CARCERAL DEFERENCE: COURTS AND THEIR PRO-PRISON PROPENSITIES

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ABSTRACT

Judicial deference to non-judicial state actors, as a general matter, is ubiquitous. But "carceral deference"—judicial deference to prison officials on issues concerning the legality of prison conditions—has received far less attention in legal literature, and the focus has been almost entirely on its jurisprudential legitimacy. This Article adds to the literature by contextualizing carceral deference historically, politically, and culturally. Drawing on primary and secondary historical sources, as well as trial and other court documents, this Article is an important step to bringing the origins of carceral deference out of the shadows, revealing a story of institutional wrestling for control and unbridled dominance that has not, until now, been fully told.

That full telling is more important now than ever, as society grapples with the scope, scale, and racist impacts of American punishment. Carceral deference plays an enormous role in the constitutional ordering of state power, as well as civil law's regulation of punishment, a force that is often neglected within the criminal law paradigm. Moreover, the Supreme Court has demonstrated a recent skepticism of judicial deference in other areas of the law, suggesting an era in which traditional notions of deference are up for reconsideration. Understanding how the foremost judicial norm in the prison law space developed gives us a foundation from which to better examine and critique the distribution of power among prisons, courts, and incarcerated people and the propriety of deference to prison officials; further informs our understanding of the systemic and structural flaws of the criminal punishment system; and adds to a growing body of literature analyzing the role of expertise in constitutional analyses across dimensions, from qualified immunity to the administrative state.

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TABLE OF CONTENTS

I. INTRODUCTION.

Judicial deference to state actors pervades the American criminal law space. Rachel Barkow identifies the "animating principle" of the U.S. Supreme Court's criminal law jurisprudence as a "pathological deference to the government."[1] Benjamin Levin asserts deference "lies at the heart of criminal law's administration."[2] Sharon Dolovich describes the "unmistakable consistency" in the field of prison law as one that is "predictably pro-state, highly deferential to prison officials' decision-making, and largely insensitive to the harms people experience while incarcerated."[3]

This Article focuses on the latter field of deference—judicial deference within prison law—a principle this Article coins as "carceral deference." By the term "prison law," I refer to the constitutional and statutory law governing conditions of incarceration.[4] Carceral deference is a sweeping form of judicial deference to prison officials that manifests both expressly and implicitly in prison law doctrine and judicial practice. The Supreme Court has instructed federal courts adjudicating challenges to prison conditions to be "*particularly conscious* of the measure of judicial deference owed to corrections officials in gauging the validity of the regulation."[5] Prison officials face "Herculean obstacles" effectively running prisons, the Court has said, and any problems that arise in those spaces "are not readily susceptible of resolution by [judicial] decree."[6] In other words, from the judiciary's own point of view, courts "are ill-equipped to deal with the increasingly urgent problems of prison administration and reform" and, therefore, must defer to the justifications offered by prison officials for a particular condition imposed on incarcerated people.[7]

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[1] Rachel Barkow, *The Court of Mass Incarceration*, 2022 CATO SUP. CT. 11, 17 (2022).

[2] Benjamin Levin, *Criminal Law Exceptionalism*, 108 VA. L. REV. 1381, 1415-16 (2022).

[3] Sharon Dolovich, *The Coherence of Prison Law*, 135 HARV. L. REV. F. 302, 302 (2022); *see also* Sharon Dolovich, *Forms of Deference in Prison Law*, 24 FED. SENT. R. 245 (2012); ("[T]his imperative of restraint—aka deference—has emerged as the strongest theme of the Court's prisoners' rights jurisprudence.").

[4] Prison law is bit of a unique animal: While the issues prison law governs arise in a space of criminal legal control (*i.e.*, prisons), prison law is operationalized most often within the civil law paradigm, and predominantly via civil constitutional challenges to prison conditions. Carceral deference, the judicial presumption of prison officials' superior expertise in operating carceral spaces, most often arises via those civil lawsuits and at the unusual nexus of civil and criminal law that prison law inhabits.

[5] *Turner v. Safely*, 482 U.S. 78, 90 (1987) (emphasis added).

[6] *Procunier v. Martinez*, 416 U.S. 396, 404-05 (1974).

[7] *Id*. at 405.

Under those terms, the deference is often dispositive: Courts "*must defer* to a prison official's judgment unless the record contains *substantial evidence* showing their policies are an unnecessary or unjustified response to problems of jail security."[8] The consequence is that without considerable evidence to rebut prison officials' stated justifications for a condition of incarceration nor a great deal of judicial attention to the plaintiff's allegations concerning the harms of the challenged condition, the incarcerated person loses their civil case. With the plaintiff's loss, the condition is effectively constitutionalized.[9] In an era in which people are dying in America's prisons and jails at exceedingly high rates,[10] and states are reporting that they are, for example, "not in control" of their prisons,[11] scrutinizing the principles underlying the judicial presumption of prison official expertise and courts' pro-prison propensities are imperative.

Legal scholars have examined the scope and operation of carceral deference within prison law jurisprudence, focusing often on the doctrinal evolution and impact of deference on litigants.[12] This Article adds to the literature in two ways: First, this piece examines carceral deference from a broader perspective than traditional legal scholarship. It pulls back from the doctrine to analyze the foundation and evolution of deference in light of the relationships among courts, prison officials, lawyers, activists, politicians, prisoners, and so on, and alongside major developments in American punishment.[13] This perspective is important

[8] *Florence v. Bd. of Chosen Freeholders of Cty. of Burlington*, 566 U.S. 318, 322 (2012).

[9] *See, e.g.*, Eric Berger, *Deference Determinations and Stealth Constitutional Decision Making*, 98 IOWA L. REV. 465, 479-85 (2013).

[10] U.S. DEP'T OF JUSTICE, *Mortality in State and Federal Prisons, 2001-2019 – Statistical Tables* (Dec. 2021), *available at* https://bjs.ojp.gov/content/pub/pdf/msfp0119st.pdf (noting 4,234 people died in state and federal prisons in 2019, and 4,515 people died in state and federal prisons in 2018; 143 homicides in state prisons in 2019 marked the highest number recorded since 2001).

[11] Assoc. Press, *Former Officer: Alabama 'Not in Control' of State Prisons* (Nov. 5, 2022), *available at* https://abcnews.go.com/US/wireStory/officer-alabama-control-state-prisons-92717282.

[12] *See, e.g.*, Dolovich, *The Coherence of Prison Law*, *supra* note XX; David M. Shapiro & Charles Hogle, *The Horror Chamber: Unqualified Impunity in Prison*, 93 NOTRE DAME L. REV. 2021 (2018); David M. Shapiro, *Lenient in Theory, Dumb in Fact: Prison, Speech, and Scrutiny*, 84 GEO. WASH. L. REV. 972, 977 (2016); Andrea C. Armstrong, *Race, Prison Discipline, and the Law*, 5 U.C. IRVINE L. REV. 759 (2015); Keramet Reiter, *Supermax Administration and the Eighth Amendment: Deference, Discretion, and Double Bunking, 1986-2010*, 5 U.C. IRVINE L. REV. 89 (2015); Dolovich, *Forms of Deference in Prison Law*, *supra* note XX; Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, n.306 (2009); Barry R. Bell. *Prisoner's Rights, Institutional Needs, and the Burger Court*, 72 VA. L. REV. 161 (1986).

[13] *See generally* MARIE GOTTSCHALK, THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA at 18 (2006) (asserting American punishment "is deeply embedded in a particular social, political, historical, and institutional context" and "reductionist explanations" for its evolution are inadequate); Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130

because it illustrates the profound interconnectedness of mechanisms of state power across the criminal and civil legal paradigms, which tends to be overlooked.

From that broader perspective, a narrative emerges: Courts have presumed prison official expertise since the earliest days of the American carceralism experiment, long before any such expertise could be credibly claimed. Over time, as carceral punishment expanded and the prison industry underwent a professionalization movement, prison officials began to explicitly claim the subject matter expertise courts presumed they had all along. They claimed such expertise even as carceral punishment continued to undergo dramatic changes in purpose and scope, during which time the historical record shows a reluctance, if not outright refusal, of some prison officials to adapt to those changes. Courts' persistent deference to prison officials over these changing eras in American punishment suggests an intractable belief in generalized expertise without scrutiny of or reasoning through the merits of such a belief.

This Article's second contribution is its analysis of the role of carceral deference in the context of developments in contemporary doctrine outside of prison law. Judicial deference of many sorts has come under recent scrutiny. Scholars and advocates across the political spectrum, for example, have challenged the premise of judicial deference to police officer actions in matters of qualified immunity.[14] The Supreme Court has expressed skepticism toward judicial deference to administrative agencies through the major questions canon and related disregard of the *Chevron* doctrine.[15] With other longstanding areas of judicial deference up for review, all in the spirit of allocating—or re-allocating—state power appropriately among government bodies, carceral deference must be chief among them.

Over three centuries of American carceralism, prison officials today may credibly claim some measure of expertise in the field, to be sure. And there may be legitimate reasons for courts to defer to certain officials' precise areas of specialized knowledge.[16] Yet, the sheer scope of deference courts afford to prison officials should concern even the most ardent critics of courts' involvement in prisoner litigation. Judicial presumption of generalized expertise in service of sweeping, unchallenged deference undermines those very claims of credible

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HARV. L. REV. 1995, 1999 (2017) (writing about the parallel phenomenon of judicial presumptions of police expertise and arguing this sort of history "illustrates the profound *interconnectivity* of the judicial process: how seemingly discrete spheres of the criminal system influence the development of legal rules in others—not only through their doctrinal content, but also through their internal structures and accidental analytic effects").

[14] *See infra*, Part IV.

[15] *See id*.

[16] *See, e.g.*, Dolovich, *Forms of Deference*, supra note XX at 245.

expertise today's individual prison officers may fairly assert. It undermines the judiciary's truth-seeking purpose, and it scaffolds a system built on human suffering and exploitation.[17] American punishment practices will not change until they are interrogated, challenged, and scrutinized by those in power—including courts.

This Article continues in four Parts. Part II sets out the principle of carceral deference in contemporary prison law doctrine and situates the doctrine within the broader context of judicial deference to other government branches across the law. Part III tells the carceral deference origin story. Part IV contextualizes carceral deference in contemporary legal developing where judicial deference in other fields has come under scrutiny. Part V concludes with recommendations and areas for further work.

II. MODERN FORMS OF JUDICIAL DEFERENCE.

Judicial deference to other government branches is not unique to prison law nor to the criminal legal system. Federal courts defer traditionally to state and federal political branches in matters of administrative law,[18] the law of foreign relations,[19] issues of national security,[20] and questions of remedies for constitutional violations,[21] among others.[22] This Part introduces the modern principle of judicial deference to political branches and then examines the specific concept of judicial deference to prison administrators. The discussion in this Part is situated in the present, describing courts' contemporary exercises of deference to contextualize the historical story of carceral deference that follows in Part III.

A. Judicial Deference, Generally.

[17] In a follow-up Article to this piece, I analyze the modern dangers of this longstanding deference principle for both prison law and beyond. *See* Danielle C. Jefferis, *The Dangers of Carceral Deference* (work-in-progress, manuscript on file with author).

[18] *See, e.g.*, Eric Berger, *Deference Determinations and Stealth Constitutional Decision Making*, 98 IOWA L. REV. 465, 479-85 (2013).

[19] *See, e.g.*, Jonathan I. Charney, *Judicial Deference in Foreign Relations*, 83 AM. J. OF INT'L L. 805 (1989).

[20] *See, e.g.*, Raquel Aldana-Pindell, *The 9/11 "National Security" Cases: Three Principles Guiding Judges' Decision-Making*, 81 OR. L. REV. 985 (2002).

[21] *See, e.g.*, Martin H. Redish, *Constitutional Remedies as Constitutional Law*, 62 B.C. L. REV. 1865 (2021).

[22] A full survey of the areas of law in which courts defer to political branches is beyond the scope of this project. The discussion herein is merely illustration of the ways in which judicial deference to political branches may occur.

The degree to which a federal court might defer to political-branch actors varies. In the foreign-affairs space, courts have afforded complete deference to the executive branch in some cases and less deference or no deference at all in others.[23] When deciding matters of administrative law, courts are bound, in theory,[24] by the deference principle articulated in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[25] So-called "*Chevron* deference" requires a court to defer entirely to an executive-branch administrative agency's decision on or interpretation of an issue so long as "the agency's answer is based on a permissible construction of the statute" and Congress has not spoken directly to the precise issue in question.[26] In matters of national security, the degree to which courts defer to political-branch actors is also mixed.[27] And when confronted with the question of whether the Constitution implies a damages remedy for individual-rights claims against federal officials, courts are increasingly deferential to the legislature,[28] affording near-blanket deference — indeed, the "utmost deference"[29] — to Congress's silence on the matter.[30]

Courts typically justify their deference on either political or epistemic grounds.[31] Pursuant to the political justification, courts defer to political-branch actors on the theory that such actors are more accountable and responsive to the electorate than the judiciary. The presumption is that those political-branch actors act in accordance with the wishes and will of the democratic majority more so than judges do.[32] The actual democratic authority of a political-branch actor may differ depending on the actor (*i.e.*, whether the actor is the legislature itself or an

[23] Charney, *supra* note XX at 805.

[24] The Supreme Court has recently expressed skepticism of the continued applicability of the *Chevron* deference standard (and related forms of agency deference principles). *Sse infra* Part IV.

[25] 476 U.S. 837 (1984).

[26] *Id*. at 843-44. *But see* Gillian E. Metzger, *The Roberts Court and Administrative Law*, 2019 SUP. CT. REV. 1 (2019) (discussing administrative law doctrine of the Roberts Court and the rejection of judicial deference to agency action).

[27] Aldana-Pindell, *supra* note XX at 995-96; *see also* Anthony John Trenga, *What Judges Say and Do in Deciding National Security Cases: The Example of the State Secrets Privilege*, 9 HARV. NAT'L SEC. J. 1 (2018).

[28] Redish, *supra* note XX at 1909-10.

[29] *Egbert v. Boule*, 142 S.Ct. 1793, 1803 (2022) (citing *Hernández v. Mesa*, 598 U.S. ___, 140 S.Ct. 735 (2020)).

[30] *Id*.; *see also Hernández*, 598 U.S. at ___, 140 S.Ct. at 741-742 (summarizing cases in which the Court has "expressed doubt about [its] authority to recognize any causes of action not expressly created by Congress"); *Ziglar v. Abbasi*, 137 S.Ct. 1842, 1861-62 (2017).

[31] Berger, *supra* note XX at 468.

[32] *Id*. at 482-83.

unelected administrative agent of the executive branch) but this deference principle extends to many areas of legislative and policy action.[33]

Pursuant to the epistemic justification, on the other hand, courts defer to the subject-matter expertise of the political branch tasked with specific decision-making authority.[34] Administrative agencies operate within a narrow field and employ professionals with expertise in that field.[35] Such expertise, the justification holds, is superior to the generalist competence of legislatures and, more importantly, courts.[36] Similarly, courts often presume Congress operates within the specific field of lawmaking expertise.[37] Thus, when faced with a challenge to agency action or a case that implicates legislative authority, federal courts often defer to the presumed epistemic superiority of the political branches.

