

CARCERAL DEFERENCE: COURTS AND THEIR PRO-PRISON PROPENSITIES

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Judicial deference to nonjudicial state actors, as a general matter, is ubiquitous, both in the law and as a topic of legal scholarship. 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 contextualizes carceral deference historically, politically, and culturally, and it thus adds a piece that has been missing from the literature. Drawing on primary and secondary historical sources and anchoring the analysis in Bourdieu’s field theory, this Article is an important step to bringing the origins of carceral deference out of the shadows, revealing the story of institutions wrestling for control and unbridled dominance that has not, until now, been fully told.

Carceral deference plays an enormous role in the constitutional ordering of state power, as well as in civil law’s regulation of punishment, a force that is often neglected within the criminal law paradigm. 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.

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INTRODUCTION

Judicial deference to state actors pervades the American criminal law space. Professor Rachel Barkow identifies the “animating principle” of the U.S. Supreme Court’s criminal law jurisprudence as a “pathological deference to the government.”¹ Professor Benjamin Levin asserts that deference “lies at the heart of criminal law’s administration.”² Professor Sharon Dolovich describes this “unmistakable consistency” in the field of prison law in particular, apparent in both pre- and post-conviction confinement,³ as one that is “predictably pro-state, highly deferential to

1. Rachel Barkow, *The Court of Mass Incarceration*, 2021–2022 CATO SUP. CT. REV. 11, 17.

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

3. Prison law is a bit of a unique animal. Although the issues that prison law governs arise in a physical space of criminal legal control (i.e., prisons), prison law is operationalized most often within the civil law paradigm and predominantly via constitutional and/or statutory challenges to prison conditions and the treatment of incarcerated people. *See, e.g., infra* Part II.D.2. Carceral deference—the judicial presumption of prison officials’ superior expertise in operating carceral spaces—arises typically via those civil lawsuits and at the unusual nexus of civil and criminal law that prison law inhabits.

prison officials' decision-making, and largely insensitive to the harms people experience while incarcerated."⁴

This Article focuses on the latter pattern of deference—judicial deference within prison law—a principle that this Article refers to as carceral deference. Carceral deference is a sweeping form of judicial deference to prison officials that manifests both explicitly and implicitly in prison law doctrine and federal judicial practice. The Supreme Court has instructed lower federal courts adjudicating many types of challenges to prison policies or practices to be “*particularly conscious* of the ‘measure of judicial deference owed to corrections officials . . . in gauging the validity of the [challenged] regulation.’”⁵ Prison officials face “Herculean obstacles” in 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, the judiciary perceives itself as “ill equipped to deal with the increasingly urgent problems of prison administration and reform”⁷ and, therefore, believes it must defer to the justifications and defenses offered by prison officials when a particular condition or practice imposed on incarcerated people is challenged through litigation.

Under those terms, the deference can be dispositive⁸: for many constitutional challenges to prison conditions, courts “*must defer* to the judgment of corrections officials unless the record contains *substantial evidence* showing their policies are an unnecessary or unjustified response” to a matter of security or prison management.⁹ For other claims in which the deference principle is not explicitly articulated in the legal standard, courts

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

5. Turner v. Safley, 482 U.S. 78, 90 (1987) (emphasis added) (quoting Pell v. Procunier, 412 U.S. 817, 827 (1974)).

6. Procunier v. Martinez, 416 U.S. 396, 404–05 (1974), *overruled in part by* Thornburg v. Abbott, 490 U.S. 401 (1989).

7. *Id.* at 405.

8. For a small sampling of recent decisions, see, for example, Heid v. Mohr, No. 18-CV-311, 2023 WL 1800936, at *8 (S.D. Ohio Feb. 7, 2023); Picarella v. Wetzel, No. 20-CV-1440, 2022 WL 3370777, at *7 (M.D. Pa. Aug. 16, 2022); Stanton v. Liaw, No. 20-CV-666, 2022 WL 1641765, at *3–4 (N.D. Ind. May 24, 2022); Carter v. Polito, No. 18-CV-232, 2022 WL 1126229, at *7 (W.D. Pa. Jan. 14, 2022); Desposito v. United States, No. 21-10446, 2021 WL 4452760, at *3–4 (D.N.J. Sept. 29, 2021); Luyster v. Bishop, No. C18-6022, 2021 WL 4430369, at *12, *21 (W.D. Wash. Aug. 18, 2021). For a more extensive discussion of the contemporary application of the carceral deference principle, see Danielle C. Jefferis, *Deconstructing Carceral Deference: The Harms of Judicial Presumptions of Prison Official Expertise* (forthcoming 2024) (unpublished manuscript) (on file with author).

