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Evaluating Punishment in Purgatory: The Need to Separate Pretrial Detainees' Conditions-of-Confinement Claims from Inadequate Eighth Amendment Analysis

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NOTE

EVALUATING PUNISHMENT IN PURGATORY: THE NEED TO SEPARATE PRETRIAL DETAINEES' CONDITIONS-OF-CONFINEMENT CLAIMS FROM INADEQUATE EIGHTH AMENDMENT ANALYSIS

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The Due Process Clause prohibits all "punishment" of pretrial detainees—individuals that are held by the Government, but not adjudged guilty of any crime. The Eighth Amendment only prohibits the infliction of "cruel and unusual punishments" upon convicted individuals. Despite the Supreme Court's insistence that the Due Process Clause, and not the Eighth Amendment, protects pretrial detainees from deplorable and harmful conditions of confinement, most federal circuits now assess pretrial detainees' claims under Eighth Amendment standards. Under the Eighth Amendment framework, pretrial detainees must establish that conditions subjected them to a substantial risk of serious harm, and that jailers were aware of the harm and deliberately indifferent to their needs. The Eighth Amendment approach puts pretrial detainees on equivalent footing with convicted prisoners: detainees are only entitled to the same objective treatment as convicted prisoners, and they must overcome the same burdensome hurdle to state a claim—establishing the subjective deliberate indifference of jail officials.

This Note argues that Eighth Amendment standards do not adequately address pretrial detainees' substantive due process rights. First, the substantive component of the Due Process Clause provides pretrial detainees with greater protection than the Eighth Amendment provides to convicted prisoners. The Eighth Amendment's only relevance to pretrial detainees' conditions-of-confinement claims is to set a floor; conditions falling below the Eighth Amendment floor automatically trigger a substantive due process violation. The ceiling of substantive due process protection is higher than the Eighth Amendment ceiling, however. Pretrial detainees retain the fundamental liberty interest to be free from deplorable conditions of confinement, whereas convictions substantially impair or extinguish

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that liberty interest. Second, requiring pretrial detainees to establish the subjective deliberate indifference of jail officials contradicts the traditional approach of substantive due process jurisprudence, which relies upon objective criteria in assessing conditions-of-confinement claims.

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INTRODUCTION

Pretrial detention has been called the "dubious interval between the commitment and trial."[1] One court has colorfully invoked the biblical notion of "purgatory" to describe the condition of those persons held by the gov-

1. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 297 (1769).

ernment prior to a formal adjudication of guilt.[2] Some individuals are detained following an arrest because they simply cannot afford to post bail. Bail may also be denied and pretrial detention sustained for two primary purposes: first, to ensure an individual's appearance at trial, and second, to ensure public safety, which would presumably be threatened if the person were released.[3] Although the Supreme Court has upheld the constitutionality of pretrial detention,[4] the legal system has struggled to condone a regime that frequently subjects pretrial detainees to the same conditions of confinement as convicted prisoners. In fact, pretrial detainees commonly face harsher conditions of confinement than convicted individuals.[5] Whereas most convicted prisoners serve their sentences at state or federally operated prisons, detainees are typically housed in locally operated jails where resources are scarcer, the staff is "less professionalized," classification of inmates is haphazard, and rapid turnover makes for generally chaotic conditions.[6] Detainees are also more vulnerable than convicted prisoners and, facing worse conditions of confinement, far more likely to be harmed by incarceration.[7]

Pretrial detainees and convicted prisoners are both constitutionally protected from deplorable or dangerous conditions of confinement,[8] but the protections for each group are found in distinct constitutional sources. Convicted prisoners are entitled to the protections of the Eighth Amendment, which prohibits the infliction of "cruel and unusual punishments." The

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2. Jones v. Blanas, 393 F.3d 918, 933 (9th Cir. 2004).

3. See Bail Reform Act of 1984, 18 U.S.C. § 3142(e) (2006), for federal authorization of pretrial detention. States have enacted their own statutes allowing for pretrial detention under similar circumstances. *See, e.g.*, MASS. GEN. LAWS ch. 276, § 58A (2008); VA. CODE ANN. § 19.2-120 (2008); WIS. STAT. ANN. § 969.035 (West 2007).

4. United States v. Salerno, 481 U.S. 739, 759 (1987) (upholding the Bail Reform Act as a legitimate and nonpunitive regulation of the criminal justice system).

5. Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1684–88 (2003).

6. *Id.* at 1684; *see also* Robert G. Lawson, *Turning Jails Into Prisons—Collateral Damage from Kentucky's "War on Crime"*, 95 KY. L.J. 1, 4–5, 24–25 (2007) (providing a similar description of jail conditions).

7. Schlanger, *supra* note 5, at 1687 (explaining that jail inmates are more likely than convicted prisoners to be mentally ill, drunk, high, suicidal, inexperienced with incarceration, or otherwise facing a crisis); *see also* Martin Schönteich, *The Scale and Consequences of Pretrial Detention around the World*, *in* OPEN SOC'Y JUSTICE INITIATIVE, JUSTICE INITIATIVES: PRETRIAL DETENTION 11 (2008) (providing a global background on pretrial detention and explaining how detention harms detainees and society alike).

8. DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 199–200 (1989). The Court stated as follows:

> [W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. . . . The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.

Id. (citations omitted).

Eighth Amendment does not protect pretrial detainees, however, because they have not been adjudged guilty of any crime.[9] Instead, pretrial detainees are protected by the substantive component of the Due Process Clause, which prohibits the deprivation of liberty without due process of law;[10] as such, pretrial detainees are protected from all "punishment," cruel, unusual, or otherwise.[11]

Claims alleging unconstitutional conditions of confinement take a variety of forms.[12] A typical claim alleges deplorable environmental conditions, such as extreme cold.[13] Detainees also commonly allege unsanitary conditions[14] and overcrowded cells.[15] Courts frequently scrutinize a variety of detention facility rules, regulations, and practices as affecting a prisoner's conditions of confinement.[16] In some circumstances, conditions-of-confinement claims overlap with claims alleging a failure to provide adequate medical care.[17] Psychologically harmful or humiliating conditions of confinement may also suffice for detainees' constitutional claims.[18]

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9. *See* Ingraham v. Wright, 430 U.S. 651, 671 n.40 (1977) ("Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions.").

10. U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."); U.S. CONST. amend. XIV § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .").

11. Block v. Rutherford, 468 U.S. 576, 583 (1984); Bell v. Wolfish, 441 U.S. 520, 537 n.16 (1979).

12. Such claims are brought under 42 U.S.C. § 1983 (2000) (against state actors) and *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (against federal actors).

13. *E.g.*, Spencer v. Bouchard, 449 F.3d 721 (6th Cir. 2006).

14. *See, e.g.*, Benjamin v. Fraser, 343 F.3d 35 (2d Cir. 2003); Owens v. Scott County Jail, 328 F.3d 1026 (8th Cir. 2003).

15. *See, e.g.*, *Wolfish*, 441 U.S. 520; Hubbard v. Taylor, 399 F.3d 150 (3d Cir. 2005).

16. *See, e.g.*, *Block*, 468 U.S. 576 (policy denied contact visits with family members); Pierce v. County of Orange, 526 F.3d 1190 (9th Cir. 2008) (policies limited detainees' opportunities for exercise and limited access to common areas); Slade v. Hampton Rds. Reg'l Jail, 407 F.3d 243 (4th Cir. 2005) (policy charged detainees $1 per day during detainment); Demery v. Arpaio, 378 F.3d 1020 (9th Cir. 2004) (practice of using webcams to stream live video of pretrial detainees on the internet). Claims alleging that prison regulations lead to deplorable conditions of confinement should be distinguished from claims alleging that prison regulations deprive inmates of other, distinct rights. *See, e.g.*, Washington v. Harper, 494 U.S. 210 (1990) (substantive due process right to refuse administration of antipsychotic drugs); O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (First Amendment right to free exercise of religion).

17. *E.g.*, Butler v. Fletcher, 465 F.3d 340 (8th Cir. 2006) (alleging unconstitutional conditions when detainee contracted tuberculosis at detention facility).

18. *Demery*, 378 F.3d at 1029–33. Pretrial detainees often bring their suits after their release from jail when they are no longer "prisoners" within the coverage of the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e (2000). *See* Schlanger, *supra* note 5, at 1641. The PLRA's limitations on inmate litigation are therefore inapplicable to many detainees' claims. Even when the PLRA is applicable, it mostly addresses procedural matters and remedies but does little to change the substantive law of inmate litigation, which is covered by constitutional definitions beyond the reach of Congress. *See id.* at 1627. As a substantive matter, the PLRA prohibits recovery on claims alleging "mental or emotional injury suffered while in custody without a prior showing of physical injury," 42 U.S.C. § 1997e(e), but that restriction did not affect the former detainees' claims in *Demery*. To

There is a fierce circuit split over the extent of pretrial detainees' substantive due process rights. A slight majority of circuits holds that the Eighth Amendment and substantive due process offer identical protections, and these circuits commonly apply Eighth Amendment jurisprudence to claims brought by pretrial detainees. The minority position holds that Eighth Amendment jurisprudence does not sufficiently address detainees' conditions-of-confinement claims, and that substantive due process provides distinct and heightened protection to pretrial detainees. The Supreme Court has not unequivocally resolved the issue,[19] although each side of the debate naturally stakes its position as the most faithful reading of precedent.