B. Judicial Deference to Prison Officials.

The Supreme Court acknowledged nearly fifty years ago that "[t]here is no iron curtain drawn between the Constitution and the prisons of this country."[38] While a person's full legal rights may be restricted due to the environment in which they live while incarcerated,[39] the basic concept underlying many of the constitutional rights a person does retain while in prison "is nothing less than the dignity of man."[40] Accordingly, several federal constitutional and statutory provisions aim to protect people confined to prisons from harms that may arise during their incarceration.[41]

The Eighth Amendment, for example, prohibits cruel and unusual punishment.[42] Federal courts have interpreted this clause to prohibit the conscious deprivation of medical care for prisoners' serious medical needs,[43] unsafe prison

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[33] *Id*.

[34] *Id*. at 479-80; *see also* Levin, *supra* note XX at 1415.

[35] Berger, *supra* note XX at 479-80. *But see id*. at 480 (noting "[i]n practice, however, not all agencies possess this presumed proficiency over all the subjects before them, and the Court is not always as sensitive as it should be to variations in agency competence").

[36] *Id*.

[37] *See, e.g.*, *Egbert*, 142 S.Ct. at 1802-03 (discussing task of creating a cause of action and Congress's superior competence in weighing the relevant policy considerations to do so).

[38] *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974).

[39] *Id*. at 556 (asserting "there must be mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application").

[40] *Trop v. Dulles*, 356 U.S. 86, 100 (1958).

[41] Protections at the state and/or municipal level are beyond the scope of this Article and, therefore, not discussed herein.

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

[43] *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

conditions of which prison staff are aware,[44] and conditions that otherwise deprive incarcerated people of life's basic necessities.[45] The First Amendment preserves the rights of incarcerated people to access the courts,[46] communicate with lawyers,[47] practice their religion,[48] and speak and associate with some degree of autonomy.[49] The Fourth Amendment protects some measure of privacy within the walls of a prison.[50] The equal protection and due process guarantees of the Fifth and Fourteenth Amendments provide some measures of procedural and substantive protections.[51] Federal statutory protections from disability and religious discrimination also apply within prison walls.[52]

An incarcerated person who files—or considers filing—a civil lawsuit to enforce any one of those constitutional or statutory protections and, in turn, impose some measure of liability on a prison or prison official for an illegal condition of incarceration, faces a host of legal and practical barriers to advancing their lawsuit. The practical and often threshold concern of finding an attorney willing to represent the plaintiff is a significant challenge[53] and one that dramatically impacts

[44] *Farmer v. Brennan*, 511 U.S. 825, 828 (1994).

[45] *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981).

[46] *Johnson v. Avery*, 393 U.S. 483, 485 (1969).

[47] *Procunier*, 416 U.S. at 419; *see also Pell v. Procunier*, 417 U.S. 817, 822 (1974).

[48] *Cooper v. Pate*, 378 U.S. 546, 546 (1964); *see also Cooper v. Pate*, 382 518, 521 (7th Cir. 1967); *Cruz v. Beto*, 405 U.S. 319 (1972).

[49] *Turner v. Safley*, 482 U.S. 78, 89 (1987).

[50] *Bell v. Wolfish*, 441 U.S. 520, 559-60 (1979). *But see Hudson v. Palmer*, 468 U.S. 517, 526 (1984) ("[W]e hold that society is not prepared to recognize as legitimate any subjective expectation of privacy that a prison might have in his prison cell and that, accordingly, the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell.").

[51] *Lee v. Washington*, 390 U.S. 333, 333 (1968); *Wolff*, 418 U.S. at 555.

[52] The Americans with Disabilities Act (ADA), 42 U.S.C. § 12131 *et seq*., and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, apply to prisons. *See, e.g.*, *Penn. Dep't of Corrections v. Yeskey*, 524 U.S. 206, 209 (1998); *Wright v. N.Y.S. Dep't of Corrections*, 831 F.3d 64 (2d Cir. 2016). The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc *et seq*., and the Religious Freedom Restoration Act of 1993 likewise apply to prisons. *See, e.g.*, *Holt v. Hobbs*, 574 U.S. 352 (2015); *Cutter v. Wilkinson*, 544 U.S. 709, 721-22 (2005).

[53] Gregory Sisk, Michelle King, Joy Nissen Beitzel, Bridget Duffus, & Katherine Koehler, *Reading the Prisoner's Letter: Attorney-Client Confidentiality in Inmate Correspondence*, 109 J. CRIM. L. & CRIMINOLOGY 559, 572 (2019) ("The attorney market for prisoner cases, whether civil or criminal, is hardly dynamic and competitive . . . 'Prisoner cases are particularly unpopular' and the courts rarely can find 'counsel willing to represent pro se civil rights litigants.' (quoting *LaPlante v. Pepe*, 307 F. Supp. 2d 219, 223 (D. Mass. 2004)). *See also* Eleaor Umphres, *150% Wrong: The Prison Litigation Reform Act and Attorney's Fees*, 56 AM. CRIM. L. REV. 261, 261 (2019); Deborah Labelle, *Bringing Human Rights Home to the World of Detention*, 40 COLUM. HUM. RTS. L. REV. 79, 101-02 (2008); Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1610 (2003)

an incarcerated plaintiff's chance of success.[54] The risk of retaliation for pursuing legal action by prison staff is another,[55] as is informational asymmetry between the incarcerated person and those in power.[56] The Prison Litigation Reform Act (PLRA)[57] and the heightened substantive law standards[58] are legal barriers that often make any sort of success for the incarcerated plaintiff notoriously difficult.[59]

Casting a shadow over all of those barriers is the principle of carceral deference. Carceral deference refers to the ways in which courts explicitly and implicitly, through application of the relevant doctrine and/or judicial practice, defer to prison officials when presiding over challenges to prison conditions. Though the Supreme Court has never articulated a clear rationale for it,[60] the deference principle is, by most accounts, the "unmistakably consistency"[61] in an otherwise incoherent field of law.[62] This pro-prison judicial leaning gives the field of prison law a "moral center of gravity tilting so far in the direction of" prison officials that "plaintiffs bringing constitutional claims in federal court can expect

("[Prisoner] civil rights plaintiffs are . . . unrepresented by counsel in over ninety-five percent of their cases terminated in 2000.").

[54] Schlanger, *supra* note XX at 1610-11 ("[C]ounseled cases were three times as likely as pro se cases to have recorded settlements, two-thirds more likely to go to trial, and two-and-a-half times as likely to end in a plaintiff's victory at trial. One-quarter of settlements and one-third of plaintiff's trial victories occurred in the four percent of cases with counsel.").

[55] James E. Robertson, *"One of the Dirty Secrets of American Corrections": Retaliation, Surplus Power, and Whistleblowing Inmates*, 42 U. MICH. J.L. REFORM 611, 614 (2009) ("Correctional officers who retaliate against inmates cannot be regarded as rogue actors. They act within the norm.") .

[56] Schlanger, *supra* note XX at 1616-17.

[57] 42 U.S.C. § 1997e *et seq*.

[58] Danielle C. Jefferis, *Carceral Intent*, 27 MICH. J. OF RACE & L. 323 (2022); Nicole B. Godfrey, *Institutional Indifference*, 98 OR. L. REV 151 (2020); David M. Shapiro & Charles Hogle, *The Horror Chamber: Unqualified Impunity in Prison*, 93 NOTRE DAME L. REV. 2021 (2018); Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881 (2009).

[59] *See, e.g.*, Rachel Poser, "Why It's Nearly Impossible for Prisoners to Sue Prisons," NEW YORKER (May 30, 2016), https://www.newyorker.com/news/news-desk/why-its-nearly-impossible-for-prisoners-to-sue-prisons; Dolovich, *supra* note XX at 302-03.

[60] Emma Kaufman, *Segregation by Citizenship*, 132 HARV. L. REV. 1379, 1425 (2019); Dolovich, *Forms of Deference in Prison Law*, *supra* note XX at 245 ("Yet taken as a body, the cases in this area [of judicial deference] reveal no principled basis for determining when deference is justified, what forms it may legitimately take, or the proper limits on its use. Instead, the mere mention of 'deference' has emerged as a catch-all justification for curtailing both the burden on prison officials to ensure constitutional prisons and prisoners' prospects for recovery even for arguably meritorious claims.").

[61] Dolovich, *supra* note XX at 302.

[62] *See generally* Justin Driver & Emma Kaufman, *The Incoherence of Prison Law*, 135 HARV. L. REV. 515 (2021).

to win only in the most extreme cases."[63] The leaning is so dramatic that it starts to seem like a normative pro-prison commitment.[64]

For as long as the Supreme Court has entertained prisoners' civil lawsuits against prison officials,[65] most of the justices have endorsed some need to defer to the judgment of the defending officials—those whose conduct or decisions are alleged to be the source of the challenged condition. It was not, however, until the 1987 decision in *Turner v. Safley* that the Court effectively constitutionalized the deference principle, marking for the first time the explicit doctrinal manifestation of carceral deference.[66]

In *Turner*, Leonard Safley[67] challenged the constitutionality of Missouri prison regulations and practices that restricted prisoners' correspondence and limited their freedom to marry each other.[68] Mr. Safley had become friends with Pearl Jane "P.J." Watson while the two were confined in the same mixed-gender prison, Renz Correctional Center.[69] Renz confined men designated at a minimum security level and women designated between medium and maximum security levels.[70] When Ms. Watson was transferred to another prison, the two tried to stay in touch with each other via letter.[71] Prison officials prohibited them from doing so, citing a regulation that allowed only incarcerated people who were immediate family members to write to each other.[72] Mr. Safley and Ms. Watson also wanted to get married but Missouri officials had routinely refused to allow other incarcerated women to exercise their right to marry, purportedly for "protective" reasons.[73] Mr. Safley alleged both restrictions violated his fundamental rights.[74]

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[63] Dolovich, *supra* note XX at 303.

[64] Dolovich, *supra* note XX at 317.

[65] For many decades, the federal courts took a "hands-off" approach to most prisoners' lawsuits. *See infra* Part III.

[66] 482 U.S. 78 (1987).

[67] Mr. Safley alleged his claims on behalf of a class of similarly situated incarcerated people in Missouri. *Safely v. Turner*, 586 F. Supp. 589, 590 (W.D. Mo. 1984).

[68] *Id*. at 590-91.

[69] *Id*. at 590, 593.

[70] *Id*. at 590.

[71] *Id*. at 593.

[72] *Id*.

[73] *Id*. Interestingly, when Mr. Safley and Ms. Watson appeared in court for a preliminary hearing, Mr. Safley's lawyer, Floyd Finch, offered the Court a quick way to resolve the marriage claim: he brought an officiant to court and invited the judge to allow the marriage to occur right there. The Court agreed, and with Finch serving as the best man Mr. Safley and Ms. Watson were married. Mia Armstrong, *In Sickness, In Health—and In Prison*, MARSHALL PROJ. (Aug. 19, 2019), *available at* https://www.themarshallproject.org/2019/08/19/in-sickness-in-health-and-in-prison. Mr. Safley marriage claim was moot, but the claim continued on behalf of the class.

[74] 586 F. Supp. at 594-97.

The district court agreed with the prisoners after a five-day bench trial. Pursuant to precedent, the court engaged in a strict-scrutiny analysis of the challenged restrictions in light of the evidence presented to conclude that both restrictions were unconstitutional.[75] The district court acknowledged that precedent mandated *some* restrictions on the rights of incarceration people due to the nature of their incarceration,[76] but concluded each challenged practice was more restrictive on prisoners' fundamental rights than was reasonable or essential to any legitimate interest of the prison administration.[77] The court recognized the prison administrators' defenses of the challenged regulations—primarily, that both were needed to maintain institutional security—but did not credit such defenses with any greater deference that a court may have granted to a non-prison defendant. The Court employed a traditional strict-scrutiny analysis, measuring the prison's institutional interests against the challenged restrictions and their impact on fundamental rights, much like a court would have done in analyzing a restriction on a non-incarcerated person's fundamental rights.[78]

The Eighth Circuit affirmed, concluding that the court's application of the strict-scrutiny standard was appropriate.[79] The panel, however, acknowledged that precedent was muddied on the degree to which courts must defer to prison administrators.[80] The prison defendants had urged the appellate court to adopt a rational basis or reasonableness test.[81] The panel, however, observed the significance of the rights the plaintiffs alleged were impacted by the challenged regulations and found that ordinarily a government restriction on free speech is

[75] *Id*.

[76] *Id*. at 594.

[77] *Id*. at 594-595.

[78] *Id*. at 594 ("The Missouri Division of Corrections' inmate marriage rule unconstitutionally infringes upon plaintiffs' right to marriage because it is far more restrictive than is either reasonable or essential for the protection of any state security interest, or any other legitimate interest, such as rehabilitation of inmates."); *id*. at 595 (finding a "bare assertion of [prison] security interests is not enough"). The Supreme Court had yet declined to address the applicable standard of review for challenges to prison conditions that impacted fundamental rights. In *Procunier v. Martinez*, for example, another challenge to prisoner correspondence restrictions, the Court sidestepped the issue entirely by focusing instead on the First Amendment right of the free person to receive and send correspondence, which demanded an application of the strict-scrutiny standard. 416 U.S. at 408-09 ("In determining the proper standard of review for prison restrictions on inmate correspondence, we have no occasion to consider the extent to which an individual's right to free speech survives incarceration, for a narrower basis of decision is at hand. In the case of direct personal correspondence between inmates and those who have a particularized interest in comminating with them, mail censorship implicates more than the right of prisoners.").

[79] *Safely v. Turner*, 777 F.2d 1307, 1313-14 (8th Cir. 1985).

[80] *Id*. at 1310.

[81] *Id*. at 1309-10.

permissible "only if the restriction furthers a compelling governmental interest and is the least restrictive alternative for achieving that purpose."[82] But the panel reflected a concern the Supreme Court had expressed in prior cases: Some prisoners' cases alleging infringements on fundamental rights "present[] special problems" because "[c]ourts are ill equipped to deal with the increasingly urgent problems of prison administration and reform."[83]

The prison-official defendants successfully petitioned for Supreme Court review of the decision in Mr. Safley's favor. In their merits brief, the prison officials mounted a burden-of-proof argument, asserting the Eighth Circuit panel had erred in requiring the prison officials to present evidence justifying their asserted security concerns.[84] They claimed the court should have instead adopted the rational basis standard and accepted the officials' security justification at face value, shifting the burden to the prisoners to disprove the officials' justification for a challenged condition.[85]

In the officials' view, the lower court's decision would lead to catastrophic results: Communication between prisoners, they argue, is "easily the most feared of all inmate dangers."[86] The lower courts are putting officials in a position where the only valid defense to a restriction is "produc[ing] bleeding bodies."[87] Without the challenged mail restriction, officials will miss "complex codes" passed "in seemingly innocent correspondence."[88] Courts should not put officials in positions to "gamble on changes of heart when handling violent inmates."[89] Upholding the lower courts' decisions "will result in a tragedy that will be far more serious" than the restrictions at issue on the prisoners' rights.[90]

The Supreme Court was seemingly persuaded by the officials' contentions and reversed the trial court's decision in part.[91] Justice O'Connor, writing for the Court, began the opinion by giving nod to the principle that incarcerated people retain some constitutional rights: "Prison walls do not form a barrier separating prison

[82] *Id*. at 1310.
[83] *Id*.
[84] Brief for Petitioners, *Turner v. Safley*, No. 85-1384, 1988 WL 1026291.
[85] *Id*. at 14-15 ("The regulation and discretion of the prison officials should be judges on the basis of whether the regulation was rationally related to a legitimate penological goal. Once the prison officials have established that the regulation is rationally related to a proper penological goal, the burden then shifts to the prisoners to demonstrate that the correctional officials have substantially exaggerated their response to legitimate penological concerns.").
[86] *Id*. at 26.
[87] *Id*.
[88] *Id*. at 26.
[89] *Id*. at 33.
[90] *Id*. at 26-27.
[91] 482 U.S. at 81.

inmates from the protections of the Constitution."[92] She turns quickly, though, to the notion that courts are poorly situated to decide constitutional challenges to prison conditions: "Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government."[93] The proper standard, then, is: "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[94]

In the Court's view, the decision involved a Sophie's choice—substantial deference or serious danger: "[S]uch a standard is necessary if prison administrators and not the courts are to make the difficult judgments concerning institutional operations."[95] Perhaps influenced by the prison officials' bleeding-body rhetoric, Justice O'Connor wrote, "Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration."[96] Prison officials must be able to make decisions unhindered by the threat of judicial intervention.[97] And thus, carceral deference was expressly constitutionalized.

