gross negligence,’ is enough to trigger the protections of the Due Process Clause.”³⁴³

These considerations suggest that the standards governing the conditions of judicial detention should occupy an intermediate ground between objective reasonableness and subjective deliberate indifference. In crafting such an intermediate test, it makes sense to carry forward the part of the *Wolfish* test that holds that conditions cannot be imposed on pretrial detainees to punish them for the crimes they stand accused of committing. Thus, a plaintiff should prevail on his claim concerning the conditions of pretrial detention if he can show that he was harmed by a condition that was imposed by the defendant in order to punish him for his alleged crime. Occasions for applying this branch of the test, though, will likely be rare, given that there will usually not be evidence of an explicit intent to punish. Absent such evidence, *Wolfish* directed courts to assess the condition’s reasonableness and proportionality in relation to legitimate government interests; it is this branch of the *Wolfish* test, I have argued, that requires further definition.³⁴⁴

Court will adopt an approach that applies a Fourth Amendment objective reasonableness standard to the conditions of confinement throughout the period of pretrial detention.

³⁴² See *Bell v. Wolfish*, 441 U.S. 520, 535 (1979) (“[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.”)

³⁴³ *Daniels v. Williams*, 474 U.S. 327, 334 n.3 (1986).

³⁴⁴ The need for further definition of this standard is most apparent in cases involving damages claims that will go to a jury. See *supra* note 49 and accompanying text. My proposal, correspondingly, focuses on the standards for such damages claims. Cases involving requests for injunctive relief may pose distinct issues that lie beyond the scope of this Article.

To accomplish that definition, I propose that courts apply a two-pronged objective deliberate indifference test.³⁴⁵ The first prong of that test would track the first prong of the Eighth Amendment test: the detainee would have to show “conditions posing a substantial risk of serious harm.”³⁴⁶ But the second prong of the test would diverge from the Eighth Amendment test: where the Eighth Amendment, the Court has held, requires that the defendant *actually knew* of the risk,³⁴⁷ my proposed test would permit liability if the defendant *knew or reasonably should have known* of the risk. This was, in essence, the objective deliberate indifference test that was in use in some lower courts, for Eighth Amendment claims, before the Court announced the subjective deliberate indifference test in *Farmer v. Brennan*.³⁴⁸

For each type of claim discussed in Section II.C, the adoption of an objective deliberate indifference test for pretrial detainee claims would rationalize and simplify lower court case law and provide a more appropriate standard than those currently employed. As I have noted, the lower courts’ approaches vary widely both among circuits and among types of claims. For general conditions-of-confinement claims, some lower courts apply the *Wolfish* reasonable-relationship test and some apply the Eighth Amendment subjective deliberate indifference test. For medical care claims, the consensus approach applies the subjective deliberate indifference test. For suicide and attack claims, the trend is toward applying the subjective deliberate indifference test, but some circuits have not overruled older precedents that applied the deliberate indifference test before it was clearly established (for Eighth Amendment claims) as a subjective one. And for excessive force claims, some circuits apply the malicious-and-sadistic test across the board, some limit that test to the use of force during disturbances, and some instead employ a test that features objective elements.

As to claims concerning general living conditions, adoption of my proposed approach would simplify the case law by eliminating the tension between the *Wolfish* test and the subjective deliberate indifference test. Absent explicit intent to punish, such claims would be assessed under one

³⁴⁵ See Gorlin, *supra* note 20, at 443 (arguing that “an objective deliberate-indifference requirement complies with the notion that substantive due process protections exceed Eighth Amendment protections”); Rosalie Berger Levinson, *Reining in Abuses of Executive Power Through Substantive Due Process*, 60 FLA. L. REV. 519, 570-71 (2008) (suggesting an objective deliberate indifference standard that would apply to claims by “arrestees and detainees”).

³⁴⁶ *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (describing the first prong in a case involving “a failure to prevent harm”).

³⁴⁷ See *id.* at 842.

