'TIL FREEDOM COMES: REFORMING CONSTITUTIONAL STANDARDS FOR FOURTH AMENDMENT, FOURTEENTH AMENDMENT, AND EIGHTH AMENDMENT VIOLATIONS

Jill Collen Jefferson

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'TIL FREEDOM COMES: REFORMING CONSTITUTIONAL STANDARDS FOR FOURTH AMENDMENT, FOURTEENTH AMENDMENT, AND EIGHTH AMENDMENT VIOLATIONS

Jill Collen Jefferson*

People of color are dying at the hands of police officers each day. Conditions in United States prisons are so barbaric that they have effectively extended the death penalty to some who are incarcerated for minor offenses. Inmates are dying from lack of medical care, inadequate food, constant threats of violence and abuse, and the overuse of isolation. I argue that these problems exist in large part because the fear justification available to police officers in Fourth Amendment excessive force cases is easily abused, and the Fourteenth Amendment's "shocks the conscience" standard for excessive force cases is too high a bar. I also argue that the Eighth Amendment's subjective intent standard for prison conditions cases does not capture, accurately reflect, or account for scientific findings on human behavior. More specifically, I raise the question, what relevance should contemporary understandings of human behavior have on legal standards of intent, particularly the Eighth Amendment standard of deliberate indifference? I respond that they

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* Civil rights and human rights attorney based in Washington D.C. I would like to thank the following contributors for the many conversations had and emails exchanged as I developed this Article. Among those consulted were then-Harvard Law School Dean Martha Minow who formally advised this Article; Roy Austin, the former Deputy Assistant Attorney General of the U.S. Department of Justice's Civil Rights Division and former Deputy Assistant to President Barack Obama for the Office of Urban Affairs; Harvard Law Civil Rights Litigation professor and ACLU senior staff attorney Scott Michelman; Harvard Law School professors Michael Klarman, Susannah Barton Tobin, Ron Sullivan, and Randall Kennedy, among others; and Steptoe and Johnson chairman Phil West along with partners Jason Weinstein and Michael Baratz.

should guide those standards. Simply put: If a constitutional standard is based on intent, then that intent should be based on psychology. Our current constitutional intent standards are not. Therefore, I oppose these standards and propose new ones. For Fourth Amendment excessive force cases, I propose that courts implement a test analogous to the test for Batson *violations in order to determine whether officers' justifications for using excessive force are pretextual. I propose that courts formally adopt the test outlined in* Kingsley v. Hendrickson *for Fourteenth Amendment "shocks the conscience" claims. Then last, I propose that the Eighth Amendment test for prison conditions cases parallel Title VII's disparate impact test for discrimination so that courts' analyses will be on track with psychological findings. This Article will progress as follows: In Section I, I introduce a more extensive overview of the Article's contents. In Section II, I describe the thin and outdated underlying rationales for the current doctrines. In Section III, I explain how these deficient standards result in harm to black bodies and the incarcerated. In Section IV, I describe contemporary findings on human behavior, and in Section V, I propose new standards that incorporate these modern understandings into reformed doctrines. Section VI provides a roadmap for how plaintiffs and their attorneys can implement these new standards now.*

This Article's argument that the Eighth Amendment's subjective standard does not reflect psychological findings, its proposal for Fourth Amendment excessive force claims, and its proposal for Eighth Amendment prison conditions cases are its three contributions.

I am a black, southern woman who feels the uneasiness created by my mere presence day in and day out. I am a person who knows that my life could be taken from me in the blink of an eye, like the victims I discuss below, despite the fact that I have worked my entire life to "be somebody," if only to me. I want this Article to seek justice for the women and men who have been brutalized and/or killed at the hands of police officers and corrections officers and by the indifference, complacency, and apathy of lawmakers and officials who waste and abuse the great privilege of deciding what justice is and whether it will be served.

Reverend Dr. Martin Luther King, Jr.'s "I Have a Dream" speech is often quoted for the refrain, but what is usually overlooked is a line that is found right in the speech's middle:

> As we walk, we must make the pledge that we shall always march ahead. We cannot turn back. There are those who are asking the devotees of civil rights, "When will you be satisfied?" We can never be satisfied as long as the Negro is the victim of the unspeakable horrors of police brutality.

From what is known, this is the only public reference that Dr. King ever made about police brutality, and it is the sentiment that causes me anxiety every day. I am not satisfied, and my fear is that I—we—never will be.

I. Introduction

Two glaring indictments of the American justice system are excessive use of force claims against police officers and prison conditions claims against correctional officers. Excessive use of force claims generally arise in three types of situations: Fourth Amendment pre-arrest incidents, Fifth and Fourteenth Amendment substantive due process pre-trial (post-arrest) encounters, and Eighth Amendment prison security cases. A second type of prisons case—prison conditions cases—arise under the Eighth Amendment's deliberate indifference standard. This Article will address the first two types of excessive force—Fourth Amendment pre-arrest incidents and Fifth and Fourteenth Amendment substantive due process pre-trial (post-arrest) encounters—and Eighth Amendment deliberate indifference claims under 42 U.S.C. § 1983.

1. Excessive Force. — This Article will analyze excessive force claims in the context of the Fourth Amendment's objective reasonableness test before considering Fourteenth Amendment substantive due process through the lens of the case that established it: *County of Sacramento v. Lewis*.[1] The scholarship on these two claims is notable. Yet, more important is the fact that the objective reasonableness test's inability to take account of police brutality has resulted in the loss of real lives and a lack of officer accountability for those injuries and deaths. I discuss those lives and the circumstances where the test fails in Section III, below.

2. Deliberate Indifference. — This Article will address the questions of what relevance contemporary understandings of human behavior should have on legal standards of intent and how we can change those standards to facilitate the system's ability to exact justice. I argue that such contemporary understandings should guide the Court's views on the intent standards and ultimately lead to those standards being modified. This Article proposes one such modification. Regarding the question of how we can change the system to better exact justice, I argue that making the deliberate indifference standard accurately reflect psychologists' and social scientists' findings on human behavior is an answer.

[1] 523 U.S. 833 (1998).

For decades, the Supreme Court has used constitutional intent-based standards to help determine culpability for certain rights violations. In *Washington v. Davis*,[2] it found that equal protection violations require purposeful discrimination. In *Daniels v. Williams*,[3] it held in relevant part that substantive due process generally requires one to prove an abuse of government power. The Court then addressed Eighth Amendment violations in *Farmer v. Brennan*,[4] and found that cases involving prison conditions require a threshold of at least deliberate indifference. However, *Whitley v. Albers*,[5] ratcheted up that standard for prison security cases, calling for a state of mind of conduct engaged in "maliciously and sadistically for the very purpose of causing harm."

This Article will focus on one of those constitutional standards of intent: deliberate indifference. The discussion tackles deliberate indifference rather than the Eighth Amendment's excessive force standard because prison conditions cases are more ubiquitous and symptomatic of overall problems. They also affect a wider swath of individuals.

Current scholarship on the deliberate indifference standard focuses primarily on the pros and cons of its application, and scholars' proposals generally suggest amending the standard or eliminating it all together. In assessing a prison condition, one should judge that condition by its "excessiveness," proposes Brittany Glidden of Golden Gate University School of Law. Elaborating, she states, "[T]he condition should be considered *in light of* its asserted purpose." She goes on to make a second proposal: in cases of injunctive relief, "where a harm or risk is ongoing, courts should presume that the prison officials have a culpable mindset that satisfies the [deliberate indifference] test."[6] In contrast to presuming a culpable mindset, I propose partially replacing the intent standard with a test that more accurately captures the workings of the human mind.

Also in contrast to my proposal is the argument that prior to a judicial determination of probable cause, prison conditions claims

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[2] 426 U.S. 229 (1976).

[3] 474 U.S. 327 (1986).

[4] 511 U.S. 825 (1994).

[5] 475 U.S. 312 (1986).

[6] Brittany Glidden, *Necessary Suffering?: Weighing Government and Prisoner Interests in Determining What Is Cruel and Unusual*, 49 AM. CRIM. L. REV. 1815, 1816 (2012).

(for example, access to medical and mental health care or overall conditions of confinement) should be analyzed under a Fourth Amendment reasonableness test. This scholar, Professor Catherine Struve of the University of Pennsylvania Law School, then proposes that after a determination of probable cause, these claims should be held to an "objective" deliberate indifference standard. If a prisoner can prove the defendant had an express intent to punish, she has shown a constitutional violation. Yet, Struve acknowledges that such instances of "express" intent will be rare.[7] Rather than proving express intent, my proposal outlines a test similar to that of Title VII's disparate impact analysis.

Like Struve, Professor Alexander A. Reinert believes that deliberate indifference should be objective—a possibility that the Court rejected in *Farmer v. Brennan*,[8] discussed below. However, he critiques specifics of Struve's approach and offers a different one, writing, "If Struve hopes to improve pretrial detention conditions, however, a test that focuses on harm is more fruitful than one that focuses on the official's state of mind because the latter does not play a significant role in establishing baseline conditions of confinement."[9] In an earlier article, Reinert argues that "with respect to the twin confounding aspects of conditions litigation—deference to prison administrators and the need to establish culpable intent of prison officials—there is some value added by recognizing and effectuating some . . . principles at stake in proportionality litigation"—litigation that considers whether some punishments are disproportionate to the crime.[10] I agree with Reinert that a test focusing on harm would be fruitful, and proportionality litigation might well add value to conditions litigation, but I propose that we keep the current intent standard where such intent can be proven and use a quasi-objective standard when it cannot.

In her article *Sexual Punishments*, Alice Ristroph of Seton Hall University's school of law recommends that an act or practice's "penal" status "depend not on specific legislative designation or individual intent, but on whether the act or practice is a necessary

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[7] Catherine T. Struve, *The Conditions of Pretrial Detention*, 161 U. PA. L. REV. 1009 (2013).

[8] *See* 511 U.S. 825 (1994).

[9] Alexander A. Reinert, *Finding the Proper Measure for Conditions of Pretrial Confinement*, 161 U. PA. L. REV. Online 191, 194 (2013).

[10] Alexander A. Reinert, *Eighth Amendment Gaps: Can Conditions of Confinement Litigation Benefit From Proportionality Theory?*, 36 FORDHAM URB. L.J. 53, 56 (2009).

element or direct consequence of the state's response to an individual's criminal conviction."[11] The problem with this standard, which my proposal avoids, is that it allows too much discretion with the term "necessary element." Taking yet a different perspective, others argue that Congress should amend the Prison Rape Elimination Act (PREA) to include a confidential administrative court.[12] Such modifications would be helpful, but they still do not reach the problem's root: The intent standard is inaccurate in itself and therefore produces inaccurate results.

Overall, this Article seeks to intervene in these and other larger legal and academic conversations by, first, recounting the histories of each standard at issue and the Court's rationales for making them what they are (Section II). Understanding the rationales is necessary to find an appropriate solution. The Article will then discuss some of the standards' problems in Section III by examining the toll they have taken on real lives. Together, Sections II and III paint a picture of what the standards were intended to be and the tragedy that they have grown to create. Section IV applies only to deliberate indifference and other subjective intent-based standards. That section will outline psychologists' and social scientists' findings on human behavior. These findings are the foundation of my argument that the deliberate indifference standard is inaccurate. In order to recognize the inaccuracies, we must explore the truth. The Article's focus then broadens again in Section V, where I offer three proposals—one for each standard discussed—for what the standards should be. In sum, I first propose that Fourth Amendment excessive force claims be subject to a test similar to that of *Batson* violations. I then propose that courts formally adopt the standard provided in *Kingsley v. Hendrickson* for Fourteenth Amendment excessive force claims.[13] Third, I propose that Eighth Amendment prison conditions cases be analyzed under a framework similar to disparate impact. Finally, Section VI will address how plaintiffs and their attorneys can take my proposals and implement them now to more easily exact justice.

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[11] Alice Ristroph, *Sexual Punishments*, 15 COLUM. J. GENDER & L. 139, 168 (2006).

[12] *See* Maureen Brocco, *Facing the Facts: The Guarantee Against Cruel and Unusual Punishment in Light of PLRA, Iqbal, and PREA*, 16 J. GENDER RACE & JUST. 917, 951–52 (2013).

[13] 576 U.S.___, 135 S. Ct. 2466 (2015).

II. The Rationales Behind Excessive Force and Prison Conditions Standards

The standards at issue were not always what they are today. Before discussing what the tests for the violations at issue should become, it is important that we first explain what they are now and why they are what they are. This section will do that. It will first give an overview of the reasoning behind the Fourth Amendment's objective evaluation. It will then describe how "shocks the conscience" became the standard for Fourteenth Amendment Substantive Due Process excessive force cases. Last, it will explain how deliberate indifference became the test for prisoners' Eighth Amendment conditions-of-confinement claims.

A. The Fourth Amendment's Objective Test is Meant to Account for Fast-Paced Situations

The Fourth Amendment's standard for unreasonable search/seizure claims (specifically called "excessive force" claims) started as a blanket test. Courts lumped together Fourth and Eighth Amendment excessive force claims in the 1970s and analyzed them according to a single generalized inquiry. In *Johnson v. Glick*,[14] a case wherein a pretrial detainee sued a guard who had assaulted him without justification, Judge Henry Friendly of the Second Circuit Court of Appeals listed four factors that should be considered when determining whether excessive use of force gives rise to a § 1983 cause of action. They are "(1) the need for the application of force; (2) the relationship between the need and the amount of force that was used; (3) the extent of the injury inflicted; and (4) [w]hether [the] force was applied in a good faith effort to maintain and restore discipline or maliciously and sadistically for the very purpose of causing harm."[15]

After *Glick*, the "vast majority" of lower courts applied Judge Friendly's test indiscriminately to every excessive force claim under § 1983, whether the claim was against law enforcement or prison officials, and they did so "without considering whether the particular application of force might implicate a more specific constitutional right governed by a different standard."[16] Sixteen

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[14] *See* 481 F.2d 1028 (2d Cir. 1973).

[15] *Id.* at 1033.

