NOTES

A CHANGING LANDSCAPE FOR PRETRIAL DETAINEES? THE POTENTIAL IMPACT OF *KINGSLEY V. HENDRICKSON* ON JAIL-SUICIDE LITIGATION

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Suicide is the leading cause of death in jails, yet many jails and municipalities have insufficient policies for preventing inmate suicide. One of the ways to lead jails and municipalities to change such policies would be through financial pressure from individual lawsuits for damages resulting from an inmate's suicide; however, due to the legal structure surrounding custodial liability, it is often difficult for inmates' estates to successfully hold jail officials or local municipalities liable. In Farmer v. Brennan*, the Supreme Court found that a subjective deliberate indifference standard applied to a convicted prisoner's Eighth Amendment failure-to-protect claim. Since then, courts have been applying this subjective deliberate indifference standard to similar claims by pretrial detainees, even though such claims arise under the Fourteenth Amendment, which protects pretrial detainees from any punishment, not just cruel and unusual punishment. In 2015, the Supreme Court held in* Kingsley v. Hendrickson *that an objective, rather than subjective, standard applies to determine whether an official's use of force against a pretrial detainee was excessive—a lesser standard than the subjective standard used for convicted prisoners.*

This Note examines how the Kingsley *decision and the Court's emphasis that intent is not required for an act to be considered punishment might impact a pretrial detainee's failure-to-protect and serious-medical-needs claims, particularly as they relate to jail-suicide litigation. Ultimately, the Note asserts that courts should begin to apply an objective deliberate indifference standard to such claims and that this could lead municipalities to adopt more effective suicide prevention policies.*

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INTRODUCTION

In summer 2015, the suicides of Kalief Browder[1] and Sandra Bland[2] shed light on the consistently high rate of suicide in jails.[3] Suicide is the leading cause of death in jails[4] and has been since 2000.[5] In 2013, the

1. See Jennifer Gonnerman, Kalief Browder, 1993-2005, New Yorker (June 7, 2015), http://www.newyorker.com/news/news-desk/kalief-browder-1993-2015 (on file with the *Columbia Law Review*) (describing Browder's suicide after multiple past attempts and connecting his death to his experience while incarcerated on Rikers Island).

2. See, Greg Botelho & Dana Ford, Sandra Bland's Death Ruled Suicide by Hanging, CNN (July 23, 2015), http://www.cnn.com/2015/07/23/us/sandra-bland-arrest-death-main/ [http://perma.cc/QA2N-79AG] (describing the circumstances surrounding Bland's death and analyzing the autopsy results).

3. See, e.g., Martin Kaste, The 'Shock of Confinement': The Grim Reality of Suicide in Jail, NPR (July 27, 2015), http://www.npr.org/2015/07/27/426742309/the-shock-of-confinement-the-grim-reality-of-suicide-in-jail [http://perma.cc/PE44-T7E4] (noting the high rates of jail suicide and providing commentary by a corrections expert and surviving family members); Jim Liske, Jail Suicide Is Not Justice, Huffington Post: The Blog (Aug. 28, 2015), http://www.huffingtonpost.com/jim-liske/jail-suicide-is-not-justi_b_8054654.html [http://perma.cc/9XH5-7VYC] (discussing the prevalence of jail suicide and possible policy solutions). The Supreme Court recognized the importance of these stories for starting a conversation about what is happening in prisons and jails. See Davis v. Ayala, 135 S. Ct. 2187, 2210 (2015) (Kennedy, J., concurring) (referencing the "new and growing awareness in the broader public of the subject of corrections and of solitary confinement in particular" and citing a *New Yorker* article describing the confinement of Browder).

4. This Note specifically looks at suicide in jails, not prisons. For the purposes of this Note, there are two key differences between jails and prisons: (1) jails are usually local facilities run by the city, district, or county, while prisons are usually run by the state or federal government and (2) jails house individuals who have been arrested and are waiting for trial or sentencing or inmates who have been sentenced to less than a year, while prisons house inmates who have been sentenced to more than one year. See James R.P. Ogloff et al., Mental Health Services in Jails and Prisons: Legal, Clinical, and Policy Issues, 18 Law & Psychol. Rev. 109, 110 (1994) (describing the differences between jails and prisons).

5. Margaret Noonan, Harley Rohloff & Scott Ginder, Bureau of Justice Statistics, Office of Justice Statistics, U.S. Dep't of Justice, NCJ 248756, Mortality in Local Jails and State Prisons, 2000–2013—Statistical Tables 1 (Aug. 2015), http://www.bjs.gov/content/pub/pdf/mljsp0013st.pdf [http://perma.cc/TPF2-5PDC] (noting suicide is the leading cause of death in jails when illness is broken down by type). The Death in Custody Reporting Program at the Department of Justice's Bureau of Justice Statistics collects data on deaths that occur during arrests or while persons are in custody of jails or prisons. Data is collected from state and local law enforcement agencies and includes demographic information, criminal background details, and information about the death itself. See Data Collection: Deaths in Custody Reporting Program, Bureau of Justice Statistics, Office

mortality rate for jail suicide was 46 deaths per 100,000 local jail inmates, as compared to the overall mortality rate of 135 deaths per 100,000 local jail inmates.[6] Yet, despite the availability of well-established standards promulgated by organizations such as the American Corrections Association and the National Commission on Correctional Health Care, many jails continue to have nonexistent or insufficient suicide prevention policies.[7]

The constitutional legal structure surrounding custodial suicide protects municipalities and correctional officials from accountability.[8] To succeed in a suicide claim concerning a convicted prisoner, the plaintiff (usually the prisoner's estate) must invoke the Eighth Amendment's Cruel and Unusual Punishment Clause and prove that a municipality or correctional official acted with deliberate indifference when the municipality or officer failed to address the inmate's serious medical need or protect the inmate from a substantial risk of serious harm.[9] For Eighth Amendment claims against individual officers, deliberate indifference is

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of Justice Programs, U.S. Dep't of Justice, http://www.bjs.gov/index.cfm?ty=dcdetail&iid=243 [http://perma.cc/88SS-T5KM] (last visited Aug. 30, 2016).

6. Noonan et al., supra note 5, at 8 tbl.3. The suicide rate in jails is significantly higher than the suicide rate in prisons. In 2013, the mortality rate for prison suicide was 15 deaths per 100,000 state prisoners, while the overall morality rate was 274 deaths per 100,000 state prisoners. Id. at 21 tbl.18.

7. A 1996 study by the National Center on Institutions and Alternatives (NCIA) found that only about one-third of the thirty-two states that had any jail standards at all had suicide prevention policies. Schnavia Smith Hatcher, Deliberate Indifference in Jail Suicide Litigation: A Fatal Judicial Loophole, 24 Soc. Work Pub. Health 401, 407–08 (2009). In 2005, NCIA's Project Director Lindsay Hayes noted that it would "take many more years of 'legalese' . . . for the majority of facilities to implement the guidelines in America." Id. at 408.

8. See Christine Tartaro, What Is Obvious? Federal Courts' Interpretation of the Knowledge Requirement in Post–*Farmer v. Brennan* Custodial Suicide Cases, 95 Prison J. 23, 40 (2015) ("[T]he standards for awareness of a suicide risk set in *Farmer v. Brennan* seemed to have offered little assistance to plaintiffs as they try to demonstrate that police or corrections officials violated the Eighth and/or Fourteenth Amendment rights of people who harm themselves while in custody."); Jessa Irene DeGroote, Comment, Weighing the Eighth Amendment: Finding the Balance Between Treating and Mistreating Suicidal Prisoners, 17 U. Pa. J. Const. L. 259, 270 (2014) ("[T]he Supreme Court jurisprudence is highly deferential to prison administrators."); see also infra section I.C (describing the difficulties in establishing liability in suicide cases). This Note focuses on suicide claims brought under federal law. Plaintiffs might also have the ability to bring claims in state court as wrongful death or negligence claims. These state claims might provide alternative avenues for success, particularly because state law might mandate a lesser liability standard. Civil Liability for Prisoner Suicide, 2007(2) AELE Monthly L.J. 301, 307, http://www.aele.org/law/2007JBFEB/2007-02MLJ301.pdf [http://perma.cc/42X8-C2KX].

9. See, e.g., Gish v. Thomas, 516 F.3d 952, 954 (11th Cir. 2008) (recognizing that deliberate indifference is the appropriate standard to measure liability claims resulting from inmate suicide).

a subjective standard[10] in contrast to the objective deliberate indifference standard used for municipal liability.[11] In order for an official to exhibit subjective deliberate indifference, the official must have had actual knowledge that the inmate had a strong likelihood of suicide *and* must have failed to take reasonable measures to address the substantial risk of serious harm.[12]

This high standard is a contributing factor to an apparently low probability of success in suicide litigation.[13] A study examining suicide litigation brought under 42 U.S.C. § 1983 from 1994 through 2008 found that in over 800 published opinions, prisoners' families were the prevailing parties only seventeen percent of the time.[14] The high hurdle for proving liability for custodial suicide supports a culture that favors custodial ignorance and deprioritizes suicide prevention policies.[15]

The case in which the Supreme Court determined that the subjective deliberate indifference standard applies to claims of failure to protect from substantial risk of serious harm and serious medical needs was in the Eighth Amendment context.[16] The Eighth Amendment only protects convicted prisoners and not pretrial detainees. The Fourteenth Amendment serves as the basis for a pretrial detainee suicide claim.[17] Nevertheless, lower courts have typically assumed that the Eighth Amendment subjective deliberate indifference standard governs pretrial detainee Fourteenth Amendment claims.[18]

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10. See Farmer v. Brennan, 511 U.S. 825, 834 (1994) (finding that the Eighth Amendment requires a subjective deliberate indifference standard and rejecting the objective standard).

11. See City of Canton v. Harris, 489 U.S. 378, 388–89 (1989) (finding a municipality is liable for failure-to-train claims when there is "deliberate indifference" to individual rights and noting that this rule is "most consistent" with precedent that a municipality is liable when its policies are the "moving force [behind] the constitutional violation" (quoting Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694 (1978))).

12. See *Farmer*, 511 U.S. at 847. For discussion of the subjective deliberate indifference standard, see infra section I.B.

13. See Darrell L. Ross, The Liability Trends of Custodial Suicide, Am. Jails, Mar.–Apr. 2010, at 37, 39 & fig.1 (discussing the difficulties that prisoners face in winning suicide litigation after *Farmer v. Brennan*).

14. Id. This statistic includes litigation brought against correctional personnel in jails, lock-ups, and prisons. Id.

15. See 1 Fred Cohen, The Mentally Disordered Inmate and the Law ¶ 14.1[1], at 14-4 (2d ed. 2008) (arguing that the "law of custodial suicide places an unseemly premium on the ignorance of custodians . . . of the readily accepted factors that are predictive of suicide").

16. See *Farmer*, 511 U.S. at 834 (finding that the Eighth Amendment requires the subjective deliberate indifference standard).

17. See, e.g., Estate of Moreland v. Dieter, 395 F.3d 747, 758 (7th Cir. 2005) (finding that the plaintiff's claim falls under the Fourteenth Amendment because he was a pretrial detainee at the time of his death).

18. Id. (noting that even though the plaintiff is a pretrial detainee, the court assumes the claim is evaluated by the Eighth Amendment standard); see also Castro v. County of

Scholars and advocates have called for a shift away from using the subjective deliberate indifference standard for pretrial detainees' claims and suggest that courts instead apply an objective deliberate indifference standard to these claims.[19] An objective standard would require plaintiffs to prove that the official *should have known* of the inmate's serious medical needs or substantial risk of serious harm and failed to take reasonable measures to address the risk, rather than that the official had *actual knowledge* and failed to take such reasonable measures.[20] Arguments for the less demanding standard assert that an objective standard would better protect a pretrial detainee's substantive due process rights.[21]

This Note examines how the Supreme Court's decision in *Kingsley v. Hendrickson* might serve as precedent for the application of an objective deliberate indifference standard for pretrial detainee suicide claims.[22] In *Kingsley*, the Court found that an objective standard should be used to determine whether an act of intentional force was "excessive" for a pretrial detainee's excessive force claims.[23] As a result of this decision, the Court uses different standards to evaluate pretrial detainees' excessive force claims brought under the Fourteenth Amendment and convicted prisoners' excessive force claims brought under the Eighth Amendment. Pretrial detainees only have to prove that the force was objectively unreasonable, regardless of the official's state of mind, but prisoners must prove that the force was "malicious and sadistic."[24] Thus, pretrial detainees have less to prove. Post-*Kingsley*, courts and scholars are considering whether the decision mandates that an objective standard should govern pretrial detainees' other Fourteenth Amendment claims.[25]

This Note suggests that the *Kingsley* decision should lead courts to adopt the objective deliberate indifference standard for pretrial detainee Fourteenth Amendment claims of failure to protect from substantial risk

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Los Angeles, No. 12-56829, 2016 WL 4268955, at *5 (9th Cir. Aug. 15, 2016) (explaining that the Ninth Circuit had read the Court's precedent to "create a single 'deliberate indifference' test for plaintiffs who bring a constitutional claim—whether under the Eighth Amendment or the Fourteenth Amendment").

19. See Catherine T. Struve, The Conditions of Pretrial Detention, 161 U. Pa. L. Rev. 1009, 1068 & n.345 (2013) (proposing a "two-pronged objective deliberate indifference test" and citing other scholars with similar proposals).

20. Cf. *Farmer*, 511 U.S. at 838 ("[A]n 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.").

21. See, e.g., Rosalie Berger Levinson, Reining in Abuses of Executive Power Through Substantive Due Process, 60 Fla. L. Rev. 519, 571 (2008) [hereinafter Levinson, Due Process] (noting that the objective deliberate indifference standard better complies with substantive due process).

22. 135 S. Ct. 2466 (2015).

23. Id. at 2473 ("Several considerations have led us to conclude that the appropriate standard for a pretrial detainee's excessive force claim is solely an objective one.").

24. See, e.g., id. at 2475 (noting that the "malicious and sadistic" standard applies to convicted prisoners' excessive force claims).

25. See infra note 162 (listing cases).

of serious harm and serious medical needs. It posits that doing so might pressure municipalities to strengthen policies related to suicide prevention in jails. Part I of this Note provides background information about the legal claims, liability theories, and standards associated with suicide litigation. It also lays out the difficulties that plaintiffs face when proving inmate-suicide claims. Part II then explores the Supreme Court's recent decision in *Kingsley v. Hendrickson*. It examines whether the opinion supports an objective deliberate indifference test for pretrial-detainee claims of failure to protect and failure to treat serious medical needs. Finally, Part III advocates for the adoption of the objective deliberate indifference standard for these claims and postures that this might lead to policies aimed at reducing suicides in jails.

I. AN OVERVIEW OF § 1983 CLAIMS FOR JAIL AND PRISON SUICIDES

Incarcerated individuals have limited legal protections.[26] This Part examines the foundation and evolution of inmates' constitutional rights that are relevant to suicide litigation. Section I.A addresses the statutory and constitutional foundations for suicide claims and discusses liability theories. Section I.B then explores the development of the deliberate indifference standard and provides a detailed explanation of how courts apply the subjective standard. Finally, section I.C examines how the subjective deliberate indifference standard has been applied in suicide litigation.