³⁴⁸ See *id.* at 832 (quoting *Young v. Quinlan*, 960 F.2d 351, 360-61 (3d Cir. 1992), as holding that a “prison official is deliberately indifferent when he knows or should have known of a sufficiently serious danger to an inmate”).

test—the objective deliberate indifference test. As to medical care claims, the prevailing test for pretrial detainees’ claims would switch from a subjective to an objective deliberate indifference test. The same would be true for suicide and attack claims; in those areas, older circuit precedents that employed an objective deliberate indifference test would be validated while newer cases employing the subjective test would be overruled.

In each of these four areas, the most significant effect of my proposed test would be the substitution of the objective deliberate indifference test for the subjective deliberate indifference test. In many instances, the proof employed to meet one of these tests would be the same as the proof employed to meet the other; the difference would be that under the objective standard the proof would *directly* show that the defendant *should have known* of the risk, whereas under the subjective test the proof would constitute *circumstantial evidence* that the defendant *did know* of the risk. Likewise, it would be a sufficient defense to a pretrial detainee claim (as it is to a convicted prisoner’s claim) if the defendant shows that he or she “responded reasonably to the risk, even if the harm ultimately was not averted.”³⁴⁹ Given the significant overlap in the evidence that would ordinarily prove both subjective and objective deliberate indifference, it might well be the case that the choice between my proposed objective test and the existing Eighth Amendment subjective test would only rarely alter a case’s chances of surviving summary judgment.³⁵⁰ But for cases that reached trial, the jury instructions would differ significantly. The Court has stressed that juries hearing Eighth Amendment claims must be told that the plaintiff cannot prevail unless the defendant actually knew of the risk,³⁵¹ and a defendant can defend against an Eighth Amendment deliberate indifference claim by arguing that despite the risk’s obviousness, he was not actually aware of it.³⁵²

Claims for excessive force, as I have noted, are treated under a distinctive test when asserted by convicted prisoners. The Court in *Whitley v. Albers* held that force used during a prison disturbance does not violate a convicted prisoner’s Eighth Amendment rights unless it is used “maliciously

³⁴⁹ *Id.* at 844.

³⁵⁰ Even on summary judgment, the choice between the two tests could make a dispositive difference in some cases. *See, e.g.,* *Bruederle v. Louisville Metro Gov’t*, 687 F.3d 771, 778 (6th Cir. 2012) (upholding summary judgment for defendants where “[n]o reasonable juror could find that [the defendant] knew [that the plaintiff] required further attention” and “[a]t best, [the plaintiff] might argue that [the defendant] should have known he would suffer a seizure or should have taken more aggressive precautionary steps”), *cert. denied*, 133 S. Ct. 866 (2013).

³⁵¹ *Farmer*, 511 U.S. at 843 n.8.

³⁵² *Id.* at 843 n.8, 844.

and sadistically for the very purpose of causing harm.”³⁵³ The Court justified this defendant-friendly standard on the ground that officers should not have to worry about the threat of liability while addressing emergencies; but in *Hudson v. McMillian*, the Court extended the malicious-and-sadistic test to all uses of force against convicted prisoners.³⁵⁴

There are several reasons why the use of force against pretrial detainees should be analyzed under a different test. First, as Justices Thomas and Scalia pointed out in *Hudson*, there was no reason to extend such a deferential standard to all uses of force by guards against convicted prisoners, given that most such instances of force arise in nonemergency contexts.³⁵⁵ Second, the considerations specific to pretrial detainees make clear that the malicious-and-sadistic standard would be inappropriate. Certainly, force that is purely malicious and sadistic would violate pretrial detainees’ substantive due process rights under *Wolfish*, both because it is punitive and because it is not rationally related to any legitimate government objective. But force short of sadistic—even if it did not trigger the “punitiveness” prong of the *Wolfish* test—could still fail the rational-relationship prong of that test.