This Note argues that applying Eighth Amendment analysis to pretrial detainees' conditions-of-confinement claims inadequately addresses detainees' distinct substantive due process rights. Part I describes how the Supreme Court's opinion in *Bell v. Wolfish*, which held that the Due Process Clause forbids punishment of pretrial detainees, has been largely supplanted by Eighth Amendment jurisprudence. The diminished role of *Wolfish* means that more than half of the federal circuits currently equate pretrial detainees' and convicted prisoners' rights to be free from deplorable conditions of confinement. Part II asserts that applying Eighth Amendment analysis to conditions-of-confinement claims brought by pretrial detainees ignores that substantive due process protections from harsh conditions of confinement are more extensive than analogous Eighth Amendment protections. Part III argues that analyzing pretrial detainees' due process claims under Eighth Amendment standards wrongly imposes on detainees a requirement of establishing the subjective intent of jail officials, an approach that is incompatible with substantive due process's traditional reliance on objective criteria.

I. THE UNLIKELY MERGER OF THE EIGHTH AMENDMENT AND SUBSTANTIVE DUE PROCESS

The Supreme Court has long held that the Eighth Amendment offers no protection prior to a formal adjudication of guilt,[20] and thus even the harshest treatment of pretrial detainees does not violate the Eighth Amendment because its protections simply do not apply to them. The Due Process Clause instead operates to protect those that have not been found guilty of a crime.[21] Despite the Court's explicit directive that the Eighth Amendment

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be clear, this Note deals entirely with substantive constitutional law that is beyond the coverage of the PLRA.

19. In the context of medical care, for example, the Supreme Court has reserved decision of whether pretrial detainees are entitled to superior care than that guaranteed by the Eighth Amendment. City of Canton v. Harris, 489 U.S. 378, 388 n.8 (1989); City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983).

20. Ingraham v. Wright, 430 U.S. 651, 671 n.40 (1977); United States v. Lovett, 328 U.S. 303, 317–18 (1946).

21. Bell v. Wolfish, 441 U.S. 520, 537 n.17 (1979) (holding that the Fifth Amendment protects pretrial detainees held in a federally operated custodial facility); *Ingraham*, 430 U.S. at 671

does not protect pretrial detainees,[22] more than half of the federal circuits now analyze detainees' claims under the Eighth Amendment standard, thereby equating detainees' substantive due process rights to be free from deplorable conditions of confinement with the analogous Eighth Amendment rights of convicted prisoners. This Part explains how the due process standard has been supplanted in a majority of jurisdictions and what it means for pretrial detainees. Section I.A analyzes *Bell v. Wolfish*, in which the Supreme Court established the test for pretrial detainees' conditions-of-confinement claims. Section I.B examines the Supreme Court's Eighth Amendment jurisprudence culminating in *Farmer v. Brennan*, in which the Court established the test for convicted prisoners' conditions-of-confinement claims. Section I.C analyzes the current circuit split in which a slight majority of courts now apply *Farmer*, as opposed to *Wolfish*, to pretrial detainees' conditions-of-confinement claims. Section I.D contends that whether *Wolfish* or *Farmer* is applied can have meaningful practical and legal consequences for pretrial detainees; in particular, courts applying *Farmer* equate detainees' rights with convicted prisoners' rights.

A. Bell v. Wolfish: *The Substantive Due Process Test for Pretrial Detainees' Conditions-of-Confinement Claims*

In *Wolfish*, the Supreme Court held that substantive due process protects pretrial detainees from conditions of confinement that "amount to punishment."[23] To state a constitutional violation, a detainee must establish that he was subjected to a disability or restrictive condition that harmed him beyond merely interfering with his "desire to be free from discomfort" during confinement.[24] Accordingly, not every disability or restrictive condition of confinement can be classified as punitive; detainees have no due process claim solely because they bear the "inherent incidents of confinement," such as the loss of freedom of choice and privacy.[25]

Courts must decide whether the disability or restrictive condition "is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose."[26] This determination usually turns on "whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it]."[27] As long as a disability or restrictive condition is "reasonably related to a legitimate governmental ob-

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n.40 ("Where the State seeks to impose punishment without . . . an adjudication [of guilt], the pertinent constitutional guarantee is the Due Process Clause of the Fourteenth Amendment.").

22. *Wolfish*, 441 U.S. at 537 n.16.

23. *Id.* at 535.

24. *Id.* at 534; *see also Ingraham*, 430 U.S. at 674 ("There is, of course, a *de minimis* level of imposition with which the Constitution is not concerned.").

25. *Wolfish*, 441 U.S. at 537.

26. *Id.* at 538.

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

jective, [such as maintaining the security of the detention facility,] it does not, without more, amount to 'punishment.' "[28] Although *Wolfish* provides a standard by which pretrial detainees' conditions-of-confinement claims may be scrutinized, the Court cautioned that judges should generally defer to the expertise of jail and prison administrators.[29]

Disabilities or restrictive conditions that are excessively harmful to pretrial detainees "amount to punishment" under *Wolfish*.[30] "[A]rbitrary or purposeless" conditions of confinement bearing no relation to a legitimate governmental goal might likewise amount to punishment.[31] Suffering de minimis harm, on the other hand, provides an insufficient basis to state a claim.[32] Courts may also consider the "useful guideposts"[33] from *Kennedy v. Mendoza-Martinez*,[34] to decide whether conditions of confinement amount to punishment in the constitutional sense:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, [and] whether the behavior to which it applies is already a crime.[35]

A detention facility official's "expressed intent to punish" also provides evidence that a debilitating condition or restriction amounts to unconstitutional punishment.[36] Although the dissenting justices expressed concerns that the Court was far too deferential to detention facility officials,[37] the

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28. *Id.* at 539.

29. *Id.* at 540 n.23 ("In determining whether restrictions or conditions are reasonably related to the Government's interest in maintaining security and order and operating the institution in a manageable fashion, courts must heed our warning that '[s]uch considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters.' " (quoting Pell v. Procunier, 417 U.S. 817, 827 (1974))).

30. *Id.* at 538.

31. *Id.* at 539.

32. *See id.* at 539 n.21. Such a limitation prevents the Due Process Clause from becoming "a font of tort law." Paul v. Davis, 424 U.S. 693, 701 (1976).

33. *Wolfish*, 441 U.S. at 538.

34. 372 U.S. 144, 168–69 (1963).

35. *Wolfish*, 441 U.S. at 537–38 (internal quotation marks omitted).

36. *Id.* at 538–39. Overall, the *Wolfish* court placed little emphasis on the detention facility official's subjective state of mind. See *infra* Part III for further discussion on the role of objective and subjective criteria in addressing substantive due process claims.

37. The dissenting justices expressed concern that in practice, the Court's standard would make it very difficult for pretrial detainees to state a claim without establishing punitive intent on the part of detention facility officials. Justice Marshall fretted that the Court's standard was "toothless" because "[a]lmost any restriction on detainees . . . [could] be found to have some rational relation . . . to the effective management of the detention facility." *Wolfish*, 441 U.S. at 567 (Marshall, J., dissenting) (internal quotation marks omitted). Marshall further criticized the Court for too broadly promoting the general aims of detention facility officials at the expense of objective analysis of the conditions of confinement and their effect on detainees: "By its terms, the Due Process Clause focuses on the nature of deprivations, not on the persons inflicting them. If this concern is to be

Wolfish test remains the Supreme Court's definitive statement on pretrial detainees' rights regarding their conditions of confinement.

B. Farmer v. Brennan *and Its Precedents: The Eighth Amendment Test for Convicted Prisoners' Conditions-of-Confinement Claims*

The Eighth Amendment protects convicted individuals from deplorable or excessively harmful conditions of confinement. Convicted prisoners face two burdens in establishing that conditions of confinement constitute cruel and unusual punishment. First, convicted prisoners must establish that they were subjected to disabilities or restrictive conditions that caused them sufficiently serious harm.[38] Second, they must establish that prison officials exhibited subjective deliberate indifference to their basic needs.[39]

Prison officials' subjective state of mind is a central feature of the Supreme Court's Eighth Amendment jurisprudence. Two years before *Wolfish* the Court held that convicted inmates had to prove that prison officials were deliberately indifferent to their serious medical needs to state an Eighth Amendment claim.[40] The Court subsequently extended the deliberate-indifference requirement to Eighth Amendment claims alleging unconstitutional conditions of confinement.[41]

For Eighth Amendment analysis, deliberate indifference is evaluated using the test set out in *Farmer v. Brennan*, which requires a subjective test akin to the test of recklessness in criminal law:

> [A] prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.[42]

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vindicated, it is the effect of conditions of confinement, not the intent behind them, that must be the focal point of constitutional analysis." *Id.* Justice Stevens warned that the Court, while purportedly crafting a distinct due process test, had articulated an Eighth Amendment approach to due process claims: "[A] careful reading of the Court's opinion reveals that it has attenuated the detainee's constitutional protection against punishment into nothing more than a prohibition against irrational classifications or barbaric treatment." *Id.* at 586 (Stevens, J., dissenting).

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

39. *Id.* at 837.

40. Estelle v. Gamble, 429 U.S. 97, 104–05 (1976) ("[D]eliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' . . . proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed." (citations omitted) (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976))).

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

42. *Farmer*, 511 U.S. at 837. The Court rejected an objective test of deliberate indifference akin to civil or tort recklessness in which one is held liable for acting or failing to act "in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known." *Id.* at 836. See *infra* Section III.C for further discussion of objective deliberate indifference.