A. *The Legal Claim for Suicide Litigation*

After a person in government custody commits suicide,[27] the deceased's estate or survivors might bring a lawsuit for damages. Typically, the estate or survivors will sue correctional officers, medical staff, and the municipality[28] responsible for managing the jail or prison.[29] The plaintiff alleges that the defendants' failure to prevent the suicide led to the inmate's death.[30]

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26. See Turner v. Safley, 482 U.S. 78, 84 (1987) ("Prison walls do not form a barrier separating prison inmates from the protections of the constitution.").

27. This Note focuses on suicide claims resulting from successful suicide attempts.

28. While local municipalities such as cities or counties usually manage jails, a few states, such as Connecticut, have an integrated system in which jails are managed by the State Department of Correction. See, e.g., Frequently Asked Questions, Conn. Dep't of Corr., http://www.ct.gov/doc/cwp/view.asp?a=1492&q=265472&docNav= [http://perma.cc/2CKZ-NHB9] (last updated Mar. 9, 2016).

29. See, e.g., Luckert v. Dodge County, 684 F.3d 808, 808 (8th Cir. 2012) (noting the plaintiff filed claims against the municipality, individual officers, and medical staff).

30. See Cohen, supra note 15, ¶ 14.2[3], at 14-6 (explaining that a "custodian's legal duty will always be preventative" and that plaintiffs "invariably will charge the defendants with one or more . . . failures to act or omissions").

Suicide claims based on federal law are generally brought under 42 U.S.C. § 1983,[31] which provides the cause of action for a claim that "[a] person . . . under color of any statute, ordinance, regulation, custom, or usage, of any State" violated a federally protected constitutional or statutory right.[32] This provision allows the victim's estate to asserts a claim for damages. In a § 1983 claim against an individual, the plaintiff brings a lawsuit against a state or local officer in her individual capacity.[33] In a § 1983 claim against a municipality,[34] the plaintiff must prove that the municipality had an official policy, custom, or practice that actually inflicted injury and deprived the individual of a federal right.[35] The

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31. See Michael Welch & Danielle Gunther, Jail Suicide Under Legal Scrutiny: An Analysis of Litigation and Its Implications to Policy, 8 Crim. Just. Pol'y Rev. 75, 77 (1997) ("Although plaintiffs in custodial suicide litigation may file civil suits in state courts in the form of wrongful death, the vast majority of cases take the route of a Civil Rights Action under 42 U.S.C. 1983."); see also Cohen, supra note 15, ¶ 14.1[3], at 14-5 ("Federal actions constitute the vast majority of the reported cases."). Section 1983 claims are the most prevalent way to recover for custodial suicides under federal law; however, if the victim was in federal custody, third parties can also file actions under the Federal Tort Claims Act. Id. ¶ 14.7, at 14-74. Suicide-related litigation has also been brought under the Americans with Disabilities Act (ADA). The Department of Justice has found that subjecting inmates with serious mental illness to solitary confinement resulted in serious harm, including suicide, violating the inmates' rights under the ADA. See Letter from Jocelyn Samuels, Acting Assistant Attorney Gen., U.S. Dep't of Justice, & David J. Hickton, U.S. Attorney, U.S. Attorney's Office, to Tom Corbett, Governor, State of Pa. 11–12, 23 (Feb. 24, 2014), http://www.justice.gov/sites/default/files/crt/legacy/2014/02/25/pdoc_finding_2-24-14.pdf [http://perma.cc/DT4T-NN5A] (detailing the ways in which the use of solitary confinement impacted mentally ill prisoners, including leading to self-harm and suicide, and proposing remedies). In addition to federal claims, many plaintiffs also bring wrongful death suits under state law. For an in-depth discussion of the difference between state and federal claims, see Cohen, supra note 15, ¶ 14.2[2], at 14-12; see also Tartaro, supra note 8, at 24 (describing requirements for tort claims under state law).

32. 42 U.S.C. § 1983 (2012).

33. See Kentucky v. Graham, 473 U.S. 159, 165–66 (1985) (noting "[p]ersonal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law" in contrast to an "official-capacity suit [which] is, in all respects other than name, to be treated as a suit against the entity").

34. Municipalities are generally city or county governments or agencies responsible for establishing practices and policies that serve as guidelines for state actors. Section 1983 claims cannot be brought against states, which have sovereign immunity. See, e.g., Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54 (1996) ("For over a century we have reaffirmed that federal jurisdiction over suits against unconsenting States 'was not contemplated by the Constitution when establishing the judicial power of the United States.'" (quoting Hans v. Louisiana, 134 U.S. 1, 15 (1890))).

35. See Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690–91 (1978) ("Local governing bodies . . . can be sued directly under § 1983 . . . [when] the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers . . . [or] constitutional deprivations visited pursuant to governmental 'custom' . . . ."). Section 1983 claims against municipalities can take three forms. The plaintiff can allege that: (1) the implementation of policy or custom caused the injury, (2) an "omission" of policy led to injury, or (3) an action by an official with "final policy-making authority" caused the injury. See Clouthier v.

policy or custom must be the "moving force" of the constitutional violation[36] and the deprivation of the right must be the result of a government decision—it cannot be the result of aberrant action by an individual employee.[37] If the policy or custom is not in writing, the plaintiff must usually demonstrate that the violation was a pattern or "well settled" practice.[38]

1. *The Constitutional Protections for Convicted Prisoners.* — In a § 1983 claim resulting from the suicide of a convicted prisoner, the plaintiff alleges a violation of the Eighth Amendment's prohibition of "cruel and unusual punishment."[39] The Court has held that the Eighth Amendment constrains the "treatment a prisoner receives in prison."[40] Eighth Amendment protections include both protective[41] and affirmative[42]

County of Contra Costa, 591 F.3d 1232, 1249–51 (9th Cir. 2010) (describing claims alleging municipal liability under § 1983). Section 1983 claims against municipalities often allege that an agency failed to adequately train its employees to comply with agency policy. See City of Canton v. Harris, 489 U.S. 378, 380 (1989) (finding that "under certain circumstances" § 1983 permits liability for a municipality's "failure to train municipal employees"). To succeed in a "failure-to-train" claim, the plaintiff must prove that the municipality's failure to adequately train its staff amounted to deliberate indifference to the plaintiff's rights. See id. at 388 ("[T]he inadequacy of . . . training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the [officials] come into contact."). In these claims, the plaintiff must prove that the policy or custom deprived an individual of federal rights when there was "a clear constitutional duty implicated in recurrent situations that [the] particular employee [was] certain to face" and the policy failed to address this duty, or when "policymakers were aware of, and acquiesced in, a pattern of constitutional violations involving the exercise of [official] discretion." See id. at 396–97 (O'Connor, J., concurring in part and dissenting in part).

36. *Monell*, 436 U.S. at 694–95.

37. Id. at 691 (explaining that customs and usages must be the result of "'persistent and widespread discriminatory practices of state officials'" (quoting Adickes v. S.H. Kress & Co., 398 U.S. 144, 167 (1970))).

38. Id. (noting practices that "[a]lthough not authorized by written law . . . could well be so permanent and well settled as to constitute a 'custom or usage' with the force of law" (quoting *Adickes*, 398 U.S. at 167–68)).

39. U.S. Const. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

40. Helling v. McKinney, 509 U.S. 25, 31 (1993).

41. Prisoners are protected from excessive force. See, e.g., Hudson v. McMillian, 503 U.S. 1, 9 (1992) ("When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated."). Prisoners are also protected from sexual assault. See, e.g., Farmer v. Brennan, 511 U.S. 825, 834 (1994) ("Being violently assaulted in prison is simply not 'part of the penalty that criminal offenders pay for their offenses against society.'" (quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981))).

42. Prisoners have the right to humane conditions. See, e.g., *Farmer*, 511 U.S. at 832 ("The [Eighth] Amendment also imposes duties on these officials, who must provide humane conditions of confinement . . . ."); *Helling*, 509 U.S. at 31 ("It is undisputed that the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment."). Prisoners also have the right to adequate medical care. See infra notes 50–54 and accompanying text.

rights; not only are prisoners protected from government actions but the government has an obligation to "provide for [prisoners'] basic human needs."[43]

Two Eighth Amendment protections are relevant to suicide litigation: the right to be free from substantial risk of serious harm and the right to adequate medical care. In *Farmer v. Brennan*,[44] the Court found that an inmate has the right to be free from "substantial risk of serious harm"[45]—inmates require "reasonable safety"[46] and the government is responsible for protecting inmates from "unsafe" conditions.[47] Thus, prison officials have a duty to "provide humane conditions of confinement . . . and must 'take reasonable measures to guarantee the safety of the inmates.'"[48] They may not "ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering."[49] An inmate bringing a claim under *Farmer* alleges that an official or the government failed to protect her from substantial risk of serious harm.

In *Estelle v. Gamble*,[50] the Court found that the Eighth Amendment guarantees prisoners the right to adequate medical care: The government has an "obligation to provide medical care" for prisoners who "rely on prison authorities to treat [their] medical needs."[51] The Court explained that "deliberate indifference to serious medical needs of prisoners" violates the Eighth Amendment.[52] Lower courts have read

43. *Helling*, 509 U.S. at 32 (quoting DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 199–200 (1989)).

44. In *Farmer*, a transgender woman alleged that prison officials were guilty of "deliberately indifferent failure to protect [her] safety" by placing her in the general population despite knowledge that she would be particularly vulnerable under these conditions. 511 U.S. at 830–31.

45. Id. at 834.

46. Id. at 844 (internal quotation marks omitted) (quoting *Helling*, 509 U.S. at 33).

47. *Helling*, 509 U.S. at 33 (internal quotation marks omitted) (quoting Youngberg v. Romeo, 457 U.S. 307, 315–16 (1982)).

48. *Farmer*, 511 U.S. at 832 (quoting Hudson v. Palmer, 468 U.S. 517, 526–27 (1984)).

49. *Helling*, 509 U.S. at 33.

50. 429 U.S. 97 (1976). In *Estelle*, an inmate alleged that inadequate medical treatment for a back injury, high blood pressure, and heart problems amounted to cruel and unusual punishment. Id. at 107.

51. Id. at 103.

52. Id. at 104.

"serious medical needs" under *Estelle* to extend to mental health[53] and to include an obligation to protect inmates from self-harm.[54]

The Supreme Court has never explicitly established that a prisoner has the right to be protected from suicide,[55] and lower courts have found no duty to screen all detainees for "suicidal tendencies."[56] However, *Farmer* and *Estelle* establish that there is a duty to protect prisoners from conditions leading to suicide when they amount to a "condition[] posing a substantial risk of harm"[57] or when the officer failed to attend to a "serious medical need[]."[58] When considering *which* of these two constitutional theories is at issue in a suicide case, courts often blend the two together.[59] Courts find that the exact right at issue is less relevant because the resulting duties serve the "same underlying purpose" of "prevent[ing] the detainee from suffering further physical pain or harm."[60] For greater simplicity, courts might focus the analysis on whether there was "a known risk of suicide."[61]

Courts are able to combine an analysis of these two claims because both are evaluated under the same standard—deliberate indifference. The Court has determined that an official is liable in these cases if the

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53. For example, the Fourth Circuit has explained there is "no underlying distinction between the right to medical care for physical ills and its psychological or psychiatric counterpart." Bowring v. Godwin, 551 F.2d 44, 47 (4th Cir. 1977); see also Lori A. Marschke, Proving Deliberate Indifference: Next to Impossible for Mentally Ill Inmates, 39 Val. U. L. Rev. 487, 503–05 (2004) (describing the *Bowring* court's justification for "remov[ing] the distinction between physical and mental health care for Eighth Amendment purposes").

54. Lee v. Downs, 641 F.2d 1117, 1121 (4th Cir. 1981) ("[P]rison officials have a duty to protect prisoners from self-destruction or self-injury.").

55. Taylor v. Barkes, 135 S. Ct. 2042, 2044 (2015) ("No decision of this Court establishes a right to the proper implementation of adequate suicide prevention protocols.").

56. See Cohen, supra note 15, ¶ 14.3[4], at 14-44 to -45 (citing Belcher v. Oliver, 898 F.2d 32, 32 (4th Cir. 1990)) (noting the Third, Fifth, Sixth, Ninth, and Eleventh circuits have made similar statements).

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

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

59. See Cohen, supra note 15, ¶ 14.3[1], at 14-34 ("The reported decisions are confused on the precise boundaries of these competing theories . . . .").

60. Hare v. City of Corinth, 74 F.3d 633, 644 (5th Cir. 1996) (explaining "whether the State's obligation is cast in terms of a duty to provide medical care or protection from harm, its ultimate constitutional duty is 'to assume some responsibility for [the] safety and general well-being'" of inmates (quoting DeShaney v. Winnebago Cty. Dep't. of Soc. Servs., 489 U.S. 189, 200 (1989))); see also Sanville v. McCaughtry, 266 F.3d 724, 733–34 (7th Cir. 2001) (noting injury satisfying objective prong of *Farmer* test could be framed in multiple ways, including failure to prevent harm or a serious medical need). But see Cohen, supra note 15, ¶ 14.3[1]–[2], at 14-34 to -47 (explaining that the distinction does not impact the "custodian's duty to preserve life" but may have "significant consequences for the particular duty owed the individual and its duration," which would be more significant in cases involving prisons than jails).

61. Turney v. Waterbury, 375 F.3d 756, 760 (8th Cir. 2004).

official exhibits "'deliberate indifference' to a substantial risk of serious harm to an inmate"[62] or "deliberate indifference to serious medical needs."[63] Under the Eighth Amendment, deliberate indifference requires a "sufficiently serious" deprivation of the right and that the prison official must have a "sufficiently culpable state of mind."[64]

2. *The Constitutional Protections for Pretrial Detainees.* — The Eighth Amendment protections described above apply only to convicted inmates. Pretrial detainees, individuals who are charged with a crime but not yet convicted,[65] rely on the protections of the Fourteenth Amendment's Due Process Clause.[66] This is important because the Eighth Amendment protects convicted prisoners from cruel and unusual punishment, but the Fourteenth Amendment protects pretrial detainees from *any* punishment.[67]

In *Bell v. Wolfish*, the Supreme Court explained that "in evaluating the constitutionality of conditions or restrictions of pretrial detention that implicate only the protection against deprivation of liberty without due process of law . . . the proper inquiry is whether these conditions amount to punishment of the detainee."[68] The Court held that pretrial detainees can be constitutionally subject to "regulatory restraints" that may interfere with the ability to live comfortably if such restraints are part of some other legitimate government purpose but not if they are "imposed for the purpose of punishment."[69] A court can infer punishment "if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless."[70] The Court emphasized that this decision was not meant to allow officials to "justify punishment"

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62. *Farmer*, 511 U.S. at 828.

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

64. *Farmer*, 511 U.S. at 834 (quoting Wilson v. Seiter, 501 U.S. 245, 297–98 (1991)).

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

66. U.S. Const. amend. XIV, § 1 ("[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."). The Fourteenth Amendment applies to individuals charged with a state or local crime—individuals held by the federal government are protected by the Fifth Amendment's Due Process Clause. U.S. Const. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."); see also Ingraham v. Wright, 430 U.S. 651, 671 n.40 (1977) ("[T]he State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt . . . . [W]ithout such an adjudication, the pertinent constitutional guarantee is the Due Process Clause of the Fourteenth Amendment.").

67. This is because pretrial detainees have not yet had their crimes adjudicated. *Bell*, 441 U.S. at 535 ("[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.").