Under my proposed approach, a plaintiff should be able to prevail on a showing of more than de minimis force coupled with an expressed intent to punish. Absent evidence of such an explicit punitive intent, the objective deliberate indifference test would apply. As applied to excessive force claims, that test would require the plaintiff to show that (1) the force employed was unreasonable under the circumstances, and (2) the defendant knew or reasonably should have known that employing that amount of force posed a substantial risk of serious harm to the inmate. The first of these two elements would track the Fourth Amendment test for excessive force. The second element would render the test that applies during judicial detention more demanding (from the plaintiff’s perspective) than the Fourth Amendment test, but less demanding than the Eighth Amendment test.

In light of the precedents that I discussed in Section III.D, the standard for the use of force against pretrial detainees should acknowledge the Court’s special concern for the predicament of officers during disturbances, and should take into account whether exigent circumstances such as a jail riot were ongoing at the time of the use of force. It would be possible to accommodate this concern within the structure of the objective deliberate indifference test by including, in the jury instruction, language about the need for deference to judgments made under emergency circumstances; the

³⁵³ 475 U.S. 312, 320-21 (1986) (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973)).

³⁵⁴ 503 U.S. 1, 6-7 (1992).

³⁵⁵ See *supra* text accompanying footnote 243.

Court has set forth a similar approach under the Fourth Amendment's reasonableness framework.³⁵⁶ However, it seems possible that, for pretrial detainees' claims arising during such exigent circumstances, the Court would instead adopt the *Whitley* test; after all, it adopted a similar test in the context of substantive due process claims arising during high-speed car chases.³⁵⁷

D. *Potential Objections*

In Sections V.A and V.C, I argued that the Court should adopt separate constitutional standards for the treatment of pretrial detainees before and after a judicial determination of probable cause. For the period of pre-judicial detention, I argued that the Fourth Amendment's objective reasonableness standard should govern all of the standard types of conditions-of-confinement claims. During the period of judicial detention (or, at any rate, during postarrest judicial detention), I advocated an intermediate due process standard of objective deliberate indifference.³⁵⁸ I acknowledged that during either period, claims of excessive force that arose during exigent circumstances would trigger a more deferential standard than that which applies to other conditions-of-confinement claims. In this Section, I address likely objections to this proposal. First, I consider the concern that my proposal would subject officers to different standards with respect to inmates in the same facility. Next, I rebut the objection that my proposal is built upon a notion that it is acceptable to subject convicted prisoners to brutal conditions because they committed crimes. I then consider whether my justification for an objective deliberate indifference test during judicial detention is at odds with the Court's stated rationale for adopting a subjective deliberate indifference test for claims by convicted prisoners. Finally, I address the concern that my proposed standard for the period of judicial detention is insufficiently protective of the rights of pretrial detainees.

³⁵⁶ In *Graham v. Connor*, the Court stated:

The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . . The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.

490 U.S. 386, 396-97 (1989).

³⁵⁷ See *supra* notes 248-51 and accompanying text.

³⁵⁸ As noted in Section V.B, one could argue for the application of the Fourth Amendment reasonableness test to all pre-arrest claims, including claims by persons arrested upon a warrant.

One could borrow a strong form of the first objection from Henry Hart: "People repeatedly subjected, like Pavlov's dogs, to two or more inconsistent sets of directions, without means of resolving the inconsistencies, could not fail in the end to react as the dogs did. The society, collectively, would suffer a nervous breakdown."³⁵⁹ As we saw in Part IV, one jail facility may house two or perhaps three different types of inmates: detainees awaiting a judicial determination of probable cause, other pretrial detainees, and convicted prisoners. If differing constitutional tests with varying levels of protectiveness apply to each type of inmate, guards will not know how to behave without first determining the status of a particular inmate and then recalling the specific standard that applies to that inmate. This objection is not without force.³⁶⁰ It may be one of the primary practical reasons why the Court has not yet specified the standards applicable to pretrial detainees, and why—as we saw in Section II.C—some lower courts have simply assimilated certain types of pretrial detainees' claims to convicted prisoners' claims.