Thus, the subjective state of mind of prison officials is indispensable to the Eighth Amendment's definition of punishment:

> The source of the intent requirement is not the predilections of this Court, but the Eighth Amendment itself, which bans only cruel and unusual *punishment*. If the pain inflicted is not formally meted out *as punishment* by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify.[43]

Despite criticism that *Farmer* relies too heavily on subjective intent,[44] the test for stating a claim under the Eighth Amendment is undisputed. First, convicted prisoners must allege conditions that are, objectively, "sufficiently serious,"[45] such that they deny "the minimal civilized measure of life's necessities"[46] and subject prisoners to a "substantial risk of serious harm."[47] Second, convicted prisoners must establish that prison officials were, subjectively, deliberately indifferent to their needs.[48]

C. *The Circuit Split: Application of the Eighth Amendment to Pretrial Detainees' Claims*

A slight majority of circuit courts are convinced that the Due Process Clause and Eighth Amendment provide virtually identical protection. Those courts, persuaded that the *Farmer* and *Wolfish* tests merge, apply the two-pronged *Farmer* approach to conditions-of-confinement claims brought by pretrial detainees. For these courts, it is not unreasonable to analogize the objective first prong of *Farmer*, under which convicted prisoners must establish a sufficiently serious deprivation, to the *Wolfish* test, under which a detainee must establish that he was subjected to an excessive, arbitrary, or purposeless condition of confinement that subjected him to something more than de minimis harm.[49] Judge Posner concluded that the *Wolfish* and *Farmer* tests "merge" because "the interests of the prisoner is [sic] the same whether he is a convict or a pretrial detainee. In either case he . . . has an interest in being free from gratuitously severe restraints and hazards."[50] Judge Posner's conclusion may reflect an underlying but unspoken reality that courts rely upon in applying the Eighth Amendment standard to pretrial detainees' claims: in the majority of cases, the result for detainees will be the same whether *Farmer* or *Wolfish* is applied.

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43. *Wilson*, 501 U.S. at 300.

44. *Farmer*, 511 U.S. at 851 (Blackmun, J., concurring) ("Whether the constitution has been violated 'should turn on the character of the punishment rather than the motivation of the individual who inflicted it.' " (citation omitted)).

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

46. Rhodes v. Chapman, 452 U.S. 337, 347 (1981).

47. *Farmer*, 511 U.S. at 834.

48. *Id.* at 837.

49. *See supra* notes 30–32 and accompanying text.

50. Hart v. Sheahan, 396 F.3d 887, 892–93 (7th Cir. 2005).

The majority approach also applies the second, subjective prong of *Farmer* to claims brought by pretrial detainees: given that pretrial detainees may not be subjected to conditions of confinement that "amount to punishment,"[51] and that Eighth Amendment "punishment" requires subjective deliberate indifference on the part of prison officials,[52] it plausibly follows that pretrial detainees must also establish subjective deliberate indifference on the part of detention facility officials to state a due process violation. Such a reading simply extends the Court's definition of "punishment" in the Eighth Amendment context to the Court's use of the word in *Wolfish* and the substantive due process context. Requiring intentional or deliberate conduct on the part of jail officials also seems to accord with the Supreme Court's declaration that "liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process."[53]

Based on the foregoing reasoning and rationales, a slight majority of the federal circuit courts now apply the Eighth Amendment test to pretrial detainees' conditions-of-confinement claims.[54] These courts typically acknowledge the *Wolfish* holding in a perfunctory manner,[55] but apply Eighth Amendment analysis for simplicity[56] or convenience.[57] Some courts conclude that pretrial detainees and convicted prisoners have the "same"

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

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

53. Butler v. Fletcher, 465 F.3d 340, 345 (8th Cir. 2006) (internal quotation marks omitted) (quoting County of Sacramento v. Lewis, 523 U.S. 833, 849 (1998)).

54. According to the present count, the First, Sixth, Eighth, Tenth, and Eleventh Circuits definitively apply the *Farmer* test to conditions-of-confinement claims brought by pretrial detainees. *See, e.g.*, Spencer v. Bouchard, 449 F.3d 721, 727–30 (6th Cir. 2006); *Butler*, 465 F.3d at 343–45; Suprenant v. Rivas, 424 F.3d 5, 18–19 (1st Cir. 2005); Marsh v. Butler County, 268 F.3d 1014, 1024 n.5 (11th Cir. 2001); McClendon v. City of Albuquerque, 79 F.3d 1014, 1022 (10th Cir. 1996). Meanwhile, only the Second, Third, and Ninth Circuits rely exclusively on *Wolfish* and consistently maintain that Eighth Amendment authority is inapposite to conditions-of-confinement claims brought by pretrial detainees. *See, e.g.*, Pierce v. Orange County, 526 F.3d 1190, 1205 (9th Cir. 2008); Hubbard v. Taylor, 399 F.3d 150, 157–58, 165–67 (3d Cir. 2005); Benjamin v. Fraser, 343 F.3d 35, 49–50 (2d Cir. 2003). There appears to be no obvious prevailing standard in the Fourth or Seventh Circuits. *Compare* Brown v. Harris, 240 F.3d 383, 388–89 (4th Cir. 2001) (applying Eighth Amendment analysis to detainee's claim), *and* Board v. Farnham, 394 F.3d 469, 478 (7th Cir. 2005) (same), *with* Slade v. Hampton Rds. Reg'l Jail, 407 F.3d 243, 250–51 (4th Cir. 2005) (relying on *Wolfish* test to address detainee's claim), *and Hart*, 396 F.3d at 891–94 (arguing that the *Wolfish* and *Farmer* tests merge because detainees and convicts have identical interests, but ultimately adjudicating the detainee's claim without inquiry into the subjective state of mind of detention officials). The Fifth Circuit adopted a unique hybrid approach in *Hare v. City of Corinth*, 74 F.3d 633, 648–50 (5th Cir. 1996). *See infra* note 71. The D.C. Circuit's major decision on the subject, *Brogsdale v. Barry*, 926 F.2d 1184 (D.C. Cir. 1991), was issued prior to the Supreme Court's decisions in *Wilson* and *Farmer*, so this Note will not address its relatively outdated ruling. For more elaborate discussion of the circuit split, see Petition for Writ of Certiorari, *Butler*, 465 F.3d 340 (No. 06–98147), 2007 WL 98147, *cert. denied*, 550 U.S. 917 (2007).

55. *See, e.g.*, *Spencer*, 449 F.3d at 729; Burrell v. Hampshire County, 307 F.3d 1, 7 (1st Cir. 2002); *McClendon*, 79 F.3d at 1022 (citing *Wolfish* but concluding that Eighth Amendment standards "provide the benchmark" for claims brought by pretrial detainees).

56. *Spencer*, 449 F.3d at 727.

57. Board v. Farnham, 394 F.3d 469, 478 (7th Cir. 2005) ("[W]e have found it convenient and entirely appropriate to apply the same standard to claims arising under the Fourteenth Amendment (detainees) and Eighth Amendment (convicted prisoners) 'without differentiation.' ").

rights,[58] or that the Due Process Clause and Eighth Amendment are "coextensive"[59] or used "interchangeably."[60] Many of these courts cite *Wolfish* and its "amount to punishment" language, but they frequently invoke *Wilson v. Seiter*'s definition of "punishment" to apply the Eighth Amendment's subjective test to claims brought by pretrial detainees.[61]

The logic of the majority approach is not totally implausible, but there are far more compelling reasons to conclude that the *Farmer* and *Wolfish* tests are distinct such that applying *Farmer* to claims brought by pretrial detainees would inadequately address detainees' distinct substantive due process rights. First, although *Farmer*'s objective prong may be analogous to the overall spirit of the *Wolfish* test, treating them as virtual equivalents is questionable when multiple legal and moral authorities suggest that pretrial detainees may be entitled to greater protection than convicted inmates.[62] Judge Posner's conclusory suggestion that pretrial detainees and convicted prisoners have identical interests[63] might reflect the reality that *Wolfish* and *Farmer* will yield the same results for pretrial detainees in most cases, but it does not adequately account for detainees' distinct rights in all cases.[64]

Farmer's most obvious break from *Wolfish* is its second prong's explicit reliance on the subjective deliberate indifference of prison officials. Requiring pretrial detainees to establish subjective deliberate indifference is well beyond the *Wolfish* Court's explicit mandate.[65] Furthermore, the word "punishment" does not appear in the Fifth or Fourteenth Amendments; to mechanistically apply the Supreme Court's Eighth Amendment definition of "punishment" to the substantive due process inquiry plainly denies that these constitutional sources are distinct.[66] Finally, even if the Supreme Court requires more than mere negligence on the part of jail officials, due process violations may still follow from unintentional, grossly negligent, or reckless conduct.[67] It does not follow that subjective deliberate indifference is the proper standard for addressing such violations.[68]

A slight minority of circuits has held that the Eighth Amendment test does not adequately address conditions-of-confinement claims brought by

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58. Daniel v. U.S. Marshall Serv., 188 F. App'x 954, 961–62 (11th Cir. 2006) (per curiam); Daniels v. Woodside, 396 F.3d 730, 735 (6th Cir. 2005).

59. Suprenant v. Rivas, 424 F.3d 5, 18 (1st Cir. 2005).

60. Marsh v. Butler County, 268 F.3d 1014, 1024 n.5 (11th Cir. 2001).

61. *E.g.*, Butler v. Fletcher, 465 F.3d 340, 344 (8th Cir. 2006), *cert. denied*, 55 U.S. 917 (2007); *Suprenant*, 424 F.3d at 18–19.

