OUR PROGRESSIVELY BRUTAL CONSTITUTION: THE EXCESSIVE FORCE DOCTRINE AND THE POLICING-PUNISHMENT CONTINUUM

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ABSTRACT

The Constitution forbids certain acts of physical force carried out by state actors against individuals. The degree to which constitutional provisions limit official acts of force turns on the legal status of the target of the force. Under current doctrine, a free person stopped by a law enforcement officer on the street, for example, bears a Fourth Amendment right to be free from "objectively unreasonable" force. A person who is charged with a crime and detained pending trial has a similar right to be free from objectively unreasonable force from detention authorities, though under the Due Process Clause. A person who has been convicted of and sentenced for a criminal offense, on the other hand, has a right under the Eighth Amendment to be free only of official force applied "maliciously and sadistically for the very purpose of causing harm." The latter protection is hardly any protection at all, as I have demonstrated in recent empirical work. This excessive force doctrine, thus, constitutes a constitutional regime that condones steadily harsher treatment as one proceeds through the criminal legal system, along what I call the policing-punishment continuum.

This Article examines the expressive values of our progressively brutal constitution. Drawing from the work of Robert M. Cover and other legal expressivists, this Article situates the excessive force doctrine within the nomos *of state-inflicted force —* i.e.*, the normative world in which some state actors' violence is lawful and others' is not — and asserts that the current doctrine creates and perpetuates a legal and physical world in which one's involvement in the criminal legal system results in the steady devaluation of their bodily autonomy and physical safety and, overall, their dehumanization. This Article thus critically examines the individual-rights based model of regulating incarceration and the purpose and role of constitutional law as a means of restraint (or lack thereof) on state-inflicted physical violence. The Article concludes with a proposal to re-imagine the constitutionality of force.*

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INTRODUCTION.

> *Interpretations in law also constitute justifications for violence which has already occurred or which is about to occur. When interpreters have finished their work, they frequently leave behind victims whose lives have been torn apart by these organized, social practices of violence.*[1]
>
> *We live in and by the law. It makes us what we are . . .*"[2]

Physical violence[3] is intrinsic to American prisons and jails.[4] Assaults, homicides, and suicides occur with such frequency, and are seemingly so normalized, that researchers have only recently begun to examine the rates and context for such occurrences.[5] Sexual abuse, which has garnered more

[1] Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1602 (1986).

[2] RONALD DWORKIN, LAW'S EMPIRE vii (1986).

[3] I focus in this Article on physical violence — *i.e.*, the use of a weapon or other instrument, or one's own body such as a fist, foot, or knee, to inflict pain on another person. In doing so, however, I acknowledge that incarceration and the carceral state engages in myriad forms of violence, as many scholars of punishment have examined for some time. *See, e.g.*, [CITE].

[4] *See, e.g.*, Leah Wang & Wendy Sawyer, *New data: State prisons are increasingly deadly places*, Prison Pol'y Initiative (June 8, 2021), https://www.prisonpolicy.org/blog/2021/06/08/prison_mortality/.

[5] *See, e.g.*, Wolff, Blitz, Shi, Siegel, & Bachman, *Physical Violence Inside Prisons*, 34 CRIM. J. & BEHAVIOR 588, 588-89 (2007).

attention, is also pervasive.[6] Both victims and perpetrators of prison and jail violence include the people in custody — those behind the bars — and those employed by the state to operate the spaces — those in control of the bars.[7] This Article focuses on the infliction of physical violence by the latter, those responsible for the care of the people in the state's custody.

The Constitution forbids certain uses of physical violence by state actors.[8] The degree of constitutional protection from such force depends on the legal status of the target of the force. Is the target a legally "free" person simply walking down the street and encountering a police officer? Has the person been charged with a crime? Has she been convicted of and sentenced for a crime? The protection weakens as one proceeds from each stage of the criminal legal process along what this Article calls the "policing-punishment continuum."

Under current doctrine, a free person stopped by a law enforcement officer on the street — what might be deemed the starting point on the continuum — bears a Fourth Amendment right to be free from "objectively unreasonable" force.[9] The same goes for a person who has been placed under arrest.[10] A person who is charged with a crime and detained pending trial has a similar right to be free from objectively unreasonable force, though under the Due Process Clause.[11] A person who has been convicted of a criminal offense and incarcerated, on the other hand, has a right under the Eighth Amendment to be free only of official force applied "maliciously and sadistically for the very purpose of causing harm."[12] The latter protection is hardly an protection at all, as my recent empirical work has shown.[13] This excessive force doctrine, thus, constitutes a legal regime that condones

[6] *See, e.g.*, Val Kiebala, " 'It's an Emergency': Tens of Thousands of Incarcerated People are Sexually Assaulted Each Year," *The Appeal* (Apr. 18, 2022), https://theappeal.org/cynthia-alvarado-sexual-assault-in-prisons/.

[7] [CITE]

[8] Criminal statutes may also proscribe acts classified as assaults, battery, homicide, etc., though those are not the focus of this Article.

[9] *Graham v. Connor*, 490 U.S. 386 (1989).

[10] *See, e.g.*, *Phelps v. Coy*, 286 F.3d 295, 300 (6th Cir. 2002) ("The district court correctly determined that the alleged beating occurred during the course of the arrest of a free person, and therefore the parties' rights and liabilities are governed by the Fourth Amendment's reasonableness standard. [The defendant] contends that the Fourth Amendment does not apply to [the plaintiff's] case because [the plaintiff] had already been arrested when the incident took place. Our cases refute the idea that the protection of the Fourth Amendment disappears so suddenly . . . We have explicitly held that the Fourth Amendment reasonableness standard governs throughout the seizure of a person." (citations omitted)).

[11] *Kingsley v. Hendrickson*, 576 U.S. 352 (2015).

[12] *Whitley v. Albers*, 475 U.S. 312 (1986); *Hudson v. McMillian*, 503 U.S. 1 (1992).

[13] Danielle C. Jefferis, *The Prison Penalty: Use of Force Litigation After* Kingsley v. Hendrickson, 103 N.C. L. REV. ___ (2025).

steadily harsher treatment by the state as one advances through the criminal legal system. Ours is, then simply put, a progressively brutal constitution.

This Article examines the expressive nature of our progressively brutal constitution. Legal expressivism holds that the law may do more to regulate human behavior than through coercion by sanction alone, and looks instead to the expressive dimensions of legal principles and obligations:[14] What *messages* does the law send? What *beliefs* or *ideas* does the law convey through its regulation of human behavior?[15] How and when might the law be interpreted to represent official or *collective attitudes*?[16] In other words, what *values* underpin the law's condemnation or condonement of certain behavior?

This Article contends that the Constitution's excessive force doctrine embodies and communicates a steady devaluation of a person's physical safety and bodily integrity as they proceed through the criminal legal system. The doctrine is both constitutive and reflective: the law communicates to state officials that people who are in their custody receive less constitutional protection from the officials' use of force against them, thus constructing a legal and physical world in which one's bodily integrity matters less and less as one proceeds along the policing-punishment continuum. At the same time, the law reflects a collective social attitude that state actors' use of corporal violence against people in state custody is more and more acceptable to the point at which, after conviction, it is nearly always permissible, thus mirroring back to us the notion that those branded as "criminal" deserve less — and matter less.

A hypothetical may help to reinforce this claim: Imagine a person is standing at a public intersection. A police officer approaches and attempts to speak to them. The person, fearful of the officer, runs away. The officer chases after them. Realizing defeat, the person surrenders and lays down on the ground before the officer catches up to them. When the officer does catch up to them, however, the officer strikes the person in the face. The person loses consciousness and sustains abrasions and bruises to their eye. Should this person pursue a claim that the officer used excessive force in violation of the Constitution, their claim would be governed by the Fourth Amendment.[17] Such force is lawful under the Fourth Amendment only if it

[14] *See, e.g.*, Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PENN. L.R. 1503, 1506 (2000); Maggie Wittlin, *Buckling Under Pressure: An Empirical Test of the Expressive Effects of Law*, 28 YALE J. ON REG. 419, 420 (2011). [ADD MORE FOUNDATIONAL SOURCES]

[15] *See generally* Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PENN. L.R. 1503, 1506 (2000).

[16] *See generally* Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PENN. L.R. 1503, 1506 (2000).

[17] *Dubay v. Craze*, 327 F.Supp.2d 779, 782 (E.D. Mich., 2004).

is "objectively reasonable, balancing the cost to the individual against the government's interests in effecting the seizure" or arrest of the individual.[18] In this scenario, "[s]triking an unarmed suspect about the face after he has voluntarily surrendered is objectively unreasonable and is an unequivocal violation of [the person's] Fourth Amendment rights."[19] Personal liberty and bodily integrity prevail, with little weight afforded to the officer's justifications for the force.[20]

Now imagine that that person had been arrested and charged with a crime. They are detained in a county jail awaiting trial on the criminal charge. The person exchanges verbal insults with two detention officers, at which point the officers tackle the person to the ground and kick and punch the person in the head. In this version of the story, because the person has advanced further along the policing-punishment continuum from a free person to a pre-trial detainee, the officers' use of force against them is governed by the Fourteenth Amendment's guarantee of due process, rather than the Fourth Amendment's protection from unreasonable seizures.

Last, imagine instead that the person has been convicted of a crime and sentenced to a length of time prison as punishment for that offense. [CONTINUE CASE DESCRIPTION]

Often, media coverage and scholarly research concerning prison and jail violence focuses on the physical violence perpetrated by incarcerated people themselves, either on each other or on prison staff.[21] Less attention is paid to the physical violence that comes at the hands of state actors — the prison and jail employees who are charged with maintaining the safety and security

[18] *Id*.

[19] *Id*.

[20] *Id*. ("A reasonable officer would have known that such behavior under similar circumstances was not reasonable.").