9. Florence v. Bd. of Chosen Freeholders, 566 U.S. 318, 322 (2012) (emphasis added); see also Walker v. Wexford Health Sources, Inc., 940 F.3d 954, 965 (2019) (“We defer to [prison] medical professionals’ treatment decisions unless there is evidence that no ‘minimally competent professional would have so responded under those circumstances.’” (quoting Pyles v. Fahim, 771 F.3d 403, 409 (7th Cir. 2014))). *Florence* dealt with a challenge to a jail condition imposed on a pretrial detainee, but the principle holds true for challenges to prison conditions imposed post-conviction as well. See *infra* Part I.B.

nonetheless often defer to prison officials' presumed justifications for a challenged practice. Thus, carceral deference operates so that, without considerable evidence to rebut prison officials' stated justifications for a condition of incarceration (in spite of the multifaceted challenges to obtaining such evidence), and because plaintiffs' allegations of the *harms* of the challenged condition do not receive a great deal of judicial attention,¹⁰ the incarcerated person loses their civil case. This occurs typically at the motion to dismiss or summary judgment stage with little litigation around or scrutiny of the scope or propriety of the claimed expertise.¹¹ With the plaintiff's loss, the challenged condition is effectively legalized and constitutionalized—what Professor Eric Berger calls “stealth constitutional decision making.”¹² In an era in which people are dying in America's prisons and jails at exceedingly high rates,¹³ and at least one state is reportedly “not in control” of its prisons,¹⁴ scrutiny of the principles underlying the judicial presumption of generalized prison official expertise and courts' pro-prison propensities is imperative.

Legal scholars have examined the scope and operation of carceral deference within prison law jurisprudence, focusing often on its jurisprudential legitimacy and impact on litigants.¹⁵ 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 itself to analyze the foundation and evolution of federal courts' practice of deference to prison officials in light of the law's embeddedness in social and historical contexts, as well as the relationships among federal courts, prison officials, lawyers, activists, politicians, prisoners, and so on. This perspective is important because it illustrates the profound

10. See generally Danielle C. Jefferis, *Carceral Intent*, 27 MICH. J. RACE & L. 323 (2022) (arguing for more judicial and doctrinal attention to carceral conditions' harms).

11. See, e.g., *id.* at 345–46 (explaining that the Supreme Court introduced a high standard for what Eighth Amendment complainants must allege and prove in their complaints in *Estelle v. Gamble*, 429 U.S. 97 (1976)); Jefferis, *supra* note 8.

12. Eric Berger, *Deference Determinations and Stealth Constitutional Decision Making*, 98 IOWA L. REV. 465, 479–85 (2013).

13. U.S. DEP'T OF JUST., MORTALITY IN STATE AND FEDERAL PRISONS, 2001–2019 – STATISTICAL TABLES (2021), <https://bjs.ojp.gov/content/pub/pdf/msfp0119st.pdf> [<https://perma.cc/ZUY9-JPH6>] (noting that 4,234 people died in state and federal prisons in 2019; 4,515 people died in state and federal prisons in 2018; and 143 homicides in state prisons in 2019 marked the highest number recorded since 2001).

14. *Former Officer: Alabama 'Not in Control' of State Prisons*, ASSOC. PRESS (Nov. 5, 2022, 4:46 PM), <https://apnews.com/article/prisons-alabama-treatment-of-prisoners-50e1832966f34b0a5a2f65520a4cdc83> [<https://perma.cc/BW26-3MER>].

15. See, e.g., Dolovich, *The Coherence of Prison Law*, *supra* note 4; 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*, *supra* note 4; Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 961 n.306 (2009); Barry R. Bell, Note, *Prisoner's Rights, Institutional Needs, and the Burger Court*, 72 VA. L. REV. 161 (1986).

interconnectedness of mechanisms of state power across the criminal and civil legal paradigms, which tends to be overlooked.¹⁶

From that broader perspective, a narrative surfaces: courts' presumption of the generalized expertise of prison officials emerges from decades of judicial nonintervention in prison oversight.¹⁷ In the early nineteenth century, incarceration was a new form of punishment; prisons were often administered and staffed by former merchants and farmers.¹⁸ Few could reasonably demonstrate experience or claim expertise in the sort of ordered custodial control that prisons endeavored to exert. And for more than a century, courts took little interest in the conditions of prisons or the operation of carceral spaces, viewing incarcerated people as having few rights and allowing for the untested and unexamined evolution of punishment practices.¹⁹ This period is known as the "hands-off era."²⁰

Over time, the prison system expanded, and the punishment industry underwent a professionalization movement.²¹ Prison officials began to explicitly claim subject matter expertise, even as carceral punishment continued to undergo dramatic changes in purpose and scope.²² During these eras of change, the historical record shows prison officials' reluctance—if not outright refusal—to adapt to such changes, resulting in what some may consider operational crises.²³ Yet, with the exception of a brief period during the civil rights era, federal courts continued to decline intervention, leaning on a newly articulated justification for their nonengagement in prison oversight—a presumption that prison officials were better equipped than judges in keeping prisons safe and secure and, thus, better positioned to evaluate the legality of challenged conditions and policies.²⁴ Even in the context of growing federal judicial involvement in the recognition and protection of constitutional rights outside of the prison context, these courts insisted on relinquishing their authority to examine the lawfulness of prison policies and practices, despite American prisons being anything but safe and secure.²⁵

16. *See generally* MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA* 18 (2006) (asserting that American punishment "is deeply embedded in a particular social, political, historical, and institutional context" and "[r]eductionist explanations" for its evolution are inadequate); Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 *HARV. L. REV.* 1995, 1999 (2017) (writing about the parallel phenomenon of judicial presumptions of police expertise and arguing that 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").