68. Id.

69. Id. at 537–38.

70. Id. at 539.

since "retribution and deterrence are not legitimate nonpunitive government objectives."[71]

In determining whether a restraint is punishment under *Bell*, a court first looks at whether there was intent to punish.[72] If there was no intent, the court then determines if there was a reasonable government purpose for the restraint and, given that purpose, whether the restraint was excessive.[73] The court might also consider whether there were less punitive alternatives.[74]

Nearly four decades later, the Supreme Court still has yet to explain how *Bell*'s interpretation of pretrial detainees' due process rights regarding jail conditions might guide the interpretation of pretrial detainees' rights when an official fails to protect her from a substantial risk of serious harm or to provide care for a serious medical need.[75] In *City of Revere v. Massachusetts General Hospital*, the Court held only that a pretrial detainee's "due process rights . . . are at least as great as the Eighth Amendment protections available to a convicted prisoner."[76] This decision simply established that the Eighth Amendment protection from deliberate indifference serves as a floor for any standard used to evaluate pretrial detainee failure-to-protect or serious-medical-needs claims.

B. *The Deliberate Indifference Standard*

The deliberate indifference standard originated in *Estelle*,[77] but the opinion contained relatively little guidance on how to use it. Post-*Estelle*, courts generally agreed that deliberate indifference was "reckless disregard for risk."[78] However, they disagreed as to whether to satisfy deliberate indifference, the custodian must have disregarded risks she *knew or should have known*—an objective standard—or risks she *actually*

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71. Id. at 539 n.20.

72. Id. at 538.

73. Id.

74. Id. at 539 n.20.

75. City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244–45 (1983) ("We need not define, in this case, Revere's due process obligation to pretrial detainees or to other persons in its care who require medical attention . . . . Whatever the standard may be, Revere has fulfilled its constitutional obligation . . . ."). Notably, however, the Court has previously held that physical conditions of confinement are essentially equivalent to other conditions of confinement, such as medical care and protection from assault. See Wilson v. Seiter, 501 U.S. 294, 303 (1991).

76. 463 U.S. at 244.

77. See Farmer v. Brennan, 511 U.S. 825, 835 (1994) (noting that the term "deliberate indifference" first appeared in *Estelle*); see also Estelle v. Gamble, 429 U.S. 97, 104 (1976) (holding "deliberate indifference to serious medical needs of prisoners" would violate the Eighth Amendment).

78. John Boston et al., *Farmer v. Brennan*: Defining Deliberate Indifference Under the Eighth Amendment, 14 St. Louis U. Pub. L. Rev. 83, 86 (1994) [hereinafter Boston et al., Defining Deliberate Indifference].

knew—a subjective standard.[79] For example, the Third Circuit found liability when an official disregarded a risk she "knew or should have known,"[80] but the Seventh Circuit required actual knowledge of the risk.[81] It was not until nearly twenty years later in *Farmer* that the Supreme Court honed and defined the standard as it is used today. In *Farmer*, the Court found that to prove deliberate indifference, a convicted prisoner's claim must satisfy a subjective standard.[82] In doing so, the Court confirmed that "proof of a prison officials' state of mind [is required] to demonstrate an Eighth Amendment violation."[83]

1. *The* Farmer *Deliberate Indifference Test.* — *Farmer* clarified the two-prong test to determine whether prison officials or municipalities have violated a convicted prisoner's Eighth Amendment rights by failing to protect the inmate from "excessive risk to inmate health or safety."[84] The *Farmer* Court recognized that its prior decision in *Wilson v. Seiter* had laid out two requirements for an Eighth Amendment violation in the context of a failure-to-protect claim:[85] The first is that there be an objective, "sufficiently serious" deprivation, and the second is that the prison

79. See *Farmer*, 511 U.S. at 835 ("[W]e have never paused to explain the meaning of the term 'deliberate indifference' . . . ."); id. at 832 ("We granted certiorari because Courts of Appeals had adopted inconsistent tests for 'deliberate indifference.'"); Boston et al., Defining Deliberate Indifference, supra note 78, at 86 (describing a split among circuit courts regarding the application of an objective or subjective standard for deliberate indifference); Marschke, supra note 53, at 512–13 (same).

80. See, e.g., Young v. Quinlan, 960 F.2d 351, 360–61 (3d Cir. 1992) (noting an "official is deliberately indifferent when he *knows or should have known* of a sufficiently serious danger" and specifying "should have known" means that a "strong likelihood of [harm] must be so obvious that a lay person would easily recognize the necessity for preventative action" (internal quotation marks omitted)); see also Colburn v. Upper Darby Township, 946 F.2d 1017, 1023 (3d Cir. 1991) (holding that for a court to find liability in a pretrial detainee suicide case the plaintiff must establish that the official "knew or should have known of that vulnerability").

81. See, e.g., McGill v. Duckworth, 944 F.2d 344, 349 (7th Cir. 1991).

82. See *Farmer*, 511 U.S. at 837.

83. See Boston et al., Defining Deliberate Indifference, supra note 78, at 102.

84. *Farmer*, 511 U.S. at 837. While in *Farmer* the claim at issue was "failure to protect," the Court explained that the subjective deliberate indifference standard applies more generally to claims of "excessive risk to inmate health or safety." Id. Courts have interpreted this decision to apply to claims of deliberate indifference to serious medical needs. See, e.g., Harrison v. Barkley, 219 F.3d 132, 137 (2d Cir. 2000) (citing *Farmer*'s subjective deliberate indifference standard in a claim of deliberate indifference to serious medical needs).

85. *Farmer*, 511 U.S. at 834. In *Wilson*, the Court recognized the "objective" and "subjective" components of an "Eighth Amendment challenge to a prison deprivation." Wilson v. Seiter, 501 U.S. 294, 298 (1991) (noting the Court's prior decision in *Rhodes v. Chapman* turned on the "objective component of an Eighth Amendment prison claim (Was the deprivation sufficiently serious?)" and not "the subjective component (Did the officials act with a sufficiently culpable state of mind?)").

official have a "sufficiently capable state of mind."[86] These requirements form the two prongs of the Eighth Amendment test.

In *Farmer*, the first prong of the test was not in dispute. Lower courts agreed that in a failure-to-protect claim, the plaintiff must first establish that the custodian committed an act or omission that was "sufficiently serious"[87] or "sufficiently harmful"[88] so as to deny the individual "the minimal civilized measure of life's necessities."[89] This prong is an objective standard.

Lower courts diverged on the second prong of the test—specifically, courts disagreed about the state of mind required to support a deliberate indifference claim.[90] The *Farmer* Court clarified the second prong, holding that a subjective analysis must be used to determine if an individual acted with a deliberately indifferent state of mind. Under this requirement, there has to be "'conscious[] disregar[d]'" of the risk to constitute punishment,[91] and so, an official must "know[] of and disregard[] an excessive risk to inmate health or safety."[92] The official must both "be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists" *and* "draw the inference."[93] The Court explained that one way a plaintiff might establish the necessary knowledge is to prove that the risk was so obvious that the prison official must have been aware.[94]

2. *The* Farmer *Test: Application to Pretrial Detainees?* — The Supreme Court has not addressed whether *Farmer*'s subjective deliberate indifference standard should also apply to pretrial detainee claims under the Fourteenth Amendment.[95] Nevertheless, all of the circuit courts have adopted the *Farmer* test for pretrial detainee medical-care claims, and those that have considered the issue have adopted the test for claims resulting from the suicide of pretrial detainees.[96] The circuits justify this

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86. *Farmer*, 511 U.S. at 834 (quoting *Wilson*, 501 U.S. at 297–98).

87. Id.

88. Estelle v. Gamble, 429 U.S. 97, 106 (1976) (detailing the standard for a "cognizable claim" for violation of the Eighth Amendment).

89. *Farmer*, 511 U.S. at 834 (quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981)).

90. Id. at 832.

91. Id. at 839 (second alteration in original) (quoting Model Penal Code § 2.02(c) (Am. Law Inst. 1985)) (adopting Model Penal Code's definition of recklessness).

92. Id. at 837.

93. Id.

94. Id. at 840–41; see also Boston et al., Defining Deliberate Indifference, supra note 78, at 90 (discussing significance of the "*Farmer* Court's language on obvious risks" that "obvious risk, without more, creates a triable issue of fact").

95. See Struve, supra note 19, at 1012 (noting "the Court has provided no further articulation of the standards that govern [Fourteenth Amendment] claims by pretrial detainees").

96. Id. at 1027–28 & n.96 (listing cases in which circuits have applied the subjective deliberate indifference test to pretrial detainees' medical-care claims). Seven circuits have fully adopted the test for suicide-related claims. The First, Sixth, Seventh, Eighth, Ninth,

position by suggesting that in order for an official's failure to protect an inmate from substantial risk of serious harm or failure to adequately address a serious medical need to ever constitute punishment, the jail official must have acted knowingly. As the Fifth Circuit explained in *Hare v. City of Corinth*: "[T]here is no legally significant situation in which a failure to provide an incarcerated individual with medical care or protection from violence *is* punishment yet *is not* cruel and unusual."[97] The *Hare* court's reasoning implies that the subjective deliberate indifference test can constitutionally be applied to pretrial detainees, since the test essentially serves to protect any inmate, pretrial detainee, or convicted prisoner from all forms of punishment. As a result, for these claims, the circuits find that the standard to determine whether an official violates a pretrial detainee's Fourteenth Amendment right not to be punished is "comparable" to the standard to determine whether there

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Tenth, and Eleventh Circuits have adopted the subjective test. Id. at 1028 nn.102–107 (listing cases from the Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits applying the subjective deliberate indifference test to suicide claims); see also Burrell v. Hampshire County, 307 F.3d 1 (1st Cir. 2002) ("Pretrial detainees are protected under the Fourteenth Amendment Due Process Clause rather than the Eighth Amendment; however, the standard to be applied is the same as that used in Eighth Amendment cases."). The Fifth Circuit uses the standard in "episodic act or omission" cases. See Jacobs v. W. Feliciana Sheriff's Dep't, 228 F.3d 388, 393 (5th Cir. 2000) ("It is well-settled in the 'law that a state official's episodic act or omission violates a pretrial detainee's due process rights to medical care [and protection from harm] if the official acts with subjective deliberate indifference to the detainee's rights.'" (quoting Nerren v. Livingston Police Dep't, 86 F.3d 469, 473 (5th Cir. 1996))). The court explained that

> [i]n an "episodic act or omission" case, an actor usually is interposed between the detainee and the municipality, such that the detainee complains first of a particular act or [sic], or omission by, the actor and then derivatively to a policy, custom, or rule (or lack thereof) of the municipality that permitted or caused the act or omission.

Id. at 393 n.3 (internal quotation marks omitted) (quoting Scott v. Moore, 114 F.3d 51, 53 (5th Cir. 1997)). The Fourth Circuit has applied the subjective standard in an unreported case. See Hearn v. Lancaster County, 566 F. App'x 231, 236 (4th Cir. 2014) (noting that as part of the *Farmer* standard in a jail suicide case, "the plaintiffs must demonstrate 'that the official in question subjectively recognized a substantial risk of harm' to the detainee" (quoting Parrish ex rel. Lee v. Cleveland, 372 F.3d 294, 303 (4th Cir. 2004))). The Third Circuit applied the objective standard prior to *Farmer* but, at the appellate level, has yet to determine how to apply the deliberate indifference standard to pretrial detainees post-*Farmer*. See Woloszyn v. County of Lawrence, 396 F.3d 314, 321 (3d Cir. 2005) (finding no need to "reconcile" the *Farmer* deliberate indifference standard with the "should have known" element required for § 1983 liability under the Fourteenth Amendment because there was no evidence that the first element of the *Farmer* test was satisfied). However, district courts in the Third Circuit have applied the subjective standard to pretrial detainee suicide claims. See Estate of Thomas v. Fayette County, No. 2:14-CV-00551, 2016 WL 3639887, at *10 (W.D. Pa. July 8, 2016). Finally, district courts in the Second Circuit have applied the standard to suicide-related claims. See, e.g., Silvera v. Conn. Dep't of Corr., 726 F. Supp. 2d 183, 192 (D. Conn. 2010) (using the subjective deliberate indifference standard to evaluate claims resulting from the suicide of a pretrial detainee).

97. 74 F.3d 633, 649 (5th Cir. 1996).

is a violation of a convicted prisoner's right to be free from cruel and unusual punishment.[98]

C. *The Post-*Farmer *§ 1983 Claim for Inmate Suicide*

Since *Farmer*, courts have applied the subjective deliberate indifference standard to suicide-related § 1983 claims against individual officers. As a result, the plaintiff in a suicide-related claim is less likely to succeed on a § 1983 claim than in the pre-*Farmer* era when some courts still applied an objective deliberate indifference standard.[99] A study of pre- and post-*Farmer* suicide litigation demonstrates that pre-*Farmer*, the estate of an inmate who committed suicide in jail prevailed in twenty-five percent of jail-suicide cases; post-*Farmer*, the estate prevailed in only sixteen percent of these cases.[100] The decrease in success was even starker for litigation resulting from a combination of suicides in jail, lock-up, and prison: The success rate nearly halved from twenty-nine percent to seventeen percent.[101] This section examines the particular difficulties a plaintiff might face in a post-*Farmer* § 1983 suicide claim.

1. *Individual Officer Liability.* — To establish officer liability,[102] the plaintiff must satisfy both prongs of the *Farmer* test. First, the plaintiff alleges that the custodian committed a sufficiently serious act to constitute deprivation of the right. This objective component is "met by virtue of the suicide itself":[103] In claims alleging failure to protect from a substantial risk of serious harm, courts have found that suicide is a serious harm, and in claims alleging deliberate indifference to a serious medical need, it is "well established" that a "risk of suicide by an inmate is a serious medical need."[104]

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98. See, e.g., Clouthier v. County of Contra Costa, 591 F.3d 1232, 1243 (9th Cir. 2010) (describing the reasoning for applying the subjective deliberate indifference standard to both convicted prisoners and pretrial detainees). Notably, this case was recently overturned. See Castro v. County of Los Angeles, No. 12-56829, 2016 WL 4268955, at *6 (9th Cir. Aug. 15, 2016); see also infra notes 177–182 and accompanying text (explaining the *Castro* decision).

99. See Ross, supra note 13, at 45.

100. See id. at 39 fig.1. Pre-*Farmer* litigation consisted of cases from 1980 to 1993 and post-*Farmer* litigation consisted of cases from 1994 to 2007. Id.

101. Id.

102. This section examines only the liability of correctional officers and not of medical staff. Establishing medical staffs' deliberate indifference generally involves a claim of deliberate indifference to serious medical needs and an inquiry into the adequacy of the professional medical advice, which requires expert analysis. This liability of medical staff is beyond the scope of this Note.