[21] *See, e.g.*, Nancy Wolff, Cynthia L. Blitz, Jing Shi, Jane Siegel, & Ronet Bachman, *supra* note XX, at 588 ("It is not surprising that violence is the leading by-product of prisons because hundreds or thousands of people with antisocial tendencies or behavior are aggregated and confined in close and frequently overcrowded quarters characterized by material and social deprivation . . . Even without assuming a Hobbesian-like character, one would reasonably predict that environments such as these would bring out the worst in human nature. Survival instincts are notoriously primitive and the behavior code of prison life, must like the code of the streets in impoverished communities reflects such instincts."); *id*. at 589 (discussing "inmate-on-inmate physical assault"); *see generally* Bill Kelly, *"It's Scary." Nebraska Prison Staff Share Fears of Violence*, NEB. PUB. MEDIA (Sept. 23, 2021), https://nebraskapublicmedia.org/en/news/news-articles/its-scary-nebraska-prison-staff-share-fears-of-violence/; Sorensen, Cunningham, Vigen, & Woods, *Serious Assaults on Prison Staff: A Descriptive Analysis*, 39 J. OF CRIM. JUST. 143 (2011); Lahm, *Inmate Assaults on Prison Staff: A Multilevel Examination of an Overlooked Form of Prison Violence*, 89 PRISON J. 131 (2009).

of incarcerated people and the institution as a whole.[22] That must change. Physical violence perpetrated by state actors is a matter for deep concern given the power imbalances and means of near-total control prison staff wield over incarcerated people. The excessive force doctrine

This Article aims to center such violence and interrogate the constitutional doctrine underpinning it. [ROADMAP]

I. THE EXCESSIVE FORCE DOCTRINE.

In February 2023, the Federal Bureau of Prisons (BOP) announced the closure of one of its newest prison units — the Special Management Unit (SMU) at the penitentiary in Thomson, Illinois — because the unit had become one of the deadliest in the country with five suspected homicides, two suspected suicides, and at least 120 reports of rampant violence and abuse.[23] An Associated Press investigation published in 2021 revealed to the public for the first time that sexual abuse was so rampant at a federal women's prison in Dublin, California, that both BOP employees and incarcerated people had darkly nicknamed the institution the "rape club."[24] At least eight prison employees have been charged with sexual abuse of incarcerated people; five pleaded guilty, two were convicted at trial, and one case is pending.[25] Judge Yvonne Gonzalez Rogers, presiding over the resulting class action lawsuit, granted in part the plaintiffs' motion for a preliminary injunction and appointed a special master to ensure the BOP's compliance with the court's orders — the first time the BOP has been the subject to such judicial relief in its history.[26] A February 2024 OIG report documented 344 deaths in BOP prisons, either by suicide, homicide,

[22] *See, e.g.*, William Thornton, *2 Alabama correctional officers allegedly assaulted 75-year-old inmate with broom handle*, AL.com (Feb. 21, 2024, 2:42 PM), https://www.al.com/news/2024/02/2-alabama-correctional-officers-allegedly-assaulted-75-year-old-inmate-with-broom-handle.html; Paul Flahive, *A prison beating by guards reflects staffing and training issue, something Texas denies*, Tex. Stand. (Nov. 6, 2023, 9:45 AM), https://www.texasstandard.org/stories/texas-prison-guard-beatings-staffing-training-tdcj-coffield-unit/.

[23] Christie Thompson & Joseph Shapiro, *How the newest federal prison became one of the deadliest*, NPR (May 31, 2022, 6:00 AM), https://perma.cc/G4PZ-XWCG; *see generally* WASH. LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS, CRUEL AND UNUSUAL: AN INVESTIGATION INTO PRISON ABUSE AT USP THOMSON (2023), *available at* https://perma.cc/G5N2-4HZ5.

[24] Michael Balsamo & Michael R. Sisak, *AP Investigation: Women's Prison Fostered Culture of Abuse*, ASSOC. PRESS (Feb. 6, 2022, 8:40 AM), https://perma.cc/FSP9-UNT8.

[25] Diana Ramirez-Simon, *Judge Orders Special Master for California Prison Known for Rampant Sexual Abuse*, The Guardian (Mar. 16, 2024, 8:48 AM), https://perma.cc/C922-FK5V.

[26] *Id*.

overdose, or other "unknown accidents," between 2014 and 2021.[27] Those findings represent an average of forty-three deaths per year, slightly under one per week.

Violence in state and local institutions is just as severe. In early 2020, at least five people were killed within one week in Mississippi prisons.[28] A Florida civil rights lawyer wrote in a *Miami Herald* op-ed that he receives thirty to sixty letters from incarcerated people each week "about beatings, stabbings, denial of medical care and retaliation for grievances."[29] He described Florida prisons as "gang-filled hellholes" where "few who can fix them seem to care."[30] Between 2023 and May 2024, at least fifty-seven people had died in LA County jails, reportedly "driven by severe overcrowding, pervasive neglect and mistreatment, inadequate care inside jails, and a failure to offer robust alternatives to incarceration.[31] At least 31 people died in New York City jails between January 2022 and March 2024.[32]

There is a critical gap in the empirical study of carceral violence,[33] and much of the research focuses on sexual violence rather than non-sexual physical violence.[34] Recent studies, however, affirm the generalized reach of

[27] EVALUATION OF ISSUES SURROUNDING INMATE DEATHS IN FEDERAL BUREAU OF PRISONS INSTITUTIONS, DEP'T OF JUSTICE OFFICE OF THE INSPECTOR GEN. (2024), *available at* https://perma.cc/9SM5-XAG5.

[28] Luke Ramseth, Alissa Zhu, & Lici Beveridge, *Parchman riot: 'Gangs are at war.' Fifth Mississippi prison death reported as violence continued*, CLARION LEDGER (Jan. 4, 2020, 4:56 PM), https://www.clarionledger.com/story/news/local/2020/01/03/parchman-riot-fifth-inmate-killed-mississippi-violence-lockdown/2803056001/.

[29] James V. Cook, *Florida prisons are gang-filled hellholes, but few who can fix them seem to care*, MIAMI HERALD (Feb. 6, 2020, 4:20 PM), https://www.miamiherald.com/opinion/op-ed/article240052263.html.

[30] *Id*.

[31] Sam McCann, *Fifty-seven people have died in LA County jails since the start of 2023.* VERA INST. (May 15, 2024), https://www.vera.org/news/la-county-jail-deaths.

[32] Sam McCann & Erica Bryant, *Third Jail Death in 2024 Brings New York City's Total to 31 Under Mayor Adams*, VERA INST. (Mar. 28, 2024), https://www.vera.org/news/nyc-jail-deaths.

[33] *See, e.g.*, Brent Teasdale, Leah E. Daigle, Shila R. Hawk, & Jane C. Daquin, *Violent Victimization in the Prison Context: An Examination of the Gendered Contexts of Prison*, 60 INVEST. J. OF OFFENDER THERAPY & COMP. CRIM. 995, 996 (2016) ("This perception of prisons as dangerous places may be accurate, yet is surprisingly a relatively neglected area of empirical inquiry."); Wolff, Blitz, Shi, Siegel, & Bachman, *Physical Violence Inside Prisons*, 34 CRIM. J. & BEHAVIOR 588, 589 (2007) ("No nationally representative surveys have been undertaken to improve on these official estimates of physical victimization inside prisons. Consequently, what is known is based on surveys drawn from small, localized studies.").

[34] Wolff, Blitz, Shi, Siegel, & Bachman, *supra* note XX, at 588.

violence in prisons and jails.[35] One study found incarcerated men are eighteen times more likely to be the victims of physical assault than their non-incarcerated counterparts, and incarcerated women are twenty-seven times more likely than their non-incarcerated counterparts to suffer physical assault.[36] In 2016, researchers found that more than thirteen percent of incarcerated people in a national dataset were victims of prison violence.[37] A 2018 study found that eighty percent of the respondents sample had witnessed violence involving prisoners; twenty-eight percent had witnessed violence involving prison staff.[38]

Recent media reports recount fears, for instance, among the people incarcerated at USP-Thomson of the "pressing threat of violence from cellmates as well as brutality at the hands of staff."[39] According to NPR, "many men reported being shackled [by prison staff] in cuffs so tight they left scares, or being 'four-pointed' and chained by each limb to a bed for hours, far beyond what happens at other prisons and in violation of [BOP] policy and federal regulations."[40]

Violent jail and prison officials often operate with impunity. A joint investigation by the New York Times and the Marshall Project reveals hundreds of violent attacks on incarcerated people by prison guards across New York.[41] Specific reports ranged from group beatings to withholding food, resulting in: "Shattered teeth. Punctured lungs. Broken bones."[42] Often, state officials did not even attempt to discipline the officers.[43] When they did try to fire officers or their supervisors, their efforts failed ninety percent of the time.[44] In one reported case, the state tried — and failed — on three separate occasions to fire a guard for repeatedly using excessive force.[45]

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[35] *See generally* Wolff, Blitz, Shi, Siegel, & Bachman, *supra* note XX, at 588 ("Violence is a pervasive feature of prison life.").

[36] Wolff, Blitz, Shi, Siegel, & Bachman, *supra* note XX, at 595.

[37] Brent Teasdale, Leah E. Daigle, Shila R. Hawk, & Jane C. Daquin, *Violent Victimization in the Prison Context: An Examination of the Gendered Contexts of Prison*, 60 INVEST. J. OF OFFENDER THERAPY & COMP. CRIM. 995, 1003 (2016)

[38] BRUCE WESTERN, HOMEWARD: LIFE IN THE YEAR AFTER PRISON (2018).

[39] Christie Thompson & Joseph Shapiro, *How the newest federal prison became one of the deadliest*, NPR (May 31, 2022, 6:00 AM), https://perma.cc/G4PZ-XWCG.

[40] *Id*.