But this concern should not be overstated. The most protective standard that I am proposing (the Fourth Amendment objective reasonableness test) would apply only during the period after a warrantless arrest and prior to a judicial determination of probable cause—a period presumptively limited to forty-eight hours.³⁶¹ To limit liability that might arise from the applicability of the more protective standard of care during this period, local governments might endeavor to expedite the judicial probable cause determination, or they might hold warrantless arrestees separately from the general population pending that determination—both options which would presumably appeal to Justices who have expressed concerns about the welfare of those subjected to warrantless arrests.³⁶²

³⁵⁹ Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 489 (1954).

³⁶⁰ A distinct, though related, objection might be that adopting a special standard for pretrial detainees could cause problems in cases where claims concerning both pretrial detainees and convicted prisoners are tried together—e.g., in a civil case brought by two types of inmates or in a criminal civil rights prosecution involving alleged crimes against two types of inmates. But it is not clear that such cases arise with any frequency; and when they do arise, any problems could be dealt with on a case-by-case basis, for example by holding separate trials if there is a likelihood of jury confusion.

³⁶¹ If a court were to accept the argument sketched in Section V.B, then the Fourth Amendment test would apply prior to arraignment, even if the arrest occurred pursuant to a warrant. That would not materially alter my point concerning the brevity of the period to which the Fourth Amendment standard applies, because the period prior to arraignment would likewise be short.

³⁶² It should be noted that when a detainee presents a suicide risk, there would be disadvantages to an approach that entailed isolating that detainee from the rest of the jail population.

One might make a similar argument about the conditions of judicial detention: even as to this period, a number of authorities advocate housing pretrial detainees separately from convicted prisoners.³⁶³ Moreover, to the extent that an objective deliberate indifference standard might be expected to raise by some amount the costs of confining pretrial detainees, jurisdictions might thereby be motivated to bring criminal proceedings to a speedier resolution or to examine more closely bail policies that—in some jurisdictions—result in the pretrial incarceration of some nondangerous defendants due to indigence.

It is also worth asking whether the adoption of the proposal outlined here would really result in a marked difference in the standards that ordinarily govern jail management.³⁶⁴ As between the objective and subjective deliberate indifference tests, there may turn out to be little actual difference from an officer's *ex ante* perspective: the same facts that would ground a showing that the officer *should have known* of a substantial risk of serious harm to a pretrial detainee would also, in many instances, ground a showing that the officer *actually did know* of such a risk to a convicted prisoner.³⁶⁵ In addition, federal constitutional tort liability will usually not be the only sort of liability that might shape the conduct of jail officials. State tort law appears generally to follow the approach reflected in the *Restatement (Second) of Torts*, which states that “[o]ne who is required by law to take . . . custody of

³⁶³ See, e.g., 28 C.F.R. § 551.100 (2012) (providing that in Federal Bureau of Prisons facilities “[p]retrial inmates will be separated, to the extent practicable, from convicted inmates”); Gorlin, *supra* note 20, at 433 & n.106 (citing relevant federal and state statutes).

³⁶⁴ One might also question, as a matter of principle, whether a government's decision to house pretrial detainees and convicted prisoners together should constrain the selection of a more protective constitutional standard for the conditions of confinement of pretrial detainees. On the other hand, the decision to house both types of inmates together may be driven by budgetary and legal exigencies, such as the dire overcrowding in California's prison system. See *Brown v. Plata*, 131 S. Ct. 1910, 1923-27 (2011) (discussing California's prison overcrowding and resulting litigation). Furthermore, in circuits where the court of appeals has held that Eighth Amendment standards govern pretrial detainees' claims, administrators may have assumed that combining the two populations would cause no doctrinal complications.

³⁶⁵ A plaintiff asserting an Eighth Amendment deliberate indifference claim can use circumstantial evidence to show the defendant's knowledge. See *Farmer v. Brennan*, 511 U.S. 825, 842 (1994) (“Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence, and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious.” (citations omitted)).