103. Collins v. Seeman, 462 F.3d 757, 760 (7th Cir. 2006).

104. Gregoire v. Class, 236 F.3d 413, 417 (8th Cir. 2000); see also *Collins*, 462 F.3d at 760 ("In prison suicide cases, the objective element is met by virtue of the suicide itself, as '[i]t goes without saying that "suicide is a serious harm."'" (quoting Sanville v. McCaughtry, 266 F.3d 724, 733 (7th Cir. 2001))); *Sanville*, 266 F.3d at 733 ("[N]ot only was there a risk of serious harm but that harm actually materialized . . . . It would be difficult to think of a

Next, the plaintiff must satisfy the second prong of the *Farmer* test by proving that the officer acted with subjective deliberate indifference.[105] To satisfy this prong, the plaintiff must first demonstrate that the official had individual-specific knowledge of the threat of serious harm to the inmate or had knowledge of a general risk that all prisoners in the inmate's particular situation faced.[106] Frequently, officials have no individual-specific knowledge in suicide cases. Unlike physical ailments, a mental illness may not manifest itself in clear ways that would provide officials with actual knowledge of the inmate's condition.[107] Also, inmates experiencing physical ailments or poor conditions of confinement might be more likely to inform prison officials of their risk of substantial harm than mentally ill patients—mentally ill patients might not have the capacity to provide this information or might fear that reporting such information would lead to retaliation or other unpleasant consequences, such as isolation or suicide watch.[108]

Individual-specific knowledge is most successfully established when there are available records indicating prior suicide attempts or suicidal tendencies. Courts are unlikely to find liability if an inmate has not

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more serious deprivation than to be deprived of life, and thus plaintiff's claim clearly satisfies the first element."); DeGroote, supra note 8, at 265 n.34 (citing cases in which the court recognized that the objective element of the deliberate indifference inquiry is met by the completion of suicide).

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

106. Id. at 843 ("[I]t does not matter whether . . . a prisoner faces an excessive risk of attack for reasons personal to him or because all prisoners in his situation face such a risk."). Immediately after the *Farmer* decision, scholars were optimistic that the expansion to "different levels of generality" might help to refute an official's ignorance defense. See Boston et al., Defining Deliberate Indifference, supra note 78, at 94 ("The Court's acknowledgment that constitutionally significant risks to prisoners' safety may be found at different levels of generality may provide another fruitful approach to the 'ignorance is bliss' defense that might be asserted under an actual knowledge standard."). However, even if this lower burden ensures that plaintiffs are able to successfully establish actual knowledge, it does not assist in establishing that the officer recklessly disregarded the risk. See Robert D. Hanser, Inmate Suicide in Prisons: An Analysis of Legal Liability Under 42 USC Section 1983, 82 Prison J. 459, 475 (2002) ("The strict adherence of the courts to the requirement that the defendant knew of the risk of suicide and deliberately acted in an indifferent manner undermines any gain obtained from the waiver of the individual-specific requirement.").

107. For example, a correctional officer might more easily identify a broken bone or a laceration than a mental health issue such as depression, which may not have a physical manifestation.

108. See Christy P. Johnson, Comment, Mental Health Care Policies in Jail Systems: Suicide and the Eighth Amendment, 35 U.C. Davis L. Rev. 1227, 1251 (2002) ("Courts may reason that, because mental illness affects the mind rather than the body, a layperson may not be able to identify a mental illness."); see also Bowring v. Godwin, 551 F.2d 44, 48 n.3 (4th Cir. 1977) (describing mental illness diagnosis as an "extremely subjective art"); cf. Stacy Lancaster Cozad, Note, Cruel but Not So Unusual: *Farmer v. Brennan* and the Devolving Standards of Decency, 23 Pepp. L. Rev. 175, 203 (1995) (explaining the *Farmer* standard implicitly requires an inmate to take "affirmative steps to unequivocally and clearly inform prison officials that a threat to his safety exists").

threatened or attempted suicide in the past, has not been previously identified as a suicide risk, or has not demonstrated extremely aberrant behavior.[109] Furthermore, even if records exist, the official must have been aware of, had access to, and have read the records.[110]

Proving a generalized risk should be easier. However, since *Farmer*, courts have mostly declined to find that a generalized risk is sufficient to sustain liability without a threat specific to the individual inmate.[111] In fact, some circuits have explicitly refused to find that generalized risk is sufficient for a deliberate indifference claim in suicide litigation.[112] Notably, this is in direct contrast with the *Farmer* Court's holding that "it does not matter whether the risk comes from a single source or multiple sources, any more than it matters whether a prisoner faces an excessive risk of attack for reasons personal to him or because all prisoners in his situation face such a risk."[113]

The second step in proving subjective deliberate indifference is to establish that the official was not only aware of the facts but that she drew the inference that there was a substantial risk of serious harm to the inmate or a serious medical need. Most prison officials have some training in suicide prevention but are unlikely to have in-depth mental health training.[114] As a result, courts are sympathetic to officials and

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109. See Cook ex rel. Estate of Tessier v. Sheriff of Monroe Cty., 402 F.3d 1092, 1116–17 (11th Cir. 2005) (explaining that a defendant must have notice of an individual's suicidal tendency for liability).

110. See, e.g., Stewart ex. rel. Estate of Stewart v. Waldo County, 350 F. Supp. 2d 215, 221 (D. Me. 2004) (finding that an officer's failure to read jail records indicating an inmate's suicidal tendencies insufficient to prove "subjective indifference" to the risk of suicide).

111. See, e.g., Frake v. City of Chicago, 210 F.3d 779, 782 (7th Cir. 2000) (noting the lack of evidence that anyone had knowledge that the inmate was suicidal was a factor in limiting liability).

112. See *Cook*, 402 F.3d at 1117 ("Deliberate indifference, in the jail suicide context, is not a question of the defendant's indifference to suicidal inmates or suicide indicators generally, but rather . . . 'to *an individual's* mental condition and the likely consequences of that condition.'" (quoting Tittle v. Jefferson Cty. Comm'n, 10 F.3d 1535, 1539 (11th Cir. 1994))).

113. Farmer v. Brennan, 511 U.S. 825, 843 (1994).

114. See, e.g., SpearIt, Mental Illness in Prison: Inmate Rehabilitation and Correctional Officers in Crisis, 14 Berkeley J. Crim. L. 277, 291 (2009) (noting California's requirements for becoming a correctional line officer include fifteen hours of training for "Monitoring Physiological and Physical Health unit," which covers "Legal Issues, Mental Health Issues, Suicide Issues, Indicators of Substance Abuse, Indicators of Physical/Mental Problems, and Assisting Medical Personnel in the Distribution of Medication" (emphasis omitted)); Lindsay M. Hayes, Report on Suicide Prevention Practices Within the District of Columbia, Department of Corrections' Central Detention Facility 9–10 (2013), http://doc.dc.gov/sites/default/files/dc/sites/doc/release_content/attachments/DC%20JAIL-LH_0.pdf [http://perma.cc/T3BL-X84C] (noting that D.C. practices included one or two one-hour presentations regarding suicide prevention and concluding that the "number of hours devoted to both pre-service and annual suicide prevention training for correctional, medical and mental health staff is inadequate"); Mental Health Services, Pa.

"'continually hold guards to a lesser standard in recognizing [suicide] conditions[,]' . . . shield[ing] [the guards] from the liability attached to subjective knowledge."[115] Officials might be given the benefit of the doubt that a lack of expertise or experience might limit their ability to evaluate a potential harm and thereby their ability to "draw the inference."

A plaintiff can attempt to argue that, given awareness of the facts, the official knew there was a risk of suicide because the risk was obvious.[116] However, courts have developed a high threshold for obviousness and tend not to find liability without an explicit suicide threat. The Third Circuit found no liability when a detainee had large, prominent scars on his arm suggestive of previous acts of self-harm because there was no additional evidence of an explicit threat.[117] Similarly, the Seventh Circuit failed to find officials liable for the suicide of an inmate who was known to have a history of mental illness and suicide attempts and was exhibiting "strange behavior."[118]

Finally, even if the plaintiff proves that an official knew of the actual risk, the plaintiff must also show that the official disregarded the risk. Under *Farmer*, an official can escape liability if she "responded reasonably to the risk."[119] Lower courts have interpreted this to mean that liability will only ensue if an official responds recklessly; negligence will not suffice.[120] Courts have declined to find liability when officials

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Dep't of Corr., http://www.cor.pa.gov/General%20Information/Pages/Mental-Health-Services.aspx#.V7RdrpMrJp8 [http://perma.cc/C7AP-ZJKH] (last updated Apr. 27, 2016) (describing training of officers in suicide prevention and explaining that "every [Department of Corrections (DOC)] employee was trained in the area of Mental Health First Aid" and that new DOC employees would receive such programming during training).

115. Marschke, supra note 53, at 529 (quoting Holly Boyer, Home Sweet Hell: An Analysis of the Eighth Amendment's 'Cruel and Unusual Punishment' Clause as Applied to Supermax Prisons, 32 Sw. U. L. Rev. 317, 333 (2003)); see also Gregoire v. Class, 236 F.3d 413, 418 (8th Cir. 2000) ("In evaluating an official's response to a known suicide risk, we should be cognizant of how serious the official knows the risk to be.").

116. *Farmer*, 511 U.S. at 842 ("[A] factfinder may conclude that a prison official knew of a substantial risk from the very fact the risk was obvious.").

117. See Freedman v. City of Allentown, 853 F.2d 1111, 1116 (3d Cir. 1988) (finding no liability for failure to protect from suicide when officials ignored "large prominent scars on his wrists, inside of his elbows and neck [that] were shown by Freedman to the individual defendants" because ignoring the scars was at most negligence).

118. Estate of Novack ex rel. Turbin v. County of Wood, 226 F.3d 525, 530 (7th Cir. 2000) ("[S]trange behavior alone, without indications that that behavior has a substantial likelihood of taking a suicidal turn, is not sufficient to impute subjective knowledge of a high suicide risk to jail personnel.").

119. *Farmer*, 511 U.S. at 844.

120. See Brown v. Harris, 240 F.3d 383, 390 (4th Cir. 2001) (holding that an official taking "less action than he could have, and by his own admission, should have[,] . . . does not, however, either negate the reasonableness of his response or mean that he acted with 'deliberate indifference'"); Liebe v. Norton, 157 F.3d 574, 578 (8th Cir. 1998) (holding that negligence in failing to consistently check on an inmate and failing to notice the

improperly delegated suicide prevention responsibilities or did not follow municipal policies intended to prevent suicide.[121] Furthermore, in some cases in which courts have found evidence of deliberate indifference, the court has emphasized the official's prior experience with suicidal inmates, suggesting that expertise beyond that of a typical official might be necessary for a liability claim to be successful.[122]

This section demonstrates that in order for a plaintiff to succeed in suicide litigation against a jail official under *Farmer*'s standard, the plaintiff must prove that the official: (1) had actual knowledge, individual specific or generalized, of the factors creating a risk; (2) drew the inference of a substantial risk to harm; *and* (3) knowingly disregarded the risk. This is a heavy burden. Thus, it is not surprising that there is a low rate of success in suicide litigation against jail officials under the subjective deliberate indifference standard.

2. *Municipal Liability.* — Establishing municipal liability for suicide is also a difficult task, and very few litigants have been successful.[123] For a successful municipal-liability claim in a suicide case, the plaintiff must establish that the municipality's policies or customs exhibited deliberate indifference to the inmate's serious medical needs or unsafe conditions and that these policies caused the plaintiff to suffer a constitutional injury.[124] In suicide litigation, the plaintiff often alleges that the muni-

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exposed electrical conduit on which the suicidal inmate hung himself was not sufficient to satisfy deliberate indifference).

121. See Luckert v. Dodge County, 684 F.3d 808, 819 (8th Cir. 2012) (finding that failure to follow the department's written policy for suicide intervention did not constitute individual deliberate indifference).

122. See, e.g., Jacobs v. W. Feliciana Sheriff's Dep't, 228 F.3d 388, 395–97 (5th Cir. 2000) (finding evidence of deliberate indifference when defendant, despite knowledge of an inmate's serious risk of suicide, placed the inmate in conditions he knew to be inadequate for the suicidal inmate). In medical cases, particularly those related to mental health, courts tend to be deferential to the opinions of prison or jail medical officials; a successful challenge to a medical official requires significant evidence as well as the testimony of a medical expert, making it very difficult for plaintiffs to succeed. See Joel H. Thompson, Today's Deliberate Indifference: Providing Attention Without Providing Treatment to Prisoners with Serious Medical Needs, 45 Harv. C.R.-C.L. L. Rev. 635, 650–52 (2010) (describing the difficulties of bringing a successful Eighth Amendment claim for violation of serious medical needs against a medical provider).

123. See Gray v. City of Detroit, 399 F.3d 612, 618 (6th Cir. 2005) ("Very few cases have upheld municipality liability for the suicide of a pre-trial detainee."); George J. Franks, The Conundrum of Federal Jail Suicide Case Law Under Section 1983 and Its Double Bind for Jail Administrators, 17 Law & Psychol. Rev. 117, 126 (1993) (noting that municipal liability usually requires "repeated suicides without a change in practice, or glaring deliberate indifference" and "[e]ven then, some courts have held that liability still does not attach").

124. See Barbara Kritchevsky, A Return to *Owen*: Depersonalizing Section 1983 Municipal Liability Litigation, 41 Vill. L. Rev. 1381, 1444 (1996) (emphasizing that a municipal-liability inquiry is a search into "*entity* liability, not the state of mind of individual officials"). Notably, this is an objective standard.

cipality's failure to train its officers—an omission—led to a violation of the constitutional right.[125]

Courts rarely find a municipality liable if its policy is "reasonable and comprise[s] an effort to prevent suicides,"[126] regardless of whether the policy is effective in practice. Courts do not view conditions and policies in isolation; the fact that one condition or policy may facilitate suicidal behavior is not sufficient evidence for deliberate indifference if other precautions are taken.[127] In the limited body of cases in which courts have found municipal deliberate indifference, there has been evidence of a pattern of past suicides in the jails, as well as evidence that the municipality had knowledge of effective policy-based remedies to prevent future deaths.[128]

The *Farmer* mandate of a subjective deliberate indifference standard for failure-to-protect and serious-medical-needs claims against individual officers ensures that plaintiffs have a high burden of proof to establish custodial liability. Lower courts have relied on *Farmer* as guidance for suicide claims[129] and have imposed requirements that are extremely difficult for plaintiffs to meet. Parts II and III examine the possibility of a shift to an objective deliberate indifference standard for pretrial detainee suicide cases and how such a shift might increase the success of jail-suicide litigation and lead to better jail-suicide prevention policies.

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125. See City of Canton v. Harris, 489 U.S. 378, 388 (1989) ("[T]he inadequacy of . . . training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the [officials] come into contact."); Cohen, supra note 15, ¶ 14.4[2][a]–[b], at 14-48 to -54 (discussing liability under a failure-to-train claim and describing cases in which the failure to train led to liability).

126. Yellow Horse v. Pennington County, 225 F.3d 923, 929 (8th Cir. 2000); see also Liebe v. Norton, 157 F.3d 574, 580 (8th Cir. 1998) (finding that "the County's policy cannot be both an effort to prevent suicides and, at the same time, deliberately indifferent to suicides").

127. See Frake v. City of Chicago, 210 F.3d 779, 782 (7th Cir. 2000) (noting that the city's policies should not be viewed "in isolation . . . [because] many precautions are taken to ensure the safety of detainees" from suicide).

128. See Simmons v. City of Philadelphia, 947 F.2d 1042, 1070–74 (3d Cir. 1991) (explaining that evidence of past suicides among intoxicated and suicidal detainees combined with an awareness of "relatively inexpensive suicide prevention measures" was sufficient for municipal liability for deliberate indifference to serious medical needs). Though *Simmons* was decided prior to *Farmer*, the court applied the deliberate indifference standard currently applied in the post-*Farmer* era. Id. at 1068–70; see also Owens v. City of Philadelphia, 6 F. Supp. 2d 373, 392 (E.D. Pa. 1998) ("[T]he City, although aware of the problem of suicide within City correctional facilities, failed to do more than go through the motions of training its correctional officers in suicide prevention and in administering first aid to a person found hanging.").