62. *See infra* Part II.

63. Hart v. Sheahan, 396 F.3d 887, 892–93 (7th Cir. 2005).

64. *See infra* Section I.D.

65. *See infra* Section III.A.

66. *See* Gibson v. County of Washoe, 290 F.3d 1175, 1189 n.9 (9th Cir. 2002).

67. County of Sacramento v. Lewis, 523 U.S. 833, 849 (1998).

68. *See infra* Section III.C (discussing how objective deliberate indifference may be an appropriate standard).

pretrial detainees.[69] The *Wolfish*-reliant jurisdictions vary in their approaches to some extent, but all of them reject the subjective deliberate-indifference requirement of *Farmer*.[70] For example, these courts acknowledge that under *Wolfish*, "it may be possible to infer a given [condition's] punitive status 'from the nature of the [condition].' "[71] The Second Circuit relies on *Wolfish* and substantive due process precedent to arrive at an objective deliberate-indifference standard: rather than prove that prison officials "knew of and disregarded an excessive risk," detainees must only establish, objectively, "actual or imminent substantial harm."[72] Other courts require similarly objective criteria, such as whether detainees "endur[ed] such genuine privations and hardships."[73] In addition to rejecting the subjective requirement, *Wolfish*-reliant courts have also suggested that pretrial detainees may be entitled to treatment objectively superior to that afforded by the first prong of the Eighth Amendment test.[74]

D. *Practical Consequences of Applying the Eighth Amendment to Detainees' Claims*

Whether courts apply *Wolfish* or *Farmer* has important practical implications for both the substantive rights of pretrial detainees and their burden in alleging a constitutional violation. This Note does not contend that the outcome of detainees' conditions-of-confinement claims always hinges upon the standard applied. Realistically, in most cases the same result would be reached whether *Wolfish* or *Farmer* was utilized. That reality does not limit the importance of applying the proper standard, however. Because condi-

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69. *See supra* note 54.

70. *E.g.*, Benjamin v. Fraser, 343 F.3d 35, 50–51 (2d Cir. 2003).

71. Pierce v. County of Orange, 526 F.3d 1190, 1205 (9th Cir. 2008) (quoting Valdez v. Rosenbaum, 302 F.3d 1039, 1045 (9th Cir. 2002)); *see also* Slade v. Hampton Rds. Reg'l Jail, 407 F.3d 243, 251 (4th Cir. 2005) (asserting that a detainee only has to show that a condition of confinement was "not reasonably related to a legitimate nonpunitive governmental objective [so] an intent to punish may be inferred" (quoting Martin v. Gentile, 849 F.2d 863, 870 (4th Cir. 1988))); Hare v. City of Corinth, 74 F.3d 633, 644–45 (5th Cir. 1996) (holding that for general jail conditions, rules, restrictions, and practices, intent is presumed based on the nature of the alleged constitutional deprivation). The *Hare* court's holding is unique because it applies the *Wolfish* test only to general conditions and restrictions. *See id.* at 644. For episodic acts and omissions such as failure to provide proper medical care, the court applies the *Farmer* subjective deliberate-indifference test. *Id.* at 648–50. The *Hare* dissent properly points out that this is an odd result given the Supreme Court's explicit rejection of any distinction between "one-time" conditions and "systematic" conditions. *Id.* at 651–52 (Dennis, J., specially concurring) (citing Wilson v. Seiter, 501 U.S. 294, 300–01 (1991)).

72. *Benjamin*, 343 F.3d at 51.

73. Hubbard v. Taylor, 399 F.3d 150, 159–60 (3d Cir. 2005).

74. *See id.* at 163–67 (concluding that the district court erred in part by requiring pretrial detainees to establish that they were deprived of the "minimal civilized measures of life's necessities," (quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981)), a phrase that sets the standard for the objective component of Eighth Amendment claims rather than substantive due process claims).

tions-of-confinement claims can assume an infinite variety of forms,[75] there are undoubtedly scenarios in which the applications of *Wolfish* and *Farmer* could lead to different results. Moreover, that a *Farmer* application results in heavier substantive and procedural burdens for detainees is further evidence that applying the correct standard matters.

1. *Different Results Under* Wolfish *and* Farmer

Under certain circumstances, applying *Wolfish* to detainees' conditions-of-confinement claim will yield better results for detainees than an Eighth Amendment application would. In *Demery v. Arpaio*, for example, the Ninth Circuit analyzed a sheriff's use of webcams to broadcast images of pretrial detainees from the local jail over the internet.[76] The court first concluded that the sheriff's use of webcams harmed the detainees by exposing their daily activities to humiliating, worldwide scrutiny.[77] Pursuant to *Wolfish*, the court acknowledged that, "to constitute punishment, the harm or disability caused by the government's action must either significantly exceed, or be independent of, the inherent discomforts of confinement."[78] Indeed, the use of webcams met the court's definition of punishment:

> [T]he additional impact on pretrial detainees of webcam transmission is greater by several orders of magnitude than the intrusion inherent in incarceration. Being detained in a county jail necessarily involves being observed by the staff of the jail and the other detainees. The webcams increase exponentially the number of people observing detainees, and also alter drastically the classes of people who can watch the detainees.[79]

The court next analyzed whether the harm was imposed "for the purpose of punishment or whether it [was] but an incident of some other legitimate governmental purpose."[80] Citing *Wolfish* and *Mendoza-Martinez*, the court rejected the sheriff's contention that the webcams' deterrent effect on crime was a legitimate nonpunitive goal for pretrial detainees.[81] Furthermore, the security of the jail was not enhanced by the use of webcams because the jail already had closed circuit cameras in operation.[82] The court also rejected the sheriff's claim that the webcams were justified because they advanced the

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75. A litany of factors frame conditions-of-confinement claims such that no two claims are identical: duration of confinement; amount of space in the cell; time available outside of the cell; level of sanitation; temperature; behavior of fellow inmates; behavior of jail detention facility officials, among many other factors.

76. 378 F.3d 1020 (9th Cir. 2004).

77. *Id.* at 1029–30.

78. *Id.* at 1030.

79. *Id.*

80. *Id.* (quoting Bell v. Wolfish, 441 U.S. 520, 538 (1979)).

81. *Id.* at 1030–31.

82. *Id.* at 1030.

legitimate governmental objective of opening jails to public scrutiny.[83] "[T]urning pretrial detainees into the unwilling objects of the latest reality show" does nothing to ensure detainees' presence at trial or promote jail safety.[84] Because Sheriff Arpaio failed to assert a nonpunitive purpose, and because the resulting harm to inmates was not an incident of a legitimate governmental objective, the court affirmed the lower court's order enjoining the use of webcams.[85]

Applying the Eighth Amendment standard to the pretrial detainees' claims in *Demery* may have returned a different result. In the same year that *Demery* was decided, the Ninth Circuit held that a humiliating shaming punishment imposed on a convicted individual did not cause sufficiently serious harm to state an Eighth Amendment violation.[86] If the same standard controlled claims brought by detainees, such that detainees' rights and interests were equivalent to those of convicted individuals, a *Farmer* court may have simply concluded that the broadcasting webcams, though humiliating, did not cause the detainees sufficiently serious harm to state a due process violation. But even if a *Farmer* court recognized that due process provided greater protection than the Eighth Amendment[87] and accepted that the psychological harm to detainees was sufficiently serious, it would still have to assess whether the sheriff was aware of the harm and deliberately indifferent to the detainees' needs. The sheriff could have claimed that he was simply unaware that his broadcasts were psychologically harmful to the detainees.[88] If the court could point to no evidence that rebutted the sheriff's contention, the detainees' claims would have to be dismissed. The unique facts of *Demery* illustrate that *Wolfish* and *Farmer* may, in some cases, return different results on identical conditions-of-confinement claims. The application of the proper standard is therefore consequential, and courts should not be dismissive of *Wolfish* for the sake of convenience or simplicity.[89]

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83. *Id.* at 1031–32.

84. *Id.* at 1031.

85. *Id.* at 1033.

86. United States v. Gementera, 379 F.3d 596, 608–10 (9th Cir. 2004). Facing challenges under the Sentencing Reform Act and the Eighth Amendment, the court upheld a trial judge's sentence that required an individual who pled guilty to mail theft to stand in front of a postal facility bearing a sign declaring, "I stole mail. This is my punishment." *Id.* at 598. The court noted that "the mere fact of conviction, without which state-sponsored rehabilitation efforts do not commence, is stigmatic. The fact that a condition causes shame or embarrassment does not automatically render a condition objectionable; rather, such feelings generally signal the defendant's acknowledgment of his wrongdoing." *Id.* at 605.

87. *See generally infra* Part II.

88. *See* Farmer v. Brennan, 511 U.S. 825, 837 (1994) (holding that the Eighth Amendment "does not outlaw cruel and unusual 'conditions'; it outlaws cruel and unusual 'punishments' ").

89. *See generally supra* notes 54–60 and accompanying text.