Justice Stevens, concurring, foreshadowed the risks of the Court's exceedingly pro-state standard. He highlighted the internal inconsistency in the majority's opinion: at some points, the Court demanded a challenged restriction be "reasonably related" to a legitimate interest;[98] but at other times, the Court sought a "logical connection" between the restriction and the interest.[99] Justice Stevens reasoned there is a significant difference between demanding that a prison restriction bears a *reasonable* connection to a legitimate interest and a mere *logical* connection to such interest:

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[92] *Id*. at 84.

[93] *Id*. at 84-85.

[94] *Id*. at 89. The Court explained several factors are relevant to determining whether a prison regulation is valid: (1) whether there is a valid, rational connection between the regulation and the governmental interest put forward to justify it, (2) whether there are other avenues for the prisoner challenging the regulation to exercise the right at issue, (3) the impact recognizing the asserted right will have on prison operations, and (4) whether there are ready alternatives to advancing the asserted governmental interest. *Id*. at 90-91.

[95] *Id*. (internal quotations and alterations omitted).

[96] *Id*.

[97] *Id*.

[98] *Id*. at 89 (". . . the regulation is valid if it is reasonably related to legitimate penological interest.").

[99] *Id*. at 93 (upholding the mail restriction because "it logically advances the goals of institutional safety and security").

> Application of the [latter] standard would seem to permit disregard for inmates' constitutional rights whenever the imagination of the warden produces a plausible security concern and a deferential trial court is able to discern a logical connection between that concern and the challenged regulation. Indeed, there is a logical connection between prison discipline and the use of bullwhips on prisoners; and security is logically furthered by a total ban on inmate communication, not only with other inmates but also with outsiders who conceivably might be interested in arranging an attack within the prison or an escape from it.[100]

Thirty-five years later, Justice Stevens's prediction has rung true in many regards. The *Turner* standard now governs not just challenges to correspondence and marriage restrictions but is "the default standard for reviewing constitutional challenges to prison policy."[101] As Professor Dolovich recognizes, "Since *Turner* was decided, the Court has applied its standard to cases involving First Amendment expression, association, and free exercise, the Fifth Amendment right against self-incrimination, the Fourteenth Amendment right against being involuntarily medicated, and even the due process right of access to the courts. The impact of *Turner* on the scope of prisoners' constitutional claims cannot be overstated."[102] Indeed, by 2016, lower federal courts had cited *Turner* in over 8,000 judicial decisions.[103] By 2023, that number had grown to over 13,000 cases.[104]

The impact of *Turner*, and its explicit carceral deference mandate, is significant but it is not the only way in which judicial deference to prison officials manifests. Implicit practices of judicial deference, such as framing facts and altering procedural rules in ways that favor prison officials, join the doctrinal deference standard to create what Professor Dolovich calls dispositional favoritism—

> a general normative orientation with which, in its prison law cases, the Court approaches the parties' submissions and even the parties themselves—an orientation that can best be described as a readiness to look upon prison officials

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[100] *Id*. at 100-01.

[101] Driver & Kaufman, *supra* note XX at 536.

[102] Dolovich, *supra* XX at 313.

[103] David M. Shapiro, *Lenient in Theory, Dumb in Fact: Prison, Speech, and Scrutiny*, 84 GEO. WASH. L. REV. 972, 977 (2016).

[104] Kristen Schnell, Turner's *Insurmountable Burden: A Three-Circuit Survey of Prisoner Free Speech Claims*, 6 COLUM. HUM. RTS. L. REV. ONLINE 123 (2022); Mikel-Meredith Weidman, *The Culture of Judicial Deference and the Problem of Supermax Prisons*, 51 UCLA L. REV. 1505 (2004).

> and their evidence and arguments with favor and sympathy, while regarding incarcerated litigants and *their* evidence and arguments with skepticism and even hostility.[105]

The Supreme Court often models this dispositional favoritism,[106] and lower federal courts follow.[107]

From where does this exceedingly apparent pro-state judicial posture come? What has motivated the Court, and lower federal courts following in its path, to lean so deferentially in favor of prison officials that the tilt begins to look like a normative moral preference, one that heavily favors prison officials and "ensures only minimal constitutional protections for a class of legal subjects whose interactions with state actors takes place behind high walls, away from public view, and in fraught and adversarial environments where, absent some meaningful external check, uniformed officers hold all the power?"[108] The next Part begins to answer those questions.

III. THE ORIGINS OF CARCERAL DEFERENCE.

Tracing the origins of the carceral deference principle in its many manifestations requires looking away from the Supreme Court[109] and toward the full operative social field—the "punishment field." Drawing on the work of Pierre

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[105] Dolovich, *supra* note XX at 316-17; *see also* Danielle C. Jefferis, *Carceral Contempt* (work-in-progress, manuscript on file with author).

[106] There are some exceptions to the Court's staunchly pro-prison deference, including in the Court's interpretation of statutory religious protections, *see, e.g.*, *Holt v. Hobbs*, 574 U.S. 352 (2015), and equal protection claims, *see, e.g.*, *Johnson v. California*, 543 U.S. 499 (2005). *See generally* David M. Shapiro, *To Seek a Newer World: Prisoners' Rights at the Frontier*, 114 MICH. L. REV. FIRST IMPRESSIONS 124 (2016); Grace DiLaura, *"Not Susceptible to the Logic of* Turner*":* Johnson v. California *and the Future of Gender Equal Protection Claims From Prisons*, 60 UCLA L. REV. 506 (2012).

[107] Dolovich, *supra* note XX at 320. Congress has also followed the Court's pro-prison lead, codifying the carceral deference principle into provisions of the 1995 Prison Litigation Reform Act. *See* 18 U.S.C. § 3626(a)(1)(A) (requiring a court to give "substantial weight to any adverse impact on public safety or the operation of a criminal justice system" when determining the scope of equitable relief in a prison conditions lawsuit).

[108] Dolovich, *supra* note XX at 341-42.

[109] *Cf*., Lvovsky, *supra* note XX at 2000 (arguing, similarly, that "[t]he broader history of police expertise demonstrates the importance of casting our sights away from the Supreme Court in examining criminal procedure. Hardly a symptom of *Terry*, judicial deference to police judgment may be understood only by examining its roots among state and lower courts, including the discretionary practices of trial judges").

Bourdieu,[110] social scientists define the punishment field as "the social space in which agents struggle to accumulate and employ penal capital—that is, the legitimate authority to determine penal policies and priorities."[111] Chief characters in the field include prison officials, courts, incarcerated people, lawyers, activists, legislators, journalists, and so on.

In Bourdieu's framework, the punishment field operates like a magnet, "exerting a force upon all those who come within its range."[112] The field is organized hierarchically around a series of values, assumptions, and protocols,[113] and it intersects with or is adjacent to other coexisting social fields, including the political, legal, journalistic, economic, and academic.[114] A social field's force is often invisible and its power mysterious,[115] but shifts in power from dominant to subordinate actors within the field can prompt conflict and struggle for the redistribution of such power or, in the case of the punishment field, for "penal capital."[116]

As this Part explains, throughout much of the history of American punishment, prison administrators have held significant power within the punishment field—at times, nearly all the power.[117] Early penitentiaries operated according to a lock-

[110] Pierre Bourdieu pioneered to sociological theory of the "social field"—an "area of structured, socially patterned activity or 'practice,' [that may be] disciplinarily and professionally defined." Pierre Bourdieu, Richard Terdiman (transl.) *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805, 805 (1986).

[111] JOSHUA PAGE, THE TOUGHEST BEAT: POLITICS, PUNISHMENT, AND THE PRISON OFFICERS UNION IN CALIFORNIA at 10-11 (2011).

[112] Bourdieu, *supra* note XX at 805-06.

[113] *Id*. at 806.

[114] Page, *supra* note XX at 10-12 ("Like all fields, the penal field has an orientation consisting of its guiding principles and values. The orientation defines the purposes of action in the field and indicates proper means for achieving those ends. Along with its structure, the penal field's orientation determines what is and what is not thinkable as concerns criminal punishment . . . Agents within the penal field intuitively grasp the mores, expectations, and acceptable actions of that field; they have a distinct 'feel for the game.' Therefore they have at least a sense of what is and is not presently conceivable in the field, as well as who are the dominant and subordinate players. Seasons players can confidently predict the outcomes of penal struggles because the outcomes are determined, on the one hand, by the composition of the field (which they unthinkingly grasp) and, on the other hand, by the orientation of the field, which defines appropriate and inappropriate penal possibilities.").

[115] *See id*.

[116] *See id*.

[117] *See infra* at Part III.A-B (discussing the modicum of power courts and legislatures exercised over prison operations); *see also* Elizabeth Alexander, *The New Prison Administrators and the Court: New Directions in Prison Law*, 56 TEX. L. REV. 963 (1978) ("Prison systems have traditionally been arbitrary, brutal, and shielded from public attention when they were not overtly

them-up-and-throw-away-the-key model. By virtue of their incarceration, prisoners sacrificed their civil rights and were subject to the whims of their incarcerators; courts were largely hands off.[118]

As confinement practices evolved in the twentieth century, however, and courts began to exercise some authority over prison conditions issues brought to them via civil lawsuits, actors within the punishment field began to visibly struggle over penal capital.[119] Prison officials perceived a power-grab by subordinate actors—courts, lawyers, civil rights organizations, and prisoners themselves.[120] Prison officials battled to regain their dominant position in the punishment field, leaning heavily into and on the field's inherent values and assumptions—power and control. The consequence of this manifest agonistic moment[121] was that the judicial actors retreated to their long-time subordinate position within the field, this time constitutionalizing their position through the pronouncement of a modern version of the hands-off era emerged—one characterized in terms of carceral deference—and leading eventually to the entrenchment of the principle across prison law doctrine today.[122]

This project looks at moments and trends in the punishment field from a macro level and through the above-described frame. The American punishment landscape is vast and varied, however; no single account of this kind could fairly analyze, let alone account for, the nuances of a system of thousands of prisons across jurisdictions with sometimes divergent histories. Yet, there is value to taking a

corrupt. Prisons ran on the explicit principle that the staff was omnipotent and prisoners powerless.").

[118] *See id*.

[119] *See infra* at Part III.C-D.

[120] *Id*.; *see also* Charles Bright, THE POWERS THAT PUNISH: PRISON AND POLITICS IN THE ERA OF THE "BIG HOUSE," 1920-1955 at 4 (1996) (arguing in favor of viewing prisons and punishment as *part of* the political order, rather than simply responsive to it, because it "invites a more interactive view—one that considers, in specific contexts, how the prison intervenes in politics, contributes to the formation of political combinations, and underwrites the credibility of discourse").

[121] There is a rich body of literature within the punishment and society discipline examining the agonistic perspective and the role of conflict and struggle in the penal landscape. *See generally* PHILIP GOODMAN, JOSHUA PAGE, AND MICHELLE PHELPS, BREAKING THE PENDULUM: THE LONG STRUGGLE OVER CRIMINAL JUSTICE (2017); Johann Koehler, *Penal (Ant)Agonism*, 44 LAW & SOC. INQUIRY 799 (2019); Geoff K. Ward, *Contention and the Pendulum Pivot: Weighting Equal Justice*, 44 LAW & SOC. INQUIRY 806 (2017); Joshua Page, Michelle Phelps, and Philip Goodman, *Consensus in the Penal Field: Revisiting* Breaking the Pendulum, 44 LAW & SOC. INQUIRY 822 (2017). This project examines macro-level trends and patterns that appear in the historical record of the parallel evolutions of carceral practices and the law of incarceration, while reserving analysis of causation—and, importantly, the role of unseen struggle—in this space. *See generally* Koehler, *supra* note XX (discussing role of unseen struggle and antagonism in penal change).

[122] *See infra* at Part III.E-F.

macro-level approach in a project such as this one, looking for and drawing conclusions from national trends and patterns in the trajectories of punishment in light of the establishment of the doctrine of incarceration at the federal level.[123] Simultaneously, one must retain the awareness that there is important variation in how punishment looks and operates across place and time, and some national trends in the generalist account may not—and do not—reflect the experience of all phases and experiences of American punishment and, thus, are not explored here.[124]

Imprisonment as a means of punishment is a relatively recent phenomenon. Prior to the nineteenth century, the primary means of punishment was physical: public beatings, whippings, executions.[125] Confinement was a means to the end, a practice to keep track of people before they were corporally, and often publicly, punished.[126]

With the work of Enlightenment-era philosophers like Cesare Beccaria, Jeremy Bentham, and Voltaire, punishment changed.[127] As harsh, often inhumane, physical punishment came to be seen as equal to, if not worse than, the crime itself, the punisher—the torturer or executioner—began distancing himself from the punished: "The public execution became 'a hearth in which violence bursts against into flame,' and corporal punishment fell into disfavor."[128] Carceral punishment, a method of punishment occurring outside of the public spectacle, emerged.

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[123] *See* GOTTSCHALK, *supra* note XX at 13 (2006) ("State-level differences are important and a ripe field for further investigation. However, the construction of such an expansive and unforgiving carceral state in the United States is also a national phenomenon that has left no state untouched . . . Despite the highly decentralized character of the U.S. criminal justice system and wide variations in regional and state incarceration rates, penal trends have converged significantly across the country.").

[124] *See, e.g.*, Page, Phelps, and Goodman, *supra* note XX at 822-23 (discussing tension between studying macro-level trends and accounts for localized variations); ASHLEY T. RUBIN, THE DEVIANT PRISON: PHILADELPHIA'S EASTERN STATE PENITENTIARY AND THE ORIGINS OF AMERICA'S MODERN PENAL SYSTEM, 1829-1913 at xxvi-xxxviii (2021) (discussing generalist limits, in light of the "deviant" history of Eastern State Penitentiary).

