

Panel Overview

Prison law is emerging as its own unique domain of scholarship where civil law operates within the criminal law space to focus specifically on the impact incarceration has on an individual beyond their conviction. This panel features a diverse set of works-in-progress that provide important descriptive and analytical accounts that illuminate new developments in prisons and prison law—they also deepen our understanding of how incarceration and the civil justice system function in our system of criminal law.

Project Descriptions

Constructing Civil Confinement Law

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The line between civil and criminal proceedings is not confinement: it is punishment. On any given day, thousands of people are held in carceral institutions without a criminal conviction. If the government's stated aim is not punishment, they do not receive criminal process.

So how does the Constitution restrict the government's power to confine for ostensibly nonpunitive reasons? Despite the prevalence and severity of civil confinement, it has received little scholarly attention as its own category. Its different and myriad forms—civil commitment, executive detention, quarantine, juvenile detention, sexually violent person commitment, immigration detention, civil contempt, etc.—are typically evaluated on their own terms, or through individual comparison with the criminal system. For the first time, this Article evaluates them together. Through examining their history and legal frameworks, a coherent constitutional schema emerges that governs what the government must do if it seeks to confine someone involuntarily for ostensibly nonpunitive reasons. That schema is civil confinement law.

This Article unpacks the state and federal powers that authorize civil confinement; examines the range of civil confinement justifications allowed by substantive due process; and compares the procedural frameworks authorized by procedural due process. Through this comparison, it draws out a set of principles that restrict the government's power to civilly confine. Only through evaluating civil confinement law as its own comprehensive schema against its punitive confinement counterpart can we begin to evaluate critically the legal rationales underlying all governmental power to confine.

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Decades of Indifference: Failures in Accountability in the Provision of Medical Care in Federal Prisons

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For decades, institutions meant to provide oversight over the Federal Bureau of Prisons (BOP) have documented chronic failures in the BOP's provision of medical care. The reasons for these chronic failures are many: staffing shortages delay the provision of care to incarcerated people suffering from serious illnesses; refusals to engage in robust and critical mortality reviews for each in-

custody death inhibits the BOP's ability to make critical procedural and structural changes to the provision of care; and the aging of the federal prison population increases the number of people incarcerated in federal prisons who are in need of critical care. Despite providing a robust understanding of these failures, institutions of oversight have failed to create a culture of accountability, which has allowed the BOP's systemic deficiencies in the provision of medical care to continue unchecked for decades.

This Article unveils the BOP's historical and present-day indifference to the medical needs of incarcerated people by being the first to comprehensively describe the system of care utilized by the BOP in its more than 122 prisons. It then uncovers the BOP's historical failure to meet the medical needs of its incarcerated population. Finally, the Article critically examines the traditional mechanisms of executive, legislative, and judicial accountability; describes how they have failed to correct the BOP's well-known institutional failures in its provision of medical care to incarcerated people, particularly the chronically ill; and examines recent congressional efforts to enhance oversight and accountability of the BOP. This Article calls for all branches of the federal government to bolster efforts to prioritize the lives and health of incarcerated people.

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Brutal by Design

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In 2015, the Supreme Court issued a decision that was predicted to “reverberate in prison jurisprudence for decades to come.” The majority opinion in *Kingsley v. Hendrickson* departed from longstanding precedent to hold that pre-trial detainees’ challenges to uses of force must be evaluated according to an objective reasonableness standard, not the subjective “malicious and sadistic” standard that had until then governed force challenges arising in a carceral setting. The Court justified its decision on the premise that pre-trial detainees are not yet convicted of a crime and, therefore, not subject to “punishment” within the scope of the Eighth Amendment’s Cruel and Unusual Punishments Clause as people incarcerated after a criminal conviction are. Instead, pre-trial detainees’ force claims arise under the Due Process Clause, and no showing of a subjective intent to punish is required to establish an unlawful use of force.

Lower courts are now split on whether *Kingsley*’s holding governs more than uses of force. Some circuits, relying on the Court’s rationale that pre-trial detainees must be treated differently from post-conviction prisoners, have extended the holding to pre-trial detainees’ challenges to conditions of confinement more broadly, including cases involving claims of inadequate medical care and otherwise cruel and unusual conditions. Others have declined to unsettle the subjective “deliberate indifference” standard, derived from the Eighth Amendment, that has for decades governed conditions of confinement for all incarcerated litigants. This issue is destined for another look by the Supreme Court.