[41] Alysia Santo, Joseph Neff, & Tom Meagher, *In New York Prisons, Guards Who Brutalize Prisoners Rarely Get Fired*, MARSHALL PROJ. (May 19, 2023, 5:00 AM), https://www.themarshallproject.org/2023/05/19/new-york-prison-corrections-officer-abuse-prisoners.

[42] *Id*.

[43] *Id*.

[44] *Id*.

[45] *Id*.

Another officer "who broke his baton hitting a prisoner 35 times, even after the man was handcuffed, was not fired. Neither were the guards who beat a prisoner at Attica Correctional Facility so badly that he needed 13 staples to close the gashes in his scalp. Nor were the officers who battered a mentally ill man, injuring him from face to groin. The man hanged himself the next day.[46] [47]

With a doctrine as internally inconsistent and dubiously premised as the force doctrine, its core is "best rationalized and understood on expressive grounds."[48]

Over time, the Supreme Court has interpreted multiple constitutional provisions to regulate government actors' uses of force against individuals. Which provision applies depends solely on the status of the subject of the force.[49] The Fourth Amendment's guarantee of freedom from unreasonable search and seizure protects a free person from a police officer's use of objectively unreasonable force when making an arrest or investigatory stop.[50] The Fourteenth Amendment's promise of due process protects people charged with a crime and detained from officials' use of objectively unreasonable force, as *Kingsley* held.[51] The Eighth Amendment's prohibition on cruel and unusual punishment protects people incarcerated for criminal convictions from force that amounts to "punishment," which the Court has held amounts to force that is applied knowingly or recklessly — meaning "maliciously and sadistically for the very purpose of causing harm."[52] This legal regime reflects the many settings in which a citizen may encounter a state actor and, possibly, find themselves subject to that actor's use of physical force.[53]

[46] *Id*.

[47] Equal Justice Inst., *Alabama Reinstates Prison Guard Despite Assault of Incarcerated Man Who Died* (Oct. 24, 2023), https://eji.org/news/alabama-reinstates-prison-guard-despite-assault-of-incarcerated-man-who-died/;

[48] *See* Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PENN. L.R. 1503, 1552 (2000) (making similar claim with respect to dormant commerce clause doctrine).

[49] *See generally* Danielle C. Jefferis, *Expressive Power, Force, and the Policing-Punishment Continuum* (forthcoming 2024) (manuscript on file with author).

[50] *Graham v. Connor*, 490 U.S. 386 (1989).

[51] *Kingsley v. Hendrickson*, 576 U.S. 352 (2015).

[52] *Whitley v. Albers*, 475 U.S. 312 (1986) (citations and quotations omitted).

[53] Avidan Y. Cover, *Reconstructing the Right Against Excessive Force*, 68 FLA. L. REV. 1773, 1802-03 (2016).

None of those provisions, however, explicitly mention physical force in their prescriptions. The Fourth Amendment provides, in pertinent part, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."[54] The Fourteenth Amendment's due process clause promises "nor shall any State deprive any person of life, liberty, or property, without due process of law."[55] And the Eighth Amendment states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[56] Rather than providing express protections, the constitution's regulation of state actors' uses of force has emerged through judicial interpretation of the rights at issue. This Part examines the emergence and evolution of the constitutional regulation of force, particularly as applied to places of confinement, as well as some pertinent limits and criticisms of the doctrine, to contextualize the *Kingsley* study that follows in Part II.

A. The Policing-Punishment Continuum.

The Supreme Court did not step in to expressly regulate government actors' uses of force until the 1980s, leaving lower federal courts throughout the nineteenth and most of the twentieth century to determine whether the constitution provides any protections from such conduct. For much of that history, lower courts declined to do so, focusing more on the lawfulness of the more traditional policing functions of executing search and arrest warrants and almost exclusively through federal criminal proceedings rather than civil actions.[57] Since it was not until the 1960s that the express and full protections of the Fourth Amendment[58] were incorporated through the Fourteenth Amendment to apply to state actors, when federal courts did address the infrequent civil claim of unlawful police conduct by state (versus federal) actors they typically framed those claims as ones of due process violations arising from the Fourteenth Amendment.[59]

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[54] U.S. CONST. AMEND. IV.

[55] U.S. CONST. AMEND. V & XIV.

[56] U.S. CONST. AMEND. VIII.

[57] *See, e.g.*, *Cradle v. United States*, 178 F.2d 962 (D.C. Cir. 1949); *District of Columbia v. Little*, 178 F.2d 13 (D.C. Cir. 1949); *United States v. Diuguid*, 146 F.2d 848 (2d Cir. 1945); *Gatterdam v. United States*, 5 F.2d 673 (1925).

[58] *Aguilar v. Texas*, 378 U.S. 108 (1964); *Mapp v. Ohio*, 367 U.S. 643 (1961); *see also Wolff v. Colorado*, 338 U.S. 25 (1949) ("The security of one's privacy against arbitrary intrusion by the police —which is at the core of the Fourth Amendment—is basic to free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the states through the Due Process Clause.'").

[59] *See, e.g.*, *Jennings v. Nester*, 217 F.2d 153 (7th Cir. 1954); *Mueller v. Powell*, 203 F.2d 797 (8th Cir. 1953); *Yglesias v. Gulfstream Park Racing Ass'n*, 201 F.2d 817 (5th Cir. 1953);

Federal courts paid even less attention to claims of force arising in America's prisons and jails in the nineteenth and early-to-mid twentieth centuries, especially in terms of federal constitutional and/or civil rights concerns.[60] From the earliest days of American carceral punishment, federal courts exhibited disinterest and disengagement, at best, with the conditions inside carceral settings. This judicial disposition has come to be known as the hands-off doctrine, which dominated prison law despite brutal conditions and treatment of people in state custody for much of the nineteenth and early-to-mid twentieth century.[61] Moreover, the Eighth Amendment's explicit prohibition on cruel and unusual punishments was not incorporated to the states until 1962,[62] leaving many state and local officials' conduct beyond the reach of the constitution's express protections until then.

Hague v. Committee for Industrial Org., 101 F.2d 774 (3d. Cir. 1939); *Casserly v. Wheeler*, 282 F. 389 (9th Cir. 1922); *Cox v. Shepherd*, 199 F.Supp. 140 (S.D. Cal. 1961); *Crawford v. Lydick*, 179 F.Supp. 211 (W.D. Mich. 1959); *Mackey v. Chandler*, 152 F.Supp. 579 (W.D.S.C. 1957); *Refoule v. Ellis*, 74 F.Supp. 336 (N.D. Ga. 1947); *Ghadiali v. Delaware State Medical Soc.*, 28 F.Supp. 841 (D. Del. 1939).

[60] Federal courts reviewed some early claims of unlawful force in carceral settings, though typically under criminal law or state tort doctrines. *See, e.g.*, *Bracken v. Cato*, 54 F.2d 457 (5th Cir. 1931) (analyzing survivors' claim against deputy sheriff for killing a prisoner under state wrongful death statute); *Weigel v. Brown*, 194 F. 652 (8th Cir. 1912) (evaluating prisoner's claim of unlawful beatings under relevant sentencing framework). *But see Pullen v. United States*, 164 F.2d 756 (5th Cir. 1947) ("'The fact that a prisoner is assaulted, injured, or even murdered by state officials does not necessarily mean that he is deprived of any right protected or secured by the Constitution or laws of the United States.'" (quoting *Screws v. United States*, 325 U.S. 91, 108 (1945)).

[61] Danielle C. Jefferis, *Carceral Deference: Courts and Their Pro-Prison Propensities*, 92 FORDHAM L. REV. 983, 999-1017 (2023); *see also Bethea v. Crouse*, 417 F.2d 504, 505-06 (10th Cir. 1969) ("We have consistently adhered to the so-called 'hands off' policy in matters of prison administration according to which we have said that the basic responsibility for the control and management of penal institutions, including the discipline, treatment, and care of those confined, lies within the responsible administrative agency and is not subject to judicial review unless exercised in such a manner as to constitute clear abuse or caprice upon the part of prison officials." (citations omitted)); *Johnson v. Dye*, 175 F.2d 250 (3d Cir. 1949) (discussing testimony establishing "that it was the custom of the Georgia authorities to treat chain gang prisoners with persistent and deliberate brutality at or about the time the petitioner was suffering punishment and for some years thereafter . . . There was also evidence which showed that [Black] prisoners were treated with a greater degree of brutality than white prisoners though it is difficult to make fine distinctions as to degrees of brutality."); *Weigel v. Brown*, 194 F. 652 (8th Cir. 1912) ("The laws of the state of Arkansas empower the county court of any county in that state to let the labor of persons convicted and sentenced to the county jail to a contractor on condition that he agrees to maintain, keep, and work them . . . , and they authorize the contractor to whip any such prisoner with a strap 2 feet long and 3 1/2 inches wide, attached to a wooden handle, with 10 licks once in 24 hours for his refusal to work.").

[62] *Robinson v. California*, 370 U.S. 660 (1962).

Two Supreme Court interventions in the mid-twentieth century changed this trajectory of the force doctrine significantly. The first was the Court's 1945 decision in *Screws v. United States*, which involved "a shocking and revolting episode in law enforcement."[63] The episode, specifically, revolved around law enforcement officers' extrajudicial killing of Robert "Bobby" Hall, a Black American, mechanic, and World War II veteran.[64] Federal prosecutors charged the sheriff and a deputy under the criminal provisions of the Civil Rights Act, accusing them of willfully depriving Mr. Hall of his constitutionally protected right to not be deprived of life without due process of law.[65] The jury returned a conviction, and the defendants appealed, challenging the statute facially and as applied. Their as-applied challenge contended that an element of the statute required that they were acting "under color of law" at the time of the charged offense, and how could they be acting *under color of law* when committing murder in violation of state law?[66]

In a fractured opinion, four justices concluded that Congress did intend for the statute to cover state officials acting under the *pretense* of law, even where their conduct ultimately violated the law.[67] In other words, even though the defendants' conduct was criminal, they acted under the cloak of their authority as state law enforcement officers. "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law is action taken 'under color of state law.'[68] In a line that would be echoed throughout the force doctrine for decades to come, the four justices noted, however, that certain force against individuals in state custody, even lethal force, may well be constitutional.[69]

Following *Screws*, federal prosecutors brought criminal charges against some prison officials who used force against incarcerated targets, seemingly testing legal theories and standards.[70] In Florida, for instance, the federal government alleged the defendant-official willfully whipped prisoners to extort confessions from them and inflict "summary corporal punishment upon them in violation of the laws of Florida and the constitution of the

[63] 325 U.S. 91, 92 (1945).