129. See James E. Robertson, The Impact of *Farmer v. Brennan* on Jailers' Personal Liability for Custodial Suicide: Ten Years On, Jail Suicide/Mental Health Update, Summer 2004, at 1, 1 ("Lower federal courts have since made *Farmer* the signal case in jail suicide litigation brought under 42 U.S.C. § 1983.").

II. A CHANGING LANDSCAPE FOR PRETRIAL DETAINEES? THE IMPACT OF *KINGSLEY V. HENDRICKSON*

In summer 2015, the Supreme Court heard a § 1983 case, *Kingsley v. Hendrickson*, in which the plaintiff, a pretrial detainee, argued that the jury should use an objective standard to evaluate his claim that jail officials used unreasonable force.[130] Previously, the Court had applied the "malicious and sadistic" standard to convicted prisoners' claims to determine if intentional force was excessive but had explicitly left open what standard should be applied to similar claims by pretrial detainees.[131] Lower courts had been free to determine whether the Eighth Amendment subjective standard for excessive force or an objective standard consistent with precedent in other Fourteenth Amendment cases[132] should apply. In *Kingsley*, the Court agreed with the plaintiff and held that an objective standard should apply to determine whether intentional force used against pretrial detainees is excessive.[133]

The impact of *Kingsley* on other claims by pretrial detainees could be significant. In the *Kingsley* decision, the Court reaffirmed *Bell*'s holding that punishment does not require scienter.[134] *Kingsley* consequently raises the question of whether an objective standard should govern other Fourteenth Amendment due process claims brought by pretrial detainees. Section II.A explains the *Kingsley* decision, describes the objective standard for excessive force claims, and analyzes the Court's justification for applying the objective standard to pretrial detainees. Section II.B discusses the potential impact of a shift to an objective deliberate indifference standard on failure-to-protect and serious-medical-needs claims. It then presents arguments for and against the proposition that *Kingsley* requires courts to apply the objective deliberate indifference test to such claims by pretrial detainees.

A. Kingsley, *the* Kingsley *Standard, and the Court's Reasoning*

In *Kingsley v. Hendrickson*, pretrial detainee Michael Kingsley was removed from his prison cell after refusing to take down a piece of paper

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130. 135 S. Ct. 2466, 2473 (2015).

131. See Kingsley v. Hendrickson, 744 F.3d 443, 456 (7th Cir. 2014) (Hamilton, J., dissenting) ("The Supreme Court has not settled the question of the standard for pretrial detainees. *Graham* explicitly left it open.").

132. See supra notes 68–74 (describing the Court's finding in *Bell v. Wolfish* that a court does not need to find intent to deem an action punishment); infra note 150 (describing the adoption of an objective standard for arrestees in *Graham v. Connor*).

133. The Court held that in an excessive force claim against a prison official, the "pretrial detainee must show only that the force purposely or knowingly used against him [by a prison official] was objectively unreasonable." *Kingsley*, 135 S. Ct. at 2473.

134. Id. (noting that the objective standard is "consistent with . . . precedent" and citing *Bell*'s recognition that a restraint can be punishment without need to "consider the prison officials' subjective beliefs").

covering his cell light.[135] Correctional officers carried him to a receiving cell, placed him face down on a bunk, and handcuffed him.[136] Hendrickson, one of the correctional officers, placed his knee in Kingsley's back, allegedly in response to Kingsley's resistance.[137] Kingsley claims that Hendrickson and another officer, Degner, then slammed his head into the concrete bunk.[138] At this point, it is undisputed that Hendrickson ordered Degner to taser Kingsley.[139] Degner applied the taser for about five seconds.[140]

After the incident, Kingsley brought a § 1983 excessive force claim under the Fourteenth Amendment.[141] The district court found against Kingsley.[142] Kingsley then appealed to the Seventh Circuit on the grounds that the "correct standard for judging a pretrial detainee's excessive force claim is objective unreasonableness" and that the lower court's jury instructions were not reflective of that standard.[143] The majority denied Kingsley's appeal, and the Supreme Court granted certiorari.[144]

In *Kingsley*, the Court recognized that excessive force claims contain two separate tests, both of which address the official's state of mind. The first test is whether the official used force "deliberate[ly]," which the Court defines as "purposefully or knowingly."[145] This test is subjective and was not disputed in *Kingsley* because the officers intended to use force.[146] The second test is whether "the defendant's physical acts in the world . . . involv[ed] force that was 'excessive.'"[147] In *Kingsley*, the Court directly addressed this test, asking: "In deciding whether the force deliberately used is, constitutionally speaking, 'excessive,' should courts use an objective standard only, or instead a subjective standard that takes into account a defendant's state of mind?"[148]

The Court held that "the relevant standard is objective not subjective"[149] and found that to determine whether the force was "objectively unreasonable," and thus excessive, the decisionmaker should consider multiple factors that might indicate how a reasonable official

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135. Id. at 2470.
136. Id.
137. Id.
138. Id.
139. Id.
140. Id.
141. Id. at 2471–72.
142. Id. at 2471.
143. Id.
144. Id. at 2472.
145. Id.
146. Id. (noting that "no one here denies . . . the defendant must possess a purposeful, a knowing, or possibly a reckless state of mind" with respect to physical acts).
147. Id.
148. Id.
149. Id.

would have acted in the same circumstances.[150] Factors that a decision-maker may consider in the analysis include but are not limited to: "the relationship between the need for . . . and the amount of force used; the extent of the plaintiff's injury; any effort made . . . to limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting."[151]

1. *The* Kingsley *Court's Reasoning*. — The Court concluded that an objective standard is appropriate for several reasons. Most significantly, the objective standard is consistent with precedent. In *Kingsley*, the Court relied on *Bell* and explicitly rejected the allegation that a subjective standard is required to determine punishment. The Court cited *Bell*'s extensive examination of pretrial detainees' rights,[152] reaffirming that intent to punish is not required for an act to constitute punishment and that therefore, intent is not a "*necessary* condition for liability."[153]

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150. Id. at 2473. The Court relied on the Fourth Amendment "objective reasonableness" standard established in Graham v. Connor, 490 U.S. 386, 395 (1989). In *Graham*, the Court held that the Fourth Amendment "objective reasonableness" standard should apply to all cases alleging excessive force by law enforcement officials during an arrest or investigatory stop. Id. The *Graham* opinion laid out an analysis in which courts examine officials' actions "in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." Id. at 397.

151. *Kingsley*, 135 S. Ct. at 2473 (citing *Graham*, 490 U.S. at 396). In the limited time since the *Kingsley* decision, courts have comfortably weighed the above factors to determine whether an officer's use of force was objectively unreasonable. See, e.g., Brown v. Gusman, No. 15-1491-DEK, 2015 WL 6827260, at *3 (E.D. La. Nov. 6, 2015) (using a five-factor test to determine whether use of force was objectively unreasonable in an excessive force case brought by a pretrial detainee); Thompson v. Beasley, No. 4:14–CV–00068–DMB–JMV, 309 F.R.D. 236, 247 (N.D. Miss. July 13, 2015) ("[I]n a departure from the pre-*Kingsley* jurisprudence, the Court need only ask whether the force was unnecessary—not whether the use of force was so unnecessary as to show the requisite state of mind to support an Eighth Amendment excessive force claim."). Much of the focus of these opinions has been the need to balance the intrusion on the individual's rights and the need to maintain institutional security. See Ondo v. City of Cleveland, 795 F.3d 597, 610 (6th Cir. 2015) (noting that *Kingsley* affirmed that the objective reasonableness test is based on the "perspective of a reasonable officer on the scene" (internal quotation marks omitted) (quoting Burgess v. Fischer, 735 F.3d 462, 473 (6th Cir. 2013))).

152. See supra notes 68–74 (describing the *Bell* opinion); see also Bell v. Wolfish, 441 U.S. 520, 536–40 (1979) (discussing the rights of a pretrial detainee and establishing "guideposts" to determine whether "particular restrictions and conditions accompanying pretrial detention amount to punishment").

153. *Kingsley*, 135 S. Ct. at 2476 (clarifying that the excessive force test described in Johnson v. Glick, 481 F.2d 1028 (2d Cir. 1973), considers whether force was applied "maliciously or sadistically" but "does not suggest that . . . malicious and sadistic purpose to cause harm . . . is a *necessary* condition for liability"). The Court explained that the *Bell* decision held that a pretrial detainee can establish conditions amounting to punishment by "providing only objective evidence that the challenged governmental action is not rationally related to a legitimate governmental objective or that it is excessive in relation to that purpose." Id. at 2473–74. Under *Bell*, punishment can be established by proving the "disability" is: "imposed for the purpose of punishment"; "not reasonably related to a

The Court differentiated *Kingsley* from earlier cases involving convicted prisoners in which it had applied a subjective standard. The Court acknowledged that "pretrial detainees (unlike convicted prisoners) cannot be punished at all"[154] and rejected the argument that cases brought by convicted prisoners under the Eighth Amendment should guide the analysis of pretrial detainees' claims under the Fourteenth Amendment. The Court explained that not only does the "language of the two Clauses differ [but] the nature of the claim often differs."[155]

The Court also addressed practical considerations regarding the objective standard. First, the standard is "workable" because lower courts effectively apply similar jury instructions.[156] Second, the standard is consistent with training practices used in many facilities when instructing officers how to interact with inmates.[157] Third, the standard is sufficient to adequately protect "an officer who acts in good faith."[158] The standard protects these officers because courts must examine reasonableness from the perspective and knowledge of the defendant officer, and the reasonableness evaluation must also take into account the government's interests in maintaining order and security in managing a jail.[159] Furthermore, the standard applies only in situations in which the officer intended to use force, precluding liability for negligence.[160]

2. *The Impact of the* Kingsley *Decision.* — The inquiry into *Kingsley*'s impact raises two key questions. The first is whether the Court actually intended to set a precedent that Fourteenth Amendment and Eighth Amendment claims require different standards. In the opinion, the Court acknowledged that the decision "may raise questions about the use of a subjective standard in the context of excessive force claims brought by convicted prisoners" but deliberately chose not to address the issue. Instead, it limited the decision to the Fourteenth Amendment claim at hand.[161]

The second question is whether, if the Court *did* mean to apply two different standards, this lesser standard for pretrial detainees was meant to extend to other types of Fourteenth Amendment claims. In the post-

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legitimate [governmental] goal—if it is arbitrary or purposeless"; or excessive in relation to the government objective. See *Bell*, 441 U.S. at 538–39.

154. *Kingsley*, 135 S. Ct. at 2475. The Court also noted that the objective standard is consistent with the standard used to examine use of force upon individuals who are charged with a crime but free on bail. Id. at 2474.

155. Id. at 2475.

156. Id. at 2474 (noting that the objective standard is "consistent with the pattern jury instructions used in several Circuits").

157. Id.

158. Id.

159. Id.

160. Id. ("[W]e have limited liability for excessive force to situations in which the use of force was the result of an intentional and knowing act (though we leave open the possibility of including a 'reckless' act as well).").

161. Id. at 2476.

Kingsley period, lower courts have begun to grapple with whether the *Kingsley* holding that intent is not required for an act to be considered punishment serves as precedent for applying an objective deliberate indifference standard to pretrial detainees' failure-to-protect or serious-medical-needs claims.[162]

B. *Extending the* Kingsley *Decision*

Applying the *Kingsley* decision's underlying conclusions—that intent to punish is not required to constitute punishment and that objectively unreasonable conduct can constitute punishment—to pretrial detainees' failure-to-protect and serious-medical-needs claims would result in a deliberate indifference standard that is objective and not subjective. The objective standard would lead to liability when the official's failure to address the inmate's needs was "objectively unreasonabl[e]"[163] and not necessarily done with the intent to harm.

Notably, in pretrial detainee excessive force cases, there is still the first state-of-mind test, which is a subjective requirement that the official must have intended to use harm.[164] As the *Kingsley* Court emphasized, this protects the officer from liability in accidental uses of force, such as when an officer trips and falls on a detainee.[165] In order to extend *Kingsley*, a similar subjective requirement would be necessary for failure-to-protect or serious-medical-needs cases. This requirement might be addressed by identifying a correctional official's intentional decision to refrain from acting.[166] This subjective test would ensure that the officer's action or inaction resulted from an intentional decision and not negligence.

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162. See, e.g., Johnson v. Clafton, 136 F. Supp. 3d 838, 844 (E.D. Mich. 2015) ("After *Kingsley*, it is unclear whether courts should continue to use the Eighth Amendment's deliberate-indifference standard to analyze inadequate-medical-care claims brought by pretrial detainees pursuant to the Due Process Clause."); see also Stile v. U.S. Marshals Serv., No. 15-cv-494-SM, 2016 WL 3571423, at *3 n.2 (D.N.H. May 9, 2016) (noting that the *Kingsley* decision might impact other pretrial detainee claims); Saetrum v. Raney, No. 1:13-425 WBS, 2015 WL 4730293, at *11 n.5 (D. Idaho Aug. 7, 2015) ("A recent Supreme Court decision calls into question whether it is appropriate to borrow the Eighth Amendment standard when the claim is brought by an arrestee, not a convicted prisoner, and whether the Due Process Clause may afford greater protection than the Eighth Amendment.").

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

164. See supra notes 145–146 and accompanying text (explaining this subjective test).

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

166. The Ninth Circuit outlined this proposed first state-of-mind test in Castro v. County of Los Angeles, No. 12-56829, 2016 WL 4268955, at *6 (9th Cir. Aug. 15, 2016) ("In the failure-to-protect context, in which the issue is usually inaction rather than action, the equivalent is that the officer's conduct with respect to the plaintiff was intentional."). But see id. at *20 (Ikuta, J., dissenting) (labeling such a test "underinclusive" and noting that it "doesn't readily apply in . . . failure-to-act cases where the plaintiff is unable to point to the officer's intentional decision with respect to the plaintiff's conditions").

The next state-of-mind test, however, would be objective. Plaintiffs would still have to satisfy the first prong of the *Farmer* test by establishing that there was a substantial risk of serious harm or a serious medical need, but the burden of proof under the second prong of the *Farmer* test would change. The plaintiff would now have to prove that a reasonable officer *should have known* of the risk or medical need and thus should have acted to protect the inmate.[167] This is an objective deliberate indifference test—the test that many of the circuits were using pre-*Farmer*.[168]

1. *The Objective Deliberate Indifference Standard in Practice.* — Scholars have suggested that a shift to an objective deliberate indifference standard for pretrial detainees would better align with constitutional standards,[169] permit courts to recede from the trend of deference to prison officials, and afford greater protection for individual rights.[170] The change in the standard would refocus a court's analysis. The analysis would shift away from identifying the official's intent and toward considering whether the official, given the circumstances, should have identified and acted upon the substantial risk.[171] This would relieve the

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167. See, e.g., Young v. Quinlan, 960 F.2d 351, 360–61 (3d Cir. 1992) (holding that an "official is deliberately indifferent when he *knows or should have known* of a sufficiently serious danger to an inmate"); Redman v. County of San Diego, 942 F.2d 1435, 1443 (9th Cir. 1991) (noting that officers "know or should know of the particular vulnerability"); see also Struve, supra note 19, at 1068 (proposing an objective deliberate indifference test for pretrial detainees).