2. *Heavier Substantive and Procedural Burdens under* Farmer

Pretrial detainees in jurisdictions relying on the *Wolfish* test have substantial advantages over their counterparts in those jurisdictions applying *Farmer*. In *Wolfish* jurisdictions, precedent involving convicted prisoners plays little to no role in determining the validity of pretrial detainees' claims.[90] As such, pretrial detainees are treated as a distinct group and "entitled to greater constitutional protection than that provided by the Eighth Amendment."[91] Furthermore, pretrial detainees in *Wolfish* jurisdictions are not required to surmount the difficult burden of establishing subjective deliberate indifference on the part of prison officials.[92]

The approach in *Farmer* jurisdictions is dramatically different. In *Spencer v. Bouchard*, for example, the Sixth Circuit addressed a jailer's summary judgment motion on a pretrial detainee's claim that alleged unconstitutional overcrowding, denial of exercise time, and failure to provide warm and dry shelter.[93] The Sixth Circuit applied the *Farmer* test to the detainee's claim.[94] First, in assessing whether the detainee suffered a sufficiently serious deprivation by exposure to cold, wet conditions, the court compared the detainee's claim to similar claims in two preceding convicted prisoner cases.[95] The court thereby equated detainees' and convicted prisoners' substantive interest in protection from harsh conditions of confinement. Second, the *Spencer* court required the detainee to establish that officials exhibited subjective deliberate indifference to his needs,[96] despite no such requirement in *Wolfish*.[97]

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90. *E.g.*, Hubbard v. Taylor, 399 F.3d 150, 159 n.15 (3d Cir. 2005).

91. *Id.* at 167 n.23.

92. *See, e.g.*, Iqbal v. Hasty, 490 F.3d 143, 165 (2d Cir. 2007) (holding that conditions may qualify as punishment according to *Wolfish* and *Mendoza-Martinez* "whether or not [they] were imposed with punitive intent"), *rev'd on other grounds sub nom.* Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009); Benjamin v. Fraser, 343 F.3d 35, 51 (2d Cir. 2003).

93. 449 F.3d 721, 723 (6th Cir. 2006).

94. *Id.* at 728.

95. *Id.* at 728–29. The court analyzed convicted prisoners' claims of extreme cold in *Knop v. Johnson*, 977 F.2d 996, 1012–13 (6th Cir. 1992), and in *Franklin v. Franklin*, No. 97-4365, 2000 WL 687434, at *4 (6th Cir. May 16, 2004). The court also considered a hypothetical offered by the Supreme Court in *Wilson v. Seiter*, 501 U.S. 294, 304 (1991), another case involving convicted prisoners.

96. *See Spencer*, 449 F.3d at 729–30.

97. Ultimately, the *Spencer* court found that the detainee had presented sufficient evidence on both the objective and subjective prongs of *Farmer* to overcome the jailer's summary judgment motion. *Id.* The court found that the deprivation could be, objectively, sufficiently serious because the detainee had been exposed to extreme cold continuously for several months. *Id.* at 728–29. The court also found that the officers may have exhibited subjective deliberate indifference to the detainee based on numerous factors: they wore winter coats indoors where the detainees were housed, so they were well aware of the temperature; they personally received complaints about the cold from the detainee as well as other inmates; they actively interfered with inmates' self-help attempts by confiscating extra blankets; and they also taunted the detainee on at least one occasion. *Id.* at 729–30. Given these deplorable conditions and circumstances, it is not surprising that convicted prisoners could have had conditions-of-confinement claims under the Eighth Amendment as well. Even if the

Like the Sixth Circuit, the First Circuit relies on the Eighth Amendment test to analyze the due process claims of a pretrial detainee. In *Suprenant v. Rivas*, the court addressed a jailer's motion for judgment notwithstanding the verdict following a jury finding in favor of a pretrial detainee who had alleged substantive due process violations based on limited access to water and showers, the withholding of hygienic products, and other unsanitary conditions.[98] In assessing the validity of the detainee's claim, the court compared and contrasted similar claims in five cases from various circuits, and four of the five cases involved claims brought by convicted prisoners.[99] The First Circuit, like the Sixth, thereby equated detainees' substantive interests regarding their conditions of confinement with those of convicted prisoners. Additionally, the *Suprenant* court required the detainee to establish the subjective deliberate indifference of detention facility officials.[100]

These *Farmer* jurisdictions have concluded that pretrial detainees and convicted prisoners have identical substantive rights to be free from harsh conditions of confinement.[101] Part II of this Note argues that such an approach is unacceptable because substantive due process provides greater protection to pretrial detainees than the Eighth Amendment provides to convicted prisoners. Furthermore, as Part III maintains, the subjective deliberate-indifference analysis under *Farmer* is inconsistent with substantive due process jurisprudence as applied to conditions-of-confinement claims.

II. SUBSTANTIVE DUE PROCESS PROTECTIONS EXCEED EIGHTH AMENDMENT PROTECTIONS

This Part contends that applying the Eighth Amendment test from *Farmer* and its precedents to pretrial detainees' conditions-of-confinement

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detainee prevailed on the jailer's summary judgment motion, this Note highlights *Spencer* because it illustrates that detainees' rights are equated with convicted prisoners' rights in *Farmer* jurisdictions.

98. 424 F.3d 5, 19–20 (1st Cir. 2005).

99. *Id.* The only case that involved a claim brought by a pretrial detainee was *Smith v. Copeland*, 87 F.3d 265 (8th Cir. 1996).

100. *Suprenant*, 424 F.3d at 18–21. The court ultimately affirmed the trial court's denial of a judgment notwithstanding the verdict because it discerned "no clear and gross injustice" in the jury's finding for the detainee. *Id.* at 21. Although the detainee prevailed in this case, it nevertheless illustrates that application of the *Farmer* standard equates detainees' rights with convicted prisoners' rights.

101. Another approach is possible in jurisdictions applying *Farmer* to claims brought by pretrial detainees. For example, in *Owens v. Scott County Jail*, 328 F.3d 1026, 1026–27 (8th Cir. 2003), a pretrial detainee alleged unconstitutional conditions of confinement because he had to sleep on the floor of the cell next to the toilet where urine would often splash onto his bedding, subjecting him to an increased risk of disease. In assessing the objective first prong of *Farmer*, the court considered the detainee's claim only in light of preceding cases brought by other pretrial detainees, not by convicted prisoners. *See id.* at 1027. The *Owens* court's approach implies that pretrial detainees' rights may be superior to those of convicted inmates insofar as detainees might have a lighter burden in establishing a sufficiently serious deprivation under *Farmer*'s objective prong. *Id.* (citing *Copeland*, 87 F.3d at 268 n.4). However, Eighth Circuit courts still require pretrial detainees to surmount the difficult burden required by the second prong of *Farmer*—subjective deliberate indifference of jail officials. *E.g.*, *id.* at 1027.

claims ignores the fact that substantive due process protections for pretrial detainees are more extensive than Eighth Amendment protections for convicted prisoners. The notion that pretrial detainees are entitled to more vigorous protections than convicted prisoners is older than the Constitution itself. William Blackstone, for example, argued that prisoners awaiting trial are entitled to more considerate treatment by their jailers than are convicted inmates:

> [T]his [pretrial] imprisonment . . . is only for safe custody, and not for punishment: therefore, in this dubious interval between the commitment and trial, a prisoner ought to be used with the utmost humanity; and neither be loaded with needless fetters, or subjected to other hardships than such as are absolutely requisite for the purpose of confinement only . . . . [T]he law will not justify [the jailers] in fettering a prisoner, unless where he is unruly, or has attempted an escape: this being the humane language of our ancient lawgivers.[102]

Enlightenment philosopher Cesare Beccaria agreed that the rights of pretrial detainees should not be equated with those of convicted prisoners, warning that "the idea of power and arrogance prevail over that of justice [when] accused and convicted are thrown indiscriminately into the same cell."[103]

The moral mandate of Blackstone and Beccaria continues to prevail in the pretrial detention regimes adopted by Congress and state legislatures. Congress was no doubt concerned that the Bail Reform Act[104]—which strengthened the Government's ability to detain nonconvicted individuals—might be read to equate pretrial detainees' rights with convicted prisoners' rights. It cautioned that "[n]othing in [the Act should] be construed as modifying or limiting the presumption of innocence."[105] Congress and states alike have also mandated the separation of pretrial detainees from convicted prisoners "to the extent practicable,"[106] indicating their view that detainees' rights should not be equated with those of convicted prisoners. The inclination to separate pretrial detainees from convicted prisoners is not only

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102. 4 BLACKSTONE, *supra* note 1, at 297. Prior to *Wolfish*, the Second Circuit had adopted a similar approach to Blackstone: "pretrial detainees may be subjected to only those 'restrictions and privations' which 'inhere in their confinement itself or which are justified by compelling necessities of jail administration.' " Wolfish v. Levi, 573 F.2d 118, 124 (2d Cir. 1978). The Supreme Court explicitly rejected the compelling necessity test. Bell v. Wolfish, 441 U.S. 520, 523–24 (1979).

103. CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 20 (Henry Paolucci trans., The Bobbs-Merrill Co. 1963) (1764).

104. 18 U.S.C. § 3142 (2006).

105. *Id.* § 3142(j). Some have criticized this provision for being meaningless. Dissenting in *United States v. Salerno*, in which the Court upheld the Bail Reform Act, Justice Marshall argued, "the very pith and purpose [of the Act] is an abhorrent limitation of the presumption of innocence." 481 U.S. 739, 762–63 (1987) (Marshall, J., dissenting).