[64] *See generally* Hon. Paul J. Watford, Screws v. United States *and the Birth of Federal Civil Rights Enforcement*, 98 MARQ. L. REV. 465, 466-67 (2014).

[65] 325 U.S. at 93.

[66] *Id*.

[67] *Id* at 109-10 (citing *United States v. Classic*, 313 U.S. 299 (1941)).

[68] *Id*. at 109 (quoting *United States v. Classic*, 313 U.S. 299 (1941)).

[69] *Id*. at 108 ("The fact that a prisoner is assaulted, injured, or even murdered by state officials does not necessarily mean that he is deprived of any right protected or secured by the Constitution or laws of the United States.").

[70] *See, e.g.*, *United States v. Jones*, 207 F.2d 785, 786 (5th Cir. 1953); *Williams v. United States*, 179 F.2d 656 (5th Cir. 1950).

United States."[71] Since the case arose before the incorporation of the Eighth Amendment, the government alleged the officer's conduct violated the Fourteenth Amendment's guarantee of due process.[72] In reviewing the sufficiency of the criminal complaint, the Fifth Circuit expressly acknowledged there are some constitutional protections for violence in prisons: "[F]ederal laws may be violated within prison walls, and federal crimes committed therein . . ."[73]

The *Screws* decision paved the way for the Court's second major intervention — the 1961 decision in *Monroe v. Pape* — which marked the dawn of modern civil rights enforcement through the civil cause of action found within the Civil Rights Act of 1871, 42 U.S.C. § 1983, and opened the channels through which federal courts would soon be asked to evaluate substantive constitutional protections, including protections against physical force, at much greater rates than in the ninety preceding years of the Civil Rights Act's existence.[74]

James Monroe and his family invoked § 1983 to sue thirteen Chicago police officers[75] who broke into their home early one morning, forced them out of bed, made them stand naked in the living room, and ransacked every room of the house.[76] In contrast to the *Screws* decision, where the right at issue was the Fourteenth Amendment's due process protection because Mr. Hall was an arrestee, the plaintiffs in *Monroe* raised their claims under the Fourth Amendment's search and seizure protections[77] (which had at that been been incorporated to the states).[78]

The officers sought dismissal on the grounds that the complaint failed to state a cause of action, arguing, like the *Screws* defendants, that if their conduct violated the Fourth Amendment, as the plaintiffs alleged, they could

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[71] *Id*.

[72] *United States v. Jones*, 108 F. Supp. 266, 267 (S.D. Fla. 1952).

[73] 207 F.2d at 786. *See also United States v. Jackson*, 235 F.2d 925 (8th Cir. 1956); *United States v. Walker*, 216 F.2d 683 (5th Cir. 1954); *Crews v. United States*, 160 F.2d 746 (5th Cir. 1947) (federal prosecution of police officer).

[74] 365 U.S. 167 (1961).

[75] The plaintiffs also sued the City of Chicago. The Court analyzed that municipal liability claim under a different legal standard than the claims against the individual officers. *Id*.

[76] *Id*. at 169. The complaint alleged the officers also arrested Mr. Monroe and detained him on "open" charges for ten hours about a murder, without permitting him to see a magistrate judge or call his attorney. Mr. Monroe was subsequently released with no charges.

[77] *See id*.

[78] *Aguilar v. Texas*, 378 U.S. 108 (1964); *Mapp v. Ohio*, 367 U.S. 643 (1961); *see also Wolff v. Colorado*, 338 U.S. 25 (1949) ("The security of one's privacy against arbitrary intrusion by the police —which is at the core of the Fourth Amendment—is basic to free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the states through the Due Process Clause.'").

not be considered to have acted "under color of law" as § 1983 requires.[79] In other words, how could the police defendants have been acting "under color of law" *while* violating the law? The Court disagreed with the defendants' interpretation of the statute, relying on *Screws* to conclude that § 1983, like its criminal analog, covers even "those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it."[80]

The Court's decision in *Monroe* permitted plaintiffs to challenge a wider swath of state official conduct than before.[81] But the doctrinal slate on which to challenge such conduct was largely clean. Prior to *Monroe* (and the parallel actions of the Supreme Court in incorporating constitutional provisions to the states), federal courts had not yet articulated clear standards for many express constitutional rights, let alone rights based on implied principles such as what became the force doctrine.[82] Litigants raising constitutional challenges through federal civil actions began testing theories and approaches in this new legal landscape.

Shortly after the *Monroe* decision, for example, some lower federal courts began permitting incarcerated litigants' civil claims of unlawful force to proceed beyond the motion to dismiss stage, albeit reluctantly.[83] Few of

[79] *Id*. at 170.

[80] *Id*. at 171-72.

[81] *See, e.g.*, *United States ex rel. Atterbury v. Ragen*, 237 F.2d 953 (7th Cir. 1956) (finding, before *Monroe*, that prisoner's § 1983 claim for excessive beatings and abuse "do not state a claim upon which relief can be granted under the federal Civil Rights Act").

[82] *See, e.g.*, Sina Kian, *The Path of the Constitutional: The Original System of Remedies, How It Changed, and How the Court Responded*, 87 N.Y.U. L. REV. 132, 187-88 (2012) ("[U]ntil incorporation, there simply were not many federal constitutional rights that could give rise to a cause of action (to say nothing of the pragmatic difficulties of bringing lawsuits during Jim Crow). Equal protection claims were notoriously difficult, the Privileges or Immunities Clause suffered narrow interpretation, and pre-incorporation Fourteenth Amendment did little for civil rights plaintiffs. In the First Amendment context, the right to free speech was incorporated in 1925, free assembly in 1937, free exercise in 1940, and establishment in 1947. Even then, many of these clauses did not enjoy robust interpretation until later decisions. Although *Wolf* notably incorporated the right against unreasonable searches and seizures in 1949, it explicitly relegated plaintiffs to common law remedies, and the Fourth Amendment's warrant jurisprudence was not applied to the states until three years after *Monroe* and *Mapp*. This left only a handful of federal rights that could be invoked by ` 1983.").

[83] *See, e.g.*, *Tolbert v. Bragan*, 451 F.2d 1020 (5th Cir. 1971) ("Tolbert has alleged more than a mere matter of prison administration or of state law. Severe physical abuse of prisoners by their keepers without cause or provocation is actionable under the Civil Rights Act."); *Allison v. Cal. Adult Auth.*, 419 F.2d 822 (9th Cir. 1969) (allowing incarcerated plaintiff's claim of physical abuse by prison employees to proceed despite "recogniz[ing] that frivolous Civil Rights suits by prison inmates have become a matter of concern to district courts"); *Wiltsie v. Cal. Dep't of Corrs.*, 406 F.2d 515 (9th Cir. 1968) (allowing incarcerated plaintiff's claim of force under the Civil Rights Act to proceed in light of *Brown v. Brown*); *Dodd v.*

these decisions, however, articulated the precise constitutional right and governing legal standard at issue, speaking only vaguely to claims of physical abuse or beatings brought under "the Civil Rights Act" (*i.e.*, § 1983), and examining whether the claim of force arose in the context of prison discipline — *i.e.*, whether it appeared the prisoner provoked or otherwise warranted the abuse.[84] If it did appear that the force was warranted, the claim did not proceed; if, on the other hand, the allegations did not involve internal facility discipline or perceived provocation, courts generally allowed the claim to proceed.

Other lower federal courts allowed claims challenging force in prisons and jails to proceed under more precise legal theories. In *Bethea v. Crouse*, the Tenth Circuit was asked to analyze whether two co-plaintiffs' Eighth Amendment claim against a prison warden could proceed on the theory that the warden was legally answerable for a severe beating inflicted on them by another prisoner and, thus, in violation of the plaintiffs' right to be free from cruel and unusual punishments.[85] The court considered the hands-off doctrine and the general principle of judicial non-involvement in prison matters but concluded that the severe beating could be found to amount to cruel and unusual punishment rendering summary judgment improper.[86] In its attempt to articulate a workable standard for evaluating force within the scope of the Eighth Amendment, the court first noted the need to separate force used against prisoners as disciplinary measures and non-disciplinary force, echoing several cases that case before it.[87] For, the court acknowledged, "[w]hat force amounts to simple assault and battery and how much *more* force amounts to cruel and unusual punishment is a difficult question of degree."[88] The court ultimately concluded that the governing standard was "whether the assault as found by the factfinder is sufficiently severe in the

Spokane County, Wash., 393 F.2d 330, (9th Cir. 1968) (permitting jail detainee's civil claim alleging "threats of violence, actual assaults, and other punishment treatment" against three jail officials, among others, to proceed); *Brown v. Brown*, 368 F.2d 992, 993 (9th Cir. 1966) (reviewing a claim that prison agents "beat [the plaintiff] and caused various other deprivations of his civil rights" and stating, "The pleadings filed by appellant contain allegations which could be said to tax a reader's credulity . . . On remand we invite the district court's attention to . . . [the fact] that although a cause of action is formally alleged the proceeding is nonetheless frivolous.").