17. *See infra* Parts II.A–B.

18. *See infra* Part II.B.3.

19. *See infra* Part II.B.

20. *See infra* Part II.B.

21. *See infra* Part II.C.2.

22. *See infra* Parts II.C–D.

23. *See infra* Part II.E.

24. *See infra* Part II.F.

25. *See infra* Part II.F.

Carceral deference has evolved into a doctrine that credits untested presumptions of danger in the balancing of individual rights and institutional risk. It shows an institutionalized belief among the judiciary in generalized expertise without scrutiny of the merits of such a belief. Deference to prison officials is the modern manifestation of federal courts' long-standing disinterest in prison conditions and abuses. This faith in untested expertise harms litigants, the integrity of procedure, and the role of the judicial system in ordering state power.²⁶

This Article's second contribution is its analysis of carceral deference in the context of developments in contemporary legal doctrine outside of prison law. Judicial deference of many sorts has come under recent scrutiny. For example, scholars and advocates across the political spectrum have challenged the premise of judicial deference to state actor conduct in matters of qualified immunity.²⁷ The Roberts Court itself has expressed skepticism toward judicial deference to administrative agencies through the major questions canon and related skepticism of the *Chevron*²⁸ doctrine.²⁹ With other areas of judicial deference up for review, all seemingly in the spirit of allocating—or reallocating—state power among government bodies and irrespective of underlying or motivating policy preferences, carceral deference must be chief among them.

To be sure, after centuries of American carceralism, prison officials today may credibly claim some measure of particularized expertise in the field. And there may be legitimate reasons for courts to defer to certain officials' precise areas of specialized knowledge.³⁰ Yet, the sheer scope of deference that federal courts afford to prison officials should concern even the most ardent critics of courts' involvement in prisoner litigation and prison regulation or oversight. The judicial presumption of generalized expertise that underlies sweeping, unchallenged deference undermines those very claims of credible expertise that today's individual prison officers may fairly assert. It undermines the judiciary's truth-seeking purpose and the integrity of procedure, and it scaffolds a system built on human suffering and exploitation.³¹ American punishment practices are unlikely to change if they are not interrogated, challenged, and scrutinized by those in power—including courts.³²

This Article continues in four parts. Part I 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 II tells the carceral deference origin story. Part

26. Jefferis, *supra* note 8.

27. *See infra* Part III.

28. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

29. *See infra* Part III.

30. *See, e.g., Dolovich, Forms of Deference, supra* note 4, at 245.

31. *See Jefferis, supra* note 8.

32. *See generally* Margo Schlanger, *Incrementalist vs. Maximalist Reform: Solitary Confinement Case Studies*, 115 Nw. L. Rev. 273 (2020); Keramet Reiter, *Remaking Carceral Policy: A Response to Littman*, 74 VAND. L. REV. EN BANC 457 (2021).

III contextualizes carceral deference in contemporary legal developments where judicial deference in other fields has come under scrutiny. Part IV concludes with recommendations and areas for further work.

I. MODERN FORMS OF JUDICIAL DEFERENCE

Judicial deference to other government branches and agencies is not unique to prison law nor to the criminal legal system. Federal courts defer to state and federal political branches in matters of administrative law,³³ foreign relations,³⁴ national security,³⁵ and questions of remedies for constitutional violations,³⁶ among others.³⁷ This part introduces the modern principle of judicial deference to the political branches and then examines the specific concept of judicial deference to prison officials. 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 II.

A. Judicial Deference, Generally

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.³⁸ When deciding matters of administrative law, federal courts are bound, in theory,³⁹ by the deference principle articulated in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*⁴⁰ 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.⁴¹ In matters of national security, the degree to which courts defer to

33. See, e.g., Berger, *supra* note 12, at 479–85.

34. See, e.g., Jonathan I. Charney, *Judicial Deference in Foreign Relations*, 83 AM. J. INT’L L. 805 (1989).

35. See, e.g., Raquel Aldana-Pindell, *The 9/11 “National Security” Cases: Three Principles Guiding Judges’ Decision-Making*, 81 OR. L. REV. 985 (2002).

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

37. 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 an illustration of the ways in which judicial deference to political branches may occur.