[16] Graham v. Connor, 490 U.S. 386, 393 (1989).

years later, the Supreme Court rejected Judge Friendly's four factors in the case *Graham v. Connor*.[17]

In *Graham*, a diabetic man named Dethorne Graham sued law enforcement officers for injuries that he had sustained during his arrest. Rather than apply Judge Friendly's test, the Court stated:

> Today we make explicit what was implicit in [*Tennessee v. Garner's*] analysis, and hold that *all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other "seizure" of a free citizen should be analyzed under the Fourth Amendment and its "reasonableness" standard, rather than under a "substantive due process" approach. Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims.
>
> Determining whether the force used to affect a particular seizure is "reasonable" under the Fourth Amendment requires a careful balancing of "the nature and quality of the intrusion on the individual's Fourth Amendment interests" against the countervailing governmental interests at stake.[18]

The Court then decided that the "reasonableness" of the force used must be judged according to the perspective of "a reasonable officer on the scene, rather than with the 20/20 vision of hindsight,"[19] before providing two examples of circumstances in which the Fourth Amendment is not violated. It stated that "[the standard] is not violated by an arrest based on probable cause, even though the wrong person is arrested, nor by the mistaken execution of a valid search warrant on the wrong premises."[20] Moreover, to put an even

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[17] *See* 490 U.S. 386 (1989).
[18] *Id.* at 394–96.
[19] *Id.* at 396.
[20] *Id.*

sharper point on its examples, the Court went on to quote a portion of *Glick* with which it agreed, saying,

> Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers,' violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.[21]

Last, explaining that the "reasonableness" standard is objective rather than subjective, it wrote:

> As in other Fourth Amendment contexts, however, the "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional.[22]

To this day, *Graham's* objective test governs Fourth Amendment excessive force claims brought under § 1983.

B. The Court Intended the Fourteenth Amendment's "Shocks the Conscience" Test for Substantive Due Process Excessive Force Claims to Address the Most Brutal Acts

The Court used the phrase "shocks the conscience" for the first time in *Rochin v. California*.[23] It was there that the objective

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[21] *Id.* at 396–97 (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973)).

[22] *Id.* (citations omitted).

[23] 342 U.S. 165 (1952).

test for Fourteenth Amendment substantive due process began to take shape. In that case, a suspect's stomach was pumped by force after he had swallowed narcotics in the hope of concealing evidence. In the Court's opinion, it said that pumping the man's stomach was conduct "that shock[ed] the conscience."[24] The Court continued to use the phrase "shocks the conscience" in subsequent cases. In *Breithaupt v. Abram*,[25] it again stated that conduct which "'shocked the conscience' and was so 'brutal' and 'offensive' that it did not comport with traditional ideas of fair play and decency . . . would violate substantive due process."[26] It said the same in *Whitley v. Albers*.[27] Then, in *United States v. Salerno*,[28] the Court found that "[s]o-called 'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience,' . . . or interferes with rights 'implicit in the concept of ordered liberty.'"[29]

Finally, in *Collins v. City of Harker Heights, Texas*,[30] the Court said that "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense."[31] In that same case, it said that the due process clause was "intended to prevent government officials 'from abusing [their] power, or employing it as an instrument of oppression.'"[32] By the time *Lewis* was decided in 1998, the Court had been interpreting the level of executive abuse of power that would trigger a substantive due process violation as that which "shocks the conscience" for half a century. It admitted that "the measure of what is conscience shocking is no calibrated yard stick," before quoting Justice Friendly who said that it does "poin[t] the way."[33]

Still, the "shocks the conscience" bar is a high one, and the Court suggested as much in *Paul v. Davis*.[34] There, it said that the Fourteenth Amendment is not a "font of tort law to be superimposed

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[24] Rochin, 342 U.S. at 175.

[25] 352 U.S. 432 (1957).

[26] *Id.* at 435.

[27] *See* 475 U.S. 312, 327 (1986).

[28] 481 U.S. 739 (1987).

[29] *Id.* at 746.

[30] 503 U.S. 115 (1992).

[31] *Id.* at 126-29.

[32] *Id.* at 126 (quoting DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 196 (1989)).

[33] County of Sacramento v. Lewis, 523 U.S. 833 (1998) (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (C.A.2), cert. denied, 414 U.S. 1033 (1973)).

[34] 424 U.S. 693 (1976).

upon whatever systems may already be administered by the States."[35] It implied the heightened bar again in *Daniels v. Williams*,[36] when it found that "[o]ur Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society."[37] It later noted in *Lewis* that "the due process guarantee does not entail a body of constitutional law imposing liability whenever someone cloaked with state authority causes harm."[38]

Further explaining the Court's finding, constitutional law expert Erwin Chemerinsky writes in his treatise *Constitutional Law* that "[w]e have accordingly rejected the lowest common denominator of customary tort liability as any mark of sufficiently shocking conduct, and have held that the Constitution does not guarantee due care on the part of state officials; liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process."[39] To be sure, the *Lewis* Court put traditional tort law's negligence standard on one end of what it called the "spectrum of culpability" and violations of substantive due process on the other and defined conscience-shocking conduct as that which was "intended to injure in some way unjustifiable by any government interest."[40]

However, in noting that behavior which "shocks the conscience" would be on the far end of the culpability spectrum, the Court did not rule out the possibility that conduct falling at the spectrum's midpoint (somewhere between negligence and intentional conduct, such as gross negligence or recklessness) could meet the heightened standard. Instead, it said that such middle-of-the-road behavior would be "a matter for closer calls."[41]

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[35] *Id.* at 701.

[36] 474 U.S. 327 (1986).

[37] *Id.* at 332.

[38] Lewis, 523 U.S. at 848.

[39] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, 1133 (6th ed. 2020); *see* Daniels v. Williams, 474 U.S. 327, 328 (1986); *see also* Davidson v. Cannon, 474 U.S. 344, 348 (1986).

[40] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, 1133 (6th ed. 2020); *see* Daniels, 474 U.S. at 331 ("Historically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property.") (emphasis in original).

[41] Lewis, 523 U.S. at 834.

Yet, instead of analyzing "closer calls" according to the "shocks the conscience" standard, the Supreme Court introduced a different rule in the 2015 case *Kingsley v. Hendrickson*,[42] which is considerably more objective. In *Kingsley*, the petitioner, Michael Kingsley, was awaiting trial in a county jail when officers forcibly removed him from his cell after he had refused to follow their instructions. He filed a claim in federal district court, saying that the officers had violated his Fourteenth Amendment substantive due process right by using excessive force. Upon certiorari, the Court held in relevant part that "Under 42 U. S. C. § 1983, a pretrial detainee must show only that the force purposely or knowingly used against him was objectively unreasonable to prevail on an excessive force claim."[43] It has yet to be seen whether courts will adopt *Kingsley's* rule in place of the "shocks the conscience" standard, but some civil rights attorneys believe courts might, arguing that "shocks the conscience" is not the most important standard for pretrial detainees today.[44]

C. The Eighth Amendment's Deliberate Indifference Standard Stems from the Belief in a Duty to Keep Prisoners Safe

We owe prisoners a duty under the common law. This is the tenet that birthed the Eighth Amendment's deliberate indifference standard in the nineteenth and early twentieth centuries. We can see its infancy through the case *State of Indiana ex rel. Tyler v. Gobin*.[45] There, a lynch mob surrounded a jail. As they began to mount their attack, the sheriff handed them a lamp and told them where to find the prisoner. In his piece, *Cruel and Unusual Punishment in United States Prisons: Sexual Harassment Among Male Inmates*, civil litigator James E. Robertson recounts this case and one other, writing:

> Recalling the sheriff's common law obligation to exercise due care for goods and livestock in his

[42] 576 U.S.___, 135 S. Ct. 2466 (2015).

[43] *Id.*

[44] E-mail from Scott Michelman, Harvard Law School Civil Rights Litigation Professor and ACLU Senior Attorney, to author (May 6, 2018, 18:49 EDT) (on file with author).

[45] 94 Fed. 48,50 (C.D. Ind. 1899).

> custody, the court reasoned that a similar duty ran to his inmates. In another lynching case, an Indiana court held that failure to "exercise reasonable and ordinary care to protect the prisoner's life and health" is tortious conduct.[46]

Decades later, in 1971, lower federal courts began to recognize this common-law duty to protect inmates with the Eighth Circuit's affirmation of the Eastern District of Arkansas's decision in *Holt v. Sarver*.[47] There, dangerous prison conditions had led the Eastern District to find an Eighth Amendment violation. Explaining their rationale, the court stated that "[i]t is one thing for the State to send a man to the Penitentiary as a punishment for crime. It is another thing for the State to delegate the governance of him to other convicts, and to do nothing meaningful for his safety, well being [*sic*], and possible rehabilitation."[48]

Then, in 1976, the Supreme Court constitutionalized the common-law view that inmates were owed a duty with its decision in *Estelle v. Gamble*.[49] Justice Marshall, writing for the Court, concluded that "deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain . . . proscribed by the Eighth Amendment."[50] This was the first time that the Court had used the term "deliberate indifference," and it had used it to describe a state of mind "more blameworthy than negligence."[51]

Following *Estelle*, in *DeShaney v. Winnebago County*,[52] the Court discussed the circumstances in which a prisoner's personal security becomes a constitutional duty. It then articulated specific situations where prison staff must protect inmates from each other in *Wilson v. Seiter*,[53] and *Farmer v. Brennan*.[54]

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[46] James E. Robertson, *Cruel and Unusual Punishment in United States Prisons: Sexual Harassment Among Male Inmates*, 36 AM. CRIM. L. REV. 1, 23–24 (1999).

[47] 309 F. Supp. 362, 381 (E.D. Ark. 1970), *aff'd and remanded,* 442 F.2d 304 (8th Cir. 1971).

[48] *Id.*

[49] 429 U.S. 97 (1976).

[50] *Id.* at 104.

[51] Farmer v. Brennan, 511 U.S. 825, 835 (1994) (explaining the term "deliberate indifference").

[52] 489 U.S. 189 (1989).

[53] 501 U.S. 294 (1991).

[54] 511 U.S. 825 (1994).

In *Wilson*, the Court outlined the two-part test required to prove an Eighth Amendment violation. Robertson outlines that test, writing:

> The first component, which the Court characterized as "objective" in nature, requires that the deprivation be "sufficiently serious." Speaking for the Court, Justice Scalia observed that a deprivation of this magnitude "denies the minimal civilized measure of life's necessities." Justice Scalia also articulated a "subjective component" in conditions-of-confinement claims, namely, whether the defendant prison officials were "deliberately indifferent" to this deprivation.[55]

In *Farmer*, the Court rejected petitioner's argument for an objective, "ought to have known" deliberate indifference standard and, instead, held that:

> [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.[56]

The Court then reasoned that it had conveyed the standard as it did because that approach aligned with their previous interpretations of the Eighth Amendment. It explained:

> The Eighth Amendment does not outlaw cruel and unusual "conditions"; it outlaws cruel and unusual "punishments." An act or omission unaccompanied by knowledge of a significant risk of harm might well be something society wishes to discourage, and if harm does result, society might well wish to assure compensation. The common law reflects such

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[55] Robertson, *supra* note 46.
[56] *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

> concerns when it imposes tort liability on a purely objective basis. But an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment. In *Wilson v. Seiter,* we rejected a reading of the Eighth Amendment that would allow liability to be imposed on prison officials solely because of the presence of objectively inhumane prison conditions. As we explained there, 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."[57]

Considering this rationale, the Court found that petitioner's argument for an objective deliberate indifference reading was incompatible with *Wilson's* holding and that criminal law's subjective recklessness standard was "familiar," "workable," and consistent with precedent.[58]

As this Article's next section will discuss, each of these standards has significant problems.

III. The Human Cost of Each Standard

Police officers are assaulting and killing black people at their discretion, and our laws still have not addressed it. Gaps in Fourth and Fourteenth Amendment excessive force tests have resulted in the loss of real lives and a lack of accountability for the officers responsible for their deaths. Eighth Amendment deliberate indifference fails to protect the imprisoned from the very harms that prisons create. This section will analyze these problems, beginning with the Fourth Amendment's objective reasonableness test, followed by the Fourteenth Amendment's "shocks the conscience" standard. The last portion of this section will address Eighth Amendment deliberate indifference.

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[57] *Id. at* 837–38 (internal citations omitted).
[58] *Id.* at 839–40.

A. The Fourth Amendment's Objective Reasonableness Test is Easily Abused

The constant killings of black women and men at the hands of police officers and the nearly impenetrable defense of "fear for my life" evidence problems with the Fourth Amendment's objective reasonableness test. If an officer has an objectively reasonable fear that he or someone else is in imminent danger of grievous injury or death, he is justified in using deadly force. Moreover, his justification for shooting (whether it be fear for his life or another reason) is relevant to both the merits of his case and any considerations of qualified immunity. In criminal justice, officers are rarely convicted of homicide for killing someone while on duty. According to an NPR data analysis published in June 2017, 2,400 people had been killed by an on-duty officer in two and a half years.[59] The Washington Post found that officers had killed 992 people in 2018 and 1,004 people in 2019 alone.[60] In the vast majority of those cases the killing was found to be justified. In only 20 of those 2,400 killings did officers face charges, and of those, just six have been convicted or pleaded guilty.[61]

1. The Fear Justification is Easily Abused

In recent years, officers have used fear to justify using excessive force and deadly force in highly controversial arrests and killings. Take, for example, the death of Philando Castile, a 32-year-old black man in Minnesota who was in a car with his girlfriend and her four-year-old daughter when Officer Jeronimo Yanez fatally shot him in July 2016.[62] Yanez used fear to justify his use of deadly force, saying that he "thought, [he] was gonna die" in the moments

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[59] *See* Martin Kaste, *Cop Shooting Death Cases Raise Question: When Is Fear Reasonable?*, NPR (June 30, 2017, 10 :37 AM), https://www.npr.org/2017/06/30/534992121/cop-shooting-death-cases-raise-question-when-is-fear-reasonable.

[60] *See Fatal Force*, WASH. POST, https://www.washingtonpost.com/graphics/2019/national/police-shootings-2019/ (last updated Mar. 16, 2020).

[61] Kaste, *supra* note 59.

[62] *See* Jamelle Bouie, *The Cloak of "Fear,"* SLATE (June 23, 2017, 2:12 PM), http://www.slate.com/articles/news_and_politics/politics/2017/06/why_fear_was_a_viable_defense_for_killing_philando_castile.html.

after Mr. Castile disclosed to him that he had a weapon in his vehicle.[63] To be clear, the officer said that he feared for his life despite the fact that dashcam footage and footage of the incident streamed live by Mr. Castille's girlfriend showed that Mr. Castille was polite and compliant, even going so far as trying to avoid raising the officer's fears by disclosing to the officer that he had a weapon in his vehicle—a tactic he had learned in a gun safety course the year before that taught him how to handle interactions with law enforcement when a firearm is in the car.[64] In a trial for second-degree manslaughter, Yanez was acquitted.