[84] *See supra* note 65. *But see Bethea v. Crouse*, 417 F.2d 504, 505-06 (10th Cir. 1969) (analyzing incarcerated plaintiff's claim against warden alleging responsibility for a severe beating inflicted on him by another prisoner under the Eighth Amendment

[85] 417 F.2d 504, 505 (10th Cir. 1969).

[86] *Id*. at 509.

[87] *Id*.

[88] *Id*. (emphasis added).

circumstances to *shock the conscience of a reasonable man*. If so, the verdict should be for the plaintiffs."[89]

Judicial confusion persisted, nonetheless, around the governing standard and principles for use of force in carceral settings.[90] Several federal courts in the 1970s evaluated arrestees' claims of excessive force under the Eighth Amendment, interpreting the provision to protect against reckless or arbitrary conduct.[91] Other courts that evaluated carceral force claims under the Eighth Amendment, even those brought by arrestees, looked to whether the alleged force amounted to "barbarous" treatment.[92] Facility discipline (or the lack thereof) did not play an express role in those decisions, as it had for earlier cases arising out of prisons, though the latter were brought by post-conviction plaintiffs.

The Second Circuit, in *Johnson v. Glick*, seized the opportunity in 1973 to interpret the Eighth Amendment and its application to carceral uses of force much more robustly than previous courts had done.[93] Looking to the history of the Eighth Amendment, the court, in an opinion written by Judge Friendly, stated, "[T]here can be no disagreement that what sparked the English provision [from which the Eighth Amendment takes its language] was the conduct of judges under James II. The background of our own Bill of Rights, however, makes clear that the Eighth Amendment was intended to apply not only to the acts of judges but as a restraint on legislative action as well."[94] In light of that history, the court concluded the Eighth

[89] *Id*. (citing *Morgan v. Labiak*, 368 F.2d 338 340 (10th Cir. 1966) (emphasis added)).

[90] *See generally Johnson v. Glick*, 481 F.2d 1028, 1031 (2d Cir. 1973) ("The great weight of authority in favor of the assumption [that brutal police conduct violates a right guaranteed by the due process clause of the Fourteenth Amendment] has not been accompanied by an equivalent amount of analysis. Many of the opinions, including our own in *Martinez* and *Inmates*, rely on a passing reference to the 'cruel and unusual punishment' clause of the Eighth Amendment. The most extensive judicial treatment of the subject, Judge Aldisert's opinion in *Howell v. Cataldi*, likewise relies on that clause.").

[91] *See, e.g.*, *Howell v. Cataldi*, 464 F.2d 272, 281-82 (3d Cir. 1972) ("Thus, although what constitutes a cruel and unusual punishment has not been exactly decided, the Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society. We are not unaware of the commonplace rhetoric: 'police brutality.' And we have heretofore observed that not every application of force by a police officer, even in a prison or police station, offends the law or the Constitution. But where the application of that force exceeds that which is reasonable and necessary under the circumstances, and also violates standards of decency more or less universally accepted, such conduct clearly extends beyond the pale.").

[92] *See, e.g.*, *Smartt v. Lusk*, 373 F.Supp. 102 (E.D. Tenn. 1973) ("There is no evidence that the punishment inflicted on Mr. Smartt by Mr. Stalcup was 'barbarous,' which is the meaning of cruelty as it relates to punishment.").

[93] 481 F.2d 1028 (2d Cir. 1973).

[94] *Id*. at 1031 (citing *In re Kemmler*, 136 U.S. 436, 446-47 (1890); *Weems v. United States*, 217 U.S. 349, 371-73 (1910); *Furman v. Georgia*, 408 U.S. 238, 266-69 (1972)).

Amendment's cruel and unusual punishments protections apply only to judicial or legislative acts of "punishment" and the manner in which such punishment is carried out (that is, any executive actions that have "been deliberately administered for a penal or disciplinary purpose, with the apparent authorization of high prison officials charged by the state with responsibility for care, control, and discipline of prisoners").[95] Accordingly, unless a person has been given a formal, legislatively authorized, judicially imposed sentence, the Eighth Amendment's cruel and unusual punishments protection simply does not apply.[96] This means the Eighth Amendment, in Judge Friendly's view, simply does not apply to pre-trial detainees who may be confined but who have not yet been convicted and formally sentenced.

Yet, it would "be absurd," according to the court, to conclude that the constitutional protection against excessive force is limited to what is proscribed by the Eighth Amendment.[97] Rather, "*both before and after sentence* . . . quite apart from any specific of the Bill of Rights, application of undue force by law enforcement officers deprives a suspect of liberty without due process of law."[98] Crucially, the court expressly extended the due process protection to *all uses of force*, including against post-conviction prisoners: "The same [due process] principle should extend to acts of brutality by correctional officers, although the notion of what constitutes brutality may not necessarily be the same."[99] Prisoners, the court noted, are "not usually the most gentle or tractable of men and women" and thus the "occasional use of a degree of intentional force" may be required and justified:[100]

> In determining whether the constitutional line has been crossed, a court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether the force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.[101]

[95] *Id*. at 1032.

[96] *Id*. ("We have considerable doubt that the cruel and unusual punishment clause is properly applicable at all until after conviction and sentence." (citations omitted)).

[97] *Id*.

[98] *Id*. (emphasis added).

[99] *Id*. at 1032-33 (citing *Collum v. Butler*, 421 F.2d at 1259-60; *Tolbert v. Bradan*, 451 F.2d at 1020; *Wiltsie v. Cal. Dep't of Corrs*., 406 F.2d 517).

[100] *Id*. at 1033.

[101] *Id*.

The court added, "Not every push or shove, even if it may later seem unnecessary *in the peace of a judge's chambers*, violates a prisoner's constitutional rights."[102]

By the mid-1970s, the force doctrine was finally taking shape, though it was far from settled. The Supreme Court stepped in shortly thereafter with a series of cases that defined the excessive force doctrine for both carceral and non-carceral settings for the next four decades. The first decision was *Tennessee v. Garner*, in which the Court held that the Fourth Amendment governs a police officer's use of force, including lethal force, against a free person: "Whenever an officer restrains the freedom of a person to walk away, he has seized that person . . . [T]here can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment."[103] The legality of such force is determined by its reasonableness, evaluated by balancing the nature of the force against the governmental interested alleged to justify the use of force.[104] *Lethal* force, the Court held, is constitutional, even against a person who is fleeing, only where "the officer has probable cause to believe the [person] poses a threat of serious physical harm, either to the officer or others."[105]

The next case was *Whitley v. Albers*, which involved the use of force in a carceral setting. Specifically, the plaintiff was a post-conviction prisoner. The Court, in a decision authored by Justice O'Connor, explicitly cabined its decision as one interpreting the Eighth Amendment to determine the specific standard that should govern a post-conviction prisoner's claim brought under it?[106] In doing so, the Court rejected — with thin and dubious reasoning[107] — any argument that the Fourteenth Amendment's due process protections might apply, in addition to the Eighth Amendment's protections, to claims of force brought by post-conviction prisoners as lower courts had done. The Eighth Amendment, the Court held, is the "primary source of substantive protection to convicted prisoners in cases such as this one," and any Fourteenth Amendment protection would likely duplicate what the Eighth Amendment already proscribes.[108]

To support that conclusion, the Court relied its 1952 decision in *Rochin v. California*, a criminal case in which the defendant alleged investigating officers violated his due process rights by directing a hospital doctor to pump his stomach, which resulted in the recovery of two morphine pills for which

[102] *Id*. (emphasis added).
[103] 471 U.S. 1, 7 (1985).
[104] *Id*. at 7-8.
[105] *Id*. at 11.
[106] 475 U.S. 312, 314 (1986).
[107] *See infra* Part I.B.
[108] 475 U.S. at 327.

he was prosecuted.[109] In discussing the bounds of the due process protections at issue, the Court noted that the constitutional prescriptions, while indefinite and vague are not fixed or frozen in time. Courts must evaluate them according to the values of both tradition and a progressive society.[110] But this was an easy case: Forcing a person to undergo a stomach pump "is conduct that shocks the conscience" and "is bound to offend even hardened sensibilities."[111] In other words, this was not a difficult case that required careful balancing of tradition and progress, in the Court's view. The officers acted unconstitutionally, and therefore, the judgment of conviction on the basis of the morphine pills was reversed.[112]

In *Whitley*, however, the Court read *Rochin* to conclude that the only applicable standard for due process protections was *Rochin*'s "shocks the conscience" standard. Thus, the Fourteenth Amendment could not *also* apply to force against post-conviction prisoners because it would duplicate the Eighth Amendment's protections: "It would indeed be surprising if, in the context of forceful security measures, 'conduct that shocks the conscience' or 'afford[s] brutality the cloak of law,' and so violates the Fourteenth Amendment were not also punishment [in violation of the Eighth Amendment]."[113], finding that the due process clause affords a post-conviction prisoner "no greater protection that does the Cruel and Unusual Punishments Clause."[114] The Court concluded by holding that the governing standard for force claims brought by post-conviction prisoners and in the context of a prison riot is "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm," borrowing from the Second Circuit's language in *Johnson*.[115]

The Court jumped back to police officers' use of force in non-carceral settings in 1989 with *Graham v. Connor*, holding for the first time that the Fourth Amendment's protection from unreasonable seizures, not the Fourteenth Amendment's due process protections, governs a free citizen's claim of excessive force "in the course of making an arrest, investigatory stop, or other 'seizure' of his person."[116] Chief Justice Rehnquist authored

[109] 342 U.S. 165 (1952).

[110] *Id*. at 171-72.

[111] *Id*. at 172.

[112] *Id*. at 174.

[113] 475 U.S. at 327 (quoting *Rochin*, 342 U.S. at 172-73); *see also id*. at 327 ("[I]n these circumstances the Due Process Clause affords respondent *no greater protection* than does the Cruel and Unusual Punishments Clause.").

[114] *Id*. at 327; *see also infra* Part I.B.

[115] *Id*. at 320-21.