38. See Charney, *supra* note 34, at 805.

39. The Supreme Court has recently expressed skepticism of the continued applicability of the *Chevron* deference standard (and related forms of agency deference principles). See *infra* Part III.

40. 467 U.S. 837 (1984).

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

political-branch actors is also mixed.⁴² 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 Congress,⁴³ affording near-blanket deference—indeed, the “utmost deference”⁴⁴—to Congress’s silence on the matter.⁴⁵

Federal courts offer varied justifications for their deference.⁴⁶ In some areas, judicial deference is justified on political grounds. The theory goes that political-branch actors are more accountable and responsive to the electorate than the judiciary is.⁴⁷ Courts presume that those political-branch actors act in accordance with the wishes and will of the democratic majority more so than judges do.⁴⁸ 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 unelected administrative agent of the executive branch), but this deference principle extends to many areas of legislative and policy action.⁴⁹

In other areas, courts justify their deference on epistemic grounds, leaning on the subject-matter expertise of the political branch or actors tasked with specific decision-making authority.⁵⁰ Administrative agencies operate within a narrow field and employ professionals with expertise in that field, for example.⁵¹ Such expertise, the justification holds, is superior to the generalist competence of legislatures and, more importantly, courts.⁵² Similarly, courts often presume that Congress operates within the specific field of lawmaking expertise.⁵³ 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.

This epistemic justification is typically the stated reasoning for courts’ deference to prison officials, with the expertise often framed as a specialized

42. See Aldana-Pindell, *supra* note 35, 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).

43. Redish, *supra* note 36, at 1909–10.

44. *Egbert v. Boule*, 142 S. Ct. 1793, 1803 (2022).

45. See *id.*; see also *Hernández v. Mesa*, 140 S. Ct. 735, 741–42 (2020) (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. 1843, 1861–62 (2017).

46. See Berger, *supra* note 12, at 468.

47. See *id.* at 482–83.

48. See *id.*

49. See *id.*

50. See *id.* at 479–80; see also Levin, *supra* note 2, at 1415.

51. Berger, *supra* note 12, at 479–80. *But see id.* at 480 (“In 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.”).

52. *Id.*

53. See, e.g., *Egbert v. Boule*, 142 S. Ct. 1793, 1802–03 (2022) (discussing the task of creating a cause of action and highlighting Congress’s superior competence in weighing the relevant policy considerations to do so).

understanding of how to keep prisons safe and secure, as illustrated in the next section.⁵⁴

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.”⁵⁵ Although a person’s full legal rights may be restricted due to the environment in which they live while incarcerated,⁵⁶ the basic concept underlying many of the constitutional rights a person does retain while in prison “is nothing less than the dignity of man.”⁵⁷ Accordingly, several federal constitutional and statutory provisions aim to protect people confined to prisons from harms that may arise during their incarceration.⁵⁸

The Eighth Amendment, for example, prohibits cruel and unusual punishment.⁵⁹ Federal courts have interpreted this clause to prohibit the conscious deprivation of medical care for prisoners’ serious medical needs,⁶⁰ unsafe prison conditions of which prison staff are aware,⁶¹ and conditions that otherwise deprive incarcerated people of life’s basic necessities.⁶² The First Amendment preserves the rights of incarcerated people to access the courts,⁶³ communicate with lawyers,⁶⁴ practice their religion,⁶⁵ and speak and associate with some degree of autonomy.⁶⁶ The Fourth Amendment protects some measure of privacy within the walls of a prison.⁶⁷ The equal protection and due process guarantees of the Fifth and Fourteenth

54. Over time, some courts have deferred to prison officials due to expressed separation-of-powers or federalism concerns, though the modern deference principle is typically justified on epistemic grounds. *See infra* Parts I.B, II.

55. *Wolff v. McDonnell*, 418 U.S. 539, 555–56 (1974).

56. *See id.* at 556 (asserting that “there must be mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application”).

57. *Trop v. Dulles*, 356 U.S. 86, 100 (1958).

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

59. U.S. CONST. amend. VIII.

60. *See Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

61. *See Farmer v. Brennan*, 511 U.S. 825, 828 (1994).

62. *See Rhodes v. Chapman*, 452 U.S. 337, 347 (1981).

63. *See Johnson v. Avery*, 393 U.S. 483, 485 (1969).

64. *See Procunier v. Martinez*, 416 U.S. 396, 419 (1974), *overruled in part by Thornburg v. Abbott*, 490 U.S. 401 (1989); *see also Pell v. Procunier*, 417 U.S. 817, 822 (1974).

65. *Cooper v. Pate*, 378 U.S. 546, 546 (1964); *see also Cooper v. Pate*, 382 F.2d 518, 521 (7th Cir. 1967); *Cruz v. Beto*, 405 U.S. 319 (1972).

66. *See Turner v. Safley*, 482 U.S. 78, 89 (1987).