[125] *See, e.g.*, René Lima-Marín & Danielle C. Jefferis, *It's Just Like Prison: Is a Civil (Nonpunitive) System of Immigration Confinement Theoretically Possible?*, 96 DENV. L. REV. 955, 968-69 (2019); James E. Robertson, *Houses of the Dead: Warehouse Prisons, Paradigm Change, and the Supreme Court*, 34 HOUS. L. REV. 1003, 1008 (1997).

[126] *Id*.; *see also* Edward J. Latessa, Alexander Holsinger, James W. Marquart, & Jonathan R. Sorenson, CORRECTIONAL CONTEXTS: CONTEMPORARY AND CLASSICAL READINGS at 3 (2d Ed. 2001).

[127] Latessa, *et al.*, *supra* note XX at 3.

[128] Lima-Marín & Jefferis, *supra* note XX at 968 (quoting MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON at 9 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977)).

This Part picks up the story at that point, chronicling the evolution of punishment practices in the United States and the struggle for power across the punishment field beginning in the nineteenth century.[129]

A. Slaves of the State.

With the emergence of carceral punishment[130] came the penitentiary.[131] Auburn State Prison opened in New York around 1820, and Eastern State Penitentiary opened in Pennsylvania a few years later.[132] Those two prisons became synonymous with the divergent models of incarceration they implemented. The "Auburn system" required prisoners to perform assembly-line labor throughout the day in total silence, retreating in the evening to cramped, solitary cells.[133] They "wore striped uniforms, they marched in lockstep to and from their cells, and misbehavior was punished at the end of a lash."[134] Proponents of the Auburn system believed forcing prisoners to perform the hard labor under harsh conditions would instill discipline.[135]

The "Pennsylvania system," on the other hand, rejected the hard labor element of incarceration. Instead, prisoners were isolated in cells for most of the day and night. They worked, slept, read, prayed, exercised, and did virtually all other activities in their cells.[136] Like the Auburn system, the Pennsylvania system forced prisoners into silence. They "were known by numbers only and, during any egress from their cells, prisoners were hooded to protect their identities even from

[129] In addition to the caveats explained above, historical research of the American punishment system is inherently difficult, given a dearth of surviving archival records, undertheorized work, and invalid and/or biased source material. *See generally* Alexander W. Pisciotta, *Corrections, Society, and Social Control in America: A Metahistorical Review of the Literature*, in CRIMINAL JUSTICE HISTORY: AN INTERNATIONAL ANNUAL at 115 (Vol. II 1981) (summarizing one historian's opinion on the literature as "bad logic and bad history").

[130] Critically, carceral punishment did not *replace* corporal punishment. As this Part explains, American prisons were, and continue to be, sites of physical brutality, violence, and abuse. *See generally infra* at Part II.A-B; Pisciotta, *supra* note XX at 115 ("March of progress works also distort history by suggesting that prisons replaced corporal and capital punishment. In fact, although capital punishment did decline, corporal punishment was simply administered additionally, in a different setting.").

[131] Robertson, *supra* note XX at 1012 ("Hereafter, imprisonment would be synonymous with punishment itself.").

[132] *See, e.g.*, RUBIN, *supra* note XX at xxiii; Robertson, *supra* note XX at 1011-12.

[133] RUBIN, *supra* note XX at xxiii.

[134] *Id*.

[135] *Id*.

[136] *Id*.

guards."[137] But unlike the Auburn system, the Pennsylvania system leaned on silence *and* isolation.[138]

While prisons differed in their approach to incarceration during the nineteenth century, following either the Auburn or the Pennsylvania system or some hybrid model in northern states,[139] and the convict leasing system in post-Emancipation southern states,[140] the social and legal status of the people confined in them was consistent: Incarcerated people had no, or very few, rights. By some accounts, they were treated as "slaves of the state," a status first articulated by the Virginia Supreme Court in *Ruffin v. Commonwealth*.[141] There, Woody Ruffin, a prisoner in Virginia, was convicted of killing a prison guard during an escape attempt.[142] The trial was held in Richmond; the homicide occurred more than a hundred miles away.[143] Prior to his execution for the murder, Mr. Ruffin challenged the trial court's decision to hold his trial in Richmond, a jurisdiction in which, he alleged, he was not provided a jury of his peers—a right he alleged the state constitution afforded him.[144]

The Virginia Supreme Court disagreed. The state constitutional right to a jury of one's peers must be construed consistently with the document's other provisions and declarations.[145] One of those other declarations states "the government is instituted for the common benefit, protection and security of the people," and, the Court explained, "one of the most effectual means of promoting the common benefit and ensuring the protection and security of the people is the certain punishment and prevention of crime."[146] For Mr. Ruffin, this meant that during his period of punishment—the term of incarceration he was serving when he committed the murder—he was "in a state of penal servitude to the State." He had forfeited his liberty and personal rights "except those which the law in its humanity

[137] *Id*. at xxiii-xxiv.

[138] *Id*. at xxiv.

[139] *See id*. xxiv-xxvi (discussing rise in popularity of the Auburn system).

[140] Jefferis, *supra* note XX.

[141] The seminal case in which a court expressly identifies a prisoner as a "slave of the state" is *Ruffin v. Commonwealth*, 62 Va. 790, 796 (1871). *See also Shaw v. Murphy*, 532 U.S. 223, 228 ("Indeed, for much of this country's history, the prevailing view was that a prisoner was a mere 'slave of the State,' who 'not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords him.'" (quoting *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 139 (1977) (Marshall, J., dissenting)).

[142] 63 Va. at 791-92.

[143] *Id*. at 791.

[144] *Id*. at 792.

[145] *Id*. at 795.

[146] *Id*.

accord to him."[147] He was "the slave of the State" and, thus, could not assert his jury trial right.[148]

There is debate over the historical significance of the slave-of-the-state status beyond Mr. Ruffin's case and its relevance to prisoners' legal classification and treatment, broadly.[149] The spirit and import of the slave status[150] may—and certainly did, for the Virginia Supreme Court—[151] derive in part from civil death statutes in force in this era, a practice inherited from English common law.[152] Under most civil death statutes, a person convicted of a felony was considered civilly dead and lost all civil rights, including the right to bring a lawsuit.[153] The practice effectively removed many incarcerated people from society and rendered them invisible.[154] Forgotten.[155]

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[147] *Id*. at 795-96.

[148] *Id*. at 796.

[149] *See, e.g.*, D.H. Wallace, *Prisoners; Rights: Historical Views*, at 229 in Edward J. Latessa, Alexander Holsinger, James W. Marquart, & Jonathan R. Sorenson, CORRECTIONAL CONTEXTS: CONTEMPORARY AND CLASSICAL READINGS (2d Ed. 2001) (disputing that *Ruffin* was a precursor to or controlling influence on the judicial "hands-off" attitude that followed).

[150] The word the court chose, itself, was almost certainly rooted in post-Emancipation sentiments and the influence of the convict-leasing system on state institutions. *See generally* Jefferis, *supra* note XX at ___.

[151] After declaring Mr. Ruffin was a slave of the state, the Court explained, "His is *civiliter mortuus*; and his estate, if he has any, is administered like that of a dead man." 63 Va. at 796.

[152] Note, *Civil Death Statutes—Medieval Fiction in a Modern World*, 50 HARV. L. REV. 968, 968-69 (1937); *see also* James Michael Kovach, *Life and Death in the Ocean State: Resurrecting Life-Prisoners' Right to Access Courts in Rhode Island*, 24 ROGER WILLIAMS U. L. REV. 400, 400 (2019) (noting civil death has been practiced "since at least the Romans" (citing Charles Phineas Sherman, ROMAN LAW IN THE MODERN WORLD (1917)); Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1793-95 (2012) (noting "[l]oss of status as a punishment also existed in other ancient legal regimes"); Susan N. Herman, *Slashing and Burning Prisoners' Rights: Congress and the Supreme Court in Dialogue*, 77 OR. L. REV. 1229, 1238-39 (1998).

[153] Note, *Civil Death Statutes*, *supra* note XX at 968, 972 (noting some civil death deaths still in effect in the twentieth century permitted prisoners to pursue *habeas corpus* actions and appeals to their sentence); Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789 (2012); *see also* ERIC CUMMINS, THE RISE AND FALL OF CALIFORNIA'S RADICAL PRISON MOVEMENT at 24-26 (1994) (explaining that pursuant to California's civil death statute, state officials deemed prisoners' writing as property of the state because civilly dead people had no right to authorship or copyright).

[154] *See, e.g.*, James B. Jacobs, *The Prisoners' Rights Movement and Its Impacts*, in Latessa, et al., *supra* note XX at 213.

[155] The American civil death was narrower than the English practice. Under English common law, a person sentenced for a felony was "placed in a state of attainder," which carried three consequences: forfeiture of property, loss of the right to transmit the person's estate to their heirs, and the loss of civil rights. As Professor Gabriel J. Chin explains, "The consequences of attainder were on the minds of our Constitution's drafters," who in the Constitution's text prohibited the

Declaring an incarcerated person civilly dead reflected (or cultivated) an ethos among prison officials that the prisoner was at the lowest rung of the social ladder. Frank Tannenbaum, who spent a year imprisoned on Blackwell's Island (now known as Roosevelt Island) in New York City and later became a history professor at Columbia University, described what one might call the *civiliter mortuus* philosophy in this way:

> The prisoner is at the bottom of the social pyramid. There is no one below him. The tramp, the vagabond, the fakir, the beggar, the thief, the prostitute, the unskilled and unemployed worker, they are all above him in the scale of things—they have freedom to move, the right to call their hours their own; . . . They are human. They are people. They have names and are called Mister. The prisoner has none of these.[156]

Indeed, a foundational premise of nineteenth century punishment philosophy was that prisoners "are to be punished and cannot be reformed until their spirits are broken."[157] The spirit-breaking purpose of the growing number of prisons around the country was simply to securely confine the nameless people whom the law had put to civil death.[158]

If incarcerated people had no rights, most courts perceived little reason to inquire or consider the conditions in which people were confined, which were often cruel.[159] The "hands-off" judicial philosophy of the era was premised, in part, on the notion that prison officials were better equipped to design and implement prison policy than courts were, given prison administrators' unique expertise in the field. That presumption of expertise, however, is suspect—almost mythical—given the

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forfeiture of property and conveyance rights but not the loss of civil rights. This absence of a constitutional prohibition left the door open for states to adopt civil death statutes, and many did. Chin, *supra* note XX at 1794-95.

[156] Frank Tannenbaum, DARKER PHASES OF THE SOUTH at 75 (1924).

[157] Leo Carroll, HACKS, BLACKS, AND CONS: RACE RELATIONS IN A MAXIMUM SECURITY PRISON at 23 (1974).

[158] Page, *supra* note XX at 16 ("The sole purpose of California's 'Big House' prisons of the nineteenth and early twentieth centuries (San Quentin and Folsom) was to securely confine prisoners.").

[159] *See infra* at Part II.B.ii; *see also* MIN S. YEE, THE MELANCHOLY HISTORY OF SOLEDAD PRISON at 2 (1970) (describing California's prisons in the early twentieth century, "Officials were compensating for money shortages by cutting food supplies. Prisoners who complained about their food were stretched across racks and 'unmercifully flogged' with truncheons. Those who broke prison rules were shackled and chained and left hanging from cold, dank walls at Folsom. For more serious infractions, inmates were thrown into dark, solitary dungeons, given two buckets for toilet facilities, and forgotten for months at a time. Many committed suicide. Many more went mad.").

degree of experience and training of many prison officials at the time, as the next section explains.

B. The "Hands-Off Era" and the Myth of Expertise.

American punishment saw some change in the early half of the twentieth century. The period between the 1920s and 1940s witnessed the expansion of high-capacity, industrial prisons known as "big houses,"[160] the opening of Alcatraz,[161] and the move away from convict leasing in southern states.[162]

The labor-focused philosophy of the Auburn system proliferated through the large prisons in this era: "To work was normal; to be sent to prison was to be corrected or normalized by work, to work."[163] There was a "growing confidence in the effectiveness of industrial discipline as the foundation of social order imparted to prison managers a surer sense that the purpose of incarceration should be to tame and channel criminal energies into productive work."[164] Accordingly, every prisoner was expected to work unless they were in solitary confinement.[165] The same was true of southern prisons, where "road prisons" and chain gangs proliferated with the end of the convict leasing era.[166]

Despite these changes, the brutal conditions of many prisons persisted. Many people attempted to seek relief through the courts, and they almost always failed.

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[160] *See, e.g.*, Zafir Shaiq, *More Restrictive Than Necessary: A Policy Review of Secure Housing Units*, 10 HASTINGS RACE & POVERTY L.J. 327, 333 (2013); Robertson, *supra* note XX at 1013.

[161] Shaiq, *supra* note XX at 333-34.

[162] Miller, *supra* note XX at 20 ("This shift from convict leasing to state-owned prison farms and road camps in Florida . . . was emblematic of a rationalizing, bureaucratizing, and modernizing state, but could also be promoted on humanitarian grounds.").

[163] Bright, *supra* note XX at 71.

[164] Bright, *supra* note XX at 72; *see also* Miller, *supra* note XX at 26-27 (In Florida, "[e]mphasis was placed on reformation through useful employment of prisoners; idleness was deemed cruel and indefensible. At the farm, prisoners were used in various ways. They continued to clear the lands, build roads and bridges, dig ditches, plant trees along the main thoroughfares, and create small parks. Women prisoners were employed at sewing and garment making, and in the garden patches.").

[165] *See, e.g.*, Miller, *supra* note XX at 111.

[166] *See generally* Jefferis, *supra* note XX at ___.

i. "Prison discipline is to be enforced by the warden . . . and by no one else."[167]

Most scholarly attention to prisoners' rights jurisprudence of the nineteenth through mid-twentieth century is focused on the federal courts.[168] Much of that attention on the federal courts frames the level of their involvement in legal challenges to conditions in America's prisons as "hands off."[169] While the term is a bit misleading[170]—courts *did* review some prisoners' claims[171]—the dominant judicial attitude toward prisoners' challenges to prison conditions was that the cases had no place in court. Courts' justifications for deference to prison officials varied. Some judges asserted separation of powers or federalism concerns; others turned to institutional competency concerns; others cited jurisdictional barriers. As punishment evolved, however, and the deference principle evolved with it, courts

[167] *State v. Haynes*, 74 Me. 161 (Maine 1882).

[168] *See, e.g.*, MALCOM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE at 30-31 (2000).

[169] Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1964) (coining the term "hands-off doctrine" to describe this doctrine); *see also* Feeley & Rubin, *supra* note XX at 31 ("This was the so-called hands-off doctrine, the dominant federal court approach to prison conditions cases until 1965."); Driver & Kaufman, *supra* note XX at 530; Margo Schlanger, *The Constitutional Law of Incarceration, Reconfigured*, 103 CORNELL L. REV. 357, 368-69 (2018).