168. The *Farmer* decision was the result of a circuit split; some circuits had been applying an objective deliberate indifference standard to deliberate indifference claims. See Boston et al., Defining Deliberate Indifference, supra note 78, at 86 (noting the pre-*Farmer* circuit split).

169. See David C. Gorlin, Evaluating Punishment in Purgatory: The Need to Separate Pretrial Detainees' Conditions-of-Confinement Claims from Inadequate Eighth Amendment Analysis, 108 Mich. L. Rev. 417, 435–38 (2010) (noting that the "substantive due process ceiling is higher than the Eighth Amendment ceiling, which only protects those convicted of crimes"); Levinson, Due Process, supra note 21, at 571 ("A showing of objective deliberate indifference, combined with some showing of more than de minimis injury, shocks the conscience and thus should sustain a substantive due process claim.").

170. See Mikel-Meredith Weidman, The Culture of Judicial Deference and the Problem of Supermax Prisons, 51 UCLA L. Rev. 1505, 1520 (2004) (noting "higher thresholds . . . make it exceedingly difficult for inmates to succeed on their constitutional claims"); see also Stephen R. Reinhardt, The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences, 113 Mich. L. Rev. 1219, 1252 (2015) (commenting on the current Court's "unbroken march toward limiting constitutional rights and remedies for criminal defendants and the victims of police abuse").

171. See Gorlin, supra note 169, at 442–43. ("Under an objective deliberate-indifference test, factfinders would concentrate on the nature of the conditions to determine whether there were serious risks to inmates of which prison officials should have been aware."); see also Philip M. Genty, Confusing Punishment with Custodial Care: The Troublesome Legacy of *Estelle v. Gamble*, 21 Vt. L. Rev. 379, 395 (1996) (asserting that shifting to an intent-based test encourages a fact-finder to empathize with the prison official rather than the prisoner).

plaintiff of the difficult task of providing evidence demonstrating the official's state of mind. This might be particularly important for pretrial detainees given that a detainee's period of incarceration can be relatively short, which may make it more difficult to establish behavioral patterns that might indicate an official had actual knowledge.[172]

Use of an objective deliberate indifference standard could also impact cultural norms that favor officials' disengagement with prisoners' needs.[173] Under *Farmer*'s actual-knowledge requirement, a prison official might purposefully avoid knowledge of risk in order to avoid potential liability.[174] But under the objective standard, the official and the municipality would be held accountable regardless of whether the official knew or successfully avoided the information.

Until *Kingsley*, there was no clear precedent to establish greater protection for pretrial detainees than for convicted prisoners with respect to claims that a pretrial detainee brings under the Fourteenth Amendment and a convicted prisoner brings under the Eighth Amendment, even though these amendments suggest different levels of protection. Now, *Kingsley* might provide lower courts with an opportunity to build upon the decision's differentiation of the rights of pretrial detainees and prisoners to establish an objective deliberate indifference standard for other Fourteenth Amendment claims.

2. *Lower Court Decisions Post-*Kingsley. — Failure-to-protect and serious-medical-needs claims share many similarities with excessive force claims; this suggests that the *Kingsley* decision might mandate extending an objective standard to these claims brought by pretrial detainees. Excessive force, failure-to-protect, and serious-medical-needs claims all come from the same constitutional rights. While in these claims *how* a prisoner might have been punished differs, whether by force or by exposure to risk, the fundamental protection under the Constitution is the same: The Eighth Amendment protects convicted prisoners from cruel and unusual

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172. See Gorlin, supra note 169, at 443 n.171 ("[A]lthough [pretrial detainees] may face the same objective conditions of confinement as convicted inmates, their relatively brief stay might inhibit their ability to establish the jail official's subjective state of mind."); see also Cohen, supra note 15, ¶ 14.3[3][a], at 14-38 to -42.

173. See Rosalie Berger Levinson, Who Will Supervise the Supervisors? Establishing Liability for Failure to Train, Supervise, or Discipline Subordinates in a Post-*Iqbal/Connick* World, 47 Harv. C.R.-C.L. L. Rev. 273, 311 (2012) (noting that the adoption of the objective deliberate indifference standard for supervisory liability claims "will ensure that the supervisors of our jails and prisons . . . cannot avoid liability by turning a blind eye to the constitutional wrongdoing of their subordinates").

174. See Sharon Dolovich, Cruelty, Prison Conditions, and the Eighth Amendment, 84 N.Y.U. L. Rev. 881, 947 (2009) ("[R]ather than directing officials' attention to possible risks, [the *Farmer* standard] would create incentives for officials not to notice such risks."); see also Boston et al., Defining Deliberate Indifference, supra note 78, at 92–93 (critiquing lower courts' failures to give weight to *Farmer*'s statement that officials cannot purposefully avoid knowledge of risk to avoid liability).

punishment, and the Fourteenth Amendment protects pretrial detainees from *any* punishment.[175]

District courts have generally been hesitant to extend *Kingsley*'s logic and stray from circuit precedent, despite these similarities.[176] However, the Ninth Circuit, the only circuit that has addressed the question directly, has affirmed that *Kingsley* changes the standard for pretrial detainees' failure-to-protect claims. In *Castro v. County of Los Angeles*, a pretrial detainee brought a failure-to-protect claim against jail officials after suffering injuries resulting from an attack by another inmate.[177] In an en banc opinion, the majority held that *Kingsley* "rejected the notion that there exists a single 'deliberate indifference' standard applicable to *all* § 1983 claims, whether brought by pretrial detainees or convicted prisoners."[178] The panel found that while excessive force claims and failure-to-protect claims differ, there are "significant reasons" to apply the objective standard to failure-to-protect claims.[179] These reasons include: the fact that § 1983 does not have a state-of-mind requirement, the similarity in the underlying constitutional rights, the similarity between the injuries of excessive force by officials and force applied by a fellow inmate, and the broad language in the *Kingsley* decision that "a pretrial detainee can prevail by providing only objective evidence that *the challenged government action*" constitutes punishment, rather than specifying that the action must be force.[180]

A strong dissent in *Castro* argued that the majority's opinion "made a mess" of existing precedent for pretrial detainees' punishment claims.[181] The dissent emphasized the difference between failure-to-protect claims and excessive force claims and the different types of analysis such claims

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175. See supra notes 65–67 and accompanying text.

176. See, e.g., Butler v. Williams, No. 14-2948-JDT-tmp, 2016 WL 5416537, at *3 n.3 (W.D. Tenn. Sept. 28, 2016) (noting "*Kingsley* may affect the deliberate indifference standard for claims concerning an inmate's health or safety, which the Sixth Circuit applies to both pre-trial detainees and convicted prisoners" but that "[a]bsent further guidance, the Court will continue to apply the deliberate indifference analysis to [these] claims"); Gilbert v. Rohana, No. 1:14-CV-00630-RLY-DKL, 2015 WL 6442289, at *3–4 (S.D. Ind. Oct. 23, 2015) (applying a subjective deliberate indifference standard to a pretrial detainee's medical claim post-*Kingsley*); Roberts v. C-73 Med. Dir., No. 1:14-CV-5198-GHW, 2015 WL 4253796, at *3 n.3 (S.D.N.Y. July 13, 2015) (applying a subjective deliberate indifference standard to a pretrial detainee's medical claim post-*Kingsley* and noting "[t]he Fourteenth Amendment standard here only changes if the Supreme Court changes the Eighth Amendment floor"); see also Mattern v. City of Sea Isle, 131 F. Supp. 3d 305, 314 (D.N.J. 2015) (explaining that, post-*Farmer*, "consistent with the law in this Circuit" the court would evaluate a pretrial detainee's claim of inadequate medical care under the same standard as an Eighth Amendment claim).

177. No. 12-56829, 2016 WL 4268955, at *2 (9th Cir. Aug. 15, 2016).

178. Id. at *5.

179. Id. at *6.

180. Id. (internal quotation marks omitted) (quoting Kingsley v. Hendrickson, 135 S. Ct. 2466, 2473–74 (2015)).

181. Id. at *18 (Ikuta, J., dissenting).

receive under the Eighth Amendment. Relying heavily on *Farmer*, the dissent argued that "while punitive intent may be inferred from affirmative acts that are excessive in relationship to a legitimate government objective, the mere failure to act does not raise the same inference" and that therefore, even when a failure to act is "objectively unreasonable," it is "negligent at most."[182]

Part III examines these arguments and suggests that courts should apply the objective deliberate indifference standard for failure-to-protect claims. It argues that doing so could lead to significant municipal policy changes that might well save lives.

III. ADOPTION OF THE OBJECTIVE DELIBERATE INDIFFERENCE STANDARD: A STEP FORWARD FOR JAIL-SUICIDE LIABILITY AND PREVENTION

The use of an objective deliberate indifference standard could have many important benefits for pretrial detainees. In the area of jail suicide, it could strengthen jail policies regarding suicide prevention, which ultimately might prevent suicides from occurring. This Note concludes that lower courts should adopt the objective deliberate indifference standard for failure-to-protect and serious-medical-needs claims by pretrial detainees. Section III.A advocates for the adoption of the objective deliberate indifference standard for failure-to-protect and serious-medical-needs claims and addresses potential objections to its application. Section III.B then examines how the standard would apply to suicide claims and how the switch from a subjective to objective deliberate indifference standard might increase the plaintiff success rate in suicide litigation. This Part concludes in section III.C by examining whether changing the standard could lead municipalities to improve suicide prevention policies.

A. *Courts Should Adopt the Objective Deliberate Indifference Standard for Pretrial Detainee Failure-to-Protect and Serious-Medical-Needs Claims*

Courts should adopt the objective deliberate indifference standard for pretrial detainee failure-to-protect and serious-medical-needs claims because the *Kingsley* decision provides strong precedent for a shift in the traditional analysis of these claims, existing precedent does not preclude the use of the standard, the standard is pragmatic, and the standard aligns with existing legal trends.

1. *Supreme Court Precedent Supports the Standard.* — The Supreme Court has now twice held that a pretrial detainee's claim under the Fourteenth Amendment requires analysis using an objective standard to determine if the inmate was unconstitutionally punished.[183] The Court

182. Id. at *20.

183. See *Kingsley*, 135 S. Ct. at 2473 (concluding that the "appropriate standard for a pretrial detainee's excessive force claim is solely an objective one"); Bell v. Wolfish, 441

has never held that a pretrial detainee would have to prove the official's intent to punish.[184] The *Kingsley* decision's affirmation of *Bell*'s holding that the Fourteenth Amendment requires an objective analysis to determine punishment and that "proof of intent (or motive) to punish is [not] required for a pretrial detainee to prevail on a claim that his due process rights were violated"[185] suggests that all pretrial-detainee due process claims require evaluation using an objective standard.[186] Furthermore, as the Ninth Circuit has identified, the "broad wording" in *Kingsley* that this interpretation of *Bell* applies to "challenged governmental action," rather than simply to excessive force, offers support that the *Kingsley* decision was meant to extend beyond excessive force.

2. *Supreme Court Precedent Does Not Preclude the Standard.* — The difference between excessive force claims and failure-to-protect and serious-medical-needs claims is insufficient to prevent the application of the *Kingsley* decision to the latter two. First, the Eighth Amendment standard for failure-to-protect and serious-medical-needs claims is not so different from the Eighth Amendment standard for excessive force claims. Both standards, subjective deliberate indifference for failure-to-protect claims[187] and "malicious and sadistic"[188] for excessive force claims, require intent. In *Graham v. Connor*, the Court emphasized this similarity, observing that the subjective motivations of individual officers are of central importance in finding an Eighth Amendment violation.[189] While the apparent unreasonableness of an official's actions is considered in Eighth Amendment excessive force cases, it is used for the purpose of assessing whether there was malicious and sadistic intent.[190]

U.S. 520, 539 (1979) ("[I]f a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees.").

184. As discussed in section I.B, the Court's decision in *Farmer* to use the subjective deliberate indifference standard applied only to Eighth Amendment claims. However, lower courts have interpreted the decision to apply to pretrial detainees' Fourteenth Amendment claims. See infra note 96 and accompanying text.

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

186. See *Castro*, 2016 WL 4268955, at *5 (noting that in *Kingsley*, the Court cast "into serious doubt" the Ninth Circuit's prior holding that failure to alleviate a risk an official should have known "could not support liability under either the Eighth or the Fourteenth amendment").

187. Farmer v. Brennan, 511 U.S. 825, 831 (1994).

188. Whitley v. Albers, 475 U.S. 312, 320 (1986) ("[W]e think the question . . . 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))).

189. 490 U.S. 386, 398 (1989).

190. See, e.g., Skrtich v. Thornton, 280 F.3d 1295, 1300 (11th Cir. 2002) (noting a variety of factors are used to determine whether force was malicious and sadistic, including "the need for the application of force, the relationship between that need and the amount

Second, the Court's decision in *Daniels v. Williams*[191] should not be read to conflict with the application of an objective analysis to failure-to-act claims. In *Daniels*, the Court found that a state official's "mere lack of due care" does not violate an individual's Fourteenth Amendment rights and that a negligent act is insufficient for liability under the Due Process Clause.[192] By eliminating liability for negligence, the decision does not necessarily require a purposeful state of mind. The *Daniels* Court, like the *Kingsley* Court,[193] left open whether something more than negligence but less than intent was sufficient for a due process violation.[194]

In *Castro*, the Ninth Circuit addressed the *Daniels* decision directly and concluded that "the test to be applied [to failure-to-protect claims] under *Kingsley* must require a pretrial detainee who asserts a due process claim for failure to protect to prove more than negligence but less than subjective intent—something akin to reckless disregard."[195] This test fits within the area left open by the *Daniels* Court, permitting liability for acts that are between negligence and intentional punishment. Furthermore, this test also fits within the *Daniels* reasoning—the *Daniels* Court emphasized that its decision was meant to preclude liability specifically for "injuries that attend living together in society."[196] Use of an objective standard in a failure-to-protect or serious-medical-needs case ensures that liability is being considered for injuries that supersede this baseline standard because the finding of a substantial risk or a serious medical need is a prerequisite to reaching the deliberate indifference test.[197]

The fact that failure-to-protect claims or serious-medical-needs claims do not always involve an affirmative act does not mean that these types of claims require a subjective deliberate indifference analysis.[198] As the Ninth Circuit's test indicates, the failure-to-act analysis to avoid

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of force used, [and] the threat reasonably perceived by the responsible official" (internal quotation marks omitted) (quoting Hudson v. McMillian, 503 U.S. 1, 7 (1992))).

191. 474 U.S. 327 (1986).

192. Id. at 330–31.

193. Kingsley v. Hendrickson, 135 S. Ct. 2466, 2472 (2015) ("Whether that standard might suffice for liability in the case of an alleged mistreatment of a pretrial detainee need not be decided here; for the officers do not dispute that they acted purposefully or knowingly with respect to the force they used against Kingsley.").

194. *Daniels*, 474 U.S. at 334 n.3 ("[T]his case affords us no occasion to consider whether something less than intentional conduct, such as recklessness or 'gross negligence,' is enough to trigger the protections of the Due Process Clause.").

195. Castro v. County of Los Angeles, No. 12-56829, 2016 WL 4268955, at *7 (9th Cir. Aug 15, 2016). But see id. at *20 (Ikuta, J., dissenting) ("[A] person who unknowingly fails to act—even when such a failure is objectively unreasonable—is negligent at most.").