67. *See* U.S. CONST. amend. IV; *Bell v. Wolfish*, 441 U.S. 520, 558–60 (1979) (prohibiting “unreasonable” strip and body cavity searches in prison and requiring courts to “consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted”). *But see Hudson v. Palmer*, 468 U.S. 517, 525–26 (1984) (declining to find that any search of the interior of a prison cell may be unreasonable and articulating that “society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner 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”).

Amendments provide some procedural and substantive protections.⁶⁸ Federal statutory protections from disability and religious discrimination also apply within prison walls.⁶⁹

Nevertheless, 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 difficulty of finding an attorney willing to represent the plaintiff is a significant challenge⁷⁰ and one that dramatically impacts an incarcerated plaintiff's chance of success.⁷¹ The risk of retaliation by prison staff for pursuing legal action is another challenge,⁷² as is informational asymmetry between the incarcerated person and those in power.⁷³ Finally, the Prison Litigation Reform Act of 1995⁷⁴ (PLRA) and the heightened substantive law

68. *Lee v. Washington*, 390 U.S. 333, 333 (1968) (holding that statutorily mandated racial segregation in prisons and jails violates the Fourteenth Amendment); *Wolff v. McDonnell*, 418 U.S. 539, 555 (1974) (finding that prison disciplinary proceedings must afford some measure of due process protections, such as advance written notice of the proceedings and basis for the charge and the option to call witnesses and present documentary evidence).

69. The Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended in scattered sections of 42 and 47 U.S.C.), and § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, apply to prisons. *See, e.g.*, *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 209 (1998); *Wright v. N.Y.S. Dep't of Corr.*, 831 F.3d 64 (2d Cir. 2016). The Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc to 2000cc-5, and the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb to 2000bb-4, *invalidated in part by* *City of Boerne v. Flores*, 521 U.S. 507 (1997), 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).

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

71. Schlanger, *supra* note 70, 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.”).

72. *See* 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.”).

73. Schlanger, *supra* note 70, at 1616–17.

74. Pub. L. No. 104-134, 110 Stat. 1321 (codified as amended in scattered sections of the U.S.C.).

standards⁷⁵ are legal barriers that often make any sort of success for the incarcerated plaintiff notoriously difficult.⁷⁶

Casting a shadow over all of those barriers is the principle of carceral deference. Though the Supreme Court has never articulated a clear rationale for it,⁷⁷ the deference principle is, by most accounts, the “unmistakable consistency”⁷⁸ in an otherwise complex and convoluted field of law.⁷⁹ 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 to win only in the most extreme cases.”⁸⁰ The leaning is so dramatic that it starts to seem like a normative pro-prison commitment.⁸¹

Indeed, for as long as the Supreme Court has entertained prisoners’ civil lawsuits against prison officials—which the Court has not always done⁸²—most of its decisions have articulated some need to defer to the judgment of the defending officials.⁸³ In *Bell v. Wolfish*,⁸⁴ for example, the Court stressed

75. See generally Jefferis, *supra* note 10; Nicole B. Godfrey, *Institutional Indifference*, 98 OR. L. REV. 151 (2020); Shapiro & Hogle, *supra* note 15; Dolovich, *supra* note 15.

76. 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> [<https://perma.cc/WDX3-MACN>]; Dolovich, *The Coherence of Prison Law*, *supra* note 4, at 302–03.

77. Emma Kaufman, *Segregation by Citizenship*, 132 HARV. L. REV. 1379, 1425 (2019); Dolovich, *Forms of Deference*, *supra* note 4, 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.”).

78. Dolovich, *The Coherence of Prison Law*, *supra* note 4, at 302.

79. See generally *id.*; Justin Driver & Emma Kaufman, *The Incoherence of Prison Law*, 135 HARV. L. REV. 515 (2021).

80. Dolovich, *The Coherence of Prison Law*, *supra* note 4, at 303.

81. See *id.* at 317.

82. For many decades, the federal courts took a “hands-off” approach to most prisoners’ lawsuits. See *infra* Part II.B.

83. See, e.g., *Procunier v. Martinez*, 416 U.S. 396, 404–05 (1974) (“[T]he problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government.”), *overruled in part by* *Thornburg v. Abbott*, 490 U.S. 401 (1989); *Cruz v. Beto*, 405 U.S. 319, 321 (1972) (“Federal courts sit not to supervise prisons but to enforce the constitutional rights of all ‘persons,’ including prisoners. We are not unmindful that prison officials must be accorded latitude in the administration of prison affairs, and that prisoners necessarily are subject to appropriate rules and regulations.”); *Johnson v. Avery*, 393 U.S. 483, 486 (1969) (“There is no doubt that discipline and administration of state detention facilities are state functions. They are subject to federal authority only where paramount federal constitutional or statutory rights supervene.”); *Lee v. Washington*, 390 U.S. 333, 334 (1968) (Black, J., concurring) (“In joining the opinion of the Court, we wish to make explicit something that is left to be gathered only by implication from the Court’s opinions. This is that prison authorities have the right, acting in good faith and in particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails.”).