Attorney and activist Andrea J. Ritchie describes the death of a black woman, Michelle Cusseaux, in her book *Invisible No More: Police Violence Against Black Women and Women of Color*.

> On August 14, 2014, [five] days after Michael Brown was killed in Ferguson, Missouri, Michelle Cusseaux was at home in Phoenix, Arizona, fixing her door when a police officer, Percy Dupra, came to execute a "pickup order" to bring her to a mental health treatment facility. When officers arrived at her home, Michelle spoke with them through the door and refused to leave her home or consent to their entry. She said she did not trust them, and believed they would shoot her. . . . Dupra instructed an Officer Anderson to pick the exterior door of Michelle's residence. When they entered, Officer Dupra saw Michelle standing near the door holding a hammer, interpreted it to be a weapon, and shot her. He later said that something about the look on her face . . . . caused him to fear for his safety. . . . Ultimately, the Phoenix Police Department found that Officer Dupra violated departmental use-of-force policies, and he was subsequently demoted but not prosecuted or fired.[65]

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[63] *Id.*

[64] *See* Abigail Abrams, *Philando Castile Took Gun Safety Training Before He Was Killed by Police*, TIME (July 14, 2016), http://time.com/4406603/philando-castile-gun-safety-class-killed-by-police/.

[65] ANDREA J. RITCHIE, INVISIBLE NO MORE: POLICE VIOLENCE AGAINST BLACK WOMEN AND WOMEN OF COLOR 95-96 (2017) (internal quotations omitted).

Ritchie later tells the story of another black woman subjected to excessive force. She writes,

> Malaika Brooks, thirty-three years old and seven months pregnant, was driving her eleven-year-old son to school in Seattle one November morning in 2004 when she was pulled over for speeding. She gave the officers her driver's license. They gave her a ticket. She refused to sign it, believing that doing so would amount to admitting guilt. The officers threatened to arrest her in front of her son and ordered her out of her car. When she refused, they tasered her pregnant body three times within a minute, hitting her in the thigh, arm, and neck, causing permanent burn marks. She fell out of the car. Officers then dragged her facedown on the street, handcuffed her, and charged her with refusing to sign the ticket and resisting arrest. She had told the officers she was pregnant when they first took out the Taser. Their only response was to avoid shocking her directly in the stomach. . . . In both [the case of Sandra Bland—a black woman who died in a Texas jail after an officer used excessive force on her in a traffic stop[66]—and Ms. Brooks's case,] the officers later tried to argue that both [b]lack women—both seated in their cars, unarmed—posed a threat to their safety.[67]

In April 2018, Cambridge police officers tackled and repeatedly punched 21-year-old Harvard student Selorm Ohene, who was naked, unarmed, and in distress. Despite the fact that multiple armed officers were on the scene to confront one naked black man, one officer reported that he perceived Mr. Ohene as a "threat."[68] Another video shows Terence Crutcher—a 40-year-old

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[66] *See* David Montgomery, *Sandra Bland, It Turns Out, Filmed Traffic Stop Confrontation Herself*, N.Y. TIMES (May 7, 2019), https://www.nytimes.com/2019/05/07/us/sandra-bland-video-brian-encinia.html.

[67] RITCHIE, *supra* note 65, at 165-66 (internal quotations omitted).

[68] Amir Vera, *Video shows Cambridge police tackle and punch black Harvard student during arrest*, CNN (Apr. 17, 2018, 4:27 PM), https://www.google.com/amp/s/amp.cnn.com/cnn/2018/04/17/us/harvard-student-police-use-of-force/index.html; *see* Eli Rosenberg and Lindsey Bever,

black man who lived in Oklahoma—raising his hands and then placing them on the side of his vehicle when he was first tased and then shot by Officer Betty Jo Shelby in September 2016. Shelby was tried on first-degree manslaughter and acquitted after claiming that she was "fearing for her life" when she killed Mr. Crutcher.[69] Officer Timothy Loehmann used that same justification in the killing of Tamir Rice, a 12-year-old black boy who was playing with a pellet gun in a Cleveland park when Loehmann and his partner, Frank Garmback, sped to the scene and shot him within seconds of their arrival.[70] A grand jury declined to charge Loehmann. Charlotte, North Carolina, police officer Randall Kerrick shot Jonathan Ferrell 10 times when Mr. Ferrell—dazed, unarmed, and looking for help after having just been in a car crash—would not obey his commands to "get on the ground."[71] Kerrick said that Mr. Ferrell was "aggressively coming towards" him. "He was going to assault me," he said. "I thought I was gonna die." After the jury could not reach a verdict, Kerrick was acquitted.[72] Michael Slager,

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Video shows police punching a Harvard student after he was found naked in the street, WASH. POST (Apr. 17, 2018, 1:43 PM), https://www.google.com/amp/s/www.washingtonpost.com/news/grade-point/wp/2018/04/16/video-shows-police-punching-a-harvard-student-after-he-was-found-naked-in-the-street/%3foutputType=amp; *see also* Katherine Q. Seelye and Jess Bidgood, *Video Shows Police Tackling and Punching Black Harvard Student*, N.Y. TIMES (Apr. 16, 2018), https://www.google.com/amp/s/www.nytimes.com/2018/04/16/us/harvard-student-beating-police.amp.html.

[69] *See* Lucia Walinchus and Richard Pérez-Peña, *White Tulsa Officer Is Acquitted in Fatal Shooting of Black Driver***,** N.Y. TIMES (May 17, 2017), https://www.nytimes.com/2017/05/17/us/white-tulsa-officer-is-acquitted-in-fatal-shooting-of-black-driver.html; *see also* Chelsea Bailey, *Terence Crutcher Shooting by Tulsa Police Was 'Tragic' but Justified: Jury Foreman*, NBC NEWS (May 20, 2017, 2:21 PM), https://www.nbcnews.com/news/us-news/terence-crutcher-shooting-tulsa-police-was-tragic-justified-jury-foreman-n762566.

[70] *See* Safia Samee Ali, *Tamir Rice Shooting: Newly Released Interview Reveals Cop's Shifting Story*, NBC NEWS (Apr. 16, 2017, 4:45 PM), https://www.nbcnews.com/news/us-news/newly-released-interview-footage-reveal-shifting-stories-officers-who-shot-n751401; *see also Cleveland Officer Will Not Face Charges in Tamir Rice Shooting Death*, N.Y. TIMES (Dec. 28, 2015)**,** https://www.nytimes.com/2015/12/29/us/tamir-rice-police-shootiing-cleveland.html.

[71] Mark Strassmann, *Officer on the stand describes shooting of unarmed black man*, CBS NEWS (Aug. 14, 2015, 7:03 PM), https://www.cbsnews.com/news/n-c-officer-testifies-he-feared-for-life-when-he-shot-unarmed-black-man/.

[72] *Id.*

a South Carolina police officer who shot, killed, and planted evidence on Walter Scott during a traffic stop, claimed he felt "total fear" during the encounter. Mr. Scott was running away when Slager shot him in the back. The jury deadlocked.[73] The list goes on and on.

The fear justification is being abused. It "can be used to excuse bias," says Ngozi Ndulue, senior director of criminal justice programs at the NAACP.[74] Ndulue goes on to say that *Graham*, discussed above, makes it "almost impossible" to convict a police officer. A prosecutor on a recent Fourth Amendment case that ended in acquittal told NPR that *Graham* has "'taken on a life of its own,' allowing police too much leeway to perceive situations as more threatening than they really are."[75] Still, the justification of fear is one that should continue to be available to officers because they do face life-threatening situations. However, courts need to more closely scrutinize the justification's use (which Section V, below, discusses) because officers are using it in circumstances, such as the incidents and killings outlined above, where a reasonable officer having fear would be questionable.

Nonetheless, the Supreme Court seems reluctant to alter the excessive force standard out of concern for causing a chilling effect on police recruitment, leaving officers without legal cover, and leading them to hesitate before acting in crucial moments, further endangering their lives and the lives of those around them. It indicated as much in a case called *Kisela v. Hughes*.[76] In *Kisela*, an Arizona police officer shot Amy Hughes outside her home after she did not drop a knife that she was holding. Ms. Huges sued the officers for excessive force in violation of the Fourth Amendment. The U.S. Court of Appeals for the Ninth Circuit allowed the case to proceed, but the Supreme Court reversed that ruling and, instead, ruled in favor of the officer. It held that the officer was entitled to qualified immunity. It did not decide whether the officer's actions violated the Constitution, but it did state that there was no clear precedent that would have alerted him that opening fire in what he

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[73] Alan Blinder, *Mistrial for South Carolina Officer Who Shot Walter Scott*, N.Y. TIMES (Dec. 5, 2016), https://www.nytimes.com/2016/12/05/us/walter-scott-michael-slager-north-charleston.html.

[74] Kaste, *supra* note 59.

[75] *Id.*

[76] 584 U. S. ____, 138 S. Ct. 1148 (2018).

claimed was an effort to protect Ms. Hughes's roommate amounted to unconstitutionally excessive force.[77]

In a passionate dissent, Justice Sonia Sotomayor said that "[the Court's] decision is not just wrong on the law; it also sends an alarming signal to law enforcement officers and the public."[78] She wrote, "It tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished."[79] She offered the case's facts, saying, "Hughes was nowhere near the officers, had committed no illegal act, was suspected of no crime, and did not raise the knife in the direction of Sharon Chadwick [, who was Ms. Hughes's roommate] or anyone else."[80] Then, noting that only one officer had opened fire, she continued, "Kisela alone resorted to deadly force in this case. Confronted with the same circumstances as Kisela, neither of his fellow officers took that drastic measure."[81]

Justice Sotomayor believed that a jury should have been allowed to hear the case. "Because Kisela plainly lacked any legitimate interest justifying the use of deadly force against a woman who posed no objective threat of harm to officers or others, had committed no crime, and appeared calm and collected during the police encounter," she said, "he was not entitled to qualified immunity."[82] She noted that the Court's ruling in *Kisela* was part of a pattern of "unflinching willingness" to protect officers accused of using excessive force and that the court's decision on qualified immunity "transforms the doctrine into an absolute shield for law enforcement officers."[83]

In his thought piece, *The Cloak of "Fear,"* then-*Slate* writer and now New York Times columnist Jamelle Bouie uses notable police killings, such as the ones discussed above, to show that officers' use of the fear justification has become a norm, saying, "Jeronimo Yanez's fear, like Timothy Loehmann's fear and Randall Kerrick's fear, reflects a tradition of fear, a custom of fear, a praxis

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[77] *See id.*
[78] *Id.* (Sotomayor & Ginsburg, JJ., dissenting).
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *Id.*

of fear. . . . To have accountability, you first need a violation—something to hold to account."[84]

However, some attorneys argue that the tide of using the fear justification is shifting. "The default position used to be, let's say 15, 20, 25 years ago, that the suspect must have done something that initiated the lethal force," they claim. "Now, the default position is 'why did that police officer use lethal force?' And if it's a racial disparity between the officer and a suspect, it's even getting a closer look."[85]

Despite such counter arguments and additional concerns, the fact still stands that in *Graham*, the Court found that "[b]ecause "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application, its proper application requires careful attention to the facts and circumstances of each particular case . . . ."[86] As suggested by the police killings discussed above in this section, courts are not currently giving the Fourth Amendment's objective reasonableness test the "careful attention" it requires in "each particular case." My proposal in Section V will address this issue.

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[84] Bouie, *supra* note 62 (Bouie also analyzes individuals' cognitive ties between blacks and criminality, writing "Among white Americans there is a strong cognitive connection between black people and crime. 'The mere presence of a black man,' note a team of researchers in a 2004 paper, 'can trigger thoughts that he is violent and criminal.' The reverse is also true: The connection between blacks and crime is so tight that just thinking about crime—irrespective of environment—triggers thoughts of black people. Measures like 'stop and frisk' have little utility in crime prevention but succeed as ways to maintain the social boundary around black Americans, against whom they're most used. On the other side, police departments in places like New Orleans and Newark, New Jersey—with high rates of violent crime among black residents—solve just a small percentage of homicides in their cities. The same goes for practices like the investigatory stop, where drivers are detained for minor violations—driving slowly, malfunctioning lights, failure to signal—which are used as pretext to investigate the driver and vehicle (both [Philando] Castile and [Walter] Scott were stopped for this reason). These stops, as researchers Charles Epp, Steven Maynard-Moody, and Donald Haider-Markel describe in *Pulled Over: How Police Stops Define Race and Citizenship*, largely target black people, particularly those driving in white neighborhoods, representing the literal enforcement of boundaries.").

[85] Kaste, *supra* note 59.

[86] Graham v. Connor, 490 U.S. 386, 396 (1989) (quoting Bell v. Wolfish, 441 U. S. 520, 441 U. S. 559 (1979)) (internal citations omitted).

B. The Fourteenth Amendment's "Shocks the Conscience" Test for Substantive Due Process Violations Does Not Protect The Abused

The "shocks the conscience" standard is an inadequate measure of culpability. Significant problems with the standard support this claim. The standard is sometimes applied in cases where pre-trial (post-arrest) detainees claim violations of their substantive due process right under the Fifth and Fourteenth Amendments. In these and other contexts, some have argued that the standard is "historically untenable," "rests on shaky precedent," is "unfounded and exaggerated," and has created circuit splits.[87] Others have said it makes it "virtually impossible" for § 1983 plaintiffs to succeed in civil rights cases.[88] Joining these critiques, this section will examine these issues.

1. Section 1983 Plaintiffs Cannot Meet the Standard's High Bar

The "shocks the conscience" standard is too high a bar for plaintiffs in § 1983 cases to overcome. One refrain that scholars rely on is the Court's statement in *Lewis* that "[d]eliberate indifference that shocks in one environment may not be so patently egregious in another."[89] Courts have begun to find that when government officials must balance competing legitimate interests—regardless of whether they have time to deliberate—they apply the "shocks the conscience" standard, some scholars argue.[90] As a result of this newfound reliance, they believe courts must now analyze the specific circumstances of each case more carefully before they find that conduct meets the "shocks the conscience" standard.[91] In this

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[87] Rosalie Berger Levinson, *Time to Bury the Shocks the Conscience Test*, 13 Chap. L. Rev. 307, 308 & 335 (2010).

[88] Sheldon Nahmod, What Does It Take to "Shock the Conscience" in the Classroom?, NAHMOD LAW (July 6, 2016, 2:30 PM), https://nahmodlaw.com/2016/07/06/what-does-it-take-to-shock-the-conscience-in-the-classroom/.