This Article is the first to empirically examine whether an objective standard governing incarcerated plaintiffs’ conditions of confinement makes a meaningful difference in case outcomes. Are pre-trial detainees more successful in their civil rights challenges than their post-conviction counterparts? If so, is that difference justified? What might that difference say about the state of American confinement? Perhaps, this Article posits, incarcerated litigants whose claims are still governed by the subjective deliberate indifference standard are challenging a system that is, simply put, brutal by design.

Carceral Privacy

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As prisons enter the digital era, one has to wonder what significance space, specifically carceral space, has on a prisoner's privacy-based rights. The daily use of digital tablets reinforces the ability of incarcerated people to participate actively in their communities, and simultaneously, permits non-incarcerated people to engage with those on the inside in more meaningful ways. Digital tablets help break down the traditional conception of carceral space and allows incarcerated persons to feel connected with their communities all without ever physically crossing the prison walls. But this spatial divide between prisons and society is what has been the foundational scaffolding for much of prison law's constitutional applications determining individual rights. As such, these traditional conceptions of carceral space have insulated prison officials from heightened scrutiny, allowing them nearly unchecked deference when acting in the interests of maintaining order and security within the prison walls.

Undergirding these norms of heightened deference within carceral space is a tradeoff between security and privacy-based individual rights. Information privacy scholarship has long debated this tradeoff, but it is a domain that is undertheorized in the context of prison law. When it comes to the digital space, the tension in this trade-off is palpable and standard prison security rationales and doctrines do not neatly apply. For example, the primary rationale for reviewing mail is to prevent physical contraband from entering the prison. The same rationale is not applicable when considering whether correctional officers are justified in reviewing text messages. Accordingly, the use and regulation of digital tablets encourages us to rethink what carceral space means, and further how notions of privacy should interact within such spaces. This Article argues that digital tablets in prisons should not be regulated by the security-minded deference of standard prison law, or at least in a spatially limited way, but by its own body of doctrine sensitive to First Amendment community and privacy values.

This Article critically analyzes the intersection of prison and information privacy law scholarship and makes three novel contributions. First, this Article tackles the growing issues of unchecked carceral deference in a digital era where the law has yet to establish limits on a prison's ability to surveil prisoner and prisoner-adjacent information data. As such, this Article reconceptualizes the existing standard of review in light of digital privacy-based rights and proposes an alternative test based upon prison law's spatial limitations. Second, this Article builds upon existing scholarship on dispositional favoritism in prison law to reveal how the Court frequently misrepresents the nature of privacy harms claimed by prisoners, recasting notions of information-privacy claims as security-privacy claims to alleviate institutional scrutiny. And finally, this Article has broad application and contributes to larger scholarly understandings of privacy trade-offs for prisoner-adjacent individuals who are not incarcerated to demonstrate the pervasive ways carceral technology can have subordinating effects at the population-level.

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Prison Grievance Creep

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The prison grievance regime is a quagmire. Civil rights literature and prison law scholarship have largely focused on the procedural impact of this regime, which has grown in the shadow of the Prison Litigation Reform Act's exhaustion mandate. When an incarcerated person suffers abusive conditions in prison, they must file an administrative grievance with prison authorities and satisfy the prison's complex labyrinth of requirements before they can turn to the federal courts for protection. Because a single misstep can close the courthouse doors to incarcerated litigants, the PLRA—and the procedural critiques that follow—have taken center stage when assessing the devastating barriers to civil rights enforcement imposed by prison grievances.

This Article redirects the spotlight to expose a different malignancy. The prison grievance regime is not only a procedural shield for prisons—it is also a substantive weapon. I trace the history and progeny of the Supreme Court's decision in *Jones v. North Carolina Prisoners' Labor Union* to explore what I call "prison grievance creep," the doctrinal intrusion of prison grievances into constitutional rights-making and remedies in prison. Even if an incarcerated person overcomes the burden of PLRA exhaustion to reach the merits of their claim in court, the prison grievance reemerges to eviscerate the contents of their pursued right.

This Article is the first to theorize and examine this phenomenon. I outline its evolution and explain how prison grievances have crept into—and significantly undermined—First Amendment and *Bivens* rights enforcement in custody. This investigation uncovers a critical pitfall in civil rights jurisprudence that further insulates prisons from accountability. And by deconstructing the myths used to justify this creep, this Article offers a foothold to dismantle the creep's underpinnings.