84. 441 U.S. 520 (1979).

the need to defer to the presumed expertise of prison officials, noting “the problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions.”⁸⁵ It was not, however, until the 1987 decision in *Turner v. Safley*⁸⁶ that the Court effectively constitutionalized the deference principle, marking for the first time the explicit doctrinal manifestation of carceral deference.⁸⁷

In *Turner*, Leonard Safley⁸⁸ challenged the constitutionality of Missouri prison regulations and practices that restricted prisoners’ correspondence and limited their freedom to marry each other.⁸⁹ Mr. Safley had befriended Pearl Jane “P.J.” Watson while the two were confined in the same mixed-gender prison.⁹⁰ When Ms. Watson was transferred to another prison, the two tried to stay in touch with each other via letter.⁹¹ 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.⁹² 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.⁹³ Mr. Safley argued that both restrictions violated his fundamental rights.⁹⁴

The district court agreed after a five-day bench trial.⁹⁵ Pursuant to precedent, the court engaged in a strict scrutiny analysis of the challenged restrictions in light of the evidence presented—including the prison officials’ properly qualified expert witness,⁹⁶ who testified at trial within the scope of her specifically articulated expertise and was subject to cross-examination.⁹⁷ After analyzing such evidence—measuring the prison’s institutional interests against the challenged restrictions and their impact on fundamental rights,

85. *Id.* at 547.

86. 482 U.S. 78 (1987).

87. *See id.*

88. Mr. Safley alleged his claims on behalf of a class of similarly situated incarcerated people in Missouri. *See Safley v. Turner*, 586 F. Supp. 589, 590 (W.D. Mo. 1984), *aff’d*, 777 F.2d 1307 (1985), *aff’d in part, rev’d in part*, 482 U.S. 78 (1987).

89. *Id.* at 590–91.

90. *See id.* at 590, 593.

91. *See id.* at 593.

92. *See id.*

93. *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. *See Mia Armstrong, In Sickness, In Health—and In Prison*, MARSHALL PROJ. (Aug. 19, 2019, 6:00 AM), <https://www.themarshallproject.org/2019/08/19/in-sickness-in-health-and-in-prison> [<https://perma.cc/3GTX-PU2B>]. Mr. Safley’s marriage claim was moot, but the claim continued on behalf of the class. *See Turner*, 586 F. Supp. at 594.

94. *Turner*, 586 F. Supp. at 594–97.

95. *See Armstrong, supra* note 93.

96. None of the courts reviewing the matter discussed any evidentiary challenges to the defending prison official’s expert witness. *See generally Turner v. Safley*, 482 U.S. 78 (1987); *Safley v. Turner*, 777 F.2d 1307 (8th Cir. 1985), *aff’d in part, rev’d in part*, 482 U.S. 78 (1987); *Turner*, 586 F. Supp. 589.

97. *Turner*, 586 F. Supp. at 595–96.

much like a court would have done in analyzing a restriction on a non-incarcerated person's fundamental rights⁹⁸—the court held that both restrictions were unconstitutional.⁹⁹ The district court acknowledged that precedent mandated *some* restrictions on the rights of incarcerated people due to the nature of their incarceration,¹⁰⁰ but it found that each challenged practice was more restrictive on prisoners' fundamental rights than was reasonable or essential to any legitimate interest of the prison administration.¹⁰¹ In reaching its conclusion, the district court recognized the prison officials' defenses of the challenged regulations—primarily, that both were needed to maintain institutional security—but did not credit such defenses with any greater deference than a court may have granted to any other type of civil defendant.¹⁰²

The U.S. Court of Appeals for the Eighth Circuit affirmed the district court's decision, concluding that the court's application of the strict scrutiny standard was appropriate.¹⁰³ The panel, however, acknowledged that precedent was unclear as to the degree to which courts must defer to prison officials.¹⁰⁴ The prison defendants had urged the appellate court to adopt a rational basis or reasonableness test.¹⁰⁵ But the panel acknowledged the significance of the rights allegedly impacted by the challenged regulations and held that, ordinarily, a government restriction on free speech is permissible “only if the restriction furthers a compelling governmental interest and is the least restrictive alternative for achieving that purpose.”¹⁰⁶ Despite this holding, the panel also reflected a concern that the Supreme Court had expressed in prior cases: some prisoners' cases alleging infringements on fundamental rights “present[] special problems” because

98. *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 that a “bare assertion of [prison] security interests is ‘not enough’” (quoting *Rudolph v. Locke*, 594 F.2d 1076, 1077 (5th Cir.1979))). 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. 396, 408–09 (1974) (“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 communicating with them, mail censorship implicates more than the right of prisoners.”), *overruled in part by Thornburg v. Abbott*, 490 U.S. 401 (1989).