Admittedly, there is a more dramatic difference between the Eighth Amendment excessive force standard and my proposed objective deliberate indifference standard. But it is to be hoped that officers are not currently assured, during training, that their uses of force are permissible so long as they are not “malicious and sadistic.” Thus, imposing a more protective standard than the “malicious and sadistic” test should not mean (one would hope) a dramatic difference in overall approaches to the use of force within jails.

another under circumstances such as to deprive the other of his normal opportunities for protection”³⁶⁶ has a duty to “take reasonable action (a) to protect [him] against unreasonable risk of physical harm, and (b) to give [him] first aid after [the officer] knows or has reason to know that [he is] ill or injured, and to care for [him] until [he] can be cared for by others.”³⁶⁷ My argument, here, is not that the due process test for conditions of confinement should be drawn from state tort law; the Constitution, as the Court has observed, is not “a font of tort law.”³⁶⁸ Rather, my point is that if one concludes that the most appropriate standard for pretrial detainees’ due process claims is objective deliberate indifference, one should not be deterred from adopting that standard merely because the Eighth Amendment test applies to some of the inmates in jail facilities. State law may already impose on jail officials a standard of care that is considerably less deferential than that set by the Court’s Eighth Amendment jurisprudence.³⁶⁹

Moreover, the operation of qualified immunity may, in practice, smooth out some of the discontinuity between the Eighth Amendment standard for excessive force and the objective excessive force standard that I advocate here. At least some courts have held that, when the Eighth Amendment excessive force test applies, there is no room for qualified immunity: if the defendant’s conduct was malicious and sadistic, these courts reason, then it is indisputable that a reasonable officer would have known that his or her conduct violated the Constitution.³⁷⁰ By contrast, where a reasonableness

³⁶⁶ RESTATEMENT (SECOND) OF TORTS § 314A(4) (1965).

³⁶⁷ *Id.* § 314A(1). The *Restatement* also specifically addresses failure to protect from attack. It states that jailers and other custodians have

a duty to exercise reasonable care so to control the conduct of third persons as to prevent them from intentionally harming the other or so conducting themselves as to create an unreasonable risk of harm to him, if the actor

(a) knows or has reason to know that he has the ability to control the conduct of the third persons, and

(b) knows or should know of the necessity and opportunity for exercising such control.

Id. § 320. The Court recently observed that these sections of the *Restatement* mirror “general principles of tort law present, as far as we can tell, in the law of every State.” *Minneci v. Pollard*, 132 S. Ct. 617, 624 (2012).

³⁶⁸ *Daniels v. Williams*, 474 U.S. 327, 332 (1986) (quoting *Paul v. Davis*, 424 U.S. 693, 701 (1976)).

³⁶⁹ On the other hand, the applicable state law may include immunity doctrines that shield jails and their officials from state tort liability in all but very egregious cases.

³⁷⁰ *See, e.g., Johnson v. Breeden*, 280 F.3d 1308, 1321-22 (11th Cir. 2002) (“It is not just that this constitutional tort involves a subjective element, it is that the subjective element required to establish it is so extreme that every conceivable set of circumstances in which this constitutional violation occurs is clearly established to be a violation of the Constitution . . .”).

standard applies, the question of whether the defendant used excessive force is separable from the question of whether, under the circumstances, a reasonable official would have known that the force used was constitutionally unreasonable.³⁷¹

A quite different objection might arise from my reliance on the line of cases that I suggested cast Eighth Amendment conditions-of-confinement cases as a genre of “constitutional law for the guilty.”³⁷² If I advocate greater protections for pretrial detainees on the ground that they have not been convicted of the crimes for which they are being held, some might object that I am implicitly approving the idea that the State is entitled to subject convicted prisoners to cruel prison conditions because they have committed crimes. In other words, some might argue that one cannot use the status of pretrial detainees (as persons who have not been convicted) to justify improved conditions for their detention without also approving of the notion that convicted prisoners invited brutal prison conditions when they committed their crimes.³⁷³ I do not, in fact, endorse the latter idea.³⁷⁴ But one need not endorse such a notion in order to accept my proposal; one