[170] There is debate over whether the hands-off attitude of the early twentieth century was a *progression* from the earlier era or a *retrenchment* of an earlier era in which prisoners could, and did, exercise limited rights in the courts but were stymied because of procedural barriers to raising their claims. *Compare* Roberta M. Harding, *In the Belly of the Beast: A Comparison of the Evolution and Status of Prisoners' Rights in the United States and Europe*, 27 GA. J. OF INT'L & COMP. L. 1 (1998) (describing the "hands-off era" as "the beginning of an advancement in prisoners' rights when compared with the earlier era marked by the slave-of-the-state status, stating, "While this [hands-off] phase did not produce monumental steps towards recognizing and/or enforcing the rights of prisoners, it is nonetheless a critical phase because it marked the judiciary's increased willingness to acknowledge the plight of incarcerated individuals.") *with* Wallace, *supra* note XX at 230-34 ("The conventional history of prisoners' rights is that, prior to the hands-off period, prisoners had no rights. Thus, the hands-off period under this view represents some progress for prisoners' rights advocates, and under this conventional view, there need be no exploration of prisoners' rights jurisprudence before the hands-off era of the 1940s and 1950s. A revised historical view of the caselaw shows that in this second period of prisoners' rights history, the federal courts may have regarded prisoners as having rights but, for policy reasons unrelated to the legal status of prisoners, these courts would deny relief.").

[171] Wallace, *supra* note XX at 230-31 (citing cases); *see also id*. at 232; Schlanger, *supra* note XX at 367-68; *see generally Weems v. United States*, 217 U.S. 349 (1910) (holding the Eighth Amendment prohibits not only torture but also punishments grossly disproportionate to the crime). *But see* Robertson, *supra* note XX at 1040 (noting courts of this era intervened mostly to ban egregious instances of corporal punishments).

began to settle on one primary justification: prison officials have particularized expertise in operating carceral spaces and courts should second-guess their judgment only with extreme caution. Incarcerated people in this era did not fare better in the state courts, many of which mirrored the federal courts' reasons for declining to review challenges to prison conditions.[172]

The asserted justifications for the judiciary's hands-off approach varied. Some were procedural. For example, prisoners' primary mode of asserting constitutional challenges to prison conditions was via a petition for a writ of *habeas corpus*.[173] After all, the federal civil rights statute, 42 U.S.C. § 1983, had fallen into disuse until the Supreme Court reinvigorated it with its 1961 decision in *Monroe v. Pape*.[174] In reviewing these *habeas* petitions, federal courts held consistently the *habeas* statute was an improper procedural vehicle with which to bring challenges to prison conditions, reasoning the only relief a court could award on a *habeas* petition was release from prison. Without explaining why, courts asserted that the *habeas* writ was not intended to permit judges "to superintend the treatment and discipline of prisoners in penitentiaries, but only to deliver from imprisonment those who are illegally confined."[175]

Other justifications for courts remaining hands off were substantive. Judges articulated concerns with matters of federalism[176] and separation of powers at the federal level,[177] and institutional competence at the federal and state levels. There is ample room to critique each of these substantive justifications. The first two, however, may have had some grounding in law. Concerns of institutional competency—the notion that prison officials possessed specialized knowledge that

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[172] The occasional criminal proceeding stemming from prison deaths is an exception to the generally hands-off judicial approach of this era. *See, e.g.*, Miller, *supra* note XX at 89-95 (discussing criminal proceedings around homicide of prisoner Arthur Maillefert).

[173] *See, e.g.*, *Sarshik v. Sanford*, 142 F.2d 676 (5th Cir. 1944) (per curiaum); *Beard v. Bennett*, 114 F.2d 578 (D.C. Cir. 1940); *Platek v. Aderhold*, 73 F.2d 173 (5th Cir. 1934).

[174] 365 U.S. 167 (1961).

[175] *See, e.g.*, *Sarshik*, 142 F.2d at 676; *Kelly v. Dowd*, 140 F.2d 81, 83 (7th Cir. 1944); *Platek v. Aderhold*, 73 F.2d 173, 175 (5th Cir. 1934).

[176] *See, e.g.*, *United States v. Jones*, 207 F.2d 785 (5th Cir. 1953) ("[W]e hold that the federal government has no power to control or regulate the internal discipline of the penal institutions of its constituent states. All such powers are reserved to the states, and the 14th Amendment does not authorize Congress to legislate upon such matters."); *Adams v. Ellis*, 197 F.2d 483 (5th Cir. 1952) ("[I]t is not the function of the Courts to superintend the treatment and discipline of prisoners in penitentiaries, but only to deliver from imprisonment those who are illegally confined.").

[177] *See, e.g.*, *Williams v. Steele*, 194 F.2d 32 (8th Cir. 1952) ("Since the prison system of the United States is entrusted to the Bureau of Prisons under the direction of the Attorney General, the courts have no power to supervise the discipline of the prisoners nor to interfere with their discipline . . ."); *Powell v. Hunter*, 172 F.2d 330 (10th Cir. 1949) (same).

elevated their decision-making abilities above judicial review—did not. Nor did it always have grounding in fact.[178]

ii. "First you hit them with a two-by-four if they don't conform."[179]

So says William Richard Wilkinson, a thirty-year veteran employee of the California Department of Corrections, as he describes in his memoir the first phase of his career in the 1950s, a time when for many preceding decades prisons were sites of intense brutality and physical violence. Wilkinson explains the persistent, driving ethos of *civiliter mortuus* that seemed to act as a justification for cruelty:

> When I started, the inmates lost their civil rights when they came in. There was no such thing as a phone call. It was a control factor, and it was very good because you could tell what the hell was going on. You had control, and you did not have interference from the outside.[180]

The brutal conditions of America's prisons during the nineteenth and early-to-mid twentieth centuries has been well-documented, and the accounts of those responsible for or witness to episodes of the cruelty speak for themselves. Tannenbaum recounts conversations with officials in southern prisons:

> 'The guards on these [prison] farms were hardened against human sympathy and of a rather shiftless nature,' and in another place, 'We find that the guards in charge of prisoners' work in fields and on the farms, frequently beat them with ropes, quirts, bridle reins, and pistols, without necessity or authority, and that in some instances the guards have ridden over the prisoners with their horses and have set the dogs on them, inflicting serious and painful injuries.'[181]

A supervisor of Florida's road prisons characterized the early part of the era as the "Beat 'Em" period. The "Keep 'Em" period followed.[182] Another former warden

[178] Unlike in the Fourth Amendment context, where courts began relying on the presumption of police expertise to expand police authority, *see, e.g.*, Lvovsky, *supra* note XX, courts assumed prison administrators' expertise from the beginning—before any such expertise could be credibly claimed.

[179] Wilkinson, *supra* note XX at 103.

[180] Wilkinson, *supra* note XX at 102.

[181] Tannenbaum, *supra* note XX at 79.

[182] Vivien M. L. Miller, HARD LABOR AND HARD TIME at 2 (2012).

explained, "Prewar, the old [prison] system was: lock them up, don't deal with them unless you have to deal with them."[183]

The racialized brutality of prisons of this era was even worse.[184] Mortality rates for incarcerated people in southern states, who were predominately Black, was in double digits most years.[185] In Louisiana, a person was more likely to die while incarcerated than if they have lived in enslavement.[186] In the late nineteenth century, a doctor warned Alabama officials that the state's entire imprisoned population could be "wiped out within three years" at the rate the state was going at the time.[187] While the devaluing of life was certainly an issue for all incarcerated people, it was doubly so for Black prisoners.[188] As historian Vivien Miller notes, "Even the most sympathetic white southerners did not automatically recoil from the crack of the strap on the black male body."[189]

iii. "The requirements were that you could read the procedure manual and memos and things pertaining to the job—but nothing else."[190]

The dominant actors holding the power in the punishment field during this era, though brutal, were often unskilled and untrained. This was true of prison leadership and first-line officials, calling into question the judiciary's hands off attitude due to concerns of institutional competency. Judges did not have the expertise to decide legal issues implicating prison conditions, the theory went, but prison officials did. Except, they did not.

Wilkinson of the California system explained his entry into the job: "How did I get started? I had no interest in the prison business, but I was going to school, and I had thought at that time that I could work the midnight shift at the prison and do my studying." He could read, so he got the job.[191] In Florida before 1957, the commissioner of agriculture held primary responsibility for the state's prisoners. One of those commissioners, William A. McRae, worked in sawmilling, farming,

[183] Wilkinson, *supra* note XX at 22.
[184] *See generally* Jefferis, *Carceral Intent*, *supra* note XX at ___.
[185] Jefferis, *Carceral Intent*, *supra* note XX at ___.
[186] Jefferis, *Carceral Intent*, *supra* note XX at ___.
[187] Jefferis, *Carceral Intent*, *supra* note XX at ___.
[188] By most accounts, it took the agonizing death of a white man, Martin Tabert, imprisoned in Florida to finally bring an end to the convict leasing system. Jefferis, *Carceral Intent*, *supra* note XX at ___.
[189] Miller, *supra* note xx at 73.
[190] Wilkinson, *supra* note XX at 1.
[191] Wilkinson, *supra* note XX at 1.

teaching, and local politics before he was appointed to lead the prisons.[192] His successor, J.S. Blitch, was a farmer, stock raise, and state senator before he assumed the position.[193] Local press described Blitch as the ideal man for the position, not because of his experience and expertise in prison administration but because of "his party loyalty, diligence, and fair dealings with the public."[194] Another Florida warden, had no experience of either large-scale farming or prison management when he took over Florida's largest prison farm, a prison "he had never visited and could definitely not place . . . Chapman possessed no formal qualifications in penology and excepting a few passing encounters with western outlaws in his youth, had no experience of lawbreakers or prisoners."[195] Similarly, George Beto was educated in ministry and president of Concordia College when he was appointed to a seat on the Texas Prison Board.[196]

Other officials accounts describe minimal qualifications for prison staff. By one estimate, strength and sharpshooting skills were the only prerequisites to a prison job: "Time was when a man equipped with a muscle and a good rifle eye was considered the best candidate for a post as guard."[197] Similarly, Joseph Edward Ragen, the Illinois State Penitentiary warden from 1942 to 1961, reflected just after his retirement that "[u]ntil a comparatively few years ago, it was believed that a strong arm and a sadistic temperament were sufficient to qualify any man for the duties of guard in a penal institution."[198] Some did not even know how to read. "The guard is usually without an elementary education, often illiterate.'"[199]

Ragen explained why there were few qualifications for prison work beyond the ability to assert and maintain physical control:

> The old custom of men reporting for duty as guards at a penal institution with two requisites, brawn and an aptitude for browbeating and aggressiveness, might have sufficed in a day when one idea, custody, was the purpose and design of a prison. Within the minds of the administrators and personnel which made up the organization, not one thought was given

[192] Miller, *supra* note XX at 5-6.

[193] Miller, *supra* note XX at 40-41.

[194] Miller, *supra* note XX at 41.

[195] Miller, *supra* note XX at 136-37.

[196] David M. Horton & George R. Nielsen, WALKING GEORGE: THE LIFE OF GEORGE JOHN BETO AND THE RISE OF THE MODERN TEXAS PRISON SYSTEM (2005).

[197] Page, *supra* note XX at 18 (citing 1959-60 biennial California Department of Corrections report).

[198] Joseph Edward Ragen, INSIDE THE WORLD'S TOUGHEST PRISON at 281 (Springfield 1962).

[199] Miller, *supra* note XX at 81-82 (quoting Tannenbaum, DARKER PHASES OF THE SOUTH, *supra* note XX at 77-78, 94).

> to rehabilitation or the preparation of inmates for the inevitable return of a vast percentage to society.[200]

With mostly unbridled power in the hands of the prison officials and away from other subordinate actors within the punishment field (including courts), coupled with a mission driven purely by control, there was little need to require any expertise other than brute strength.

Prison leadership advanced this mission in at least two different ways. First, search for people who had no prison experience whatsoever so that they could be molded into the brute officials they needed to be. One warden expressly "wanted people who didn't have any prison backgrounds. He did not want to have a bunch of ideas to get rid of."[201] In Florida, most applicants to guard positions at the state's first prison farm, established in 1910, were local farmers and merchants.[202]

Second, do little to nothing by way of training new prison officials. One official recalls, "Guards were handed a list of state prison rules and regulations, but there were few official checks to ensure they had familiarized themselves with these, and no training was provided. As under the lease, new, inexperienced guards were expected to learn the ropes 'on the job.'"[203] Ragen, again,

> When the training of men for this field of work began some years ago, the training period consisted of a short lecture by some official of the institution, followed by a few days' work with another man who, only a few months or years before, had been obliged to work out his own ways and means of handling men. From this meager training course, the new guard was given an assignment and left pretty well to his own devices in coping with the situations that confront a man engaged in handling the lives and welfare of numbers of his fellows who had fallen astray.[204]

Some prisons did not even have written rules:

> Until [the prisoners' rights movement], prisons operated as traditional, nonbureaucratic institutions. There were no written rules and regulations,

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[200] Ragen, *supra* note XX at 119.

[201] Wilkinson, *supra* note XX at 16.

[202] Miller, *supra* note XX at 25. *But see* Miller, *supra* note XX at 23 (describing qualifications of first superintendent of Florida's first prison as having been "active in convict management during the leasing period . . . [and] was undeniably experienced in convict labor management and discipline").

[203] Miller, *supra* note XX at 26.

[204] Ragen, *supra* note XX at 119-20.

> and daily operating procedures were passed down from one generation to the next. Wardens spoke of prison administration as an 'art'; they operated by intuition. The ability of the administration to act as it pleased reinforced its almost total dominance of the inmates.[205]

Prison officials, despite their lack of experience, training, and expertise, knew the judiciary's relative position at this time in the punishment field—a deeply subordinate, almost absent position. Many officials likely internalized their dominant position and retention of significant power in the field, reflecting what Joshua Page refers to as an "intuitive[] grasp [of] the mores, expectations, and acceptable actions in the field."[206] A long-time employee of the California Department of Corrections, for example, reflected on the relationship between prison officials and the judiciary in this era: "At that time, when a convict filed a complaint, the judge would just tell him that he had been convicted and to do his time, get out, and do well.[207] Institutional knowledge that a judge would dismiss a prisoner's challenges to his conditions of confinement furthered a long-held sense of immunity, a "distinct 'feel for the game.'"[208] After all, the name of that game was: "Prison discipline is to be enforced by the warden . . . and by no one else."

C. Change from Inside.

The 1940s brought change to America's prisons, both from within and from the outside. In a 1950 presidential address to the American Prison Association, J. Stanley Sheppard "announced that the penal philosophies of revenge, brutality, and social indifference had disappeared along with the rotten, damp, musty stone cells and brutal, ignorant, and untrained political appointees serving as guards and wardens. Educated, professionally trained, and intelligent prison personnel treated prisoners humanely, while inmates occupied 'light and airy open front cells' with modern sanitation, lighting, heating, and clean bedding."[209]

The move to a rehabilitative model and a movement to professionalize prison work spurred change from within prisons. With such change, came new players and disruption to the traditional allocation of power in the punishment field.

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[205] Jacobs, *supra* note XX at 222.
[206] Page, *supra* note XX at 10-12.
[207] Wilkinson, *supra* note XX at 102.
[208] Page, *supra* note XX at 10-12.
[209] Miller, *supra* note XX at 270.

i. The "rehabilitative ideal."