196. *Daniels*, 474 U.S. at 332. In *Daniels*, the Court found a state official could not be held liable under the Fourteenth Amendment for a pretrial detainee's claim for damages when he slipped on a pillow negligently left on the jail stairway. Id. at 328.

197. See Farmer v. Brennan, 511 U.S. 825, 834 (1994) (explaining the requirements necessary to find a prison official liable under the Eighth Amendment).

198. Cf. *Castro*, 2016 WL 4268955, at *20 (Ikuta, J., dissenting) (arguing negligence "at most" can be inferred from "unknowingly fail[ing] to act").

liability for negligence could begin by requiring an "intentional decision" with respect to the inmate's conditions of confinement, which would serve a similar purpose to the affirmative act.[199] Alternatively, circumstantial evidence can be used to establish that given a situation of a "substantial risk" or "serious medical need," a reasonable person would have identified and acted upon the risk. Either of these measures would ensure that the failure to act was beyond simple negligence.

Finally, up to now, the Supreme Court has only applied a subjective analysis to failure-to-act claims because it has only heard such claims in Eighth Amendment cases; the Court has never considered what standard would apply to pretrial detainees' failure-to-act claims under the Fourteenth Amendment. As a result, the Court's precedent does not lend support to the cursory conclusion that a claim that involves an omission, rather than an affirmative act, necessarily requires a subjective analysis outside of the Eighth Amendment context.

In that vein, it is important to reiterate that *Farmer*, which many of the lower courts have heavily relied on in pretrial detainees' cases, is an Eighth Amendment case—a fact that the *Farmer* Court made very clear in the opinion. In *Farmer*, the Court used the decision in *Wilson v. Seiter*, an Eighth Amendment prison-condition case, to support the application of a subjective deliberate indifference standard to failure-to-protect claims.[200] The Court relied on the detailed justifications provided in *Wilson* for why the subjective standard should apply to Eighth Amendment claims,[201] and explicitly stated that *Wilson* requires the subjective analysis in claims of "cruel and unusual punishment."[202] This reliance on *Wilson* and emphasis on the fact that *Wilson* was an Eighth Amendment case further suggest that the *Farmer* Court's holding should be limited to claims under the Eighth Amendment.[203]

3. *The Standard Is Workable and Practical.* — The third reason courts should adopt the objective deliberate indifference standard is that the

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199. Id. at *7 (majority opinion).

200. Id. at 838–39 (discussing *Wilson*'s requirement of a subjective deliberate indifference standard).

201. Id.

202. *Farmer*, 511 U.S. at 838 ("In *Wilson* . . . we rejected . . . impos[ition] [of Eighth Amendment liability] solely because of the presence of objectively inhumane prison conditions . . . [because] our 'cases mandate inquiry into a prison official's state of mind when it is claimed that the official has inflicted cruel and unusual punishment.'" (quoting Wilson v. Seiter, 501 U.S. 294, 299 (1993))).

203. Given this emphasis, the *Farmer* Court's statement that "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," id., is best interpreted as referring to punishment as cruel and unusual punishment under the Eighth Amendment, rather than any punishment at all. Understanding the statement this way alleviates tension with *Bell*'s holding that punishment does not require intent.

standard is workable and practical.[204] As previously discussed, courts have applied the objective deliberate indifference standard in the past, prior to the *Farmer* decision.[205] Also, the standard would "protect[] an officer who acts in good faith" in the same way the *Kingsley* Court found an objective standard would in excessive force claims—by examining reasonableness from the perspective of the defending officer and taking into account the realities and necessities in running an effective corrections facility.[206]

In *Kingsley*, the Court did not closely examine logistical concerns associated with implementing a different standard for pretrial detainees and convicted prisoners. State officials and legal scholars often raise these concerns.[207] These concerns can be particularly relevant for the provision of medical care, which is often centralized in a facility that contains both detainees and prisoners, even if they are housed separately.[208] At this time, this practical concern does not have an empirical basis, and even if it did, a practical concern might not be sufficient to limit the application of constitutionally mandated protections for pretrial detainees.[209] Moreover, there are ways to address this issue. Prisons or jails might mitigate this problem by housing detainees and prisoners in separate areas, mandating different clothing or identification tags, or even applying the objective standard to interactions with all inmates.[210]

4. *The Standard Aligns with Legal Trends.* — The final reason to adopt the objective standard is that improving enforceability of constitutional rights is in line with a developing legal and popular movement to improve prisoners' rights. In *Davis v. Ayala*, Justice Kennedy wrote, "There are indications of a new and growing awareness in the broader

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204. Practicality is an important consideration in prisoners' rights litigation given the significant logistical difficulties in running jails and prisons. See, e.g., Kingsley v. Hendrickson, 135 S. Ct. 2466, 2474 (2015) (recognizing the importance of ensuring that policies "maintain order and institutional security").

205. See supra section II.B.1 (describing past applications of the objective deliberate indifference standard).

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

207. See Alexander A. Reinert, Response, Finding the Proper Measure for Conditions of Pretrial Detainment, 161 U. Pa. L. Rev. Online 191, 196 (2013), http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1107&context=penn_law_review_online [http://perma.cc/K5SA-X3M9] (noting "practical objections" of treating detainees and convicted prisoners differently including the implementation of different criteria for decision-making).

208. Id. (noting "access to medical and mental health care . . . [in conditions of confinement] is usually governed by a uniform, internal policy" for all persons).

209. See id. (noting such "practical objections rest to some extent on predictions about the feasibility of applying the different standards . . . which might be resolved through empirical study . . . in the future" and concluding "if the standards themselves are sensible, then there is value in articulating and applying them").

210. Cf. id. (suggesting physical separation is only "partly satisfactory" because of the centralization of so many jail services).

public of the subject of corrections . . . ."[211] Justice Kennedy referenced articles describing punitive conditions of incarceration and the impact these conditions have on individuals and society.[212] The Justice recognized a need to reexamine the treatment of persons in jails and prisons[213] and explicitly called upon the legal community to advocate for these changes.[214] Application of an objective deliberate indifference standard aligns with the movement toward ensuring that prisoners receive adequate treatment and protection from abuse and neglect.

B. *The Impact of the Objective Deliberate Indifference Standard on Individual Suicide Claims*

As this Note argues, a shift toward an objective deliberate indifference standard for pretrial detainees could make it easier for detainees to hold officers accountable for injuries resulting from failure to protect or deliberate indifference to serious medical needs. A closer examination of how the objective deliberate indifference standard would impact pretrial-detainee suicide litigation suggests that it not only could facilitate greater accountability for violations of a pretrial detainee's right to be free from punishment but also could lead to changes in policy that would prevent violations from occurring in the first place.

One of the difficulties in suicide litigation is establishing that the official actually knew that the inmate was suicidal.[215] Under the objective standard, actual knowledge of the threat would no longer be required; instead, plaintiffs would need only to establish that an official, given the circumstances, should have known of the need for medical care or protection.[216] Prior to *Farmer*, courts applying this objective standard in

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211. 135 S. Ct. 2187, 2210 (2015) (Kennedy, J., concurring).

212. Id. (referencing articles from the *New Yorker* and *New York Times* describing Kalief Browder, who killed himself after experiencing "multiyear solitary confinement").

213. Id. at 2209 ("Too often, discussion in the legal academy and among practitioners and policymakers concentrates simply on the adjudication of guilt or innocence. Too easily ignored is the question of what comes next. Prisoners are shut away—out of sight, out of mind.").

214. See Matt Ford, Justice Kennedy Denounces Solitary Confinement, Atlantic (June 18, 2015), http://www.theatlantic.com/politics/archive/2015/06/kalief-browder-justice-kennedy-solitary-confinement/396320/ [http://perma.cc/M2PT-3W6Y] (describing Justice Kennedy's lament over the legal community's disengagement from prison issues); Sam Hananel, Prison Reform Advocates Hope One Supreme Court Justice Will Help End Solitary Confinement, PBS Newshour: The Rundown (Aug. 11, 2015), http://www.pbs.org/newshour/rundown/prison-reform-advocates-hope-one-supreme-court-justice-will-end-solitary-confinement/ [http://perma.cc/MF4G-MU5M] (noting that Justice Kennedy's "clarion call is already gaining steam" with other Justices, President Obama, and civil rights attorneys).

215. As discussed in section I.C.2, lower courts generally require that the official actually have individual-specific knowledge that an inmate threatened suicide or that the inmate's records indicated a risk for suicide.

216. Pre-*Farmer* cases in which courts applied the objective deliberate indifference standard indicate this is the case. See, e.g., Elliott v. Cheshire County, 940 F.2d 7, 10–11

suicide cases found liability when the "'strong likelihood' of suicide [was] 'so obvious that a lay person would easily recognize the necessity for' preventative action."[217]

Under this standard, a court might find officials responsible for failing to identify a substantial suicide risk because they did not examine existing jail records containing past suicide threats or attempts. Courts have not found liability under subjective deliberate indifference for failure to read an inmate's records even if the information was easily accessible.[218] In these cases, the official's ignorance is a defense to liability. A court-imposed duty to access available records could have a large impact, particularly since many inmates are individuals who were previously incarcerated and are likely to have records from prior incarcerations.[219] The success of these types of claims would likely depend on the officer's ability to access the information and the amount of time the inmate was in jail before the suicide. Furthermore, if a jail has a poor system for centralizing this information, courts might not be inclined to hold officers accountable for failure to access and review an inmate's records.[220]

Courts might also be more likely to find officials accountable when an inmate's statements or actions strongly suggested but did not

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(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."). Notably, in these cases, courts still required some previous threat or earlier attempt at suicide. Id. at 11 ("In the absence of a previous threat of or an earlier attempt at suicide, we know of no federal court . . . that has concluded that official conduct in failing to prevent a suicide constitutes deliberate indifference." (quoting Edwards v. Gilbert, 867 F.2d 1271, 1275 (11th Cir. 1989))).

217. See Colburn v. Upper Darby Township, 946 F.2d 1017, 1025 (3d Cir. 1991) (quoting Monmouth Cty. Corr. Institutional Inmates v. Lanzaro, 834 F.2d 326, 347 (3d Cir. 1987)).

218. See, e.g., Snow ex rel. Snow v. City of Citronelle, 420 F.3d 1262, 1269 (11th Cir. 2005) (finding no liability when the officer accompanying the inmate to the hospital did not read the inmate's outpatient records that noted past suicide attempts and "suicidal ideation"); Stewart ex rel. Estate of Stewart v. Waldo County, 350 F. Supp. 2d 215, 221 (D. Me. 2004) ("[T]he Plaintiff points to evidence of his level of intoxication, prior records in the Jail of his suicidal tendencies, the removal of some, but not all his clothes, and his appearance on the videotape. Again, none of these facts . . . is direct evidence of the [defendants'] 'subjective indifference' . . . .").

219. See Matthew R. Durose et al., U.S. Dep't of Justice, Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010, at 1 (2014) (noting that in a study of state prisoners released in thirty states, about sixty-eight percent of prisoners are rearrested after three years and about seventy-seven percent are rearrested within five years).

220. One way around this issue might be for plaintiffs to bring a claim against the municipality for a policy that exhibited deliberate indifference to the inmate's needs because the municipality did not make the information accessible. See supra section I.C.2 (discussing municipal liability under the subjective deliberate indifference standard).

explicitly communicate suicidal tendencies.[221] These claims might be most persuasive to judges or juries when the inmate is at a statistically higher risk for suicide. The Department of Justice provides data detailing characteristics that make an incarcerated individual a higher suicide risk.[222] Demographic information itself would likely not be sufficient to establish liability; however, this information in combination with other behavioral indicators could be sufficient to satisfy the objective "should-have-known" standard even though it would not have satisfied the subjective deliberate indifference standard.[223] If so, this could encourage officers to be more cognizant of an inmate's statements and actions and to take threats more seriously.

The shift in standard could also address what has been categorized as a "hand-off" problem in which officers do not effectively pass along information about inmates to one another.[224] Courts have been mixed in finding liability when officers have failed to pass along a threat that an inmate was suicidal, finding liability when there is "clear and unequivocal information" but not when information is even slightly ambiguous.[225] A "should-have-known" standard would encourage officers to be more cognizant of asking for inmate-specific information, as ignorance of actual knowledge would no longer be a complete defense from liability.

Last, courts would be more likely to hold officials accountable for ensuring adequate protections once an inmate is recognized as suicidal. For example, under the subjective deliberate indifference standard, a court found no liability when an intoxicated woman who was threatening to "slash [her] throat" used a metal-clad phone cord to hang herself.[226] The officer was not liable because there was no evidence on record that he, or anyone else at the jail, realized the inmate could hang herself with the phone cord.[227] Under an objective standard, a court could find that this was something the officer should have known, particularly in

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221. These claims have not been successful under the subjective standard. See, e.g., Bell v. Stigers, 937 F.2d 1340, 1344 (8th Cir. 1991) (finding no failure to protect when an inmate made a single remark about shooting himself despite allegations that the inmate fit the "suicide profile").

222. See generally Lindsay M. Hayes, U.S. Dep't of Justice, National Study of Jail Suicide: 20 Years Later 11–32 (2010), http://static.nicic.gov/Library/024308.pdf [http://perma.cc/R2B3-NCHC] (describing demographic findings of jail-suicide data). For example, statistics indicate a white, intoxicated male is at a relatively high risk for suicide upon arrest. Id. at 3, 5.

223. This would be different than imposing a duty to screen. It would apply if information may be obvious or the municipality had screening in place that would make the information available.

224. See Cohen, supra note 15, ¶ 14.4[3], at 14-56 to -60 (describing hand-off problems as occurring when there is no sharing of information between shifts, transports, or intra- or interagencies).

225. Id.

226. Davis v. Fentress County, 6 F. App'x 243, 247 (6th Cir. 2001).

227. See id. at 250.

circumstances like these in which the presence of the phone in a secure cell violated the jail's policy against structural projections.[228]

The objective deliberate indifference standard could ultimately make it easier for the estates of pretrial detainees to succeed in claims resulting from in-custody suicides. Removing the actual-knowledge requirement makes the evidentiary requirement significantly easier. The lower standard allows for the use of circumstantial evidence to demonstrate that an official should have known of the suicide threat and removes the official's ability to rely on the ignorance defense.

C. *The Impact of the Shift on Jail-Suicide Prevention Policies*

The use of the objective deliberate indifference standard for pretrial detainees in suicide litigation could lead to an increase in the number of individual damages awards. In the long term, this increase in successful litigation could lead to improvement of municipalities' policies aimed at protecting inmates from suicide. This result is particularly important because adequate suicide prevention policies are key to reducing suicide rates,[229] but courts' ability and willingness to mandate these policies are limited.[230] The Supreme Court has never held that an inmate has the right to adequate suicide prevention policies,[231] and generally, significant obstacles stand in the way of judicial intervention in correctional facilities.[232] Under the existing § 1983 framework, it is difficult to succeed on claims for injunctive relief against a municipality.[233] Courts are often hesitant to require policy changes they see as outside of the realm of

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228. Cf. id. at 247–50 (finding the officer's "response to the risk of suicide [the inmate] presented did not amount to a conscious disregard for [the inmate]'s serious medical need" in the above circumstances).