[89] County of Sacramento v. Lewis, 523 U.S. 833, 850 (1998).

[90] S*ee* Levinson, *supra* note 87.

[91] *See id.*; *see, e.g.*, Matican v. City of New York, 524 F.3d 151 (2d Cir. 2008) (finding that officers who disclosed the identity of a confidential informant to a drug dealer had "ample opportunity" to plan the drug sting "in advance" but still ruled in officers' favor due to officers' "pull of competing obligations").

sense, whether or not an official had time to deliberate is no longer the dispositive factor; rather, the court balances the opportunity to deliberate with the pull of "competing, legitimate interests."[92]

One case in particular, *Domingo v. Kowalski*,[93] evidences the fact that some courts have begun applying the heightened "shocks the conscience" standard to a broader array of circumstances. In *Domingo*, three special-education students and their parents sued a special-education teacher for allegedly violating the students' Fourteenth Amendment substantive due process rights. The plaintiffs claimed that the teacher had "gagg[ed] one student with a bandana to stop him from spitting, strapp[ed] another to a toilet . . . , and forc[ed] yet another to sit . . . on a training toilet" with her pants pulled down in front of the entire class in order to help with the student's potty training.[94] The Sixth Circuit affirmed the district court's grant of summary judgment for the teacher and held that (1) while the teacher's conduct was perhaps "inappropriate, insensitive, and even tortious,"[95] it was not egregious enough to shock the conscience, thereby not violating the students' substantive due process rights; and (2) since there was no substantive due process violation, the teacher's supervisors had no supervisory liability under *Monell v. Department of Social Services of City of New York*.[96] There was one concurrence and one dissent.

In reaching its holding, the court applied the same four-part test that the Third Circuit had applied in *Gottlieb v. Laurel Highlands School District*[97] in 2001: "a) Was there a pedagogical justification for the use of force?; b) Was the force utilized excessive to meet the legitimate objective in this situation?; c) Was the force applied in a good-faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm?; and d) Was there a serious injury?"[98] Some have considered the test's third prong ("Was the force applied in a good-faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm"?) and argued that the Sixth Circuit applied the "shocks the conscience" standard, a standard, again,

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[92] S*ee* Levinson, *supra* note 87, at 327.
[93] 810 F.3d 403 (6th Cir. 2016).
[94] *Id.* at 406.
[95] *Id.* at 416.
[96] 436 U.S. 658 (1978).
[97] 272 F.3d 168 (3rd Cir. 2001).
[98] *Domingo*, 810 F.3d at 411.

reserved for non-deliberative instances such as prison security cases[99] and high-speed police chases[100] to deliberative conduct.[101] Simply put, the court imposed a standard that protects split-second decisions to an instance where the decision was not so. It applied the standard to a non-emergency classroom environment where minors were within the school's controlled environment and in a particularly vulnerable position under the teacher's supervision—a setting more akin to Eighth Amendment prison conditions cases, which call for deliberate indifference, than Eighth Amendment prison security cases that call for a higher bar. With the heightened bar applied in *Domingo*, the Sixth Circuit made it easier for some individuals to avoid accountability under § 1983 and, instead, be immunized from meaningful judicial review. However, this is not to say that a subjective intent standard (rather than the objective standard of "shocks the conscience") with a lower bar, such as deliberate indifference, is the answer.

Although the *Lewis* court left the door open for "deliberate indifference" to govern in non-emergency cases, even applying deliberate indifference's lower, subjective bar across the board to all substantive due process claims under § 1983 would still cause a problem. To explain, the *Lewis* Court analogized to a showing of deliberate indifference in Eighth Amendment prison condition cases and pre-trial detention standards, saying:

> To recognize a substantive due process violation in . . . circumstances [where officers have a make a decision on an occasion calling for fast action] when only midlevel fault has been shown would be to forget that liability for deliberate indifference to inmate welfare rests upon the luxury enjoyed by prison officials of having time to make unhurried judgments, upon the chance for repeated reflection, largely uncomplicated by the pulls of competing obligations. When such extended opportunities to do better are teamed with protracted failure even to care, indifference is truly shocking. But when unforeseen circumstances demand an officer's instant judgment, even precipitate recklessness fails to inch close

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[99] *See* Wilson v. Seiter, 501 U.S. 294 (1991).
[100] *See* County of Sacramento v. Lewis, 523 U.S. 833 (1998).
[101] S*ee* Nahmod, *supra* note 88.

> enough to harmful purpose to spark the shock that implicates "the large concerns of the governors and the governed." *Daniels v. Williams,* 474 U.S., at 332. Just as a purpose to cause harm is needed for Eighth Amendment liability in a riot case, so it ought to be needed for due process liability in a pursuit case.[102]

The Court sought to support their holding in *Lewis* by analogizing to Eighth Amendment prison conditions cases and differentiating the instant case from Eighth Amendment deliberate indifference. However, one problem with their analogy is that the deliberate indifference standard is itself flawed—which the next section will explain—because its requirement that prison staff have actual knowledge of prisoners' harm can, too, be difficult to overcome and is not based on science.

Additionally, as mentioned above, the substantive due process standard given in the Supreme Court case *Kingsley v. Hendrickson*,[103] may eventually displace "shocks the conscience." The *Kingsley* rule is a more straightforward test that could help to resolve some of the problems that § 1983 plaintiffs face with overcoming "shocks the conscience's" high bar.[104] My proposal for the "shocks the conscience" standard (which is, that courts adopt *Kingsley's* rule in place of the "shocks the conscience" standard) discussed below in Section V reflects this hope.

C. The Eighth Amendment's Deliberate Indifference Standard Dehumanizes Prisoners Who Face Insurmountable Hurdles and Does Not Capture Psychological Findings

The deliberate indifference standard is flawed at its base. Some contend that state-of-mind inquiries are problematic, in part, because they are irrelevant in cases involving forward-looking injunctive relief.[105] Others argue that the standard is "confusing, inconsistent, and ultimately lacks a sound theoretical basis,"

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[102] Lewis, 523 U.S. at 852–54.

[103] 576 U.S.___, 135 S. Ct. 2466 (2015).

[104] E-mail from Scott Michelman, Harvard Law School Civil Rights Litigation Professor and ACLU Senior Attorney, to author (May 6, 2018, 18:49 EDT) (on file with author).

[105] *See* Reinert, *supra* note 9, at 200.

preventing it from "serving its intended purpose,"[106] and still others believe problems stem from courts parsing the term "punishment."[107] I join these critiques and discuss them below, but there is another problem that has not yet been addressed in scholarship: The deliberate indifference standard—a subjective intent standard—does not align with what we know about human psychology. What relevance should contemporary understandings of human behavior have on legal standards of intent, particularly the Eighth Amendment standard of deliberate indifference? The end of this subsection and the next section—section IV—in its entirety address this problem for the first time. Section V will propose a solution.

1. The Deliberate Indifference Standard Denies Prisoners' Personhood

The deliberate indifference standard in prison conditions cases focuses on prison officials' intent rather than prisoners' harm. The standard "denie[s] interiority" to the prisoners harmed, argues Colin Dayan of Vanderbilt Law School.[108] In effect, the standard strips their suffering of meaning. Dean Spade, who reviewed Dayan's work, used a hypothetical to further explain Dayan's argument, writing, "If a prison official can invent an administrative reason that [the prisoners] were subjected to conditions common in American prisons, such as rape, medical negligence, nutritional deprivation, and brutal physical assault, then the cruelty will not be recognized by courts."[109] Dayan's argument shows that the deliberate indifference standard distinguishes degrees of personhood, "between those capable of intent and the presumed unthinking recipients of punishment."[110]

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[106] Glidden, *supra* note 7.

[107] Ristroph, *supra* note 11, at 167.

[108] COLIN DAYAN, THE LAW IS A WHITE DOG: HOW LEGAL RITUALS MAKE AND UNMAKE PERSONS 181 (2011).

[109] Dean Spade, *Colin Dayan, the Law Is A White Dog: How Legal Rituals Make and Unmake Persons*, 63 J. Legal Educ. 161, 165–66 (2013).

[110] Dayan, *supra* note 108, at 191.

2. The Actual Knowledge Requirement Is Practically Insurmountable

The deliberate indifference standard's requirement that prison staff have actual knowledge of prisoners' harm is difficult to overcome. To explain, the actual knowledge requirement can be satisfied by the prisoner informing the staff of his or her harm,[111] or it can be inferred.[112] The first option—informing prison staff—can be problematic because many inmates do not want to tell staff about their danger out of fear of being labeled a snitch, which could put them in even greater harm.[113] Two instances illustrate this point. In Carl Weiss and David James Friar's *Terror in the Prisons*,[114] they tell the story of an inmate named Green who had been raped. Green was told that prison staff would not help him and would send him back to the cell where he had been raped if he did not give them his rapist's name. In the hospital and scared for his life, Green agonized over whether or not to tell. Ultimately, he decided not to because he knew what would happen to him if he did.[115] In a second example, we can find the story of a prisoner whom inmates thought had snitched on them in the case *McGill v. Duckworth*.[116] There, a prisoner raped McGill after he thought McGill had told guards about threats he had received. He had not. The Seventh Circuit held for the defendants, finding that "[o]ther circuits have held that failure to tell prison officials about threats is fatal and have dismissed such claims at the pleading stage."[117] Both of these examples show that inmates informing prison staff of harms they face could further endanger them, but, as we see in *McGill*, not informing staff could defeat the plaintiff's case.

On its face, the second way of proving actual knowledge—that is, through inferential evidence—seems to lower the high bar set by *McGill*. In *Farmer*, the Court said that knowledge could be inferred when (1) "all prisoners . . . or those inmates similarly situated face such a risk" and (2) the risk is "long-standing, pervasive, well-documented, or expressly noted by prison officials

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[111] *See* McGill v. Duckworth, 944 F.2d 344 (7th Cir. 1991).

[112] *See* Farmer, 511 U.S. 825, 837–38 (1994).

[113] *See* Robertson, *supra* note 46, at 39.

[114] *See* CARL WEISS AND DAVID JAMES FRIAR, TERROR IN THE PRISONS: HOMOSEXUAL RAPE AND WHY SOCIETY CONDONES IT 5 (1974).

[115] *See id.*

[116] 944 F.2d 344 (7th Cir. 1991).

[117] *Id.* at 349-50.

in the past."[118] In *Cruel and Unusual Punishment in United States Prisons*, Robertson discusses the information that can help prove an inference of harm. He first notes that at least since 1968 when a study about sexual victimization in Philadelphia's jails was widely publicized, prison staff have known that prisoners who are at risk of harm tend to share some characteristics: they tend to be non-Hispanic whites, slightly built, and/or homosexual.[119] He then provides compelling statistics that show the frequency of inmate-on-inmate violence and demonstrate that such violence can be well documented.[120] Moreover, Robertson mentions interviews that suggest prison staff was familiar with inmate-on-inmate violence.[121] He then goes on to cite surveys that reflect the staff's belief that such violence is occurring in their prisons. He writes:

> Eigenberg's survey of 166 Texas correctional officers revealed that eighty-six percent of them "disagreed" or "strongly disagreed" that prison rape is rare. . . . The officers were most likely to believe young inmates and inmates owing debts who reported being raped. Eigenberg found that a smaller majority of officers were willing to believe homosexuals.
>
> Finally, Lockwood provided the most conclusive proof of staff's familiarity with sexual harassment. He determined that they knew of two-thirds of the sexual incidents experienced by targeted inmates.[122]

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[118] Farmer, 511 U.S. 825, 842-43 (1994).

[119] Robertson, *supra* note 46, at 39.

[120] *See id.* at 40 ("Twenty-eight percent of the inmates in the Lockwood study and twenty-nine percent of the inmates in the Nacci and Kane study experienced some form of sexual victimization. In addition, seventy-one percent of non-Hispanic white inmates and fifty-three percent of homosexuals were sexually targeted. Also recall that over half the targeted inmates interviewed by Lockwood feared for their safety (and wisely so, given the frequency of violence arising from sexual overtures.")).

[121] *See id.* ("Wooden and Parker found that correctional officers agreed with the following: (1) 'forced or pressured sexual encounters are very common;' (2) 'homosexual inmates have a more difficult time than heterosexual inmates, due to [sexual] pressure . . .;' and (3) 'it is a very common occurrence for young, straight boys to be turned out, or forced into being punks.'").

[122] *Id.* at 40–41.

However, in showing how actual knowledge can be proven under *Farmer's* inferential standards, Robertson's argument also shows how actual knowledge can be undermined: staff's beliefs.

To explain through a hypothetical, if a guard believes that a gay prisoner cannot be raped by another man because he is naturally attracted to men, a victim could tell the guard that he was raped but the guard would not have "actual knowledge" of the incident because he does not believe it can happen. Remember, *Farmer* said that knowledge can be inferred if (1) "all prisoners . . . or those inmates similarly situated face such a risk" *and* (2) the risk is "long-standing, pervasive, well-documented, or expressly noted by prison officials in the past."[123] If two inmates are raped soon after arriving at a relatively new prison and staff do not document it or if they do not believe them, those prisoners' Eighth Amendment claims can be defeated. Therefore, although the Court in *Farmer* said that guards cannot use the actual knowledge requirement to hide behind ignorance, it does allow them to hide behind implicit bias. The recent findings of the United States Commission on Civil Rights in their report *Women in Prison: Seeking Justice Behind Bars*, offer further support. Recounting statements made at their briefing on women in prison, they write,

> Cardozo Law Professor, Betsy Ginsberg testified she is concerned the subjective standard is too deferential to defendants, stating, "[t]he subjective standard also allows courts to pay tremendous deference to prison officials, often characterizing a prisoner's Eighth Amendment claim as a disagreement with medical staff that doesn't rise to the level of deliberate indifference." Professor Ginsberg testified that "the Eighth Amendment standard places a heavy burden on prisoners to show that prison officials had the requisite intent. This standard allows and even encourages prison officials to remain ignorant of health risks." Additionally, the litigation required to secure a remedy is costly, time consuming, and oftentimes out of reach for women in prison because they do not have the resources to hire an attorney. . . . [T]he Eighth Amendment standard can at times

[123] Farmer, 511 U.S. at 842-43.

become more of a legal barrier that prevents women in prison from receiving adequate care.[124]

3. The Standard Does Not Align With Human Psychology

Deliberate indifference does not accurately reflect scientific findings on human behavior. Indeed, if a constitutional standard is based on intent, then analysis of that intent should be based on psychology. Our current constitutional intent standards are not. My proposal for prison conditions cases in Section V will directly address this issue with deliberate indifference. However, before moving to that discussion, the section immediately below, Section IV, will examine one of the biggest problems with the deliberate indifference test and one that my proposal seeks to remedy, namely that deliberate indifference's subjective intent prong does not accurately reflect psychologists and social scientists' findings on human behavior.