[116] 490 U.S. 386, 388 (1989); *see also id*. at 395 ("Today we make explicit what was implicit in *Garner*'s analysis, and hold that *all* claims that law enforcement officers have

the majority opinion, and in doing so, explicitly addressed Judge Friendly's analysis in *Johnson v. Glick*.[117] Judge Friendly ignored, the Court stated, the "two most textually obvious sources of constitutional protection against physically abusive government conduct" — the Fourth and Eighth Amendments — and looked instead to substantive due process, articulating the factors that the Second Circuit and many lower courts after relied on to evaluate excessive force claims in varying contexts.[118]

But, the Court continued, "We reject this notion that all excessive force claims under § 1983 are governed by a single generic standard," such as due process protections.[119] We must, instead, "isolate the precise constitutional violation with which the defendant is charged. In most instances, that will be either the Fourth Amendment's prohibition against unreasonable seizures of the person, or the Eighth Amendment's ban on cruel and unusual punishments, which are the two primary sources of constitutional protection against physically abusive government conduct."[120] In the Court's view, the Fourth and Eighth Amendments are clearer textual sources for protections against official uses of force than the Fourteenth Amendment's due process language, despite the fact that neither provision mentions force expressly.[121] The governing standard, then, is the Fourth Amendment's "reasonableness" standard, which, as lower courts had discussed in the context of force claims in the preceding decades, "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."[122] Critically, the inquiry in an objective one, "judged from the perspective of a reasonable officer on the scene" and "without regard to [the officer's] underlying intent or motivation."[123]

Having settled the question of the shape of the force doctrine for post-conviction prisoners in *Whitley*,[124] and now deciding in *Graham* the scope of

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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.").

[117] *Id*. at 392-93.

[118] *Id*.

[119] *Id*. at 393-94.

[120] *Id*. at 394; *see also infra* Part I.B.

[121] *Id*. ("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.").

[122] *Id*. at 396.

[123] *Id*. at 397.

[124] *Id*. at 395 n.10 ("After conviction, the Eighth Amendment 'serves as the primary source of substantive protection . . . in cases . . . where the deliberate use of force is challenged as excessive and unjustified.' Any protection that 'substantive due process'

the doctrine governing police officers' interactions with free people, the Court then in a footnote addressed pre-trial detainees — those people who had progressed past the arrest, investigatory stop, or other "seizure" point on the policing-punishment continuum, and so were beyond the reach of the Fourth Amendment (as the Court defined the reach in *Graham*), but were not yet convicted and sentenced and, thus, also beyond the reach of the Eighth Amendment. Citing *Bell v. Wolfish*, the Court noted, "It is clear . . . that the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment."[125]

Readers of that footnote may have been surprised to learn that the reach of *Bell* to pre-trial detainees' force claims "was clear" at the time the Court decided *Graham*. The 1979 *Bell* decision itself examined claims of unconstitutional *conditions* at a federal jail, such as overcrowded cells, prohibitions on the receipt of certain books and magazines, prohibitions on the receipt of packages and personal items from outside the jail, and the practice of strip-searches.[126] None of the plaintiffs raised any force challenges.[127] The *Graham* Court, in an opinion also authored by Justice Rehnquist, concluded that pre-trial detainees are not yet subject to formal punishment because they have not been convicted of a criminal offense. Therefore, when a pre-trial detainee challenges an aspect of pre-trial detention that does not violate any express guarantee of the constitution (such as the First or Fourth Amendment), the right at issue is the "right to be free from punishment," which the Court located within the right to due process.[128] "Absent a showing of an expressed intent to punish on the part of detention facility officials," whether a condition of pre-trial detention is constitutional will "turn on whether an alternative purpose to which the restriction may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned to it."[129] The *Graham* Court interpreted this holding to apply to force challenges as well as the sorts of conditions challenges the *Bell* plaintiffs actually raised.

The Court's expression of the force doctrine at this point generated confusion among lower courts. Some conflated the objective Due Process standard with the subjective Eighth Amendment standard.[130] In a pre-trial

affords convicted prisoners against excessive force is, we have held, at best redundant of that provided by the Eighth Amendment." (quoting *Whitley v. Albers*, 475 U.S. at 327)).

[125] *Id*. at 395 n.10.

[126] 441 U.S. 520 (1979).

[127] The *Bell* plaintiffs did challenge the practice of body cavity searches in the jail, which the Court analyzed under the Fourth Amendment's privacy framework, not under the theory that the searches constituted unlawful force or otherwise violated due process principles.

[128] *Id*. at 534-35.

[129] *Id*. at 538 (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963)).

[130] *See, e.g.*, *Dawson v. Anderson County, Tex.*, 566 Fed. Appx. 369 (5th Cir. 2014)

detainee's force challenge, for example, a panel of the Fifth Circuit stated, " "Law enforcement officers are within their rights to use objectively reasonable force to obtain compliance from prisoners," but cited Eighth Amendment cases.[131]

Other lower federal courts continued to conflate the objective and subjective standards. A panel of the Eighth Circuit reasoned, "[T]he Due Process Clause affords pretrial detainees at least as much protection as the Eighth Amendment provides to convicted prisoners. Therefore, if the use of force in this case would have violated the Eighth Amendment had the plaintiffs been prisoners, that conduct necessarily violated the plaintiffs' rights under the Fourteenth Amendment."[132] Similarly, a panel of the Eleventh Circuit held, "We analyze a pretrial detainee's claim of excessive force under the Fourteenth Amendment as if it were an excessive-force claim under the Eighth Amendment. A prison official's use of force against a pretrial detainee is excessive under the Fourteenth Amendment if it 'shocks the conscience,' meaning that it is applied 'maliciously and sadistically to cause harm.'"[133] The Second Circuit agreed: "We have equated the standard used for excessive force brought by detainees under the Fourteenth Amendment with that used to analyze Eighth Amendment excessive force claims."[134]

Other courts not only conflated the claims but failed to identify or otherwise confused the plaintiff's status and the governing legal standard. A panel of the Fifth Circuit, for instance, correctly identified a plaintiff as a pretrial detainee but went on to evaluated the plaintiff's force claims under the Eighth Amendment.[135] A panel of the Tenth Circuit succinctly framed the task before lower courts on these sorts of claims:

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[131] *Id*. at 370.

[132] *Edwards v. Byrd*, 750 F.3d 728, 732 (8th Cir. 2014); *see also Everett v. Nort*, 547 Fed. Appx. 117, 121 (3d Cir. 2013) ("Eighth Amendment cruel and unusual punishment standards apply to a pretrial detainee's excessive force claim arising in the context of a prison disturbance." (citing *Fuentes v. Wagner*, 206 F.3d 335, 347 (3d Cir. 2000)).

[133] *Spaulding v. Poitier*, 548 Fed. Appx. 587, 593 (11th Cir. 2013) (quoting *Fennell v. Gilstrap*, 559 F.3d 1212, 1216 n.5 (11th Cir. 2009)).

[134] *DeBoe v. Du Bois*, 503 Fed. Appx. 85, 87 (2d Cir. 2012) (citing *United States v. Walsh*, 194 F.3d 37, 47-48 (2d Cir. 1999)). *See also Husnik v. Engles*, 495 Fed. Appx. 719, 721 (7th Cir. 2012) (quoting *Forrest v. Prine*, 620 F.3d 739, 744 (7th Cir. 2010) ("It is true that 'the Fourteenth Amendment right to due process provides at least as much, and probably more, protection against punishment as does the Eighth Amendment's ban on cruel and unusual punishment.'").

[135] *Edwards v. Loggins*, 476 Fed. Appx. 325, 326-27 (5th Cir. 2012) ("Edwards is correct. At all relevant event times, Edwards was a pretrial detainee. As a pretrial detainee, Edwards's constitutional rights were derived from the Fourteenth Amendment." But "the standards . . . to measure the defendants' culpability and evaluate Edwards's claims were correct."). *See also See, e.g.*, *Wright v. Langford*, 562 Fed. Appx. 769 (11th Cir. 2014) (describing plaintiff

> We know that after the Fourth Amendment leaves off and before the Eighth Amendment picks up, the Fourteenth Amendment's due process guarantee offers detainees some protection while they remain in the government's custody awaiting trial. But we do not know where exactly the Fourth Amendment's protections against unreasonable searches and seizures ends and the Fourteenth Amendment's due process detainee protections begin. Is it immediately after arrest? Or does the Fourth Amendment continue to apply, say, until arraignment? Neither do we know with certainty whether a single standard of care applies to all pretrial detainees—or whether different standards apply depending where the detainee stands in his progress through the criminal justice system. Might, for example, the accused enjoy more due process protection before a probable cause hearing than after? All these questions remain very much in play.[136]

Such was the state of the excessive force doctrine until 2015 when the Court issued its opinion in *Kingsley*.[137] As stated above, Mr. Kingsley brought his claim under the Fourteenth Amendment's Due Process Clause.[138] On appeal to the Seventh Circuit after the jury returned a verdict in the defendants' favor, Mr. Kingsley challenged the instructions the district court provided to the jury at trial, contending they improperly instructed the jury to consider the defendants' subjective intent when evaluating their use of force.[139] He argued on appeal that the district court conflated the Eighth Amendment's subjective intent standard with the Fourteenth Amendment standard, and thus, improperly required him to convince the jury that the defendants acted with reckless disregard for his safety akin to *Whitley*'s "maliciously and sadistically to cause harm" standard.[140] The specific instruction at issue told the jury Mr. Kingsley had to prove, among other elements, that the defendants "*knew* the using force presented a risk of harm

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as a "state prisoner" but noting he asserted excessive force claims "based on a series of incidents that occurred at the Baldwin County Jail"); *Toliver v. City of New York*, 530 Fed. Appx. 90, 92 n.1 (2d Cir. 2013) (noting "the record in this case is unclear, [and] Toliver may have been a pretrial detainee at Rikers[,]" not a post-conviction prisoner).