99. *Turner*, 586 F. Supp. at 594–97.

100. *See id.* at 594.

101. *Id.* at 594–95.

102. *See id.* at 595–96.

103. *Safley v. Turner*, 777 F.2d 1307, 1313–14 (8th Cir. 1985), *aff’d in part, rev’d in part*, 482 U.S. 78 (1987).

104. *See id.* at 1310.

105. *See id.* at 1309–10.

106. *Id.* at 1310.

“[c]ourts are ill equipped to deal with the increasingly urgent problems of prison administration and reform.”¹⁰⁷

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 that the Eighth Circuit panel had erred in requiring the prison officials to present evidence that justified their alleged security concerns.¹⁰⁸ They claimed that the court should have instead adopted the rational basis standard and accepted the officials’ security justification at face value, which would shift the burden to the prisoners to disprove the officials’ justification for the challenged condition.¹⁰⁹

In the officials’ view, the lower court’s decision would lead to catastrophic results: regarding the mail policy, they argued that communication between prisoners is “easily the most feared of all inmate dangers.”¹¹⁰ Furthermore, the officials argued that the lower courts were putting officials in a position in which the only valid defense to a restriction was “produc[ing] bleeding bodies.”¹¹¹ Without the challenged mail restriction, officials argued that they would miss “complex codes” passed “in seemingly innocent correspondence.”¹¹² Courts should not put officials in positions to “gamble on changes of heart when handling violent inmates,” they continued.¹¹³ Finally, they stated that 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.¹¹⁴

The Supreme Court was seemingly persuaded by the officials’ contentions and reversed the Eighth Circuit’s decision in part.¹¹⁵ Justice Sandra Day O’Connor, writing for the Court, began the opinion by acknowledging the principle that incarcerated people retain some constitutional rights: “Prison walls do not form a barrier separating prison inmates from the protections of the Constitution.”¹¹⁶ She turned 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

107. *Id.* (quoting *Procunier v. Martinez*, 416 U.S. 396, 405 (1974), *overruled in part by Thornburg v. Abbott*, 490 U.S. 401 (1989)).

108. *See* Brief for Petitioners at 10–12, *Turner v. Safley*, 482 U.S. 78 (1987) (No. 85-1384).

109. *See id.* at 15 (“The regulation and discretion of the prison officials should be judged 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.”).

110. *See id.* at 26.

111. *Id.*

112. *Id.*

113. *Id.* at 34.

114. *Id.* at 26–27.

115. *Turner v. Safley*, 482 U.S. 78, 100 (1987).

116. *Id.* at 84.

government.”¹¹⁷ Thus, the Court held that the proper standard was that “when a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.”¹¹⁸

In the Court’s view, the decision involved a “Sophie’s choice”—substantial deference or serious danger. It reasoned that “such a standard is necessary if ‘prison administrators . . . , and not the courts, [are] to make the difficult judgments concerning institutional operations.’”¹¹⁹ Perhaps influenced by the prison officials’ bleeding-body rhetoric, Justice O’Connor wrote, “[s]ubjecting 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.”¹²⁰ Prison officials must be able to make decisions unhindered by the threat of judicial intervention.¹²¹ And thus, carceral deference was expressly constitutionalized.

Justice John Paul Stevens, concurring, foreshadowed the risks of the Court’s exceedingly pro-prison 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;¹²² but at other times, the Court sought a “logical connection” between the restriction and the interest.¹²³ Justice Stevens reasoned that 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:

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

117. *Id.* at 84–85.

118. *Id.* at 89. The Court explained that 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) whether recognizing the asserted right would have an impact on prison operations, and (4) whether there are ready alternatives to advancing the asserted governmental interest. *See id.* at 89–91.

119. *Id.* at 89 (alterations in original) (quoting *Jones v. N.C. Prisoners’ Lab. Union*, 433 U.S. 119, 128 (1977)).

120. *Id.* at 89.

121. *Id.*

122. *Id.* (“[T]he regulation is valid if it is reasonably related to legitimate penological interests.”).

123. *Id.* at 93 (upholding the mail restriction because “it logically advances the goals of institutional security and safety”).

with outsiders who conceivably might be interested in arranging an attack within the prison or an escape from it.¹²⁴

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."¹²⁵ As Professor Dolovich recognizes,

[s]ince *Turner* was decided, the Court has applied this 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.¹²⁶

Indeed, by 2016, lower federal courts had cited *Turner* in over 8,000 judicial decisions.¹²⁷ By 2023, that number had grown to over 13,000.¹²⁸

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 express doctrinal deference standard to create what Professor Dolovich calls "dispositional favoritism," which she defines as:

[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 and their evidence and arguments with favor and sympathy, while regarding incarcerated litigants and *their* evidence and arguments with skepticism and even hostility.¹²⁹

The Supreme Court often models this dispositional favoritism,¹³⁰ and lower federal courts follow.¹³¹

124. *Id.* at 100–01 (Stevens, J., concurring in part and dissenting in part).