IV. The Realities of Human Behavior

I argued immediately above that the deliberate indifference standard does not align with human psychology. This Article's proposal for reforming the standard targets this specific problem. In order to understand that proposal, it is important to know the history of the standard, which I discussed in section II; what psychological studies state; and how the standard clashes with those studies. I cover the last two topics in this section. Here, I explain behavioral scientists' relevant findings on human behavior as it relates to implicit and systemic bias. This section applies only to subjective intent standards, such as deliberate indifference, rather than objective tests, like Fourth and Fourteenth Amendments excessive force. However, the findings are so relevant that they deserve their own section. The first subsection below discusses implicit bias. Systemic bias immediately follows.

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[124] USCCR, *Women in Prison: Seeking Justice Behind Bars*, February 2020, at 43.

A. Implicit Bias Influences Human Behavior

1. — Psychological and social-science evidence suggests that many rights violations stem from pervasive, implicit bias. In this sense, state-of-mind standards fail to address such non-purposeful influences on discriminatory behavior.[125] Indeed, the Implicit Associations Test (IAT) proves unconscious bias.[126] Developed in 1994 by Yale and University of Washington researchers, the IAT

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[125] *See* Robert Nelson et al., *Divergent Paths: Conflicting Conceptions of Employment Discrimination in Law and the Social Sciences*, 4 ANN. REV. L. & SOC. SCI. 103, 107 (2008). In their piece, *Divergent Paths: Conflicting Conceptions of Employment Discrimination in Law and the Social Sciences*, Robert L. Nelson, Ellen C. Berrey, and Laura Beth Nielsen discuss employment law, but the behavioral findings they discuss are applicable in other litigation contexts because they are based on general human behavior, not simply behavior specific to employers and employment-related structures. They write,

> "Legal scholars and civil rights advocates have challenged *Washington v. Davis* (1976) and the notion of purposeful intent for relying on a motive-based doctrine of discrimination, which is difficult or impossible to prove, and for failing to recognize that racial injury could occur absent perpetrators with intent to discriminate. Social scientific research and theory supports these criticisms by demonstrating that the notion of purposeful intent does not accurately describe how people act or think. This notion assumes that individuals act (and discriminate) rationally and instrumentally and in isolation from their social, institutional, and organizational contexts."

> "Social scientific research shows that people often do not base their decision-making processes on a calculated interest, such as withholding a resource from people of color, or on internalized values, such as prejudice against older workers. Likewise, people frequently make decisions without any specific reference to race, gender, or another protected status. Yet human behavior often produces discriminatory effects. More subtle but systemic organizational and institutional behaviors and the unexplained beliefs held by organizational participants can produce discriminatory outcomes, regardless of an individual's intentions or deeply held prejudices."

Nelson et al. continue, arguing, "the legal standard of purposeful intent fails to account for . . . other institutional influences on people's behaviors."

[126] *See* Charles Lawrence III, *Unconscious Racism Revisited: Reflections on the Impact and Origins of "The Id, the Ego, and Equal Protection,"* 40 CONN. L. REV. 931, 956-57 (2008).

tests which associations come most easily to the mind in order to measure implicit bias. Renowned legal scholar and law professor Charles Lawrence explained the test in his article, *Unconscious Racism Revisited*, writing,

> When you visit the IAT web site, you are asked to classify a series of faces into two categories, African American and European American. You must then mentally associate the white and black faces with words such as "joy" and "failure." You must take the test under considerable time pressure using your computer keys to respond to the pairings. If you take the test too slowly the web site indicates that you have defaulted and must begin the test again. These tests have been taken by more than two million people. An analysis of tens of thousands of these tests taken anonymously on the Harvard web site found that eighty-eight percent of white people had a pro-white or anti-black implicit bias; nearly eighty-three percent of heterosexuals showed implicit bias for straight people over gays and lesbians; and more than two-thirds of non-Arab, non-Muslim testers displayed implicit biases against Arab Muslims.[127]

Additionally, a separate IAT conducted in 2019 titled "Bias in Video Evidence: Implications for Police Body Cameras," found that individuals' implicit bias even influences supposedly objective evidence, such as police body cameras. The authors came to six conclusions, four of which are relevant here.

i. — "*IAT Influences Citizen Perception.* . . . [Participants] with implicit prejudice toward Black individuals were less likely to endorse facts in the video in favor of the Black citizen, made negative subjective assumptions about the Black citizen's actions, and identified the citizen as having less positive character traits."[128]

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[127] *Id.*

[128] Ashley Kalle & Georgina Hammock, *Bias in Video Evidence: Implications for Police Body Cameras*, 15(2) APPL. PSYCHOL. CRIM. JUST. 118, 127 (2019).

ii. — "*IAT Influences Police Perception. . . .* [T]hose favoring White individuals over Black individuals on the IAT were more likely to endorse facts in the video in favor of the police officer, interpret the officer's behaviors as appropriate and reasonable, consider the police officer to have positive character traits, and determine that the police officer was not guilty of using excessive force."[129]

iii. — "*Video Focus Influences Citizen Perception*." In instances where study participants watched body camera footage that focused on the citizen only (as opposed to footage that captured both the officer(s) and the citizen on camera), "[participants] made more negative evaluations about the citizen's actions."[130]

iv. — "*Video Focus Influences Police Perception."* . . . *"*[P]articipants focusing on the citizen only during the video [made] more favorable . . . subjective, character, and guilt judgements of the police officer."[131]

What is more, we can see the problems with deliberate indifference by examining the foundation of disparate treatment. Title VII's construction resulted from "the assumption that disparate treatment discrimination, whether conscious or unconscious, is primarily motivational, rather than cognitive, in origin."[132] Going on to explain a flaw in Title VII jurisprudence, which is also present in the deliberate indifference standard, legal expert and law professor Linda Hamilton Krieger says that "while sufficient to address deliberate discrimination . . . [Title VII's construction] is inadequate to address the subtle, often unconscious forms of bias that Title VII was also intended to remedy."[133] Charles Lawrence sums up Krieger's finding, stating, "[She] identifies the law's failure as a misunderstanding of the psychological process that produces bias: The law thinks that discriminatory treatment is caused by

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[129] *Id.* at 129.

[130] *Id.* at 131.

[131] *Id.*

[132] Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164 n.11 (1995).

[133] *Id.*

biased motivation when, in fact, the origin of discriminatory bias is primarily cognitive—the product of the process of categorization."[134] Just as discriminatory bias is not captured in Title VII, neither is it captured in the subjective deliberate indifference standard. Both standards stem from assumptions on intent. This helps to show that the deliberate indifference standard is inaccurate because it asks plaintiffs to prove unconscious bias.

Krieger, like other behavioral scientists, also discusses how unconscious bias arises in the mind's categorization process, occurring in a part of the brain responsible for reaction rather than reason.[135] However, in his article, Lawrence critiques these findings on implicit bias by noting how they "normalize" racial discrimination and provide a scapegoat for individuals who want to escape accountability for their racial bias.[136] In his critique,

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[134] Lawrence, *supra* note 126, at 963-64.

[135] *Id.* at 960 ("The cognitive behavioral research begins with the goal of understanding and demonstrating the source of bias in individuals. The theory that informs this research posits an implicit system or 'primitive' part of the brain designed for reaction rather than reason. This system specializes in mental shortcuts. Bias or stereotype occurs because the brain works by placing information into categories. We make stereotyped assumptions about others—good or bad—because categories that correspond to those stereotypes are created in this primitive part of our brain and those categories are available as a place to sort our perceptions. People revert to the shortcuts of the implicit system of categorization because this is the way our brain processes information. The theoretical claim made by cognitive social psychologists is that stereotypes should be understood as no different from other categorization constructs. Our biases and prejudices result from the same process of categorization, assimilation, and search for coherence that underlies all human cognition.

The point of this research was to understand the process of categorization. What cognition theory and the implicit bias experiments have taught us about the content of those categories is an important by- product of this enterprise, but incidental to the project's thesis and purpose. Cognitive behavior theory describes categorization as a consequence of the natural way that each of us processes information. Implicit bias is biological, normal, automatic, an inevitable product of the workings of an individual's brain. Cognitive theory sees stereotyping as 'simply a form of categorization, similar in structure and function to the categorization of natural objects. . . . [S]tereotypes, like other categorical structures, are cognitive mechanisms that all people, not just 'prejudiced' ones, use to simplify the task of perceiving . . . .'").

[136] *Id.* at 961 ("By focusing on the process of categorization, we normalize bias and make the content of white supremacy and the origins of that content irrelevant to the analysis. When the process of categorization, rather than the content of the categories, is our central concern, we turn our attention away from questions like, 'Why is racism so ubiquitous in these categories?' 'Why do we form categories that violate the value of human equality?' and 'Why we should

Lawrence distinguishes his aims from those of behavioral scientists, stating,

> Cognitive theory's view of unconscious racism and the perspective that inspires my cultural meaning test . . . differ in an important way. When cognitive theorists call racial bias normal, they refer to the normalcy of categorization—the fact that we all categorize as a way of making sense of the world. When I say that racism is normal, I refer to the ubiquity of racism—to the fact that our categories are filled with a specific content: the ideology of white supremacy.[137]

In speaking to the ubiquity of racism here, Lawrence denotes the existence not only of implicit bias but of systemic bias, as well. Yet, while the following section will address the substance of Lawrence's statement, the fact of the matter at this point is that the deliberate indifference standard, based on reckless intent,[138] does not capture implicit or systemic bias. This, again, shows that the test is inadequate and inaccurate.

2. — Jerry Kang and Mahzarin R. Banaji's cognitive research has shown that "implicit bias against African Americans and Arabs predicts policy preferences on affirmative action and racial profiling."[139] As Lawrence notes in *Unconscious Racism Revisited*,

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assume collective responsibility for correcting the consequences?' The bias in favor of whites is a prejudice like any other preference, the natural product of categorization. This description of the origin of bias suggests an inevitability—'We can't help it, we always categorize,' devolves easily back to, 'It's not our fault.'").

[137] *Id.*

[138] E-mail from Scott Michelman, Harvard Law School Civil Rights Litigation Professor and ACLU Senior Attorney, to author (May 6, 2018, 18:49 EDT) (on file with author).

[139] Lawrence, *supra* note 126, at 957 (citing Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action,"* 94 CAL. L. REV. 1063, 1065–66 (2006) (stating that the presence of implicit bias creates discrimination by causing merit to be mismeasured); *see also* Shankar Vedantam, *See No Bias*, WASH. POST, Jan. 23, 2005, at W12 (explaining that "bias against blacks and Arabs predicts policy preferences on affirmative action and racial profiling") (available at LEXIS, News Library, WPOST File); *see* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to*

these findings suggest that unconscious bias is not limited to split-second decisions like those on the IAT. They also affect well-thought-out considerations.[140] This is particularly important for prison conditions cases because it shows that prison officials and policy makers' decisions can be riddled with bias, even when there is time to deliberate. It also suggests that deliberation is not the dispositive factor for gauging intent, which suggests that the deliberate indifference standard is based on an inaccurate assumption. Indeed, Dr. Péter Cserne, Robert Nelson, and others have found that intent standards are based on assumptions about human nature rather than human nature itself. For example, a common assumption in mainstream economic theory is that consumers and firms are "self-interested"—an assumption which, again, data contradicts.[141]

3. — People's rationality and selfishness are limited, and humans do not even have the capacity to process the information required to make prudent and logical decisions that would benefit or satisfy them at all times.[142] These facts support the claim that

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Discrimination and Equal Employment Opportunity, 47 STAN. L. REV. 1161, 1169–70, 1173, 1177, 1181–82, 1200–01, 1210 (1995)).

[140] *See id.*

[141] *See* Péter Cserne, *Facts and norms in the behavioural assumptions of law*, *in* FACTS & NORMS IN LAW 100, 111-13 (Sanne Taekema et al. eds., 2016) ("It seems uncontroversial that the law makes, or is based on, such assumptions, especially about human behaviour."); *see also* Nelson, *Divergent Paths: Conflicting Conceptions of Employment Discrimination in Law and the Social Sciences*, 4 ANN. REV. L. & SOC. SCI. 103, 108 (2008) ("Absent a finding that employers purposefully created barriers to advancement for women and racial minorities, courts have assumed that women prefer low-paying jobs to protect their feminine identity whereas racial minorities favor such jobs because they do not require discipline and motivation (the lack-of-interest defense in *EEOC v. Sears, Roebuck & Co.* 1986. These assumptions rely on romanticizing and demeaning stereotypes. They suppose that women and people of color form their views of work in private, independent of their participation in the labor market and of their employers' actions.").

[142] *See* Cserne, *supra* note 141, at 102. Dr. Péter Cserne, a lecturer at the University of Hull Law School in the UK, summarizes these findings, writing,

"In the past few decades, psychological and neuro-scientific research has produced an extensive body of empirical findings on human decision- making, both in general and in legal contexts. To simplify, the gist of the findings is that, compared to the rational utility maximizer of mainstream economic models, individuals are boundedly rational and boundedly selfish. People exhibit limited cognitive abilities and attention, and incomplete self-control. Human behaviour is often characterized by loss aversion, by the endowment effect and by framing

implicit bias influences decision-making, and they refute the deliberate indifference model because they suggest that not all actions result from conscious reason or self-interestedness. Indeed, they cannot. However, the deliberate indifference intent standard requires that plaintiffs prove an intention, which data shows is not always present. In this way, the standard is difficult to overcome.

B. Systemic Bias Influences Organizational Behavior

1. — Social-science evidence suggests that organizations' structural mechanisms enhance bias.[143] Further, because courts have shifted from analyzing civil rights claims within a systemic model (e.g., the model in *Brown v. Board of Education of Topeka*[144]) to analyzing them within an individual perpetrator model (e.g., *McCleskey v. Kemp*[145]), legal doctrine has become more narrowed and intent-focused, limiting the law's remedial reach.[146] In turn, it has become more difficult for the system to exact justice.[147] The deliberate indifference standard, based on individual

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effects. By using mental short cuts or heuristics, individuals cope with complex decision- making situations reasonably well, while optimization in the sense of rational choice theory would require an amount of information and a capacity of information processing that are well beyond what real human agents can possess. This is, of course, a very condensed and simplified version of what has become an immense body of empirical knowledge on human judgement and decision-making. This knowledge is in part systematized, in part theorized, under various, partially overlapping headings such as behavioural decision theory, cognitive psychology, theories of bounded rationality, behavioural economics, and adaptive rationality.