³⁷¹ See *Saucier v. Katz*, 533 U.S. 194, 205 (2001). A different aspect of *Saucier*—namely, its directive concerning the *order* in which courts should address the two components of the qualified immunity analysis—was subsequently abrogated by *Pearson v. Callahan*. See 555 U.S. 223, 242 (2009) (“Because the two-step *Saucier* procedure is often, but not always, advantageous, the judges of the district courts and the courts of appeals are in the best position to determine the order of decisionmaking that will best facilitate the fair and efficient disposition of each case.”). But the point for which I cite *Saucier* in the text remains good law: the question of reasonableness under the circumstances (for purposes of qualified immunity) is distinct from the question of the underlying substantive test (even if that test itself is one of reasonableness under the circumstances).

³⁷² See *supra* Section III.A.

³⁷³ Some courts have explained their extension of Eighth Amendment standards to pretrial detainees’ claims by asking why conditions should be considered too brutal for pretrial detainees if they are tolerated for convicted prisoners. See, e.g., *Butler v. Fletcher*, 465 F.3d 340, 345 (8th Cir. 2006) (“Pretrial detainees and convicted inmates, like all persons in custody, have the same right to . . . basic human needs.”); *Hart v. Sheahan*, 396 F.3d 887, 893 (7th Cir. 2005) (“[W]hen the issue is whether brutal treatment should be assimilated to punishment, the interests of the prisoner [are] the same whether he is a convict or a pretrial detainee.”); *Hamm v. DeKalb County*, 774 F.2d 1567, 1574 (11th Cir. 1985) (“Life and health are just as precious to convicted persons as to pretrial detainees.”).

³⁷⁴ Rather, I agree with the view taken by a tentative draft in the American Law Institute’s (ALI) project to revise the Model Penal Code’s sentence provisions, which includes among the purposes of the sentencing system the goal of “ensur[ing] that all criminal sanctions are administered in a humane fashion and that incarcerated offenders are provided reasonable benefits of subsistence, personal safety, medical and mental-health care, and opportunities to rehabilitate themselves.” MODEL PENAL CODE: SENTENCING § 1.02(2)(b)(vi) (Tentative Draft No. 1, 2007). “Tentative Draft No. 1 . . . was approved by the [ALI] membership at the 2007 Annual Meeting (subject to the discussion at that meeting and to editorial prerogative).” *Current Projects: Model Penal Code: Sentencing*, AM. L. INST., http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=2 (last visited Feb. 8, 2013).

need merely accept the fact that this idea contributed to the development of Eighth Amendment conditions-of-confinement doctrine. Like it or not, that doctrine was premised in part—at its adoption—upon the idea that some level of harshness went along with conviction and the imposition of a prison sentence. Given that fact, and the fact that pretrial detainees have been neither convicted nor sentenced, the constitutional standards for pretrial detainees' treatment should be distinguishable from, and more protective than, current Eighth Amendment standards.³⁷⁵

Another objection would train upon the rationale that the Court offered in *Farmer v. Brennan* when it determined that the Eighth Amendment's deliberate indifference test should be subjective rather than objective. As the Court explained,

The Eighth Amendment does not outlaw cruel and unusual "conditions"; it outlaws cruel and unusual "punishments." An act or omission unaccompanied by knowledge of a significant risk of harm might well be something society wishes to discourage, and if harm does result society might well wish to assure compensation. The common law reflects such concerns when it imposes tort liability on a purely objective basis. But an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment.³⁷⁶

Given that the *Wolfish* Court premised its standard for pretrial conditions of confinement on the fact that pretrial detainees may not be "punished,"³⁷⁷ one might argue that the same punishment–no punishment dichotomy applies to each type of claim and that, therefore, the subjective deliberate indifference test must apply to pretrial detainee claims.