If the prior era of punishment was one of "beat 'em" and "keep 'em,"[210] the mid-twentieth century ushered in the era of "treat 'em."[211] Prison officials began to reconsider the warehousing model of confinement and moved toward a model that centered rehabilitation rather than retribution or incapacitation.[212] The theory, termed the "rehabilitative ideal,"[213] was presented as being grounded in science,[214] and it gained a foothold in California in the post-war period led by Regan and Wilkinson.[215] Other systems followed. Officials reasoned, "If the Allies could defeat Fascism abroad, surely California could transform socially and psychologically afflicted offenders into well-adjusted, law-abiding citizens."[216] The state rushed to transform punishment into a place of treatment, where the source of a person's criminal tendencies could be diagnosed, classified, and cured.[217] Penitentiaries across the country became "correctional institutions," and officials became "correctional officers."[218]

A change in the model of punishment necessitated a change in the model of prison staffs. New characters focusing on diagnosing and treating medical and mental health care issues joined the punishment field. Prison officials' titles changed. Some training and professionalization were needed.

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[210] *See supra* at XX.

[211] Miller, *supra* note XX at 2.

[212] *See, e.g.*, Meghan J. Ryan, *Science and the New Rehabilitation*, 3 VA. J. CRIM. L. 261, 274 (2015).

[213] Francis A. Allen, THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE (Yale 1981).

[214] Ryan, *supra* note XX at 274; Ragen, *supra* note XX at 130.

[215] Wilkinson, *supra* note XX at 18-19 (describing the progressivism of Chino and the difficulty of people who had been transferred from traditional facilities, like Folsom and San Quentin, to adapt to fewer restrictions and greater freedom at Chino); *see also* Page, *supra* note XX at 17 (noting that in 1944, Governor Earl Warren of California "signed the Prison Reorganization Act, which created the California Department of Corrections (CDC) . . . The law's passage marked the beginning of the 'Era of Treatment' in California."); Cummins, *supra* note XX at 11-12 ("The policy of the California State Board of Prison Directors is based upon the concept that there can be no regeneration except in freedom. Rehabilitation, therefore, must come from within the individual, and not through coercion. With this principle in mind, the rehabilitation program of the State Board of Prison Directors contemplates not only important educational and vocational factors, but also, by and through classification and segregation, a gradual release from custodial restraint, and corresponding increase in personal responsibility and freedom of choice.").

[216] Page, *supra* note XX at 3.

[217] Page, *supra* note XX at 3.

[218] Page, *supra* note XX at 3; Miller, *supra* note XX at 134, 153-57.

ii. The professionalization movement.

An industry built on brutality, violence, and disregard for life could hardly be viewed as "rehabilitative," nor could its employees be viewed as "correctional" professionals, without some measure of change within the ranks. Professor Page explains the reason for the impetus behind the rhetorical shift:

> With the advent of the Era of Treatment, the state reclassified "prison guards" as "correctional officers." At the same time, prisons became "correctional institutions," the prison system became the "Department of Corrections," midlevel prison managers became "correctional supervisors," and prisoners (or convicts) became "inmates." The name changes signified the state's commitment to *correcting* people through incarceration. Changing the occupational titles of prison guards and other prison staff was also supposed to show that the state . . . wanted these employees to become "professionals."[219]

Professionalizing an industry[220] that had been designed purposefully around lack of experience and little to no training required substantial effort, which at this time coalesced into three primary goals: elevating the ranks of officials, committing to formalized and standardized training, and centering the expertise from within the industry.

To elevate the ranks of prison officials, leaders focused on qualifications. What minimum standards must a person attain to be qualified to work in a prison? Many prison leaders were expressly committed to raising the educational standards for entrance into the field, moving from basic literacy to a high school diploma, at minimum.[221] Texas's George Beto went a bit further, recruiting college and university graduates and instituting more selectivity in the hiring process.[222] Emphasis shifted away, at least explicitly, from sharpshooting skills and sheer physicality.

Officials also committing to formalized and standardized training, instituting prison guard "schools" and on-the-job programs.[223] At the federal level, new hires

[219] Page, *supra* note XX at 18.

[220] Lvovsky, *supra* note XX at 2003-04 (explaining that "'[p]rofessionalization' became something of a byword in the 1950s and 1960s . . . The term 'professionalization' was broad enough to encompass almost any occupational improvement . . .").

[221] Johnston, *supra* note XX at loc. 1774.

[222] Horton & Nielsen, *supra* note XX at 138.

[223] Ragen, *supra* note XX at 120-21; Ragen, *supra* note XX at 205-07 (describing Illinois prison guard training program).

had to be certified by the U.S. Civil Service and examined by the U.S. Public Health Service, and if they met the rigorous standards for service, they were assigned to a training program. James A. Johnston, former warden of Alcatraz Prison, described the federal training program:

> For several weeks they were put through a rigorous course of physical training . . . They listened to lectures on sociology, psychology, penology, criminology, behaviorism and they were put on posts for tryouts alongside of seasoned guards . . . Mr. Bates, Mr. Bennett and Mr. Hammack [other federal prison officials] were determined to raise the educational standards for entrance into the service . . . They developed an organized plan of training instead of, or perhaps I should say, in addition to, the incidental learning by absorption on the job.[224]

Elevating industry qualifications and instituting standardized training programs may have been far less successful if officials had not simultaneously self-legitimized and centered their own expertise from within the industry. Purported legitimate authority in the field, particularly with respect to custody, was based primarily on "administrative experience in prisons and other penal institutions" and less on rigorous study of the field.[225] Ragen explained how he had become a recognized authority in the field, despite his rather typical (for the time) path to the job:

> While I stake no claims to recognition as the top authority on prison administration, I have been summoned to survey and act as consultant and advisor on prison methods, procedures, and operations in 20 states as well as in Canada, particularly after disastrous inmates' riots and demonstrations in some of these areas.[226]

The prison industry's professionalization movement coincided with the professionalization movement within policing, which similarly cast police officers as experts within their field.[227] Police departments at the time worked toward bureaucratizing their ranks, centralizing authority with police chiefs, and emphasized the need to self-regulate and adhere to a professional code of ethics.[228]

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[224] Johnston, *supra* note XX at loc. 1774.
[225] Page, *supra* note XX at 17.
[226] Ragen, *supra* note XX at vii.
[227] Lvovsky, *supra* note XX at 2003.
[228] Lvovsky, *supra* note XX at 2004-05.

And like prison officials did, police officers "emphasized the unique skills and knowledge of individual officers as professionals in their field."[229]

What was the source of this newfound expertise? Professor Lvovsky, in tracing the parallel evolution of the judicial presumption of police expertise, identifies a newfound focus of police departments on education and training for police officers.[230] No longer was policing a matter of pure brawn, but rather "brain over brawn."[231] Advocates of the professionalization of police perceived crime detection and prevention as analogous to the study of law or medicine, a field of scientific inquiry that deserve to be regarded for the depths of intellectual rigor and the depth of expertise its prominent figures claimed.[232]

The professionalization and expertization of policing changed the industry in the era—and critically, the judiciary's perception of police and their claimed expertise—in strikingly similar ways as prison officials' claimed expertise came to influence the judiciary in the latter half of the twentieth century. Police vied for judicial recognition of their expertise; with expertise came power within the policing field,[233] just as prison officials began to vie for judicial recognition of their claimed expertise and, accordingly, their retention of penal power.

Change from within prisons, and particularly the struggle for judicial recognition of prison expertise, coincided with significant change from outside the prisons. Tensions grew within the punishment field as subordinate actors—namely, incarcerated people and courts—began to assert claim to power that they otherwise had not possessed.

D. Change from Outside.

The 1950s and 1960s changed American punishment in significant ways. Growing political awareness and activity outside of prisons moved into prisons, as incarcerated people began to organize and assert claims to their humanity in myriad ways. Federal courts exercised hands-on authority, issuing sweeping structural injunctions across numerous prison systems in efforts to remedy the dehumanizing conditions that had been permitted to flourish for decades.

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[229] Lvovsky, *supra* note XX at 2005.

[230] Lvovsky, *supra* note XX at 2006.

[231] Lvovsky, *supra* note XX at 2005.

[232] Lvovsky, *supra* note XX at 2005-06.

[233] Lvovsky, *supra* note XX at 2009-10 ("In the 1950s, however, professionalization advocates became particularly concerned with the police's standing before a more specific audience: the courts. As early as 1952, the [International Association of Chiefs of Police]'s public relations committee had warned of the courts' unfortunate 'distrust of the police.'").

Within a relatively short period, the distribution of power within the punishment field had been radically disrupted. Prison officials responded with hostility and indignation, claiming outsiders were exacerbating the risks of an already dangerous profession. The struggled mounted, and the rhetoric of danger intensified.

i. The increased politicization and mobilization of prisoners.

The launch of the rehabilitative ideal in prisons across America carried promise for incarcerated people. After decades of being disenfranchised, declared civilly dead, and thrown away to rot in brutalizing conditions, the rehabilitative era carried hope for programs, treatment, and humanity. But many prisoners soon came to believe those promises were empty.[234] "After initially welcoming the advent of the Era of Treatment, prisoners increasingly felt that rehabilitation was more symbol than substance."[235]

Growing frustrations of unfilled commitments led to prisoners' increasingly vocal (and sometimes violent) opposition to prison policies and practices and general politicization among incarcerated populations.[236] "Prisoners developed political identities, engaged in political activities, "as calls for 'rights,' 'power,' and 'free speech' rang throughout American society . . . They insisted that, although incarcerated, they had certain inalienable rights, including the right to humane treatment. (Since 1871, the California penal code stated that prisoners were 'civilly dead slaves of the state.')"[237] Increased communication with family members, lawyers, and activists outside of prison, as well as communication (often clandestine) among incarcerated people, enabled increased education and organizing.[238]

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[234] *See, e.g.*, Andrew B. Mamo, *"The Dignity and Justice that is Due to Us By Right of Our Birth": Violence and the Rights in the 1971 Attica Riot*, 49 HARV. C.R.-C.L. L. REV. 531, 540 (2014) ("The inmates recognized a fundamental tension between programs aimed at legal reform and those striving for thorough reconstruction. This tension was both incredibly generative, creative a space for imaginative responses to the problem of incarceration, and unstable, as illustrated by the traumas of the summer of 1971 [when the Attica uprising occurred].").

[235] Page, *supra* note XX at 20.

[236] Miller, *supra* note XX at 269 ("A wave of riots, sit-down strikes, and acts of self-mutilation swept through U.S. prisons in the 1950s as inmates protested ineffectual prison management, guard brutality, poor food and living conditions, and racism and racial inequality, all of which underlined the limitations of the penal reforms of the previous decades. Indeed, an estimated thirty major disturbances took place across the United States in an eighteen month period from 1951 to 1953, more than the total for the preceding twenty-five years.").

[237] Page, *supra* note XX at 20.

[238] *See, e.g.*, Mamo, *supra* note XX at 535-36 (describing a manifesto shared among prisoners in New York City jails, Folsom State Prison in California, and Attica State Prison in upstate New York).

Black people, who were (and still are) incarcerated at higher rates than their non-Black counterparts, led much of the mobilization of incarcerated people.[239] The Black Panthers, led in part by Eldridge Cleaver incarcerated at Folsom and San Quentin Prisons, spearheaded education campaigns from within the walls.[240] George Jackson's public writings were deeply influential, as he became one of the era's major theorists of the politicization of incarceration.[241] Members of the Black Muslim Movement coordinated legal challenges among prisons across the country.[242]

Prisoners' mobilization and politicization included an attempted reclamation of the law, as incarcerated people started in earnest to resurrect themselves from their civil deaths and pursue remedies through the courts. Indeed, "[p]risoners, in concert with attorneys, brought the civil rights movement into the prison system."[243]

ii. From judicial hands-off to hands-on.

Few areas of American law have changed as significantly and as quickly as prison law between the mid-1960s and mid-1970s. Despite the federal courts' decades-long hands-off attitude toward constitutional challenges to prison conditions, people continued to file lawsuits. The Supreme Court's 1961 decision in *Monroe v. Pape* facilitated these efforts, as the Court recognized for the first time an expanded cause of action against a government official pursuant to 42 U.S.C. § 1983,[244] and, thus, "gave prisoner plaintiffs a jurisdictional path into federal court."[245] And shortly thereafter, the 1962 decision in *Robinson v. California*

[239] *See generally* Allegra M. McLeod, *Confronting the Carceral State*, 104 GEO. L.J. 1405, 1414-15 (2016).

[240] *See, e.g.*, Mamo, *supra* note XX at 548-49.

[241] Mamo, *supra* note XX at 549 ("Jackson's letters were partly intended to inform the public about the experience of prison and partly to place them on notice. One letter began: '[This message's] intent is to make it impossible for you to claim ignorance later on, after the war, when the world sits down to judge you, Amerikan society, Angle-Saxon law.'").

[242] Feeley & Rubin, *supra* note X at 37-38 ("Most prisoner complaints were brought pr se, by a prisoner whose motivation was a sense of grievance and a lot of spare time; a few were initiated or assisted by individual attorneys. The Black Muslim cases were the first complaints brought by an organized group as part of a consistent strategy. While the existence of this group depended on the Muslims' own organizational abilities, the choice of litigation as a strategy reflected the developing sense that relief could be obtained from the federal courts.").

[243] Page, *supra* note XX at 21.

[244] 365 U.S. 167.

[245] Schlanger, *supra* note XX at 368.

incorporated the Eighth Amendment into the Fourteenth Amendment, thereby making its provisions applicable to states and municipalities.[246]

Shortly after the *Monroe* decision, Thomas Cooper filed a § 1983 lawsuit against Frank J. Pate and Joseph E. Ragen (quoted above), senior officials at the Illinois prison where he was confined, barred him from purchasing religious materials and freely exercising his religion, and discriminated against him based on his religion.[247] The district court dismissed Mr. Cooper's complaint, and the Seventh Circuit affirmed, taking judicial notice on a motion to dismiss of the dangerousness of the Black Muslim Movement.[248] The panel asserted the need for carceral deference, relying on decades of judicial precedent and custom.[249] The Supreme Court, however, summarily reversed the decision, allowing Mr. Cooper's claim to proceed and marking a dramatic turning point in prisoners' rights litigation.[250]

Civil rights movement – "The civil rights movement helped make prisons visible, first in the South and later in the rest of the country. It provided the political context and resources for judges and the public to perceive and accept that one set of prisoners – those in the South – were subject to a 'particularly objectionable form of punishment.' This, in turn, provided an opening 'to identify a more general problem that was applicable to state prisons throughout the nation.'"[251]

The swift uptick in federal court adjudications of prisoners' cases has been well-documented, and thus a thorough doctrinal analysis is not necessary here.[252] Margo Schlanger, specifically, chronicles the evolution of the law in this period, summarizing the post-*Cooper* moment as one in which "evolution was very speedy: by 1970, plaintiffs had won the first federal case to order wholesale reform of a prison, in Arkansas. With few other effective avenues for complaint, prisoners started to bring federal cases in large numbers, alleging various types of inhumane treatment—brutal disciplinary sanctions for prison misconduct, excessive force, failures to provide adequate medical care, failures to protect from violence and extortion by other prisoners, and the like."[253] Within five years, federal courts had declared prisons in Mississippi, Oklahoma, Florida, Louisiana, and Alabama

[246] 370 U.S. 660; Barry R. Bell, *Prisoner's Rights, Institutional Needs, and the Burger Court*, 72 VA. L. REV. 161 (1986).