Note that this body of empirical research on human judgement and decision-making has been produced with or without possible policy impact in the researchers' mind. But the findings are available to, and have been used by, policymakers and legal decision-makers. In fact, it stands to reason to take this knowledge into account in regulatory design. As we know more and more about how people behave, including how they respond to regulatory policies, it seems increasingly relevant whether the assumptions policymakers have about human behaviour are compatible with these behavioural insights. It seems highly desirable, if not indispensable, for a responsible legislator to know whether a certain regulation is compatible with empirical insights."

[143] Lawrence, *supra* note 126, at 961.

[144] 347 U.S. 483 (1954).

[145] 481 U.S. 279 (1987).

[146] *See* Nelson, *supra* note 125, at 104.

[147] *Id.*

intent, fails to capture this bias, and in so doing, it creates a hole through which defendants can escape liability.

2. — Legal actors commonly make decisions in nonintentional ways, following complex scripts and well-worn paths, states Berkeley Law Professor Ian Haney Lopéz—one of the nation's leading voices on how discrimination has evolved in America since the civil rights era.[148] Such decisions are institutional bias. Similar to the finding immediately above, Lopéz contends that intent standards, such as deliberate indifference, do not account for such bias and the impacts that other institutional structures have on people's behavior.[149]

3. — Courts generalize from assumptions about human nature (mentioned in the second bullet under the Implicit Bias subsection, above) and make idealized assumptions about the administrative structures they create. For example, courts assume that prisons' internal administrative mechanisms, such as some steps in prisoners' exhaustion requirements, are functioning and just, despite the fact that some of the requirements are administrative, lacking the force of law, and are overseen by administrative agents rather than officers of the court.[150] How can an administrative step be just and functioning if it has no legal enforcement power and is overseen by someone who also lacks that power? This is an example of an idealized assumption about an administrative structure.

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[148] *See* Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717, 1721-1730, 1806-1825 (1999).

[149] *Id.*

[150] *See* Nelson, *supra* note 125, at 113 ("This research also finds that the courts have begun to assign legal significance to certain employer policies in discrimination cases. This process, in which courts and organizational personnel practices are mutually constituted, is referred to as legal endogeneity. It reverses the usual posture of courts with respect to employers in the field of antidiscrimination law. Rather than courts serving as a corrective to employing organizations when their policies stray from legal requirements, the courts' rulings on law have been influenced by the compliance structures that employers have developed within an organizational field. Examples include the deference that courts have begun to show to the internal grievance procedures of employers in sexual harassment, racial harassment, and constructive discharge cases. The endogeneity perspective calls attention to the fact that the courts are making empirical assumptions about how the internal legal structures of organizations operate.").

V. Proposed New Standards

The problems with these constitutional standards are so severe that new standards are in order. Accordingly, this section will propose new tests. It will begin with a proposal for Fourth Amendment excessive force, followed by Fourteenth Amendment excessive force. It will end by proposing a new gauge of culpability for Eighth Amendment deliberate indifference in prison conditions cases.

A. The Test for Fourth Amendment Excessive Force Should Parallel the Test for Batson *Violations*

Officers abuse the fear justification. To help make the standard fairer to plaintiffs and officers, I propose a solution that would curb its misuse: Officers' justifications for using excessive force should be subject to a test analogous to that of *Batson* violations. The North Carolina Court System's Office of Indigent Defense Services provides a useful summary of the steps necessary to prove a Batson violation during voir dire. They write:

> *Batson* Three-Step [test]:
>
> Step 1: [The] [d]efense (objecting party) shows Prima Facie case of discriminatory use of peremptory strikes.
>
> a. Use evidence outside the trial record [to prove the] State's discrimination.
> b. Use evidence in the voir dire, including, side-by-side comparisons of jurors struck and accepted, disparate questioning (in number or type), shared race of [the] client and jurors, racially prejudicial treatment of jurors, [peremptory strikes] used on prosecution-friendly jurors, and [the] State's injection of race into other parts of trial.
> c. *Important:* Step 1 becomes moot if the prosecutor skips to Step 2 and gives a reason for strikes.

> Step 2: [The] [p]rosecutor (opposing party) must provide race-neutral reason[(s)] for challenged strike(s).
>
> a. Make the prosecutor explain by saying more than "race was not a factor."
> b. Implausible reasons [do] suffice if [they are] race-neutral .
>
> Step 3: [The] [d]efense (objecting party) has [the] burden of demonstrating intentional discrimination.
>
> a. Use [the] same evidence [from] Step 1.
> b. Implausible and incredible reasons do not suffice.
> c. Use side-by-side comparisons (this time based on [the] prosecutor's purported reasons for [the] strike) to show a pretext for discrimination.
> d. Bring in evidence concerning [the prosecutor's] credibility.[151]

Analogously, there should be a test to determine whether officers' justifications for using excessive force are pretextual. The test would help to resolve cases where there are conflicting accounts and the facts are less conclusive. Specifically, that test should be:

1. The plaintiff (objecting party) shows a Prima Facie case of pretextual use of excessive force justifications.

   Here, the plaintiff can use evidence outside the trial record to prove the defendant's pretextual use. For example, whether the officer has a history of using excessive force, has disciplinary sanctions on his record, or credibility issues. If the officer had a partner who did not resort to excessive

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[151] Brian W. Stull & Sonya Allen, Batson Cheat Sheet, N.C. Off. Indigent Serv., http://www.ncids.org/Defender%20Training/2008%20Fall%20Conference/BatsonCheatSheet.pdf (last visited Mar. 24, 2020).

force in the events at issue, plaintiffs can use this fact to help prove that a reasonable officer would not have used excessive force in that situation. Circumstantial evidence *in* the trial record should also be considered, such as whether the victim was resisting arrest, fleeing, or being compliant. The race of the victim and the officer may also be a relevant factor.

2. The defendant (opposing party) must provide reasons for his challenged behavior beyond claiming a fear for his life or the life of another.

3. The plaintiff (objecting party) has [the] burden of demonstrating pretextualism. Here, the plaintiff should use the same type of evidence used in step 1.

This test is not meant to complicate easier cases—those where there is an intentional violation of someone's rights. Instead, this test would come into play for the most "difficult" cases—those where the officer has a claim that he thought his life was in danger, such as the killing of Walter Scott. In that situation, Mr. Scott, unarmed, was running away from an officer, and there is no evidence that Mr. Scott had committed any kind of violent felony. Yet, the officer shot him—a clear use of deadly force. This proposal could also be used in cases such as Daniel Shaver's (a black man who was killed in 2016 after an officer ordered him to crawl to him. Mr. Shaver, sobbing and begging for his life, was shot when he stopped to pull up his pants.[152]), Philando Castile's, Michelle Cusseaux's, or Tamir Rice's. In a civil complaint, Ms. Cusseaux's mother presented alternatives to officers killing her child. "Rather than give Michelle space and more response time, attempt to deescalate the situation, engage in additional communication . . . in a calm manner in order to build trust or alleviate her fears, or seek the involvement of appropriately trained personnel" she said,[153] Dupra chose to have an officer pick the door lock and subsequently shoot her daughter.

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[152] *See* Wesley Lowery, *Graphic video shows Daniel Shaver sobbing and begging officer for his life before 2016 shooting*, WASH. POST (Dec. 8, 2017, 1:15 PM), https://www.washingtonpost.com/news/post-nation/wp/2017/12/08/graphic-video-shows-daniel-shaver-sobbing-and-begging-officer-for-his-life-before-2016-shooting/?noredirect=on&utm_term=.9c60b38e7194.

[153] RITCHIE, *supra* note 65, at 95-96 (internal quotations omitted).

In all of these cases, when the officer fired his weapon, was the officer doing it when he knew that the person was no threat, or did the officer fire because he thought at that moment that the person was a threat (albeit mistakenly)? Whom should the law favor? And should the law put on the officer the duty to put himself in a position where he defuses the threat in a reasonable way? The law implicitly puts this burden on civilians, so why not on officers, as well? For Mr. Shaver, the officer could have told the man to lie flat on his stomach with his arms splayed instead of screaming at him to crawl to him. For Mr. Castile, the officer could have slowed everything down and told him to place his hands on the steering wheel. For Tamir Rice, the officer should have taken cover and determined whether the boy had a weapon before running into a scene where the officer was uncertain. Saying what could have or should have happened is, of course, the 20/20 hindsight that the Court opposed in *Graham*.[154] However, it is hindsight in discussing specific situations where foresight was possible.

There are broader questions still, such as should the officer be criminally liable when he fails to follow his own training and policies and that leads to death? Do we need to put the onus on the police department to properly train? The answers to these questions are articles themselves.

Yet, one standing question here is whether the objective reasonableness standard should be changed. I argue that it should. Courts are not currently giving the Fourth Amendment's objective reasonableness test the "careful attention" that the Court in *Graham*, said it requires in "each particular case."[155] This fact is evidenced by the seemingly constant police killings of blacks and seeming absence of accountability in the vast majority of them, even when the circumstances push the reasonable officer standard beyond its intended limits, such as in the cases discussed above.

The counter argument to changing the standard is that such change could lead officers to endanger their and others' lives by causing them to hesitate before acting in critical moments. But consider this, is the piling up of black bodies an acceptable alternative to action? More closely scrutinizing officers' justifications for excessive force would save lives while also giving officers the room to make split-second decisions. My proposal does not do away with justifications. It merely checks them—a favorable

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[154] 490 U.S. 386, 396 (1989).

[155] *Id.*

alternative to consistent killings. To be sure, it would help courts fulfill the goal of "careful attention in each particular case" set in *Graham*.

However, others would argue that there are less onerous proposals at hand such as prosecutors not over-charging defendants. While such an approach would be an easier route to take, it partially neglects one of the purposes of having a justice system: justice. Excluding the benefits of plea deals, individuals should be held accountable for their actual crimes. To systematically try officers on lesser charges would mitigate the act of murder because it would not punish the crime according to its penalty. Murder is not manslaughter. It is murder, and fostering a norm where it is called something different than what it is defeats the charge's purpose and distinction in the first place.

B. Courts Should Adopt Kingsley's Rule for Fourteenth Amendment Excessive Force ("Shocks the Conscience") Claims

I reject the "shocks the conscience" standard as too high a bar for plaintiffs to overcome. My proposal for it, compared to the other proposals here, is relatively simple. I propose that courts adopt *Kingsley's* more objective rule in the place of the "shocks the conscience" test. In *Kingsley*,[156] the Supreme Court held, in relevant part, that "[u]nder 42 U. S. C. § 1983, a pretrial detainee must show only that the force purposely or knowingly used against him was objectively unreasonable to prevail on an excessive force claim."[157]

One may ask why I favor an objective reasonableness test for Fifth and Fourteenth Amendment excessive force claims but reject the standard in the context of Fourth Amendment excessive force claims. The answer is simple: Cases involving Fourth Amendment excessive force have shown that an objective reasonableness standard in that context allows officers who should be held accountable to slip through the cracks. An objective reasonableness standard in Fifth and Fourteenth Amendment excessive force cases, however, works in those specific contexts for now. *Kingsley* demonstrates this fact. If or when the standard

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[156] 576 U.S.___, 135 S. Ct. 2466 (2015).
[157] *Id.*

becomes unworkable or allows the types of blatant violations allowed in Fourth Amendment cases, it should be changed.

If courts do not replace the "shocks the conscience" test with *Kingsley's* rule, they should actively incorporate the behavior the Supreme Court mentioned in *Lewis*[158] into the "shocks the conscience" standard. In *Lewis*, the Court did not close off the idea that behavior not as extreme as that of usual "shocks the conscience" acts could meet the test's high bar.[159] Indeed, the conduct at issue in *City of Revere v. Massachusetts General Hospital* [160] was not as alarming as that in usual "shocks the conscience" fact patterns, but the Court still found that it was bad enough to warrant a substantive due process claim.

In *Revere*, a hospital sued a police department for the medical fees of a suspect whom an officer had shot. The Court found the police department liable and held that "the [substantive] due process rights of a [pretrial detainee] are at least as great as the Eighth Amendment protections available to a convicted prisoner." The *Lewis* court picked up on *Revere's* Eighth Amendment analogy and carried it further. They stated:

> 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 [substantive] due process claims based on the medical needs of someone jailed while awaiting trial.[161]

If courts adopt a deliberate-indifference-like alternative rather than replace the "shocks the conscience" test with *Kingsley's* standard, they should incorporate the proposal for Eighth Amendment prison conditions cases—which are also governed by deliberate indifference—discussed below so as to avoid the problems discussed in Sections III and IV, above, that are inherent in the subjective standard.

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[158] 523 U.S. 833 (1998).
[159] *See id.* at 834.
[160] 463 U.S. 239 (1983).
[161] *Lewis*, 523 U.S. at 850 (internal citations omitted).

C. *Eighth Amendment Prison Conditions Cases Should Be Analyzed Under a Framework Similar to Disparate Impact Analysis*

We need to rebuild the foundation of prison conditions cases. In Section IV above, I discussed what the contemporary understandings of human behavior are and what they suggest about the deliberate indifference standard. In this section, I am continuing to answer one of the questions I posed at this Article's outset: What relevance should contemporary understandings of human behavior have on legal standards of intent, particularly the Eighth Amendment standard of deliberate indifference? This author argues that the findings and types of findings in Section IV should guide courts' interpretation of intent. Those findings also provide evidence for why the standard should be changed. To make deliberate indifference more reflective of human thought processes, I propose a solution that is analogous to the test for disparate impact. Explaining the disparate impact test, the Department of Justice writes,

> The first step in analyzing any disparate impact case is determining whether the recipient's criteria or method of administering its programs or activities adversely and disparately affect members of a protected class. In some cases, federal agencies proceed directly to preliminary findings after this step. To establish an adverse disparate impact, the investigating agency must (1) identify the specific policy or practice at issue; (2) establish adversity/ harm; (3) establish significant disparity; and (4) establish causation.[162]

Analogously, there should be steps to establish deliberate indifference in situations where the facts, on their face, seem

[162] USDOJ, *Section VII: Proving Discrimination – Disparate Impact*, *in* TITLE VI LEGAL MANUAL 9 (https://www.justice.gov/crt/case-document/file/931026/download (citing N.Y.C. Envtl. Justice All. v. Giuliani, 214 F.3d 65, 69 (2d Cir. 2000) (plaintiffs must "allege a causal connection between a facially neutral policy and a disproportionate and adverse impact on minorities.")) (last visited Mar. 24, 2020).

inconclusive and render intent unclear. Specifically, those steps should be to:[163]

1. Identify a person who was injured;
2. Establish causation—that that person's injury resulted from the officer's action at issue; and
3. Show that that officer's act was not objectively reasonable;

There are multiple ways that a plaintiff can prove that an act was not objectively reasonable. First, the act's impact may be so clearly discriminatory as to allow no explanation other than objective unreasonableness. For example, a plaintiff can prove objective unreasonableness by showing a clear pattern that emerges or emerged from the effect of the officer's actions, even when the actions themselves appear neutral.