However, that conclusion is not inevitable. First, though the *Farmer* Court relied on the word "punishment" in the Eighth Amendment,³⁷⁸ it also invoked its prior Eighth Amendment cases—a number of which had stressed instead the Eighth Amendment's use of the terms "cruel and

³⁷⁵ If the Court were to revise its Eighth Amendment standard in ways that rendered it more protective than the current standards, such changes could distance Eighth Amendment doctrine from its roots in the rationale of criminal guilt and render it more appropriate for application to pretrial detainees. For example, Sharon Dolovich has suggested that the Court replace *Farmer's* subjective deliberate indifference test with an objective deliberate indifference test. *See Dolovich, supra* note 6, at 948. If the Court were to adopt such a standard for Eighth Amendment claims by convicted prisoners, it would be less necessary to differentiate the standard for substantive due process claims by pretrial detainees. But such a development does not appear imminent.

³⁷⁶ *Farmer v. Brennan*, 511 U.S. 825, 837-38 (1994) (citations omitted).

³⁷⁷ *Bell v. Wolfish*, 441 U.S. 520, 535 (1979).

³⁷⁸ *Farmer*, 511 U.S. at 832, 837-38.

unusual.”³⁷⁹ Second, the word “punishment” is part of the text of the Eighth Amendment but not of the Fifth or Fourteenth Amendments.³⁸⁰ The Court has held that the operative verb in the Due Process Clause—“deprive”³⁸¹—requires more than negligence, but left open the possibility that “something less than intentional conduct, such as recklessness or ‘gross negligence,’” could suffice.³⁸² Third, the *Wolfish* test measures intent to punish largely by asking whether a particular condition of confinement is rationally related to a legitimate government interest; that formulation is consistent with the idea of an objective test.³⁸³

An objection from a different angle might be that my proposed standard for the conditions of judicial detention is insufficiently protective of pretrial detainees. The Court’s precedents in the area of municipal liability illustrate that a test of objective deliberate indifference can be quite difficult for a plaintiff to meet.³⁸⁴ Rather than (or in addition to) altering the scienter requirement, this argument might state, one should lower the showing of harm that a pretrial detainee must make.³⁸⁵ Such an approach might make it easier for pretrial detainees to establish their claims in some cases; on the other hand, setting two permissible levels of harm—one for pretrial detainees

³⁷⁹ For example, the *Farmer* Court commenced its analysis by quoting from *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981). See *Farmer*, 511 U.S. at 832 (“The Constitution ‘does not mandate comfortable prisons’ . . .”). In the passage leading up to this quotation, the *Rhodes* Court had framed its analysis by focusing on the phrase “cruel and unusual.” See *Rhodes*, 452 U.S. at 345 (“The Eighth Amendment, in only three words, imposes the constitutional limitation upon punishments: they cannot be ‘cruel and unusual.’”). For further discussion of the *Rhodes* Court’s analysis, see *supra* text accompanying notes 142-46.

³⁸⁰ See, e.g., *Gibson v. County of Washoe*, 290 F.3d 1175, 1188 n.9 (9th Cir. 2002) (“This limiting word [punishment] does not . . . appear in the Fourteenth Amendment . . .”); *Gorlin*, *supra* note 20, at 427 (noting this difference between the Eighth and the Fifth and Fourteenth Amendments and arguing that “to mechanically apply the Supreme Court’s Eighth Amendment definition of ‘punishment’ to the substantive due process inquiry plainly denies that these constitutional sources are distinct”).

³⁸¹ See U.S. CONST. amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law . . .”); *id.* amend. XIV, § 1 (“No State shall . . . deprive any person of life, liberty, or property, without due process of law.”).

³⁸² *Daniels v. Williams*, 474 U.S. 327, 334 n.3 (1986).

³⁸³ See *Gorlin*, *supra* note 20, at 439 (“Strict adherence to the text of *Wolfish* reveals an objective approach to pretrial detainees’ conditions-of-confinement claims . . .”).