106. 18 U.S.C. § 3142(i)(2). Similar provisions have been codified at the state level. *See, e.g.*, CAL. PENAL CODE § 4001 (West 2000); COLO. REV. STAT. § 17-26-105 (2008); FLA. STAT. ANN. § 951.23 (West 2006); 730 ILL. COMP. STAT. ANN. 125/11 (West 2007); MASS. GEN. LAWS ch. 127, § 22 (2008); MICH. COMP. LAWS ANN. § 791.262b (West 1998 & Supp. 2009); N.D. CENT. CODE § 12-44.1-09 (1997 & Supp. 2007); WIS. STAT. ANN. § 302.315 (West 2005).

grounded in moral concerns; as a practical matter, separation reduces the potential risk of harm that comes with placing a potentially innocent pretrial detainee with a dangerous, convicted felon.[107] Unfortunately for pretrial detainees, the ideals espoused by Blackstone and Beccaria are only reflected in legislative prerogatives, but not mandated by legal doctrine. The *Wolfish* court rejected the notion that the presumption of innocence entitles pretrial detainees to comfortable conditions of confinement.[108] Pretrial detainees must instead rely on the subtler doctrinal differences between substantive due process and the Eighth Amendment to assert that they are entitled to more favorable treatment than convicted prisoners.

Section II.A contends that the Eighth Amendment's only legitimate role in substantive due process analysis is establishing a floor for pretrial detainees' rights. Section II.B contends that establishing a floor for detainee treatment is the limit of the Eighth Amendment's application because substantive due process protections are more extensive than Eighth Amendment protections. Put another way, although the Eighth Amendment might estab-

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107. The *Wolfish* dissent recognized the danger of indiscriminate mixing of detainees with hardened criminals. "An innocent man who has no propensity toward immediate violence, escape, or subversion may not be dumped into a pool of second-class citizens and subjected to restraints designed to regulate others who have. For him, such treatment amounts to punishment." *Wolfish*, 441 U.S. at 583–84 (Stevens, J., dissenting). Of course, under *Wolfish*, not every instance of mixing or commingling of pretrial detainees with convicted prisoners gives rise to a constitutional violation. A pretrial detainee in jurisdictions applying *Wolfish* must always establish that he was subjected to an excessive, arbitrary, or purposeless condition of confinement that exposed him to something more than de minimis harm; mixing or commingling with convicted prisoners will not satisfy this requirement in all circumstances. There are even situations where a convicted criminal might have an Eighth Amendment claim based on a jail's decision to house him with a particularly dangerous pretrial detainee. That is why many states make dangerousness of convicted prisoners and detainees the key factor in housing determinations. *E.g.*, MASS. GEN. LAWS ch. 127, § 22 ("[P]risoners charged with or convicted of a crime not infamous shall not be confined with those charged with or convicted of an infamous crime."). Putting the factor of dangerousness aside, some courts have concluded that as a general matter, placing detainees in the same facility as convicted persons and subjecting them to conditions designed for convicts "carries a punitive element" and "raises the spectre of a Constitutional violation." *E.g.*, Robbins v. Doe, 994 F. Supp. 214, 218 (S.D.N.Y. 1998).

108. *Wolfish*, 441 U.S. at 533 ("The presumption of innocence is a doctrine that allocates the burden of proof in criminal trials; it also may serve as an admonishment to the jury to judge an accused's guilt or innocence solely on the evidence adduced at trial and not on the basis of suspicions that may arise from the fact of his arrest, indictment, or custody, or from other matters not introduced as proof at trial. . . . Without question, the presumption of innocence plays an important role in our criminal justice system. . . . But it has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun."); *see also* Cathy Lynne Bosworth, Note, *Pretrial Detainment: The Fruitless Search for the Presumption of Innocence*, 47 OHIO ST. L.J. 277 (1986) (discussing the role of the presumption of innocence before and after *Wolfish*).

The *Wolfish* dissent vigorously criticized what they viewed as the Court's narrowing of the presumption of innocence beginning with *Wolfish*. Justice Stevens cited numerous instances in which the Court had "relied upon [the] presumption [of innocence] as a justification for shielding a person awaiting trial from potentially oppressive governmental actions." *Wolfish*, 441 U.S. at 582 n.11 (Stevens, J., dissenting). Academics too have criticized the curtailment of the presumption of innocence. For example, Professor Rinat Kitai-Sangero advocates "a broad view of the presumption of innocence" and claims that subjecting a pretrial detainee to conditions identical to those faced by convicted prisoners "violates [that presumption] since it treats [detainees] as offenders, sends them [a] message of guilt and makes them feel like convicted persons." Rinat Kitai-Sangero, *Conditions Of Confinement—The Duty To Grant The Greatest Possible Liberty For Pretrial Detainees*, 43 CRIM. L. BULL. 250, 267 (2007); *see also* Rinat Kitai, *Presuming Innocence*, 55 OKLA. L. REV. 257 (2002).

lish a floor for pretrial detainees' rights, substantive due process provides a higher ceiling than the Eighth Amendment. Accordingly, Eighth Amendment analysis is inadequate to address the substantive due process rights of pretrial detainees.

A. *The Eighth Amendment Only Establishes a Floor for Detainees' Rights*

The Supreme Court has repeatedly suggested that the Eighth Amendment and substantive due process provide analogous, yet distinct, protections. The *Wolfish* Court acknowledged that "pretrial detainees, who have not been convicted of any crimes, retain *at least* those constitutional rights that we have held are enjoyed by convicted prisoners."[109] The Court has since read *Wolfish* to mean that "the due process rights of a [detainee] are *at least as great* as the Eighth Amendment protections available to a convicted prisoner."[110] Accordingly, any Eighth Amendment violation would automatically satisfy the requirements of a due process violation for pretrial detainees. The Supreme Court affirmed this notion in the context of claims alleging inadequate medical care:

> Since it may suffice for Eighth Amendment liability that prison officials were deliberately indifferent to the medical needs of their prisoners . . . it follows that such deliberately indifferent conduct must also be enough to satisfy the fault requirement for due process claims based on the medical needs of someone jailed while awaiting trial.[111]

These statements suggest that "the Eighth Amendment [is] relevant to conditions of pretrial detainees only because it establishe[s] a floor."[112] Put more colorfully, "purgatory cannot be worse than hell."[113]

B. *Substantive Due Process Provides a Higher Ceiling for Detainees' Rights than the Eighth Amendment*

While the Eighth Amendment establishes a floor for pretrial detainees' substantive due process rights, it does not establish the ceiling. The Supreme Court has never explicitly held that the substantive due process right to be free from deplorable conditions of confinement is more robust than the analogous Eighth Amendment right, but basic principles of grammatical and statutory construction lead to that conclusion. Whereas detainees are protected from all

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109. *Wolfish*, 441 U.S. at 545 (emphasis added).

110. City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983) (emphasis added).

111. County of Sacramento v. Lewis, 523 U.S. 833, 850 (1998) (citation omitted). The Court also applied this reasoning to claims brought by the involuntarily committed. Youngberg v. Romeo, 457 U.S. 307, 315–16 (1982) ("If it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional to confine the involuntarily committed—who may not be punished at all—in unsafe conditions.").

112. Hubbard v. Taylor, 399 F.3d 150, 165–66 (3d Cir. 2005).

113. Jones v. Blanas, 393 F.3d 918, 933 (9th Cir. 2004).

punishments under *Wolfish*, the qualifying adjectives "cruel and unusual" limit the extent of convicted prisoners' Eighth Amendment protection from punishment.[114] To equate detainees' rights with convicted inmates' rights, one would essentially have to read the phrase "cruel and unusual" out of the Eighth Amendment.[115] While these arguments retain validity, the notion that pretrial detainees' substantive due process rights are superior to convicted prisoners' Eighth Amendment rights has more significant legal grounding in substantive due process jurisprudence. Most importantly, substantive due process protects fundamental liberties—including the right to be free from deplorable conditions of confinement—that cannot be extinguished or substantially impaired unless an individual is convicted of a crime.

Pretrial detainees, not yet convicted of any crime, are entitled to the broad protections of substantive due process.[116] Substantive due process prevents government conduct that impinges on rights "implicit in the concept of ordered liberty."[117] The Supreme Court has identified "the right to personal security"[118] as a fundamental and historic liberty interest[119] that encompasses "freedom from bodily restraint and punishment."[120] *Wolfish* concluded that substantive due process protects pretrial detainees from deplorable conditions of confinement that amount to punishment.[121] In *United States v. Salerno*, the Supreme Court held that pretrial detention alone does not constitute punishment or impermissible bodily restraint.[122] But during detention, pretrial detainees nevertheless retain fundamental liberty interests that must be balanced against the Government's legitimate regulatory interest in community safety.[123]

Convictions substantially impair a prisoner's substantive liberty interests under the Due Process Clause,[124] and the due process right to freedom from

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114. *See* NOBLE BUTLER, A PRACTICAL GRAMMAR OF THE ENGLISH LANGUAGE 40 (rev. ed. 1879).

115. *See* 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46:06, at 181 (6th ed. 2000) ("It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute." (internal quotation marks omitted)). If the prohibition against punishment (read into the Constitution by *Wolfish*) and the prohibition against cruel and unusual punishment are both contained in the Constitution, the terms must have different meanings. *See id.*

116. *See* United States v. Salerno, 481 U.S. 739, 746 (1984).

117. Palko v. Connecticut, 302 U.S. 319, 324–25 (1937).

118. Youngberg v. Romeo, 457 U.S. 307, 315 (1982).

119. *See* U.S. CONST. amend. XIV § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .").

120. Ingraham v. Wright, 430 U.S. 651, 674 (1977).

121. *See supra* Section I.A.

122. 481 U.S. 739 (1984) (upholding the Bail Reform Act as a valid regulatory, not punitive, congressional act).

123. *Id.* at 747–48 ("[T]he Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest.").