Second, plaintiffs can prove objective unreasonableness through the historical background surrounding the officer's act (especially if it shows a series of similar actions) and/or the sequence of events that led to the act at issue.[164]

Third, training materials, established protocols in the prison, minutes from staff meetings, and reports, as well as the histories of these sources can be used to show objective unreasonableness.[165]

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[163] Though not discussed in this Article, a similar test could be used in prison-security cases where the facts are inconclusive. Those steps should be to:

1. Identify a person who was injured;
2. Establish that force was used;
3. Establish causation – that that person's injury resulted from the force at issue; and
4. Show that that use of force was not objectively reasonable.

[164] *See* Jaeah Lee, *How Science Could Help Prevent Police Shootings*, MOTHER JONES, https://www.motherjones.com/politics/2016/07/data-prediction-police-misconduct-shootings/ ("[O]ne of the best predictors of future problems was a history of past problems.") (last visited Mar. 24, 2020).

[165] *See generally* Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453 (2004) (providing an analysis of organizational culture); *see, e.g.*, Warren Christopher, *Report of the Independent Commission on the Los Angeles Police Department*, COMMISSION (1991) (providing a specific example of organizational culture).

4. Then, if the plaintiff produces evidence that the defendant's actions were objectively unreasonable, the burden shifts to the defendant to prove that they were not; and
5. If the court accepts the defendant's justification, deliberate indifference is not established.

Some of these steps may sound like subjective, rather than objective, intent. They do draw on some subjective intent standards, but the frame through which I consider them is wholly objective. One can see that an act had a discriminatory impact or a questionable historical background without considering the defendant's subjective state of mind. Again, this new test should be used when the facts are inconclusive.

However, in situations where the facts are clear, the existing deliberate indifference test should still apply. In discussing what the standard should be, Roy Austin, the former Deputy Assistant Attorney General of the U.S. Department of Justice's Civil Rights Division and former Deputy Assistant to President Barack Obama for the Office of Urban Affairs, stated, "You want an intent standard when you can prove intent. I wouldn't say you want to get rid of intent entirely, but in a case where the intent is provable, I want the option there to prove it."[166] The new test would come in when attorneys face gray areas. My solution addresses state-of-mind issues by applying an objective test to cases where intent is more difficult to prove. In this sense, the case does not have to turn on a subjective intent standard that is out of step with findings on human behavior.

One might ask if my solution might create a shift toward greater liability. The answer is no. It is not that liability is greater in the sense that more officers would be held accountable; rather, the new test is a more precise tool than the test that currently exists. It is designed to capture those cases that slip through the cracks because they do not align with prison conditions cases' flawed standard of intent, and it is more likely than the current test to separate the true violators from those who are not.

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[166] Phone conversation between author and Roy Austin, former Deputy Assistant Attorney General of the U.S. Department of Justice's Civil Rights Division and former Deputy Assistant to President Barack Obama for the Office of Urban Affairs, (May 4, 2018, 10:00 AM EDT).

Moreover, so as to increase its effectiveness, my proposal should be implemented alongside efforts to raise awareness of implicit bias, such as those being undertaken by implicit bias expert Jack Glaser and his think tank Center for Policing Equity (CPE) through the designs they are creating.[167] In *Unconscious Racism Revisited*, Lawrence pointedly states, "I did not set out to invent a better tool for . . . litigators. I sought to challenge the . . . paradigm itself."[168] In contrast, I seek to do both. However, like all proposals, this one has both strengths and limitations.

1. Strengths of this New Standard

First, my Eighth Amendment proposal responds to Lawrence's critique of current intent-based standards and scientists' findings on human behavior. By taking into consideration whether and how organizations and/or their officials have handled similar incidents in the past, [169] the claimant's injury, individual officials' disciplinary histories, and the history and culture of the organization as a whole, my approach better captures what Lawrence calls "the ubiquity of racism."[170] Rather than acting as though individuals always act intentionally or, on the opposite end of the spectrum, that they have no accountability for their actions, my proposal specifically examines their actions and histories for indications of bias. It rests on the foundation that bias has become the norm in society while also acknowledging the role that individuals' cognitive processes play in perpetuating that norm.

Moreover, it helps to produce systemic change. By moving to a quasi-objective intent standard, my proposal allows for courts to broaden the scope from individual intent (conscious or unconscious) alone to capture systemic bias (i.e., what is also implicated by racism's ubiquity), as well. Indeed, objectivity is not synonymous with imprecision. My proposal addresses both implicit *and* systemic bias, individual and systematic. What is more, it does so without sacrificing one for the other because the objective test

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[167] *See* Diana Fine Maron, *How to Reduce Police Violence*, SCI. AM. (July 22, 2016), https://www.scientificamerican.com/article/how-to-reduce-police-violence/.

[168] Lawrence, *supra* note 126, at 964.

[169] *See* Lee, *supra* note 164.

[170] Lawrence, *supra* note 126, at 961.

and the individualized considerations serve as backstops for one another.

One may argue that my proposal falls into Lawrence's critique rather than overcoming it because it acknowledges the cognitive process, thereby making discrimination seem as though it is a normal part of human cognition. Yet, such a critique would be misguided because it assumes that that acknowledgment necessarily leads to a lack of accountability, but this is not true. One critique that I have of Lawrence's piece is that it presents a false choice between individual and systemic accountability, but we do not need to choose between justice and change. We can have both. Indeed, I did not create this proposal to avoid accountability but to foster it.

Second, apart from the benefit of making the law more accurate, a strength of my proposal is that it would make it easier for the system to exact justice. It would do this, in part, by removing the actual-knowledge requirement (which many legal scholars deem a high bar) in cases where the subjective intent is unclear.[171] Further, modifying actual knowledge could also help to alleviate the risk of dismissal in the pleading phase because plaintiffs would no longer have to plausibly plead the defendant's state of mind in all cases, let alone plead it without access to discovery tools. One could argue that if plaintiffs sometimes do not have to plead the defendant's state of mind, that could make it easier for non-meritorious claims to slip into courts when they otherwise would not. This is a valid concern. However, even if some non-meritorious claims slip through, it is better to make justice more accessible (especially to groups like prisoners who already face an uphill battle through exhaustion requirements) than to cut it off from those who need it most. Moreover, the number of meritorious cases that would be heard when they otherwise would not be, could outweigh the number of non-meritorious claims that slip through.

A third strength of my proposal is that in basing my approach on psychological and social-science conclusions, it moves away

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[171] *See* Glidden, *supra* note 7, at 1857-58*; see also* Ristroph, *supra* note 11, at 166 ("[I]nstead, the Court insisted on a standard of 'actual knowledge'—'the official must both be aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists, *and he must also draw the inference*.' A[n]…official could escape liability, the Court conceded, if he could 'show that the obvious escaped him.' As several commentators have noted, this required showing of actual knowledge has often proven to be an insurmountable hurdle for…plaintiffs.") (emphasis added).

from basing the law on assumptions about human nature and administrative structures.

Fourth, my approach would mitigate the problem of "rais[ing] people's awareness about the possibility that implicit bias exists and affects them, [is] not the same thing as stopping it from influencing their judgments." This is because "[t]he nature of implicit bias is that you can't feel it operating."[172] By addressing implicit bias, especially on the organizational level (i.e., if plaintiffs prove step three of the new test—show that that officer's act was not objectively reasonable—by referring to training materials, established protocols in the prison, minutes from staff meetings, and reports), my proposal would provide a backstop to such potentially biased judgments. Even though individuals cannot feel bias, the modified standard would still address it.

Fifth, along the same lines, giving plaintiffs the option of proving systemic objective unreasonableness (i.e., again, this is one of the ways plaintiffs can prove step three) would better account for implicit bias within an organization as a whole. Prisons and police departments have similar protect-our-own cultures. Indeed, the director of the Prisoners' Rights Project, John Boston, believes that prisons have it worse, writing, "There is a persistent tendency in jails and prisons to make excuses and to cover up for internal misconduct. The 'blue wall of silence' is even thicker and higher in corrections than in police work."[173] Given these similarities, we can assume that the cultures influence their personnel in similar ways. Therefore, University of Virginia Law Professor Barbara Armacost's analysis on the importance of organizational structures within police departments and the impact that those structures have on officers[174] could be applied to the prison context. Armacost writes:

> First, it is *factually inaccurate* to focus on individual deeds, and ignore the organization, in analyzing the causes of police conduct. Law enforcement organizations have cultures—commonly held norms, social practices, expectations, and assumptions that

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[172] Maron, *supra* note 167.

[173] John Boston, *Excessive Force in the New York City Jails: Litigation and its Lessons*, 22 WASH. U. J.L. & POL'Y 155, 168 (2006).

[174] *See* Armacost, *supra* note 165.

> encourage or discourage certain values, goals, and behaviors. Police agencies are culpable if they tolerate cultures that promote conduct that is morally or legally objectionable.
>
> Second, it is *unfair* to lay the moral responsibility for police misconduct solely at the feet of individual officers. . . . [L]aw enforcement officers cannot be viewed as individual decision makers who function in isolation. They are embedded in an organization that makes them more likely to frame their judgments in terms of role-based obligations and expectations than according to a simple cost-benefit analysis of their potential actions. . . .
>
> Finally, the impulse to isolate misbehaving officers as "rogue cops" is, essentially, a search for scapegoats. While punishing individual miscreants may satisfy society's thirst for someone to blame, it also causes us to miss important systemic and organizational causes that lie behind individual acts of brutality. This is not to say that individual officers bear no causal or moral responsibility for their own harm-causing deeds. Indeed, the fact that individuals function within an organizational framework poses special risks of unintended and inadvertent harms, and imposes corresponding obligations to guard against such harms. Focusing *only* on isolated actors, however, may divert attention away from needed institutional reform.[175]

To be sure, we can see the impact that prisons' organizational cultures have on personnel and operations by considering case law. Take, for instance, the case *Fisher v. Koehler*.[176] There, the prevalence of excessive force and inmate-on-inmate violence at Rikers Island led the Southern District of New York to find that the Eighth Amendment had been violated. During trial, the court said, "Systematic deficiencies in the operation of [the

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[175] *Id.* at 493.

[176] 692 F. Supp. 1519 (S.D.N.Y. 1988), *injunction entered*, 718 F. Supp. 1111 (S.D.N.Y. 1989), *aff'd*, 902 F.2d 2 (2d Cir. 1990).

New York City Correctional Institution for Men] . . . have led to a world where inmates suffer physical abuse, both by other inmates and by staff, in a chillingly routine and random fashion."[177] By factoring in such systemic deficiencies, my proposal addresses organizational structures that help to perpetuate implicit bias and suggests a method to hold them accountable. However, it is worth noting that my proposal does not suggest that systems are to blame and individuals are blameless. Rather, my approach acknowledges the fact that individuals alone are not to blame.

Another benefit of my proposal is that it would help avoid alienating officials and result in fewer false positives, like those that Data Scientist and University of Chicago professor Rayid Ghani discusses in Jaeah Lee's article *How Science Could Help Prevent Police Shootings*. There, the Charlotte-Mecklenberg Police Department had a system for flagging problematic police officers. Innocent officers felt like the department was "accusing them when they didn't do anything wrong."[178] Ghani attributed some of the system's problems to individuals making decisions according to gut feelings. Yet, the criteria that Ghani suggests to replace these gut decisions could itself foster more gut decisions and allow for implicit bias.

For example, in deciding whether an officer meets the recommended criteria, someone must assess that officer's actions. However, bias could influence the person making the assessment and, in extension, influence her decision and create a false positive. In contrast, by focusing on the organization as a whole rather than the mindset of individual officials, my proposal would avoid alienating individuals who may, themselves, be cogs within a biased organization. Indeed, Dr. Péter Cserne emphasizes the importance of not alienating key players in his work *Facts and norms in the behavioural assumptions of law* when he writes, "Roughly, in order to be stable and effective, an institutional mechanism or policy should not go systematically against the self-interest of those subject to the institutional rules or policy. The literature on mechanism design calls this incentive compatibility."[179] What is more, by considering commonsense factors such as red flags in the organization's culture, its handling of similar matters in the past, and

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[177] *Fisher*, 692 F. Supp. at 1521.

[178] Lee, *supra* note 164.

[179] Cserne, *supra* note 141, at 111.

the plaintiff's injury, plaintiffs and courts would better triangulate and gauge culpability, leading to fewer false positives.