[247] *Cooper v. Pate*, 324 F.2d 165, 166 (7th Cir. 1963).

[248] *Id*. at 167.

[249] *Id*.

[250] 365 U.S. at 546.

[251] GOTTSCHALK, *supra* note XX at 177.

[252] *See generally* Schlanger, *supra* note XX; Dolovich, *supra* note XX; Feeley & Rubin, *supra* note XX.

[253] Schlanger, *supra* note XX at 369.

unconstitutional in whole or in part.[254] Over the next five years, courts reaches similar decisions regarding prisons in twenty-eight more jurisdictions.[255] At one point, "forty-eight of America's fifty-three jurisdictions had at least one facility declared unconstitutional by the federal courts."[256]

The effect of this wave of federal court intervention[257] in American punishment cannot be overstated. Prisoners, their lawyers, and the courts fundamentally altered the course of prison operations over a span of just twenty years. The impact, though, is not so much in the judicial decisions and case outcomes themselves, but in the reaction of prison officials to the increased intervention from competing forces. The backlash this era inspired creates the conditions for the deference retrenchment that soon comes.

E. The Backlash.

Prison officials felt the changes imposed by forces outside their own on a structural, and deeply personal, level. Wilkinson reflects, "All American prisons experienced tremendous change between the mid-1960s and the mid-1970s."[258] After the Court's decision in *Cooper*, officials perceived their entire way of doing things was under attack: "Penal practices and policies that in earlier times were considered acceptable were soon falling under the definition of unconstitutional acts."[259]

i. "Besieged."

Legal actors' involvement in prison affairs felt personal for many prison officials, who were deeply offended, troubled, or both. Official described prisoners as having "besieged" courts with lawsuits during this era, which in turn burdened an already overworked and frustrated staff.[260] The lawsuits were a nuisance, at best,

[254] Feeley & Rubin, *supra* note XX at 39-40.

[255] Feeley & Rubin, *supra* note XX at 40.

[256] Feeley & Rubin, *supra* note XX at 40.

[257] Federal courts were intervening not just in civil lawsuits but in federal criminal matters arising from poor prison conditions as well. In 1959, for example, a federal grand jury indicted several Florida prison officials on allegations they had mistreated prisoners and violated their civil rights. "The guards were accused of violating inmates' civil rights by chaining sometimes naked prisoners to the bars of their cells, withholding food for up to ten days, and assaulting them with high-pressure water hoses . . ." The guards were ultimately acquitted but not before a jury, the press, and Congress heard the allegations against them. *See* Miller, *supra* note XX at 285-86.

[258] William Richard Wilkinson, PRISON WORK xiv-v (2005).

[259] Horton & Nielsen, *supra* note XX at 144-45.

[260] Jacobs, *supra* note XX at 211.

and a deeply destabilizing safety concern in the eyes of many. The near-total control prison officials had wielded in the punishment field for a century was suddenly vulnerable.[261]

Of the lawyers representing incarcerated people, Wilkinson recalled, with apparent hostility,

> They were self-satisfied people who would come in and have the attitude that they were a Ph.D. and I was a dumb prison guard. Sometimes I had to react. But you pick your spots, because it got pretty hairy when they would call the director. I did not think they were doing right by letting people in the prison who had no knowledge of what was going to happen to them, who were totally ignorant about the environment and the inmate.[262]

He continues, "Until college students (or wherever it came from) started crying about racism and minorities and so on, there was not any problem with them in the prison business."[263] These "supposedly intelligent people" were simply "pushing their agenda."[264] Beto was reportedly frustrated with "a few lawyers" who "compounded the seeds of unrest" and made prison administration more difficult by "stirring up malcontents behind the walls." According to his biographer, Beto

[261] Wilkinson, *supra* note XX at 63 ("Then the sixties hit us. There were demonstrations outside, the outside pressure groups came in. This is where Procunier tried to accommodate everyone. Things just snowballed, and we almost lost control.").

[262] Wilkinson, *supra* note XX at 112.

[263] Wilkinson, *supra* note XX at 121-22; *see also* Wilkinson, *supra* note XX at 104 ("Now, in the late 1960s, you give them everyone they ask for, appease them. And then these special groups started coming in . . . So we had to revamp the whole thing about the screening process . . . [T]hese outside groups were something else. They would have whole groups come in. They would have bands come in. They would have banquets. You just opened the front door and let anybody in.")

[264] Wilkinson, *supra* note XX at 105; *see also* Wilkinson, *supra* note XX at 105-06 ("The ones who would come from the Bay Area were so naïve. Most of them were educated. Still they had no idea what was going on with the inmate. You would try to explain things to them to begin with, but they would brush you off . . . and they would want to get down to tutoring the inmate. Two weeks later they very thing that you told them would happen happened . . . During the orientation I would try to warn them about the convict, and they would flat-out deny it and not believe you. It was startling sometimes what they would say to you. I would tel them this is what convicts do . . . They would tell me that I did not understand the convict. These people had never been in a prison before, and they were telling me that it was obvious how I treated the convict and why they acted the way they did. It was not obvious to me. Their idea was that we should provide the inmate with a giveaway program, and my idea was we should cut their balls off if they do not perform.").

"firmly believed that a national movement, assisted by some lawyers, was underway which was aimed at breaking down prison authority."[265]

Not only were the so-called naïve and irresponsible lawyers assisting incarcerated people and impeding prison administration, in the view of many officials, so were the courts that issued orders against the prisons. Beto lamented the fact that "penologists and *not jurists* administer prisons."[266] Wilkinson decried "every Podunk judge in California [who] was establishing case law."[267] The judges "completely misunderstood."[268]

Moreover, officials felt the courts were favoring the incarcerated people, an especially significant upset to the status quo in which the officials had enjoyed the judiciary's deference throughout the hands-off era.[269] Of this period, the late Professor James B. Jacobs writes,

> Even worse, from the perspective of prison officials, judges have not been content merely to resolve conflicts, but have made Herculean efforts, by use of structural injunctions, special masters, and citizens' visiting committees, to restructure and reorganize prisons according to their own value preferences. Legal attacks and judicial interference have, according to some prison officials, fatally undermined these officials' capacity to administer their institutions and to maintain basic order and discipline.[270]

In the officials' view, the courts were unfairly refusing to accept their authority and expertise in the field, capital the officials had claimed for themselves as the dominant actor in the punishment field for decades.

And the courts were dangerously destabilizing the prison hierarchy and power structure. Sociologist Leo Carroll explains that officers perceived the judicial interference of this era as restricting their power, which in turn was "a serious infringement upon their authority and [made] it impossible for them to perform their duties."[271] Officials felt this put in them in vulnerable positions in which "an

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[265] Horton & Nielsen, *supra* note XX at 149.

[266] Horton & Nielsen, *supra* note XX at 145.

[267] Wilkinson, *supra* note XX at 102.

[268] Wilkinson, *supra* note XX at 102.

[269] Page, *supra* note XX at 21 ("Whereas convicts and their supporters celebrated court intervention into prison affairs, custody staff opposed it. Prison officers, in particular, alleged that lawyers and judges were meddlers who knew nothing about running a prison and consistently facilitated policy changes that benefited prisons while compromising staff safety. They were convinced that the attorneys and judges sided with convicts at the workers' expense.").

[270] Jacobs, *supra* note XX at 211.

[271] Carroll, *supra* note XX at 54.

aggrieved inmate might easily assault them."[272] Courts had abandoned them, despite their efforts to convince judges that prisoners were inherently dishonest[273] and manipulative,[274] while the officials were inherently credible and working in good faith.[275]

This perceived favoritism, and the felt lack of respect for the officials' professed good intentions and self-identified expertise in the field, seem to have inflicted deep psychological wounds among prison officials. Officers reportedly felt "betrayed" and "sold out" by court decisions against them;[276] the effect was demoralizing.

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[272] Carroll, *supra* note XX at 54.

[273] Ragen, *supra* note XX at 8 (decrying "the type of men we see in prisons today": "Their word is not good and they go into a tailspin without giving consideration to what the final result might be."); Ragen, *supra* note XX at 187 (discussing "the problem of malingering" and describing it as "a big one in a penitentiary"); Wilkinson, *supra* note XX at 84-85 ("It is the nature of the situation. Beating the system is what you do. We even did it in the Navy, beat the system. You had time to think about it, and it was fun . . . This is true with any group of young people with time on their hands and a system to beat . . . The inmates were doing it because they had been doing it all their life. Whether they were in a group or by themselves. That is just the nature of it. It starts in grammar school: how can I snooker the teacher and not have to do this or that? Can I charm her or cause enough disruption? It just happens with some people. Eventually some become convicts, and it is just reinforced. They learn more sophisticated ways to snub the system. Even I learned how to pick locks.").

[274] Wilkinson, *supra* note XX at 105 ("But what it was all about was the inmates' exploiting the outsiders. That is what inmates do, that is what they are. They can't resist the opportunity. It is their whole life, running this sandy candy on someone else. They are going to do what they do naturally with outsiders. That is a given."); *see also* Wilkinson, *supra* note XX at 106-07 ("Anything you give the inmate is something he will build upon. That is the nature of the inmate. You have to understand that that is their way.").

[275] Regan, *supra* note XX at 145 ("It is realized, of course, that no officer will voluntarily violate any of the regulations—no conscientious officer, that is—but for the protection of all and to maintain maximum efficiency, it has been necessary to impose penalties upon those officers who, through carelessness, neglect, or willful intent, fail to conduct themselves properly . . . It should, however, be entirely unnecessary for any officer to bring upon himself any of those penalties."); Regan, *supra* note XX at 172 ("[A prison guard's] reputation, both past and present, is of the utmost importance. That his honesty must be unquestioned is, of course, obvious; but that alone is not enough. His personal habits, both within and without the institution, must be above reproach . . . He must at all times demonstrate his unequivocal loyalty to the institution and to his superiors and show by word and example his innate respect for properly constituted authority, bearing in mind that it is for lack of these qualities that the majority of these men have become inmates of a penal institution."). *But see* Regan, *supra* note XX at 164 (noting "some men are unable to have authority without abusing it" and "[a]ny unnecessary manifestation of authority is very unbecoming to an officer whether his rank be high or low"); Ragen, *supra* note XX at 273 ("Even though an inmate makes false charges against prison authorities, the latter must counter with truth, not deceit. If employees have in all things conducted themselves according to the rules and regulations, the truth will suffice.").

[276] Carroll, *supra* note XX at 54 ("Like the police in the case of the Miranda decision, the officers view the court decision as placing the law and the courts on the side of the inmate and in opposition

A U.S. Department of Justice report issued after protracted litigation involving a Louisiana prison described the "worst effects" of the litigation as follows:

> It was psychologically very difficult for the [prison official] defendants to accept that what they had been doing was wrong or inadequate when they believed they were doing a decent job. It was psychologically very difficult for the defendants to accept that a federal judge who had never operated a correctional facility could dictate what would be done. It was psychologically very difficult for defendants to have their job performances criticized by persons who were not believed to understand their problems. It was psychologically very difficult for the defendants to accept blame for defects for which they saw others as being responsible. Acceptance of all of these things was made even more difficult by the fact that they were imposed publicly.[277]

Without a doubt, this era changed the way in which officials did their jobs. Court decrees required prison administrators to draft policies and procedures, many for the first time.[278] Conditions arguably improved for many incarcerated people across the country, if only by virtue of the fact that they had been resurrected from their civil death. The Supreme Court had recognized them as human beings and acknowledged that they carry many of their fundamental rights with them when they are forced to walk through a prison gate. But to achieve such progress required the federal courts to destroy the absolute power prison officials had held within the punishment field for decades, something the officials would not stand by quietly and allow to happen for much longer.

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to them. By extending legal rights to inmates, restricting the power of the officers and placing the institution on eighteen months probation, the decision makes the prisoners the 'good guys.' In short, the officers feel themselves betrayed and 'sold out' by agencies that should support their authority.").

[277] M. Kay Harris and Dudley P. Spiller, Jr., *After Decision: Implementation of Judicial Decrees in Correctional Settings*, U.S. Dep't of Justice, Law Enforcement Assistance Administration (1977).

[278] Jacobs, *supra* note XX at 222 ("Early lawsuits revealed the inability of prison officials to justify or even to explain their procedures. The courts increasingly demanded rational decision making processes and written rules and regulations; sometimes they even demanded better security procedures. The prisons required more support staff to meet the increasing demand for 'documentation.'").

ii. "[P]olitical interference of any kind disrupts and disorganizes the serenity of a well-operated institution."[279]

Ragen did not mince the above words in discussing his perspective on the tumultuous decades of judicial involvement in prison oversight, though he seems to have been referring to *outside* political interference of any kind. That the warden—and any prison employee, for that matter—have absolute control of the prison is "paramount," he reiterated.[280] Prison officials across the country seemed to share his sentiment, as reflected in the rise of prison unions during this era—new characters in the punishment field whose missions were to exercise political influence and seemingly claw back officials' ceded power.

California's Correctional Officers Association (CCOA) is a poignant example of this development and a good bellwether for this sort of change development.[281] Disgruntled officers started the organization in 1957, reportedly frustrated with their wages.[282] The CCOA was not especially active in its early years; the group functioned more like a club or fraternal organization than a labor union.[283] When one former officer reportedly tried to file a grievance with the CCOA, the then-president responded, "'Grievance? What do you mean, grievance? We do pizza and beer.'"[284]

That sentiment changed, however, in the midst of the backlash to the outside interventions described above. The CCOA, which became the California Peace Officers Association (CCPOA), had a couple thousand members in the late seventies; by 1981, its membership had nearly tripled.[285] The CCPOA began making substantial campaign contributions and could "really sway an election."[286] Wilkinson recalls the group was "a really militant union" that focused solely on officers' interests and said "to heck with the rest of the world."[287]

That newly developed and evolving prison unions had a political impact within the punishment field is clear; the extent to which their political influence impacted

[279] Ragen, *supra* note xx at viii.
[280] Ragen, *supra* note xx at viii.
[281] Page, *supra* note XX at 7 ("[T]he implications stretch beyond California's borders. It is well documented that California is a bellwether state that sets national trends in a variety of policy areas, such as taxation, affirmative action, immigration, and environmentalism. This is particularly true with criminal justice.").
[282] Page, *supra* note XX at 15.
[283] Page, *supra* note XX at 15.
[284] Page, *supra* note XX at 15.
[285] Page, *supra* note XX at 5.
[286] Wilkinson, *supra* note XX at 160.
[287] Wilkinson, *supra* note XX at 160.

the courts is a topic for further study in a forthcoming Article.[288] Many sociologists have observed, however, that in the wake of the backlash to the judicial involvement of the 1960s and 1970s, many unions embarked on aggressive strategies to secure their own interests.[289] Such strategies included staging sick outs, pressuring courts to revoke certain rules, and chastising officers for actions seen as irresponsible.[290] Given their influence, "It is not far-fetched to consider prison officials' key professional associations are playing a role in the prisoners' rights movement . . ."[291]

F. Deference Retrenchment.

In the early 1980s, the message from prison officials was clear: ceding some measure of power to courts, lawyers, and especially incarcerated people through recognition—and enforcement—of prisoners' rights was a serious risk to public safety.[292] The safety rhetoric coincided with societal concerns of rising crime and the War on Drugs.[293] Prison populations skyrocketed.[294] The rehabilitation ideal had failed,[295] and the public was scared.[296] Prisons returned to the harsh, punitive model the focus on rehabilitation was designed to eradicate.[297] Professor Page observes,

> For most of the first half of the twentieth century, the central purpose of imprisonment and related forms of punishment was rehabilitation. But

[288] Danielle C. Jefferis, *Courts and Prison Unions* (work-in-progress, manuscript on file with author).