124. A convicted prisoner retains procedural due process rights. *E.g.*, Wolff v. McDonnell, 418 U.S. 539, 556 (1974).

harsh conditions of confinement is extinguished altogether. In *Meachum v. Fano*, the Supreme Court held that a conviction eliminated an individual's liberty interest to be free from harsh conditions of confinement:

> [G]iven a valid conviction, the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him and subject him to the rules of its prison system so long as the conditions of confinement do not otherwise violate the Constitution. . . . The conviction has sufficiently extinguished the defendant's liberty interest to empower the State to confine him in any of its prisons. . . . Confinement in any of the State's institutions is within the normal limits or range of custody which the conviction has authorized the State to impose. That life in one prison is much more disagreeable than in another does not in itself signify that a Fourteenth Amendment liberty interest is implicated when a prisoner is transferred to the institution with the more severe rules.[125]

The Court has also held that when the State punishes convicted prisoners, it does not encroach upon their fundamental liberty interests under the Due Process Clause.[126] Instead, punishment merely "effectuates prison management and prisoner rehabilitation goals," and is "within the expected perimeters of the sentence imposed by a court of law."[127] Fundamental liberty interests do not protect convicted inmates from generally brutal prison conditions, which may form "part of the total punishment to which the individual is being subjected for his crime."[128] In fact, the Supreme Court has identified very limited circumstances in which convicted prisoners retain fundamental liberty interests through substantive due process, and these circumstances do not involve conditions of confinement.[129]

Having lost the broad protections of substantive due process, convicted prisoners are not entitled to the regulatory balancing considerations of *Salerno*. The Government is thereby empowered to punish them with harsh conditions without regard for fundamental liberty interests, and the convicted inmate's only resort is establishing an Eighth Amendment claim under the burdensome standard set forth in *Farmer*.[130] His substantive due process right extinguished, there is no reason to believe that the Eighth Amendment restores to an individual the identical right to be free from the

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125. 427 U.S. 215, 224–25 (1976) (emphasis omitted).

126. Sandin v. Conner, 515 U.S. 472, 484–85 (1995).

127. *Id.* at 485.

128. Ingraham v. Wright, 430 U.S. 651, 669 (1977) (internal quotation marks omitted).

129. *See* Washington v. Harper, 494 U.S. 210, 221–22 (1990) (holding that a convicted prisoner had a liberty interest against the involuntary administration of antipsychotic medications); Vitek v. Jones, 445 U.S. 480, 493–94 (1980) (holding that a convicted prisoner had a liberty interest against an involuntary transfer to a mental hospital because such a transfer had "stigmatizing consequences" and was "qualitatively different" from traditional punishment). When a convicted prisoner is not challenging conditions of confinement, and is instead alleging that a prison regulation violates a constitutional right other than the Eighth Amendment, *Farmer* does not control. Instead, courts ask whether "the regulation is . . . reasonably related to legitimate penological interests." Turner v. Safley, 482 U.S. 79, 89 (1987).

130. *See Ingraham*, 430 U.S. at 671 n.40.

harsh conditions that he had preconviction. As such, in the context of conditions-of-confinement claims, the Eighth Amendment establishes a lower ceiling for protection than substantive due process.

The Supreme Court's reasoning in *Youngberg v. Romeo*[131] substantiates the notion that the Eighth Amendment ceiling for convicted prisoners' rights is lower than the substantive due process ceiling for nonconvicted individuals. In assessing the substantive due process rights of an involuntarily committed mentally retarded individual—who, like a pretrial detainee, has a fundamental liberty interest in personal security and freedom from punishment and restraint[132]—the Court concluded that "[p]ersons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish."[133] Because pretrial detainees cannot be subjected to conditions of confinement that are designed to punish, the Court's logic implies that detainees, like the involuntarily committed, are at least entitled to more considerate treatment and conditions than convicted prisoners.[134] This is not to suggest that pretrial detainees should be placed on equivalent footing with individuals who are civilly committed. Rather, *Youngberg* stands for the proposition that the substantive due process ceiling is higher than the Eighth Amendment ceiling, which only protects those convicted of crimes.

C. *Limitations*

Although substantive due process establishes a higher ceiling for detainees' rights than the Eighth Amendment, this conclusion is a limited one. It does not mean, for example, that pretrial detainees are automatically entitled to comfortable conditions of confinement. Such an inference would disregard the mandate of *Wolfish*, where the Court held that pretrial detainees do not have a constitutional right to be free from all discomfort.[135] It does not even mean that pretrial detainees are always entitled to better conditions than convicted prisoners in a given jurisdiction. Such an inference would ignore the fact that most convicted prisoners are treated better than the low floor of the Eighth Amendment requires, and pretrial detainees subjected to identical conditions may not automatically state a substantive due process violation.[136] Pressing the conclusion too far would also risk undermining the "very limited role that courts should play in the administration of detention facilities."[137] This Note merely contends that Eighth Amendment analysis is

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131. 457 U.S. 307 (1982). See *infra* Section III.B for more background on *Youngberg*.

132. *Youngberg*, 457 U.S. at 317–18.

133. *Id.* at 321–22.

134. *See* Hare v. City of Corinth, 74 F.3d 633, 653 (5th Cir. 1996) (Dennis, J., specially concurring) (citing *Youngberg* for the proposition that "convicted inmates have less protections and rights than pretrial detainees and other unconvicted persons in the state's custody").

135. 441 U.S. 520, 537 (1979).

136. *See supra* Section II.A.

137. Block v. Rutherford, 468 U.S. 576, 584 (1984).

inadequate for pretrial detainees' conditions-of-confinement claims. The fact that the ceiling on substantive due process protections is higher than that of the Eighth Amendment supports the Note's conclusion.

III. THE OBJECTIVE CRITERIA OF SUBSTANTIVE DUE PROCESS JURISPRUDENCE

Applying the Eighth Amendment test and its subjective deliberate-indifference requirement to claims brought by pretrial detainees clashes with the objective criteria relied upon in typical substantive due process jurisprudence. Section III.A delves into *Wolfish* and concludes that the Court never intended that the subjective state of mind of detention facility officials should play a dispositive role in the substantive due process inquiry. Section III.B contends that the Supreme Court's reliance on objective criteria in its approach to civil detention provides a useful analog to the criminal detention context. Section III.C concludes that requiring objective rather than subjective deliberate indifference of detention facility officials would fully accord with substantive due process principles.

A. *The Objective Criteria of* Bell v. Wolfish

Strict adherence to the text of *Wolfish* reveals an objective approach to pretrial detainees' conditions-of-confinement claims; most importantly, nothing in *Wolfish* requires detainees to establish subjective deliberate indifference by jail officials. Instead, the Court explicitly held that the punitive inquiry is not limited to the official's intent to punish: "[I]n the absence of a showing of intent to punish, a court must look to see if a particular restriction or condition, which may on its face appear to be punishment, is instead but an incident of a legitimate nonpunitive governmental objective."[138] Nothing in that statement makes the official's state of mind the dispositive inquiry.

Furthermore, most of the "useful guideposts"[139] from *Kennedy v. Mendoza-Martinez* can be examined in an objective manner without reference to the detention official's state of mind. First, courts are free to consider whether the condition of confinement "involves an affirmative disability or restraint."[140] Nothing in this language mandates an inquiry into the official's state of mind; rather, it suggests at most an objective inquiry into the nature of the condition and the actions of the officials. Second, courts can consider "whether [the condition] has historically been regarded as punishment."[141] Historical analysis in particular requires an expansive, objective approach rather than a narrow inquiry into the subjective state of mind of the individual. Third, under *Wolfish* and *Mendoza-Martinez*, courts may also

138. *Wolfish*, 441 U.S. at 539 n.20.

139. *Id.* at 538.

140. *Id.* at 537 (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963)).

141. *Id.* at 537 (quoting *Mendoza-Martinez*, 372 U.S. at 168–69).

objectively analyze whether the condition promotes deterrence.[142] Fourth, determining "whether the behavior to which [the restraint] applies is already a crime"[143] could also be analyzed with objective criteria.

Although two factors in particular—whether the restraint "comes into play only on a finding of *scienter*,"[144] and whether it promotes retribution[145]—are more likely to demand an inquiry into the official's subjective state of mind, courts need not rely exclusively on subjective, state-of-mind analysis to find a valid substantive due process claim. Rather, *Wolfish* demands an objective analysis of the conditions of confinement and the actions of detention facility officials; consideration of subjective factors is permissible and may even prove important, but officials' state of mind is not a mandatory component of a due process claim.[146]

B. *The Standard for the Civilly Committed and Detained Relies on Objective Criteria*

Conditions-of-confinement claims brought by the civilly committed and detained provide a useful analog to claims brought by criminal pretrial detainees because they are analyzed under the Due Process Clause and, like pretrial detainees, the civilly committed and detained may not be subjected to punishment.[147] In *Youngberg v. Romeo* the Supreme Court held that those involuntarily committed to state institutions have substantive rights under the Due Process Clause.[148] *Youngberg* concerned a severely retarded man committed by his mother to a state mental institution.[149] While committed, the respondent suffered numerous injuries both self-inflicted and from other residents and was subjected to prolonged periods of physical restraint.[150] The respondent asserted that he had substantive due process rights in safety, freedom from bodily restraint, and minimally adequate training and rehabilitation to help ensure his safety and freedom of movement.[151] The complaint

142. *Id.*

143. *Id.* at 538 (quoting *Mendoza-Martinez*, 372 U.S. at 168–69).