³⁸⁴ See *Connick v. Thompson*, 131 S. Ct. 1350, 1360 (2011) (“A pattern of similar constitutional violations by untrained employees is ‘ordinarily necessary’ to demonstrate deliberate indifference for purposes of failure to train.” (quoting *Bd. of the Cnty. Comm’rs v. Brown*, 520 U.S. 397, 409 (1997))); see also *id.* at 1361 (positing a “narrow range” of cases in which “the unconstitutional consequences of failing to train could be so patently obvious that a city could be liable under § 1983 without proof of a pre-existing pattern of violations”).

³⁸⁵ The Seventh Circuit, in fact, once contemplated such an approach, but has not followed through on it. See *supra* note 92 and accompanying text.

and one for convicted prisoners—might be more likely than my proposal to raise problems concerning conflicting standards in the same facility. In light of existing Eighth Amendment precedent and the fact that convicted prisoners and pretrial detainees are so often housed together, the objective deliberate indifference test that I have outlined here seems the most pragmatic accommodation of the competing concerns.

CONCLUSION

In Part I of this Article, I noted the need for further articulation of the standard for pretrial detainees' claims concerning conditions of confinement. The Court commenced in *Wolfish* by holding that conditions must not be imposed for punitive reasons and that they must be reasonably related to a legitimate government interest. In the years since *Wolfish*, the Court has (1) in *Turner* and subsequent cases, extended the rational-relationship test to almost all constitutional challenges to prison regulations; (2) pointed out that the *Turner* test is inapplicable to Eighth Amendment claims because it is too deferential; and (3) stated that the test for pretrial detainees' conditions-of-confinement claims is at least as protective as that for convicted prisoners' claims. But though the Court has specified in detail the standards for convicted prisoners' claims under the Eighth Amendment, its treatment of analogous claims by pretrial detainees has been Delphic.

Part II noted that, in the lower courts, the law of pretrial detainees' rights is in flux. Though the *Wolfish* test continues to hold some sway with respect to claims concerning general living conditions, other types of claims are increasingly (though not always) analyzed under Eighth Amendment standards—an assimilation that has not been adequately examined. In Part III, I reviewed aspects of Supreme Court case law that, while not directly on point, shed some light on the treatment of pretrial detainees, and in Part IV, I briefly set out some data concerning pretrial detainees and the jails that house them.

In Part V, I described and defended my proposed approach to pretrial detainees' claims. For claims that arise prior to a judicial determination of probable cause, I proposed the adoption of the Fourth Amendment reasonableness standard. I also noted a strong argument in favor of applying that Fourth Amendment standard to all pre-arraignment claims, even those by persons arrested upon a warrant, but I noted that the Court might find such an argument less persuasive than an argument that focuses solely on pre-judicial detention after a warrantless arrest. For claims arising subsequently, I proposed that the plaintiff be required to show either explicit punitive intent or objective deliberate indifference. I advocated extending the

objective deliberate indifference test to all five of the types of claims on which I focused—general conditions of confinement, denial of medical care, failure to prevent suicide, failure to protect from attack, and excessive force—but I noted that the test would require adjustment when applied to excessive force claims that arise during a jail disturbance.

For most types of claims, adoption of my proposal would require most circuits to overrule their precedents.³⁸⁶ But my proposals are designed to fit within the framework of existing Supreme Court case law, such that the Supreme Court could plausibly adopt them if and when it chooses to revisit this important area of law. If the Court were to adopt the proposals set forth here, it would not be the first time it overturned a trend in the lower court case law in this general area. In 1989, when the Court held that the Fourth Amendment's objective reasonableness test governs force employed during an arrest, it took lower courts to task for improperly assimilating such claims to Eighth Amendment claims by convicted prisoners.³⁸⁷ It is to be hoped that the Court will make a similar correction in the near future to the law governing pretrial detainees' claims.

³⁸⁶ See *supra* Section II.C.

³⁸⁷ See *Graham v. Connor*, 490 U.S. 386, 393-94, 397-98, 398 n.11 (1989).