[289] Carroll, *supra* note XX at 60.

[290] Carroll, *supra* note XX at 60.

[291] Jacobs, *supra* note XX at 221.

[292] Carroll, *supra* note XX at 47 ("In granting inmates access to the legislature and courts, in eliminating censorship of mail, and by extending certain safeguards of due process of law prisoners, the reforms have provided inmates with the capacity to develop a significant degree of countervailing power.").

[293] Dolovich, *supra* note XX at 340 ("The judiciary is not the only public institution to regard the incarcerated with hostility. The legislative politics of the tough-on-crime era of the 1980s and 1990s were enabled by a sense—still persisting today—that people with criminal convictions, especially prisoners, are 'a breed apart,' 'a different species of threatening, violent individuals for whom we can have no sympathy and for whom there is no effective help.'").

[294] Wilkinson, *supra* note XX at 135 n.1 (editors noting that changes in laws between 1977 and 1981 "caused a crisis in overcrowding" in California prisons); Robertson, *supra* note XX at 1014-15, 1026-27.

[295] Robertson, *supra* note XX at 1027-28.

[296] Allen, *supra* note XX.

[297] Page, *supra* note XX at 4 ("As the penal system ballooned [since the 1980s], state policy and funding decisions made prisons increasingly stark, depressing, and punitive.").

> from the mid-1970s onward, the central aim and logic of incarceration switched to retribution and incapacitation. With rehabilitation no longer a major aim of imprisonment, funding for educational, vocational, and treatment programs dried up, making it ironic that states still refer to their prisons as 'correctional facilities' and their penal agencies as 'departments of correction.'[298]

It is within this period that the Court's view of prisoners' rights and the deference owed to prison officials explicitly shifted with the 1987 decision in *Turner*. The Court, seemingly persuaded by prison officials' response to the preceding decades, relinquished most newfound power to the officials and, in turn, yanked the modicum of power—the power to assert one's humanity—from incarcerated people. Prison officials persuaded the Court, under new Chief Justice Rehnquist, of their superior expertise in the field[299] and re-assumed their position at the dominant actor in the punishment field. And the prisoners' rights revolution came to an end, sacrificed to the sweeping power of carceral deference.[300]

IV. CARCERAL DEFERENCE IN CONTEXT.

Courts' pro-prison propensities are driven by a sweeping deference principle built on mythical notions of prison official expertise (given the novelty of carceral punishment) and persisting throughout eras of change in American incarceration The above history compels us to reevaluate courts' reasoning for this sweeping deference it affords prison officials, particularly considering recent doctrinal

[298] Page, *supra* note XX at 9.

[299] Prison officials in this era have been called the "new administrators," reflecting their newfound and elevated position within the field. *See generally* Alexander, *supra* note XX at 1007 ("The Supreme Court's endorsement of the policies of the new administrators seriously threatens even the most moderate goal of the prison reform movement, bringing prisoners within the scope of the basic protections of the Constitution. As the new administrators persuade the Supreme Court that they can be trusted, a partial withdrawal of the prisons from federal court scrutiny will occur, and prison systems will worsen. Prison officials, including the new administrators, will be under less pressure to eliminate dehumanizing conditions or to recognize other basic constitutional rights.").

[300] Driver & Kaufman, *supra* note XX at 536-37 ("It risks only a mild overstatement to say that the prisoners' rights revolution ended in 1987. In June of that year, the Supreme Court issued *Turner v. Safley*, a split opinion authored by Justice O'Connor . . . To the extent that it is remembered outside prison law circles, *Safley* is understood as a vindication of the fundamental right to marry. For prisoners, though, the case's lasting impact lay in the creation of a new, default standard for reviewing constitutional challenges to prison policy . . . Though it reads as a simple rational basis test, the standard represents a stark departure from traditional constitutional analysis and a pivotal turn in the legal history of prison oversight.").

developments outside of prison law that call into question courts' traditionally deferential postures. Two areas where judicial deference has come under increasing scrutiny is with respect to the qualified immunity doctrine and the *Chevron* deference doctrine.

The qualified immunity doctrine serves as a defense to state actors sued for damages for alleged civil rights violations[301] where the defendant's challenged conduct "did not violate clearly established law of which a reasonable person should have known."[302] Underlying the law is the notion that government officials should not be liable for a legal violation that they could not have known they were committing.[303] The standard is an objective one, asking not what the defendant themselves knew or should have known under the circumstances, but what a reasonable person should have known. Notably, the doctrine provides not only a defense to *liability* but to the litigation process itself.[304]

What may have seemed initially to be a fair exercise of judicial restraint and protection of government officials became a dominant force in civil litigation against state actors. Just a few years after the Court set forth the governing "clearly established" standard, the Court observed that "it provides ample protection to all but the plainly incompetent or those who knowingly violate the law."[305] And just a year later, the Court solidified the power of the doctrine with its decision in *Anderson v. Creighton*, finding that to count as "clearly established law," "[t]he contours of the right [at issue] must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."[306] Over time, this requirement, coupled with several other procedural and substantive shifts to the standard,[307] has morphed the doctrine into a near-total liability shield for many government officials.[308]

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[301] There is some debate whether the defense applies to statutory claims, such as those brought under the Religious Freedom Restoration Act, as well as constitutional claims where it has traditionally been applied. *See* Nicole B. Godfrey (draft article).

[302] *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *see also Pierson v. Ray*, 386 U.S. 547 (1967) (recognizing a "good faith" defense for police officers, which became the precursor to the qualified immunity defense).

[303] *See, e.g.*, Adam A. Davidson, *Procedural Losses and the Pyrrhic Victory of Abolishing Qualified Immunity*, 99 WASH. U. L. REV. 1459, 1470 (2022).

[304] *Malley v. Briggs*, 475 U.S. 335, 341 (1986); *see also Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985) (explaining qualified immunity protects government officials *unless* "the law clearly proscribed [their] actions").

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[306] 483 U.S. 635, 640 (1987).

[307] *See, e.g.*, Davidson, *supra* note XX at 1471-75.

[308] *Id*. at 1472.

Scholars, lawyers, activists, jurists, legislators, and more have levied significant criticism toward the modern application of the qualified immunity doctrine, ranging from calls to modify and narrow the doctrine to abolishing it.[309] Professor Adam A. Davidson notes, "Attacking qualified immunity is seemingly one of the few things that everyone can agree on in our divided times."[310] The criticism comes from many directions, but many center on the way in which substantial judicial deference to government actors, often police officers, lead to absurd results. The Court's modern articulation of the standard requires "maximal deference to officials; only the 'plainly incompetent' or those who 'knowingly violate the law' should escape the protection of immunity."[311]

The criticism may be resonating with at least some justices on the Court. Justice Sotomayor, in a dissent to a per curiam decision reversing a denial of qualified immunity to police officer who fatally shot Amy Hughes, wrote the officer's conduct was "unreasonable," and "yet, the Court today insulates that conduct from liability under the doctrine of qualified immunity."[312] She continues, criticizing the majority's deferential, pro-officer view of the facts. "[T]he Court misapprehends the facts and misapplies the law, effectively treating qualified immunity as an absolute shield" by avoiding any scrutiny of the defendant-officer's conduct and instead focusing on the clearly-established law prong of the analysis.[313] She notes the disparity the Court has exhibited in, on the one hand, summarily reversing lower

[309] *See, e.g.*, Davidson, *supra* note XX; Bryan Castro, *Can You Please Send Someone Who Can Help? How Qualified Immunity Stops the Improvement of Police Response to Domestic Violence and Mental Health Calls*, 16 HARV. L. & POL'Y REV. 581 (2022); Jennifer E. Laurin, *Reading* Taylor*'s Tea Leaves: The Future of Qualified Immunity*, 17 DUKE J. CONST. L. & PUB. POL'Y 241 (2022); Teressa Ravenell, *Unincorporating Qualified Immunity*, 53 LOY. U. CHI. L.J. 371 (2022); Zachary R. Hart, *Managing Judicial Discretion: Qualified Immunity and Rule 12(b)(6) Motions*, 97 IND. L.J. 1479 (2022): David D. Coyle, *Getting It Right: Whether to Overturn Qualified Immunity*, 17 DUKE J. CONST. L. & PUB. POL'Y 283 (2022); David G. Maxted, *The Qualified Immunity Litigation Machine: Eviscerating the Anti-Racist Heart of § 1983, Weaponizing Interlocutory Appeal and the Routine of Police Violence Against Black Lives*, 98 DENV. L. REV. 629 (2021); Samantha K. Harris, *Have a Little (Good) Faith: Towards a Better Balance in the Qualified Immunity Doctrine*, 93 TEMP. L. REV. 511 (2021); Andrew Coan & DeLorean Forbes, *Qualified Immunity: Round Two*, 78 WASH. & LEE L. REV. 1433 (2021); William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45 (2018); Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2 (2017); Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1 (2015).

[310] *Id*. at 1475.

[311] Laurin, *supra* note XX at 245.

[312] *Kisela v. Hughes*, 138 S. Ct. 1148, 1155 (2018) (Sotomayor, J., dissenting).

[313] *Id*. at 1155, 1158.

courts for wrongly denying officers qualified immunity protection but rarely intervening when courts wrongly afford officers the same protection.[314]

Two years later, Justice Sotomayor joined the Court's majority to, in another per curiam decision, reverse the Fifth Circuit's *grant* of qualified immunity to prison officials whom Trent Taylor alleged confined him in "shockingly unsanitary cells" for six full days.[315] The conditions were so poor, Mr. Taylor did not eat or drink for four days because he feared his food and water may be contaminated.[316] Officers moved him to another cell which was equipped with only a clogged floor drain which overflowed, causing raw sewage to spill across the floor.[317] The cell had no bed and Taylor was confined with no clothing, so he was forced to sleep naked in the sewage.[318]

In an atypical decision, the Court found the lower court erred in granting the officials qualified immunity on the ground that the law prohibiting prison officials from confining people in cells with human waste was not clearly established.[319] The Court concluded, "Confronted with the particularly egregious facts of this case, any reasonable officer should have realized that Taylor's conditions of confinement offended the Constitution."[320] Likely due in part to the graphically detailed and disturbing facts Mr. Taylor alleged, the Court declined to extend its usual deference to government actors' conduct in the qualified immunity realm. The decision may signal some judicial willingness to, at minimum, narrow the near-complete defense the qualified immunity doctrine has come to provide given, in large part, to courts' willingness to defer to government actors.[321]

The Supreme Court has also exhibited skepticism in recent years of judicial deference to administrative agencies, either expressly disclaiming the propriety of deference as in the major questions canon[322] or implicitly rejecting the *Chevron* doctrine in decisions that would seemingly warrant deference to a regulatory

[314] *Id*. at 1162.
[315] *Taylor v. Riojas*, 141 S. Ct. 52, 53 (2020).
[316] *Id*.
[317] *Id.*
[318] *Id*.
[319] *Id*.
[320] *Id*. at 54.
[321] *See, e.g.*, Laurin, *supra* note XX.
[322] *West Virginia v. Environmental Protection Agency*, 142 S. Ct. 2587 (2022); *National Federation of Independent Business v. Dep't of Labor, Occupational Safety and Health Administration*, 142 S. Ct. 661 (2022); *see generally* Thomas B. Griffith & Haley N. Proctor, *Deference, Delegation, and Divination: Justice Breyer and the Future of the Major Questions Doctrine*, 132 YALE L.J. FORUM 693 (2022); Nathan Richardson, *Antideference: Covid, Climate, and the Rise of the Major Questions Canon*, 108 VA. L. REV. ONLINE 174 (2022).

agency.[323] In each area, the Court has rejected the presumption of agency expertise that may otherwise warrant deference, shifting instead to what Nathan Richardson calls an "antideference" position.[324] Scholars disagree on the normative force of the Court's moves in this arena, but the doctrinal rejection of deference is hard to ignore.

Given this contemporary context and the Court's attention in other areas to judicial deference, carceral deference deserves substantially greater scrutiny than the principle has otherwise been afforded. The principle was crafted from faulty premises of expertise in an altogether novel environment, and it has since come to function as a near-complete shield to liability for prison officials defending against incarcerated plaintiffs' challenges to prison conditions, in much the same way that qualified immunity has come to serve as a near-total shield to liability for government actors. Moreover, the credibility of the presumed generalized expertise is at least as questionable as the agency expertise the Court has rejected in its recent administrative law decisions. If the Court is going to reconsider its longstanding jurisprudence of judicial deference in the vein of re-allocating state power among government bodies, it should do the same with the carceral deference principle.

V. CONCLUSION.

Carceral deference is a powerful principle built on faulty premises and with troubling and destabilizing effects. This Article has examined its origins and evolution across American punishment, analyzing the full punishment field and the interconnectedness of prisons, courts, lawyers, and incarcerated people across the criminal and civil law paradigms. I have also situated the deference principle among other areas of law in which the Court has exhibited skepticism of the future of judicial deference to political branches. In a companion piece to this Article, I dive deeper into the operation of the carceral deference principle in contemporary prisoners' rights jurisprudence, examining the ways in which the principle manifests in the courtroom as well as the consequences of those manifestations for

[323] *American Hospital Assoc. v. Becerra*, 142 S. Ct. 1896 (2022); *see generally* Stephen M. Johnson, *Deregulation: Too Big For One Branch, But Maybe Not For Two*, 53 SETON HALL L. REV. 839, 846 (2023) ("[O]ver the past few terms, the Supreme Court has expressed increasing skepticism toward principles of deference to administrative agencies and appears poised to make significant changes to the important principles of administrative and statutory law which have limited the executive branch's ability to dismantle environmental regulatory protections."); William Yeatman, *The* Becerra *Cases: How Not to Do* Chevron, 2022 CATO SUP. CT. REV. 97 (2022).

[324] Richardson, *supra* note XX at 177.

incarcerated people, prison officials, the judicial system, and American criminal and civil justice.[325]

Examining the origins of carceral deference is more important now than ever, as society grapples with the scope, scale, and racist impact of American punishment. Understanding how the foremost judicial norm in this space developed—and the full scope of the forces impacting it—gives us a foundation from which to better examine and critique the distribution of power among prisons, courts, and incarcerated people. It further informs our understanding of the systemic and structural flaws of the criminal punishment system and adds to a growing body of literature analyzing the role of expertise in constitutional analysis across dimensions, from qualified immunity to the administrative state.

[325] Danielle C. Jefferis, *The Dangers of Carceral Deference* (work-in-progress, manuscript on file with author). In additional forthcoming projects, I analyze more deeply the relationship between corrections unions and the judiciary and, specifically, the presence and role of unions in litigation; and the role of language and rhetoric in prisoner litigation, with a focus on the hostility with which litigants and courts treat incarcerated plaintiffs. These projects build from this foundation and join doctrine and history through a sociolegal lens to further the objectives described above.