144. *Id.* at 537–38.

145. *Id.* at 537.

146. *See, e.g.*, DeAnna Pratt Swearingen, Comment, *Innocent Until Arrested?: Deliberate Indifference Toward Detainees' Due Process Rights*, 62 ARK L. REV. 101, 109–19 (2009) (arguing that detainees are entitled to better treatment than convicted individuals and proposing that the subjective component of the deliberate-indifference standard should not be applied to detainees' claims of inadequate medical care).

147. *See* Youngberg v. Romeo, 457 U.S. 307 (1982) (involuntarily committed persons); Jones v. Blanas, 393 F.3d 918, 931–35 (9th Cir. 2004) (civil detainees).

148. 457 U.S. 307.

149. *Id.* at 309.

150. *Id.* at 310.

151. *Id.* at 315–17.

alleged that the hospital had infringed these rights by "failing to provide constitutionally required conditions of confinement."[152]

The Supreme Court agreed with the respondent that the involuntarily committed have substantive due process rights to adequately safe conditions[153] and freedom from bodily restraint.[154] The right to adequate training presented a closer question, but the Court concluded that substantive due process "require[d] the State to provide minimally adequate or reasonable training to ensure safety and freedom from undue restraint."[155] The Court declined to specify the extent of the training that would be necessary, holding only that its adequacy would be determined by whatever "is reasonable in light of identifiable liberty interests and the circumstances of the case."[156] To assess reasonableness, the Court held that "the Constitution only requires that the courts make certain that professional judgment in fact was exercised."[157]

Youngberg suggests that like the claims of the involuntarily committed, criminal pretrial detainees' claims should be analyzed by objective rather than subjective criteria. And although the Court's decision is quite deferential to the judgment of state officials,[158] it still allows courts to objectively assess the actions of officials and the nature of restraints imposed on detainees. Liability should be imposed "when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on [a valid professional] judgment."[159] Like *Wolfish*, nothing in *Youngberg* requires that subjective, state-of-mind analysis play a role in claims brought by the civilly committed or detained regarding their conditions of confinement.[160] Instead, the Court found that "[w]hen a person is institutionalized—and wholly dependent on the State . . . a duty to provide certain services and care does exist."[161] The *Youngberg* court therefore asserts that the State has a positive duty to care for the involuntarily committed; subjective deliberate indifference plays no dispositive role.[162]

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152. *Id.* at 315.

153. *Id.* at 315–16.

154. *Id.* at 316.

155. *Id.* at 319.

156. *Id.* at 319 n.25.

157. *Id.* at 321 (quoting Romeo v. Youngberg, 644 F.2d 147, 178 (3d Cir. 1980) (Seitz, C.J., concurring)).

158. *Id.* at 323 (noting that professional officials' decisions are "presumptively valid" and reiterating its directive in *Wolfish* that courts should not "second-guess the expert administrators on matters on which they are better informed").

159. *Id.*

160. *See* Jones v. Blanas, 393 F.3d 918, 931–35 (9th Cir. 2004).

161. *Youngberg*, 457 U.S. at 317.

162. The same conclusion applied to claims brought by civil detainees. *See Jones*, 393 F.3d at 931–35.

This Note does not argue that criminal pretrial detainees are identically situated to civilly committed detainees. The Government needs probable cause to believe that an individual committed a crime to place him in pretrial detention. To deny bail and sustain detention, a judge must determine that "no condition or combination of conditions will reasonably assure the appearance of the person [at trial] and the safety of any other person and the community."[163] That many pretrial detainees are dangerous individuals precludes their placement in a facility as comfortable or safe as a hospital. This Note does not contend that pretrial detainees are entitled to comfortable conditions of confinement, or even conditions as comfortable and safe as those provided to the civilly committed. Rather, this Note merely argues that the inquiry for the civilly committed provides an objective mode of analysis that should be followed in the context of criminal detention, because substantive due process protects individuals in both contexts.

C. *The Objective Deliberate-Indifference Alternative*

The *Farmer* Court likened the difference between subjective and objective deliberate indifference to the difference between criminal and civil recklessness.[164] According to the *Farmer* Court's framework, the criminal law generally permits a finding of recklessness "only when a person disregards [an unjustifiably high] risk of harm of which *he is aware;*"[165] the civil law generally permits a finding of recklessness when a person *should be aware* of the risk.[166] The *Farmer* court opted for the subjective test of criminal law and concluded that an Eighth Amendment claim requires that prison officials know of and disregard excessive risks to inmate health and safety.[167] Although factfinders may infer that prison officials knew of substantial risks when the risks were obvious, the Court indicated that factfinders could only infer as much in the most extreme circumstances:

> For example, if an Eighth Amendment plaintiff presents evidence showing that a substantial risk of inmate attacks was longstanding, pervasive, well-documented, or expressly noted by prison officials in the past, and the circumstances suggest that the defendant-official being sued had been exposed to information concerning the risk and thus must have known about it, then such evidence could be sufficient to permit a trier of fact to find that the defendant-official had actual knowledge of the risk.[168]

The objective test of civil recklessness would have established a significantly less burdensome hurdle for convicted prisoners. Under an objective deliberate-indifference test, factfinders would concentrate on the nature of

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163. 18 U.S.C. § 3142(e) (2006).

164. Farmer v. Brennan, 511 U.S. 825, 836–37 (1994).

165. *Id.* at 837 (emphasis added).

166. *Id.* at 836.

167. *Id.* at 837.

168. *Id.* at 842–43 (internal quotation marks omitted).

the conditions to determine whether there were serious risks to inmates of which prison officials should have been aware.

Requiring pretrial detainees to establish objective deliberate indifference accords with substantive due process principles.[169] An objective test allows factfinders to focus on the nature of the conditions of confinement rather than an official's subjective state of mind to determine the official's responsibility. Detainees are therefore not required "to show anything more than actual or imminent substantial harm" and deliberate indifference may "be presumed from an absence of reasonable care."[170] Substantial and obvious risks, objectively analyzed according to the criteria in *Wolfish* and *Mendoza-Martinez*, will typically imply objective deliberate indifference necessary for a due process claim, while the same risks will not necessarily satisfy the more burdensome subjective requirement of an Eighth Amendment claim. As such, an objective deliberate-indifference requirement complies with the notion that substantive due process protections exceed Eighth Amendment protections.[171]

CONCLUSION

Eighth Amendment analysis is inadequate to evaluate claims of unconstitutional conditions of confinement brought by pretrial detainees, who are protected by the substantive component of the Due Process Clause. More than half of the federal circuits are nevertheless applying Eighth Amendment standards to pretrial detainees' claims. Such an approach equates the rights of pretrial detainees, not yet adjudged guilty of any crime, with those of convicted prisoners.

Applying the Eighth Amendment to pretrial detainees' constitutional claims denies detainees the distinct protections of the Due Process Clause. The majority approach ignores the fact that substantive due process

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169. *See* Rosalie Berger Levinson, *Reining in Abuses of Executive Power Through Substantive Due Process*, 60 FLA. L. REV. 519, 570–71 (2008) (concluding that a showing of objective deliberate indifference and more than de minimis harm "shocks the conscience" and therefore sustains a substantive due process claim according to the standard set forth in *County of Sacramento v. Lewis*, 523 U.S. 833, 849–53 (1998)).

170. Benjamin v. Fraser, 343 F.3d 35, 50–51 (2d Cir. 2003).

171. *See supra* Part II. Objective deliberate indifference may also be an appropriate standard for pretrial detainees because they could have greater difficulty establishing subjective deliberate indifference than convicted prisoners. Some have criticized the deliberate-indifference standard for being nearly "impossible to apply" even in convicted prisoners' conditions-of-confinement cases. Wilson v. Seiter, 501 U.S. 294, 310 (1991) (White, J., concurring). For convicted individuals, however, "[t]he long duration of a cruel prison condition may make it easier to establish knowledge and hence some form of intent." *Id.* at 300 (emphasis omitted). Establishing deliberate indifference will be even more difficult for pretrial detainees, however, because their confinement lasts for a relatively limited time. They are typically subjected to conditions of confinement for days or weeks, so although they 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. Given these circumstances, and the notion that substantive due process protections are more extensive than Eighth Amendment protections, pretrial detainees should be entitled to a less burdensome obstacle to state a valid substantive due process claim. Objective deliberate indifference may provide a sensible solution.

protections are more extensive than Eighth Amendment protections. The Eighth Amendment is only conceivably relevant to detainees because it establishes the floor of substantive due process protection.

Requiring detainees to establish the subjective deliberate indifference of jail officials likewise denies detainees the superior protection traditionally afforded by objective substantive due process analysis. According to *Wolfish*, pretrial detainees can rely on largely objective criteria to establish unconstitutional conditions of confinement. The civilly committed and detained, similarly protected by substantive due process, may likewise establish unconstitutional conditions of confinement relying largely on objective criteria. Requiring pretrial detainees to establish objective deliberate indifference is an acceptable alternative that recognizes their superior rights under the Due Process Clause.

This Note does not contend that every discomfort faced by pretrial detainees marks a constitutional violation. Such an extreme conclusion would swamp federal courts with constitutional claims and transform them into correctional administrators. Instead, this Note argues that Eighth Amendment analysis is improper for pretrial detainees' conditions-of-confinement claims because substantive due process affords detainees heightened protections and a distinct, objective mode of analysis. Strict adherence to *Wolfish* and substantive due process principles will guarantee pretrial detainees the distinct constitutional protections to which they are entitled.