229. See Lindsay M. Hayes, Suicide Prevention in Correctional Facilities: Reflections and Next Steps, 36 Int'l J.L. & Psychiatry 188, 193 (2013) [hereinafter Hayes, Suicide Prevention] ("Recent research has suggested that many jail suicides occur in facilities lacking comprehensive suicide prevention programs, with only 20% having written policies encompassing all the essential components.").

230. See Susan Sturm, Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons, 138 U. Pa. L. Rev. 805, 910 (1990) ("[G]iven the dynamics of organizational stasis, in many prisons change is unlikely to be undertaken in the absence of judicial intervention.").

231. Taylor v. Barkes, 135 S. Ct. 2042, 2044 (2015) ("No decision of this Court establishes a right to the proper implementation of adequate suicide prevention protocols.").

232. See, e.g., Sturm, supra note 230, at 910 (recognizing the important role of judicial intervention, as well as its limitations, explaining "[a]t best, effective judicial intervention can alleviate the most immediate and profound suffering perpetuated by the dynamics of organizational stasis and foster the development of more humane and sophisticated approaches to corrections").

233. See Pamela S. Karlan, The Paradoxical Structure of Constitutional Litigation, 75 Fordham L. Rev. 1913, 1920–22 (2007) (describing limitations of § 1983 claims against municipalities particularly when claims are based on an unwritten policy or failure to train).

judicial expertise. Even if courts do mandate policy changes, they can be limited in their ability to force municipalities to carry them out.[234] Furthermore, in suicide litigation, standing issues might also limit the ability to request injunctive relief, as policy changes will have no impact on the suicide victim.[235]

1. *Strengthening and Developing Suicide Prevention Policies.* — The shift in the deliberate indifference standard would not change the analysis for a municipality's liability in suicide litigation.[236] However, increasing liability for § 1983 claims against individual officers might induce municipalities to make structural changes in order to protect their officers from damages liability,[237] which in turn could lead to policy change without a court mandate.

Municipalities have incentives to avoid § 1983 lawsuits against their officers. Most municipalities indemnify their officers[238] and are ultimately

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234. The Prison Litigation Reform Act (PLRA) also limits the ability of the courts to mandate injunctive relief for prisoners. See 18 U.S.C. § 3626 (2012) (providing guidelines for remedies with respect to prison conditions); John Boston, The Prison Litigation Reform Act, *in* A Jailhouse Lawyer's Manual 1, 67–70 (9th ed. 2011) (describing the PLRA's limitations on injunctive relief). Furthermore, even when courts can have an impact by mandating an end to policies that violate constitutional rights, they are limited in their ability to force a municipality to increase spending and, often, in devising realistic standards for a jail to meet. See Erwin Chemerinsky, The Essential but Inherently Limited Role of the Courts in Prison Reform, 13 Berkeley J. Crim. L. 307, 313–15 (2008) (recognizing courts have the power to make a difference in reforming jails and prisons but have limited options).

235. See, e.g., Martin v. Sargent, 780 F.2d 1334, 1337 (8th Cir. 1985) ("[A] prisoner's claim for injunctive relief to improve prison conditions is moot if he or she is no longer subject to those conditions."); see also Oliver v. Scott, 276 F.3d 736, 741 (5th Cir. 2002) (finding transfer of a prisoner out of an institution made claim for injunctive relief moot because the plaintiff could not show "demonstrated probability" or "reasonable expectation" that he would be subject to such policies in the future (quoting Murphy v. Hunt, 455 U.S. 478, 482 (1982))).

236. The plaintiff would still have to establish the existence of a policy or custom that violated the inmate's constitutional right or that a failure to train resulted in deliberate indifference to the inmate's right. See supra section I.0 for a discussion of the requirements for a § 1983 claim against a municipality.

237. See Karlan, supra note 233, at 1918 ("The prospect of future damages can induce the government to change its policies to avoid further liability."); Margo Schlanger, Inmate Litigation, 116 Harv. L. Rev. 1555, 1681 (2003) ("[E]vidence clearly shows that, in general, government agencies seek to avoid fines, which are extremely disruptive to the normal operation of any bureaucracy . . . . Fear of major money judgments or settlements is why liability reduction is a major theme in many areas of corrections . . . .").

238. See Joanna C. Schwartz, Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking, 57 UCLA L. Rev. 1023, 1032–33 & n.43 (2010) [hereinafter Schwartz, Myths and Mechanics] (citing a variety of sources that assert the near-universal policy of municipalities indemnifying officers for damages); Michael C. Dorf, Supreme Court Jail Suicide Case Illustrates the Breadth of Qualified Immunity, Justia: Verdict (June 3, 2015), http://verdict.justia.com/2015/06/03/supreme-court-jail-suicide-case-illustrates-the-breadth-of-qualified-immunity [http://perma.cc/63LF-UZ56] (noting government officials such as prison guards "typically have indemnification agreements with their employers"). Professor Joanna Schwartz has also provided an

responsible for paying damages in civil rights suits against indemnified officers. They also have an interest in avoiding having their officers spending time on the lawsuits, which might impact both performance and morale. Finally, municipalities might worry that a high likelihood for a lawsuit would disincentivize potential employees from working in jails. Municipalities could attempt to avoid these consequences by ensuring better implementation of existing suicide prevention policies and developing more adequate suicide prevention plans.[239]

The present availability of national guidelines for adequate suicide prevention plans could facilitate the process of policy change.[240] Multiple organizations have produced standards and guidelines for adequate suicide prevention policies in jails.[241] The National Center on Institutions and Alternatives[242] provides research-based policy guidelines for effective prevention programs in jails to ensure the proper identification of inmates at risk for suicide, as well as the implementation of continuing noninvasive, nonpunitive suicide prevention policies throughout incar-

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empirical analysis of indemnification of police officers, recognizing that the municipality covers nearly all damages recovered from law enforcement officers' violations of civil rights. See Joanna C. Schwartz, Police Indemnification, 89 N.Y.U. L. Rev. 885, 945 (2014) ("*Monell*'s framework for municipal liability is unnecessary and formalistic because cities are, ultimately, footing the bills in these cases.").

239. Professor Schwartz has provided examples of municipalities shifting policies in response to litigation in the law enforcement context. For example, in Portland, Oregon, after lawsuits indicated officers did not clearly understand their authority to enter a house without a warrant, city officials produced a training video about authority in this area. Schwartz, Myths and Mechanics, supra note 238, at 1068; see also id. at 1068–76 (describing "informed decisionmaking" in law enforcement and other contexts).

240. The existing guidelines not only make it easier for municipalities to establish effective policies but also might help municipalities ensure that their guidelines are sufficient to protect their officers from liability. This is because courts "often consult [American Correctional Association] standards when attempting to determine appropriate expectations in a correctional setting." See Lindsay M. Hayes, National and State Standards for Prison Suicide Prevention: A Report Card, 3 J. Correctional Health Care 5, 7 (1996) (describing the results of a 1990 American Correctional Association study to "determine the impact of its correctional standards on court rulings").

241. See, e.g., Dep't of Mental Health & Substance Abuse, World Health Org., Preventing Suicide in Jails and Prisons (2007), http://www.who.int/mental_health/prevention/suicide/resource_jails_prisons.pdf [http://perma.cc/J8VY-9EXT]. Some are specific guidelines for juveniles in custody. See, e.g., Lindsay M. Hayes, U.S. Dep't of Justice, NCJ 213691, Juvenile Suicide in Confinement: A National Survey (Feb. 2009), http://www.ncjrs.gov/pdffiles1/ojjdp/213691.pdf [http://perma.cc/6NUM-894B].

242. The NCIA is "recognized as one of the leading experts in the prevention of suicide in custody." If You Are Looking for Information on Suicide Prevention in Custody, This Web Site Is for You, Nat'l Inst. of Corr.: Corr. Cmty. (Sept. 15, 2014), http://community.nicic.gov/blogs/nic/archive/2014/09/15/if-you-need-information-on-suicide-prevention-in-prisons-jails-and-juvenile-facilities-this-web-site-is-for-you.aspx [http://perma.cc/8XBM-97ZB]. For more information on the NCIA, see Programs and Services, Nat'l Ctr. on Insts. & Alts., http://www.ncianet.org/wp-content/uploads/2015/03/About-NCIA.pdf [http://perma.cc/8GUX-VAPP] (last visited Aug. 29, 2016) (describing the organization and its programs and services).

ceration.[243] Municipalities and states that have effectively implemented these policies, such as Massachusetts, can serve as examples for how to approach revision of suicide prevention practices.[244]

It is important to note that the expectation of a suicide prevention policy is not to prevent all jail suicides from occurring but rather to enact "reasonable and attainable . . . rules designed to reduce . . . custodial suicide and provide just compensation where liability is established."[245] Preventing all suicides would require an approach of "over-inclusiveness" that would employ extraordinary measures that significantly infringe on the inmate's privacy and are extremely unpleasant for the inmate.[246] Policies should be aimed at balancing an appropriate level of precaution with the practicalities of implementation.

2. *Potential Limitations of Increased Liability on Policy Change*. — While the courts tend to assume that lawsuits have a strong power to deter, scholars are split as to whether such lawsuits actually deter illegal action and facilitate policy remediation.[247] Deterrence theories rely on the premise that the prevalence of lawsuits impacts policymakers and that policymakers engage in "rational decisionmaking" and have access to the information needed to make these decisions.[248] Empirical research suggests that lawsuits can influence decisionmaking only if policymakers actually have information about the lawsuits[249] and the lawsuits are

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243. See generally Hayes, Suicide Prevention, supra note 229, at 188 (describing the key aspects of a successful suicide prevention program beyond basic "suicide precautions"); Lindsay M. Hayes, Nat'l Ctr. on Insts. & Alts., Guide to Developing and Revising Suicide Prevention Protocols Within Jails and Prisons (Mar. 2011), http://www.ncianet.org/wp-content/uploads/2015/05/Guide-to-Developing-and-Revising-Suicide-Prevention-Protocols-within-Jails-and-Prisons.pdf [http://perma.cc/2MUT-ALSS] (detailing the "critical components" of a "comprehensive suicide prevention program").

244. See Lindsay M. Hayes, Nat'l Ctr. on Insts. & Alts., Follow-Up Report on Suicide Prevention Practices Within the Massachusetts Department of Correction (Feb. 2011), http://www.mass.gov/eopss/docs/doc/research-reports/hayes-report-feb2011.pdf [http://perma.cc/U72K-5F97] (discussing the progress made since 2007 and listing additional recommendations for reform).

245. See Cohen, supra note 15, ¶ 14.1[2], at 14-5 ("A person who is constantly observed and deprived of any device that can be used to cause death is an unlikely candidate for suicide. However, the tariff for such an approach in terms of its over-inclusiveness should be viewed as prohibitive.").

246. See id. (noting that measures would include "regular strip and body cavity searches, unremitting visual and auditory surveillance . . . extraordinary measures as to clothing and personal possessions . . . and broadly shared risk information").

247. See Schwartz, Myths and Mechanics, supra note 238, at 1031–34 (analyzing courts' and scholars' theories of deterrence).

248. Id. at 1026.

249. Id. at 1080 ("My study suggests that damages actions can influence decisionmaking if police departments [the focus of the study] actually have information about suits.").

impactful enough to "create external pressures to review incidents or policies."[250]

Jail-suicide policy, as compared to prison-suicide policy or other instances of municipal liability, is an area that is more likely to be influenced by § 1983 lawsuits.[251] Jails are usually small entities[252] run by local municipalities.[253] Local policymakers might be more aware of what is going on in the jails and thus have knowledge of suicide-related lawsuits. The smaller size also means that lawsuits are more likely to create "external pressures."[254] First, any amount of damages might have a significant impact on the locality's limited budget.[255] Second, local newspapers are more likely to be interested in covering lawsuits in local jails than larger newspapers would be for state prisons. This is significant because the media can be a key "external pressure" by creating public demand for municipalities to examine policies. The media can also have a strong influence on elected jail officials.[256]

Additionally, when considering the impact of damages suits as deterrence, scholars have suggested that the municipality might find that the costs of liability are worth paying relative to the potential gains from the unconstitutional conduct.[257] However, suicide litigation results from unconstitutional conduct that is not usually associated with actions that

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250. Id. at 1081. This might occur when suits are high profile or involve significant damages. See id. at 1081 & n.325 (referencing an example of such a lawsuit).

251. See Schlanger, supra note 237, at 1684 (finding that "jail administrators [have been] far less reluctant [than prison officials] to admit they frequently have changed policies and practices nearly entirely because of individual lawsuits").

252. The size of jails vary widely: 73% of jails contain 1–199 inmates, incarcerating 17% of the total jail population; 21% of jails contain 200–999 inmates, incarcerating 35% of the total jail population; and 5.5% contain 1,000 or more inmates, incarcerating 48% of the jail population. Christian Henrichson et al., Vera Inst. of Justice, The Price of Jails: Measuring the Taxpayer Cost of Local Incarceration 7 (May 2015), http://storage.googleapis.com/vera-web-assets/downloads/Publications/the-price-of-jails-measuring-the-taxpayer-cost-of-local-incarceration/legacy_downloads/price-of-jails.pdf [http://perma.cc/B2PS-29J4].

253. See Ogloff et al., supra note 4, at 110 (describing differences between jails and prisons and noting that "jails are typically administered and funded by individual counties or municipalities"); Johnson, supra note 108, at 1232 (describing local municipality management of jail policies and procedures that "control the everyday aspects of jail life").

254. See Schwartz, Myths and Mechanics, supra note 238, at 1081.

255. See Schlanger, supra note 237, at 1685 (noting that jail budgets are more limited than prison budgets because they usually get money from more fiscally constrained county commissions rather than the state legislature); see also Ogloff et al., supra note 4, at 110 ("Because jails are the responsibility of the county or municipality, they have been under funded historically.").

256. See Schlanger, supra note 237, at 1681–82 (observing that the "negative effect of publicity is likely to be particularly important for jails," especially in its power to impact local elections).

257. See Schwartz, Myths and Mechanics, supra note 238, at 1033–34 (discussing scholars' assertions that litigation costs may be "outweighed" by benefits from "aggressive policing").

make officials seem tough on crime or that officials believe are necessary to maintain order. Instead, in suicide litigation, the unconstitutional conduct provides little to no advantage to the municipality, and changing the conduct might actually better align with maintaining jail security and order.[258] Together, these considerations suggest that there is a strong likelihood that an increase in successful lawsuits resulting from jail suicides could result in action by municipalities to align suicide prevention policies with contemporary policy guidelines.

CONCLUSION

The *Kingsley* decision creates precedent to extend constitutionally mandated protections to pretrial detainees that adequately protect detainees from *any* punishment. In failure-to-protect claims and serious-medical-needs claims, this would entail review using an objective, rather than subjective, deliberate indifference standard. The application of the objective deliberate indifference standard to such claims by pretrial detainees might begin to reverse the post-*Farmer* limitations on custodial liability that emerged under the subjective deliberate indifference standard. The change in standard could not only increase the success of damages claims by individual litigants that result from jail officials' often blatant disregard for inmate safety, but also could pressure municipalities to enact more effective and purposeful suicide prevention policies that courts are unable, or unwilling, to mandate through injunctive relief. As this Note suggests, this shift might ultimately help lead to a reduction in jail suicides.

258. See Schlanger, supra note 237, at 1683 (describing prison officials' assertions that litigation influences their actions when "liability reduction coincides with professional norms").