Seventh, in modifying the intent-based culpability measure, my proposal would also improve the issue of having to prove multiple officials' states of mind for the same violation. For example, if a prisoner brings a claim against a guard who did not get medical assistance for her when she requested it while another guard stood by and did nothing, and, on top of it all, a supervisor was aware of the situation, the prisoner plaintiff would have to prove three different states of mind in order to hold all of the individuals liable. This problem, in turn, creates another problem: Multiple individuals with possibly different intentions may not represent the system as a whole, making it more difficult to prove the system's liability. In her piece, *Necessary Suffering?*, Brittany Glidden explains these problems, writing,

> [R]arely can a single coherent intent be attributed to the entire institutional apparatus that imposes punishment. The intentions of individual officials within the criminal justice system may be relevant to, but are not dispositive of, the question whether the system is imposing punishment. In particular, evidentiary ambiguities allow for discretionary judgment, and courts have considerable leeway to find the requisite intent (or not) in order to reach a preferred outcome.[180]

Glidden believes that these problems further support arguments for limiting subjective intent analysis in institutional cases. The Supreme Court acknowledged the difficulty of deliberate indifference's subjectivity in *Farmer*, stating, "[C]onsiderable conceptual difficulty would attend any search for the subjective state of mind of a governmental entity, as distinct from that of a governmental official."[181]

Finally, one last benefit of my proposal is that it would better respect prisoners' personhood because in moving away from a state-of-mind culpability standard, it would help to prevent the law from

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[180] *See* Glidden, *supra* note 7, at 1836.
[181] *Farmer v. Brennan*, 511 U.S. 825, 841 (1994).

distinguishing "between those capable of intent and the presumed unthinking recipients of punishment."[182]

2. Limitations of this New Standard

One limitation is that the Court has rejected psychological and sociological data in past cases, such as *McCleskey v. Kemp*[183] and *Wal-Mart v. Dukes*.[184] However, the Court's rejection of such data in *McClesky* and *Dukes*, especially in contrast to its acceptance of it in *Brown v. Board of Education*,[185] is due in part to the Court's shift from a systemic to a perpetrator model. Therefore, the Court's rejecting the data does not necessarily indicate that it opposes it. Instead, its rejection shows that, in the least, it was opposing the systemic model, which the data supported and that it was, again, embracing the perpetrator approach. In fact, in *McClesky*, the Supreme Court called the Baldus study "sophisticated," and the Eleventh Circuit assumed its validity.[186] Moreover, in all of these cases, the Court considered psychological and sociological data as evidence of defendants' culpability. My proposal asks the Court to use it in a different way—as evidence that the culpability standard should be altered. One could argue that the way I want the Court to use the data makes it even less likely that it will accept the data because I am asking it to use the data to change an established standard—an ask that is heftier than *McClesky* or *Dukes's* request that the Court consider the data in isolated cases. However, I contend that it is the very nature of my proposal that makes it *more* likely to be accepted, not less. One of the Court's primary issues in *McClesky* and *Dukes* was their feeling that the data was not sufficiently tailored to the claims, failing to encompass the claims at issue.[187] In contrast, the data on which I base my proposal is.

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[182] Dayan, *supra* note 108, at 191.

[183] 481 U.S. 279 (1987).

[184] 564 U.S. 338 (2011).

[185] 347 U.S. 483 (1954).

[186] *McCleskey,* 481 U.S. at 289 ("The Court of Appeals for the Eleventh Circuit, sitting en banc, carefully reviewed the District Court's decision on McCleskey's claim. It assumed the validity of the study itself and addressed the merits of McCleskey's Eighth and Fourteenth Amendment claims.") (internal citations omitted).

[187] For example, in *McClesky*, the fact that the Baldus study indicated that blacks in Georgia who killed whites were subjected to the death penalty more

Unlike *McClesky*, the data provided above in Section IV are findings on human and systemic behavior period, not only on most behavior or on what happens more often in a given circumstance. These blanket findings on humans and systems apply to the humans and systems involved in deliberate indifference cases. To argue that they do not would suggest that the individuals and mechanisms at issue in those cases are neither humans nor systems—an argument that is weak, to say the least. Taking all of this into account, the Court could be more likely to accept my proposal because it overcomes a challenge that *McClesky* and *Dukes* could not. Moreover, even if one believes the Court is averse to social-science data, the Supreme Court's rulings follow the tide of social change.[188] Thus, the Court will likely follow the legal profession's growing acceptance of psychological and social-science data in the future.

Another of my proposal's limitations is that it addresses the aftermath of a rights violation rather than working to prevent that violation in the first place. It is reactionary rather than prophylactic. However, my proposal does produce prophylactic results. It does so indirectly. By giving plaintiffs the option of proving systemic objective unreasonableness (which is also mentioned above in the fifth strength of my proposal), this proposal would better account for an organization's implicit bias. In turn, as my proposed standard captures more instances of organizational bias through case after case, organizational practices and policies would change, thereby helping to prevent systemic bias.

It is true that a more direct prophylactic proposal may be implemented more quickly than mine because my proposal requires changes in legal doctrine, which can take years to implement; whereas more direct prophylactic changes, such as changing the ways that guards interact with prisoners or the way that police officers interact with individuals, could take less time. Yet, this does not mean that my proposal is not preferable or that there must be a choice between my proposal or a more prophylactic measure. Both can be implemented. Indeed, both should. It is also true, however, that prophylactic measures take a large amount of resources, including funding. Below, I mention that my proposal may require

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often than whites who killed blacks did not prove that decision makers in the defendant's case had acted with discriminatory purpose.

[188] MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 310-11 (2004).

producing more social science and psychological studies on human behavior and that those studies can be expensive. A prophylactic measure would likely require those same studies or similar ones and money to implement them, such as training for guards or officers and new or different tools and technology like rubber bullets or more objective body cameras. In this sense, prophylactic measures could cost more, which would make it more difficult for state and federal officials to implement them. My proposal, on the other hand, could accomplish similar goals but require fewer resources. As for any specific goals that my proposal would not initially reach, courts can modify my approach over time to fit their needs as they have done with tests, standards, and proposals throughout their existence. My proposal is not meant to be static, and just because it may not reach the end of every problem right now, that does not mean that we should not use them to begin.

A third possible limit on my proposal is a practical one that I briefly discussed above. Put bluntly, psychological and social-science data is expensive to produce, and the economics of litigation play a role in shaping the development of law. However, funding is available from private funders and grants from organizations like the National Science Foundation, which provided Jack Glaser and CPE with funding to create a team of researchers and staff (which included retired police officers). Such funding could also support this social data. It is also important to note that as this Article's previous section evinces, a great deal of psychological and social-science data already exists. There may not be a need for more at this time.

A fourth issue with my proposal is that it would require officials to learn another standard, potentially injecting confusion into already difficult jobs. Spelling out what new standards could mean for officials, Reinert explains,

> [F]ederal constitutional standards do not just add a new legal regime to the mix of laws governing state and local officials. They interact with state law in at least two important ways: sometimes they supplement existing regulation under state law by providing greater protection to individual[s], and at other times they regulate completely different spheres of activity.[23] Where federal standards serve to augment state law, rather than to create entirely

> new requirements, state and local officials must understand clearly what is necessary under each standard to determine what a state or municipal official must do *in addition to* what is required under state law.[189]

I understand the merits of this argument, but it is, nevertheless, misguided. Avoiding necessary change at the expense of people's rights goes against the very concept of a living Constitution, ranks convenience over justice, and renders the Eighth Amendment a privilege subject to officials, rather than a right that officials are subject to.

VI. Implementing These New Standards

The test for each standard here was judicially created and can be judicially eliminated.[190] Implementing my excessive force and substantive due process proposals can, therefore, be relatively straightforward. Attorneys could propose them through amicus briefs.

Implementing my deliberate indifference proposal, however, may be more complicated. One way to do it is through impact litigation. Scholarship on civil litigation suggests that individual claims do not adequately address sources of bias,[191] and heightened procedural requirements such as pleading and standing make it even more difficult for individual plaintiffs to succeed. Research, instead, indicates that the types of civil rights cases plaintiffs are most likely to win are class actions and lawsuits that are part of an organized social movement.[192] Therefore, plaintiffs and their attorneys should ideally implement my proposal through a class action in coordination with a larger movement.

Further, the suit should be for injunctive relief so that it can impact a broader audience and help to advance constitutional

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[189] Reinert, *supra* note 9, at 195.

[190] *Farmer*, 511 U.S. 825, 840 (1994) ("Because 'deliberate indifference' is a judicial gloss, appearing neither in the Constitution nor in a statute, we could not accept petitioner's argument that the test for 'deliberate indifference' described in *Canton v. Harris*, must necessarily govern here.").

[191] *See generally* Nelson, *supra* note 125.

[192] *See generally* Nelson, *supra* note 125; *see also* Brandon Garret, *Aggregation and Constitutional Rights*, 88 NOTRE DAME L. REV. 593, 594-607, 616-626, 641-647 (2012).

doctrine. At the same time, however, it is important to note that aggregate forms of litigation, such as class actions, are rare.[193] Thus, just as the current intent standards do not fully consider systemic and implicit bias substantively, most discrimination litigation brought by individuals against individuals, does not address it procedurally either. However, implementing my proposal through aggregate claims would help to remedy this problem by establishing a standard that itself addresses systemic bias and does so in a manner that mitigates it procedurally as well.

It is possible, however, that some civil rights attorneys may be reluctant to base their prison conditions claims on a new approach. For these individuals, I propose a smaller step akin to my suggestion for the other two proposals: the use of amicus briefs. I and other attorneys could propose my approach as an amicus brief to a prison conditions case. Another small step is that if civil rights attorneys are reluctant to propose a shift in doctrine, they can first use Eighth Amendment cases as opportunities to argue that courts should decrease the amount of deference they afford to prisons' internal mechanisms (such as certain administrative remedies that prisoners must exhaust). In leading courts to question such structures, attorneys would open the door for them to see and remedy the bias existing within those structures, thereby creating a precursor for addressing such bias through my modified deliberate indifference test.

One potential roadblock to these methods of implementation is the current makeup of federal courts. Yet, just as this bench became increasingly more conservative and moved from *Brown v. Board of Education*'s[194] systemic model to the perpetrator mold now before us, so too could reversals in this trend lead to more liberal appointments, which could change the Eighth Amendment's deliberate indifference standard.[195] In this sense, the courts could change course and open a new line of cases based on systemic analyses of prison conditions.

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[193] *See* Nelson, *supra* note 125.

[194] 347 U.S. 483 (1954).

[195] Indeed, Justice Ginsberg cited implicit bias data in her concurrence in *Grutter v. Bollinger*, 539 U.S. 306 (2003).

The 26 recent deaths in two months at Mississippi prisons[196]—the most infamous of which is Parchman prison, a former plantation now known as the Mississippi State Penitentiary—have sadly created a moment in which attorneys could introduce a new gauge for culpability. On December 29, 2019, a "major disturbance" occurred at Parchman.[197] In the weeks that followed, the death toll has continued to mount. More than two dozen inmates housed in the prison filed suit in the United States District Court for the Northern District of Mississippi, alleging a "culmination of years of severe understaffing and neglect."[198] Two celebrities have filed a second lawsuit against the Department of Corrections on behalf of 152 Parchman inmates.[199] This second suit alleges,

> The conditions of confinement at Parchman are so barbaric, the deprivation of health and mental health care so extreme, and the defects in security so severe, that the people confined at Parchman live a miserable and hopeless existence confronted daily by imminent risk of substantial harm in violation of their rights afforded by the U.S. Constitution.[200]

Both class actions would classify as prison conditions cases, and both request injunctive relief. The cases are in their initial trial

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[196] See Alissa Zhu, *Inmate dies at Parchman, bringing death toll to 27 in Mississippi prisons*, CLARION LEDGER (Mar. 12, 2020, 5:26 PM), https://www.google.com/amp/s/amp.clarionledger.com/amp/5037239002.

[197] Lici Beveridge, *Mississippi prison crisis: 18th inmate dies since Dec. 29, second in 24 hours*, USA TODAY (Feb. 16, 2020), https://www.usatoday.com/story/news/nation/2020/02/16/mississippi-inmate-deaths-18th-dies-state-prison-since-dec-29/4779704002/.

[198] Christina Maxouris, *Rappers Jay-Z and Yo Gotti are behind a lawsuit targeting Mississippi's prison conditions*, CNN (Jan. 14, 2020), https://www.cnn.com/2020/01/14/us/jay-z-yo-gotti-mississippi-prisons-lawsuit-trnd/index.html.

[199] *See* Christina Maxouris and Jamiel Lynch, *Jay-Z and Yo Gotti file second lawsuit against Mississippi prisons on behalf of 150 inmates living in 'filth and dilapidation,'* CNN (Feb. 27, 2020), https://www.google.com/amp/s/amp.cnn.com/cnn/2020/02/27/us/mississippi-prisons-yo-gotti-jay-z-second-lawsuit/index.html.

[200] Complaint at 3, Lang v. Taylor, (N.D. Miss. 2020) (No.___), https://drive.google.com/file/d/1LBWjUfpP5NtIbNLV_7meb3EWOe9okgvz/view.

phases, so attorneys could argue for the prison conditions proposal presented herein and preserve the issue for appeal. Also, the fact that the Supreme Court has yet to address questions such as the definition of "minimal standards of adequacy" for inmates' medical care increases the likelihood that it would grant certiorari if the case were to reach it on appeal.[201] In fact, the culpability standard may be an important enough issue to warrant granting certiorari on its own. At this initial trial phase, the district court could begin to give credence to an argument for this Article's prison conditions proposal by seriously considering whether there is compelling evidence of policies and practices that permit implicit systemic bias. Alternatively, if and when the inmates' cases reach appeal, psychologists, social scientists, and civil rights attorneys could file amicus briefs, which would put these proposals before the courts.

VII. Conclusion

Gaps in Fourth and Fourteenth Amendment excessive force standards have resulted in the loss of real lives—men and women of color who were gunned down, tased, beaten, or strangled—and a lack of officer accountability for those deaths. I proposed here that the standard for Fourth Amendment excessive force claims model the test for *Batson* violations. In Fourteenth Amendment excessive force claims, courts should apply the rule set forth by the Supreme Court in *Kingsley*.

Eighth Amendment deliberate indifference, like current Fourth and Fourteenth Amendment standards, voids lives, as well, but it also denies prisoners' humanity and fails to protect them from the very harms that prisons create. I raised the question, what relevance should contemporary understandings of human behavior have on legal standards of intent, particularly the Eighth Amendment standard of deliberate indifference? I argued that they should guide those standards. Simply put: If a constitutional

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[201] Greg Dober, *Beyond Estelle: Medical Rights for Incarcerated Patients*, PRISON LEGAL NEWS (Nov. 4, 2019), https://www.prisonlegalnews.org/news/2019/nov/4/beyond-estelle-medical-rights-incarcerated-patients/ ("[*Estelle v. Gamble* and *Farmer v. Brennan*] provided guidance regarding the legal standards for access to healthcare and deliberate indifference under the Eighth Amendment, but did not 'define the minimal standards of adequacy' for medical care in prisons and jails, nor prisoner-patient rights in medical decision-making.").

standard is based on intent, then that intent should be based on studies of intent's derivation. Our current constitutional intent standards are not. To help remedy this problem, I proposed that the test for deliberate indifference be similar to that of disparate impact in cases where intent is unclear.

There are openings for us to implement these changes now, and we should not waste time. Prisoners and people of color are dying at officers' hands every single day. Mothers are breaking down beside caskets. Families are being eaten alive by anger, grief, and survivor's remorse. We can choose to ignore it and be complicit, or we can act. Act.