[136] *Blackmon v. Sutton*, 734 F.3d 1237, 1240 (10th Cir. 2013).

[137] *See generally Hudson v. McMillian*, 503 U.S. 1 (1992) (extending *Whitley*'s holding to all claims of excessive force brought by post-conviction prisoners, including claims that do not necessarily implicate prison discipline or a prison riot).

[138] 576 U.S. at 393.

[139] *Id*. at 445.

[140] *Id*. at 448.

to plaintiff, but they recklessly disregarded plaintiff's safety by failing to take reasonable measures to minimize the risk of harm to plaintiff."[141] Mr. Kingsley argued

The appellate panel agreed that Mr. Kingsley's right to be free from excessive force derived from the Fourteenth Amendment's Due Process Clause rather than the Eighth Amendment due to his status as a pre-trial detainee. The panel, however, affirmed the judgment on the ground that the intent instruction was a proper statement of the law.[142] Relying on the Court's decision in *Bell*, the Seventh Circuit determined the relevant inquiry was whether the challenged force amounted to "punishment."[143] For an act to be punitive, there must be some measure of intent: "[O]ur cases are clear that the existence of intent — at least recklessness — *is* a requirement in Fourteenth Amendment excessive force cases."[144] Therefore, Mr. Kingsley had to prove the defendants acted with "an actual intent to violate [his] rights or reckless disregard for his rights."[145]

As discussed above, the Court, in an opinion written by Justice Breyer, reversed the Seventh Circuit and held the relevant intent standard[146] is "solely an objective one."[147] A plaintiff like Mr. Kingsley, who had been charged with but not yet convicted of a crime must prove only "that the force purposely or knowingly used against him was objectively unreasonable."[148] They do not, in contrast to the district court's instructions to the jury in Mr. Kingsley's case, have to prove any sort of purposeful or reckless intent on the part of the specific named defendant. The inquiry is fact-dependent, must be made from the perspective of a reasonable officer on the scene, and must account for the interests of officials in managing the facility.[149]

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[141] *Id*. at 447.

[142] *Id*. at 453 ("A faithful adherence to the case law that we have discussed precludes our accepting this contention [that the instruction should have allowed the jury to consider wholly objective factors going to intent] . . . [O]ur cases are clear that the existence of intent – at least recklessness – *is* a requirement in Fourteenth Amendment excessive force cases.").

[143] *Id*. at 449 (quoting *Bell v. Wolfish*, 441 U.S. 520, 535 (1979)).

[144] *Id*. at 453 (emphasis in original).

[145] *Id*. at 451 (citations and quotations omitted).

[146] The Court acknowledged there are actually two separate state-of-mind questions in an excessive force case like Mr. Kingsley's — one, was the physical act constituting the force intentional? In other words, did the actor mean for his actions to occur, or were the acts accidental? And two, for what purpose or reason did the actor engage in such force? The latter state-of-mind question goes to whether the force was "excessive" and is where the *Kingsley* Court focused. *See id*. at 395-97.

[147] *Id*. at 397.

[148] *Id*. at 396-97.

[149] *Id*. at 397 (citing *Bell v. Wolfish*, 441 U.S. 520 (1979)); *see also* Danielle C. Jefferis, *Carceral Deference*, 92 FORDHAM L. REV. 983 (2023) (discussing the history and context of

And so stands the constitutional doctrine governing government officials' uses of force. Tracing the meandering path on which the doctrine emerged, it is now clear that the Fourth Amendment's protection against unreasonable seizures protects free people from "objectively unreasonable" uses of force during arrests, investigatory stops, and other "seizures" that stop short of detention. Due process protections govern officials' uses of force against people who have been arrested and charged with a crime but are not yet convicted. Their claims are also evaluated according to an objective reasonableness standard. And the Eighth Amendment's protection against cruel and unusual punishments governs force claims raised by people who have been convicted of a crime and sentenced to a term of imprisonment. Their claims are governed by the subjective "malicious and sadistic for the purpose of causing harm" standard.[150] Open questions remain including how to evaluate the force claims of people detained on probation violations, for example.[151] "While alleged probation violators are afforded certain protections under the Due Process Clause . . . neither we nor the Supreme Court have afforded alleged probation violators 'a substantive liberty interest' to be free from excessive force under the Fourteenth Amendment while detained. We decline 'to expand the concept of substantive due process' unnecessarily, as the Eighth Amendment provides the 'explicit textual source of constitutional protection' against excessive force applied to an individual incarcerated on an unadjudicated probation violation."

The force doctrine, as it has evolved, is thin as compared to other areas of constitutional law.[152] What doctrine there is, is riddled with leaps in reasoning and holdings that either limit or stretch the law in ways that do not stand up to scrutiny, as the next section discusses.

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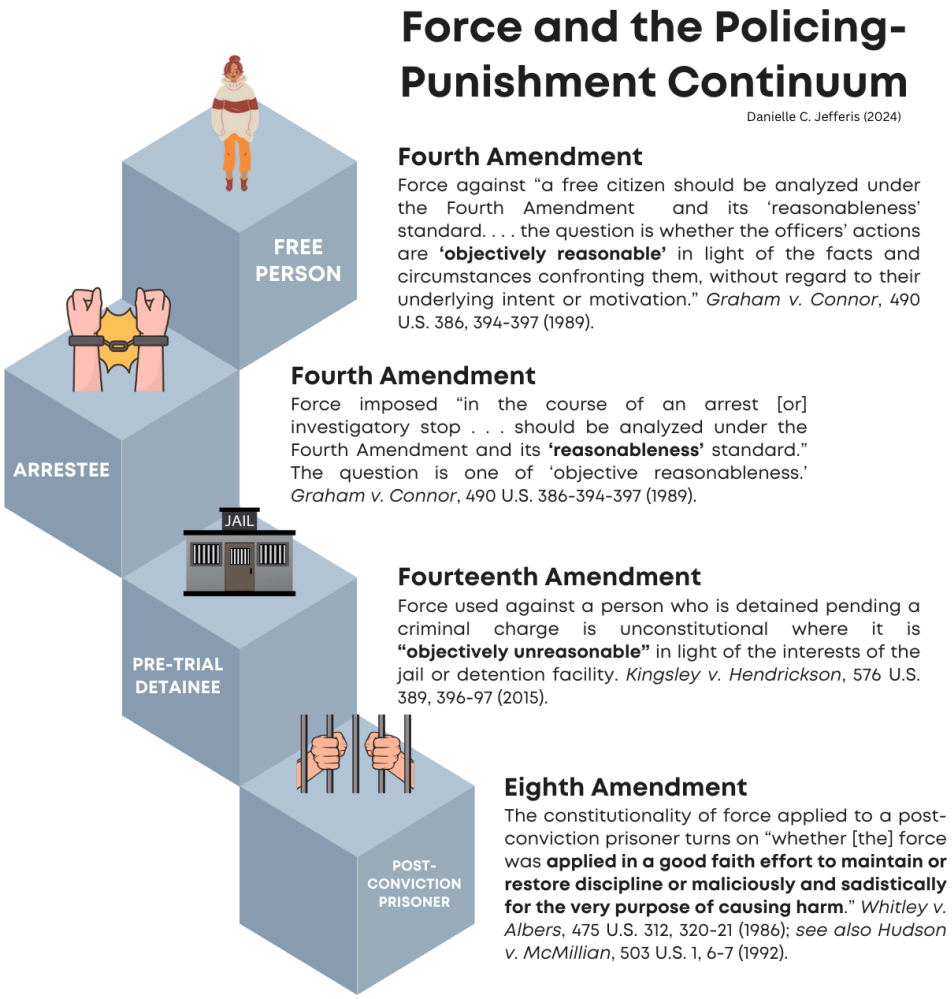
the sweeping deference federal courts afford to prison and jail officials); Danielle C. Jefferis, *Deference Creep* (forthcoming 2024) (unpublished manuscript) (on file with author).

[150] *Id*. at 634-35.

[151] *Peterson v. Heinen*, 89 F.4th 628 (8th Cir. 2023).

[152] Several legal scholars have criticized the arguably shallowness of the Court's excessive force doctrine, particularly with respect to its application to police officers' uses of force, though the same could be said for the force doctrine as applied to carceral settings, as this Article examines. *See, e.g.*, Rachel A. Harmon, *When Is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1119 (2008) ("The Supreme Court's Fourth Amendment doctrine regulating the use of force by police officers is deeply impoverished. Although lower courts frequently rely on this doctrine in civil and criminal cases alleging excessive force by police officers, the Court's standard is indeterminate and undertheorized, particularly as applied to nondeadly force."); William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1043 n.93 ("The law of police use of nondeadly force consists of the requirement that the force be constitutionally reasonable under all the circumstances . . . One searches in vain for any body of case law that gives this standard some content.").



B. The Prison Penalty

[Description of empirical work and the questions that work raises]

II. EXPRESSIONS OF BRUTALITY.

A. Expressive Theories of Law.

Expressive theories of law examine the expressive dimensions of legal principles and obligations: What messages does the law send? What values,

beliefs, or ideas does the law convey?[153] How and when might the law be interpreted to represent official or collective beliefs or attitudes?[154] Legal expressivism holds that the law may do more to regulate human behavior than by coercion by sanction alone.[155] Rather, legal rules express social values and, when transgressed, remind or reassert for us what those values are. Put simply, a law may *tell* a person what to do or not do (coercion by sanction) and/or *say* whether what a person does it right or wrong (expression).

At its core, legal expressivism is the study of human expression, a practice that is distinct from both communication and causation.[156] Expression "refers to the ways that an action or a statement (or any other vehicle of expression) manifests a state of mind."[157] Expression is distinct from communication in the sense that a person may communicate a particular feeling through words but express a contradictory state of mind by, for instance, rolling their eyes or shaking their head. Expression is distinct for causation in the sense that not every expression of a state of mind reflects one's actual state of mind: "Musicians can play music that expresses sadness, without feeling sad themselves. The music they play need not express their (or anyone's) sadness: the sadness is in the music itself."[158]

Legal expressivists take the position that just as individuals can engage in expressive conduct — *i.e.*, conveying states of mind through words and/or actions — so can collectives and groups.[159] Individuals become a collective with agency where they are acting together or jointly committed to accomplishing a shared goal.[160] Professors Anderson and Pildes illustrate this concept by considering several neighbors whose street has been buried by a snowstorm.[161] Each of the neighbors may be similar committed to clearing

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[153] *See generally* Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PENN. L.R. 1503, 1506 (2000).

[154] *See generally* Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PENN. L.R. 1503, 1506 (2000).

[155] *See, e.g.*, Maggie Wittlin, *Buckling Under Pressure: An Empirical Test of the Expressive Effects of Law*, 28 YALE J. ON REG. 419, 420 (2011).

[156] In *Shelby Cty. Ala. v. Holder*, the Court struck down Section 4 of the Voting Rights Act, a companion provision to Section 5. *See generally Shelby Cty., Ala. v. Holder*, 570 U.S. 529 (2013).

[157] Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PENN. L.R. 1503, 1506 (2000).

[158] Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PENN. L.R. 1503, 1508 (2000).

[159] Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PENN. L.R. 1503, 1516 (2000).

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[161] Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PENN. L.R. 1503, 1515 (2000).

the snow, but if they are working to do so without the knowledge of the others — perhaps the snow is too high for them to see each other — they are not acting collectively.[162] We cannot ascribe a state of mind, then, the *group* of neighbors. Similarly, even if each neighbor knows the other neighbors are trying to clear the street of snow, the group still may not have a state of mind to clear the snow if the neighbors are not coordinated. One may be blowing snow in the way of another, thus thwarting the overall goal.[163] Even if the neighbors are coordinated and acting efficiently in their efforts to clear the snow, the group itself does not have a state of mind until each neighbor is acting for the *collective* goal of the group rather than their own personal (albeit shared) goal.[164] According to Anderson and Pildes, the neighbor's shared personal goal could transform into the goal of the group where they expressly agree with each other to clear the snow or jointly empower another entity to make decisions as to how to clear the snow (for example, a homeowner's association):

> At this point, [the neighbors] are committed to digging out the street together. What has happened? These acts of communication, or delegated power, have manifested each neighbor's willingness to join forces with the others in achieving a common goal, conditioned on the others' open willingness to do the same. They publicly acknowledge a shared understanding of the basis upon which they are to act. This shared understanding is one in which each is conditionally committed to the others to act to achieve a common aim as, in effect, *a single body*.[165]

Not only may groups express a commitment or intent, they may express principles and norms. Consider, as Anderson and Pildes do, the cultural convention of wearing black at funerals.[166] Every member of the cultural group is jointly committed to the convention and, thus, every members feels obligated to adhere to it, thus reflecting a group norm.[167] Such groups may be

[162] Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PENN. L.R. 1503, 1515-16 (2000).

[163] Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PENN. L.R. 1503, 1515-16 (2000).

[164] Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PENN. L.R. 1503, 1515-16 (2000).

[165] Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PENN. L.R. 1503, 1516 (2000).

[166] Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PENN. L.R. 1503, 1518 (2000).

[167] Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PENN. L.R. 1503, 1518 (2000).

a set of neighbors, in the previous illustration, or even legislatures, political associations, and social groups — all equally capable of embodying collective beliefs, states of mind, attitudes, and values.[168]

Scholars have examined the expressive dimensions of the law from a number of angles. Professor Richard Pildes and Richard Niemi, for instance, have articulated an expressive theory of election law through the lens of the Supreme Court's 1993 *Shaw v. Reno*.[169] Since 1965, Section 5 of the Voting Rights Act had required certain state officials to seek federal district court approval or preclearance from federal officials before redrawing a voting district, each of which had to have been premised on a finding that the proposed district was conscious of racial balance among voters.[170] In *Shaw*, the Court concluded that certain voting districts governed by Section 5, if "bizarre" enough in shape and geography, may give rise to an equal protection concern: "a reapportionment scheme [may be] so irrational on its face that it can be understood only as an effort to segregate voters . . . because of their race . . ."[171] But why? What explains the impulse that a bizarrely drawn election district, in light of race-conscious districting, poses a constitutional concern? In their article, Pildes and Niemi sought to define the principles and values underlying the decision beyond mere instinct that a bizarrely looking district could be an unconstitutional one.[172]

Their theory is that a distinct conception of constitutional harm — the expressive harm, as opposed to a more familiar, concrete and material harm

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[168] Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PENN. L.R. 1503, 1519 (2000) ("[C]ollectives can have beliefs and purposes, and can act on reasons and principles of action. Because collectives are capable of responding to reasons, they can respond to reasons for having attitudes. Groups, be they legislatures, political associations, or social groups, can therefore also act on the reasons those attitudes give them. Groups therefore have all of the mental capacities needed to have attitudes toward people. This is all that is required for collectives to be subject to express theories of reason and morality.").

[169] *See generally* Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483 (1993).

[170] *See generally* 570 U.S. at 529.

[171] Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483-84 (1993) (quoting 509 U.S. 630, 642 (1993)).

[172] *Id*. at 484-85 ("That most people, judges included, recoil instinctively from willfully misshapen districts is understandable enough. Yet defining the values and purposes that might translate this impulse into an articulate, justifiable set of legal principles is no easy task. Leading academic experts in redistricting have long argued that this impulse reflects untutored intuition, an instinctive response that careful analysis reveals to be unwarranted. *Shaw* translates this impulse into constitutional doctrine but does little to explain or justify the principles that might lie behind it.").

— animates the *Shaw* decision.[173] A constitutional challenge to the *appearance* of a voting district in light of race-conscious objectives endorses a claim that the district's appearance undermines the perceived legitimacy of the electoral structure and, thus, reflects a cognizable constitutional harm.[174] This conception of harm is distinct from a claim of actual vote dilution, which reflects a distinct, material harm — an actual loss of political power. Vote dilution and district-appearance claims "recognize distinct kinds of injuries, implicate different constitutional values, and reflect differing conceptions of the relationship between law and politics."[175] The harm resulting from a district-appearance claim is one that "results from the ideas or attitudes expressed" through the districting design.[176] In other words, the injury is the policy's expressive impact or the "violation[] of public understandings or norms."[177] In other words, they write, "The harm is not concrete to particular individuals singled out for distinct burdens. The harm instead lies in the disruption to constitutionally underwritten public understandings about the appropriate structure of values in some arena of public action."[178]

Pildes and Niemi invoke Robert Cover's notion of the normative universe we all inhabit — the *nomos*.[179] Cover's *nomos* is a world in which "[w]e constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void."[180] The narratives or stories we tell about legal institutions and the rules and principles of justice are what situate those institutions, rules, and principles and given them meaning. The principle of equality, for instance, exists in the normative world in which individualism and

If government action can cause expressive harms, it must also be the case, then, that governmental action can define and shape expressive values.[181]

B. Brutal Expressions, Brutal Values.

[173] *Id*. at 485.
[174] *Id*. at 493.
[175] *Id*.
[176] *Id*. at 506-07.
[177] *See id*. at 507.
[178] *Id*.
[179] *Id*. (quoting Robert M. Cover, *The Supreme Court, 1982 Term—Forward: Nomos and Narrative*, 97 HARV. L. REV. 4, 4 (1983)).
[180] Robert M. Cover, *The Supreme Court, 1982 Term—Forward: Nomos and Narrative*, 97 HARV. L. REV. 4, 4 (1983).
[181] *See*

The force doctrine governs the **character of state action** but differently based on the status of the target of the force.

> The expressive character of the state action =
>
> > Prisoners bodily autonomy / safety matter less than institutional security
> >
> > Prisoners are somehow different from pre-trial detainees and free people

In the commerce clause space, "protectionist legislation expresses a constitutionally impermissible attitude toward the interests of other States in the political union."[182]

> In the force doctrine, permissible uses of force in the prison context express the attitude that prisoners' bodies/lives are worth less.

Expressive value of *Kingsley* –

- Unreasonable force = punishment + people are presumed innocent until proven guilty = innocent people should not be punished.
- (unpack how the opinion "sounds in expressive terms"/ maybe look to oral argument and briefing too)
    - "This is a language of degradation, subordination, and domination. Such language does not focus directly or immediately upon the dysfunctional or negative policy consequences that some may think commandeering produces. It is language concerns with disrespect for the constitutionally stipulated relations between the federal government and the States."[183]
    - Demonstrate that a purely textualist analysis doesn't make sense / functional perspective doesn't either (?)

[182] Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PENN. L.R. 1503, 1554 (2000)

[183] Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PENN. L.R. 1503, 1559 (2000)

Expressing the value that prison is and should be a violent place – deterrence

Returning to the generally accepted – but understudied – proposition that prisons are violent – why is that?

Leading academic experts in redistricting have long argued that this impulse reflects untutored intuition, an instinctive response that careful analysis reveals to be unwarranted. *Shaw* translates this impulse into constitutional doctrine but does little to explain or justify the principles that might lie behind it

The constitutional principles animating the force doctrine = diminishing bodily integrity as one proceeds along the policing-punishment continuum

III. RE-IMAGINING THE CONSTITUTIONALITY OF FORCE.

[Here's where I plan to argue for a simple extension of *Kingsley*'s "objective reasonableness" standard to the post-conviction context. There is no doctrinal justification for excluding the reach of due process protections for prisoners, as I hope I have shown above. I think this is a modest enough proposal that it may have legs, but on the other hand, does it do enough? Would a court just then say that any force that is not applied maliciously and sadistically for the purpose of causing harm is objectively reasonable? In other words, is it a meaningful reform?]

CONCLUSION.