125. Driver & Kaufman, *supra* note 79, at 536.

126. Dolovich, *The Coherence of Prison Law*, *supra* note 4, at 313.

127. *See* Shapiro, *supra* note 15, at 975.

128. *See* 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).

129. Dolovich, *The Coherence of Prison Law*, *supra* note 4, at 317.

130. There are some exceptions to the Court's staunchly pro-prison deference, including in the Court's interpretation of statutory religious protections and equal protection claims. *See, e.g.*, *Holt v. Hobbs*, 574 U.S. 352 (2015); *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).

131. *See* Dolovich, *The Coherence of Prison Law*, *supra* note 4, at 326. 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

From where do these pro-prison judicial propensities come? What has motivated the Supreme 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 take 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?”¹³² The next part begins to answer these questions.

II. THE ORIGINS OF CARCERAL DEFERENCE

Tracing the origins of the carceral deference principle in its many manifestations requires looking away from the Supreme Court¹³³ and toward the full operative social field—the “punishment field.”¹³⁴ Doing so aids in revealing the interplay between and among relevant actors and the interconnectedness of mechanisms of state power across the criminal and civil legal paradigms, both of which are critical to understanding the evolution of the law in this space. Drawing on the work of Pierre Bourdieu,¹³⁵ 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.”¹³⁶ Chief characters in the field include prison officials, courts, incarcerated people, lawyers, activists, legislators, and journalists.

In Bourdieu’s framework, the punishment field operates like a magnet, “exert[ing] a force upon all those who come within its range.”¹³⁷ It is organized hierarchically around a series of values, assumptions, and protocols,¹³⁸ and it intersects with or is adjacent to other coexisting social fields, including the political, legal, journalistic, economic, and academic.¹³⁹

a criminal justice system” when determining the scope of equitable relief in a prison conditions lawsuit).

132. Dolovich, *The Coherence of Prison Law*, *supra* note 4, at 342.

133. *Cf.* Lvovsky, *supra* note 16, 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”).

134. Professor Joshua Page calls this field the “penal field.” JOSHUA PAGE, *THE TOUGHEST BEAT: POLITICS, PUNISHMENT, AND THE PRISON OFFICERS UNION IN CALIFORNIA* 10 (2011).

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

136. *See* PAGE, *supra* note 134, at 10.

137. Terdiman, *supra* note 135, at 806.

138. *Id.* at 806.

139. PAGE, *supra* note 134, 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

A social field's force is often invisible and its power mysterious,¹⁴⁰ 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."¹⁴¹

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.¹⁴² Early penitentiaries operated according to a lock-them-up-and-throw-away-the-key model.¹⁴³ By virtue of their incarceration, prisoners were afforded far fewer civil rights and were subject to the whims of their incarcerators; courts were largely hands-off.¹⁴⁴

As confinement practices evolved in the twentieth century, however, and courts began to exercise some authority over prison condition issues brought to them via civil lawsuits, actors within the punishment field began to visibly struggle over penal capital.¹⁴⁵ Prison officials perceived a power grab by subordinate actors—courts, lawyers, civil rights organizations, and prisoners themselves.¹⁴⁶ Prison officials battled to regain their dominant position in the punishment field, leaning heavily on the field's inherent values and assumptions—power and control. The consequence of this manifest agonistic moment¹⁴⁷ was that the judicial actors retreated to their long-time

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. Seasoned 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.”)

140. *See id.*

141. *See id.* at 10–11.

142. *See infra* Parts II.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, 966 (1978) (“Prison systems have traditionally been arbitrary, brutal, and shielded from public attention when they were not overtly corrupt. Prisons ran on the explicit principle that the staff was omnipotent and prisoners powerless.”).

143. WILLIAM RICHARD WILKINSON, *PRISON WORK* 103 (John C. Burnham & Joseph F. Spillane eds., 2005).

144. *See* Alexander, *supra* note 142, at 964–66.

145. *See infra* Parts II.C–D.

146. *See id.*; *see also* CHARLES BRIGHT, *THE POWERS THAT PUNISH: PRISON AND POLITICS IN THE ERA OF THE “BIG HOUSE,” 1920–1955*, at 3–4 (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 political discourse”).

147. 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 & MICHELLE PHELPS, *BREAKING THE PENDULUM: THE LONG STRUGGLE OVER CRIMINAL JUSTICE* (2017); Johann Koehler, *Penal (Ant)Agonism*, 44 L. & SOC. INQUIRY 799 (2019); Geoff K. Ward, *Contention and the Pendulum Pivot: Weighting Equal Justice*, 44 L. & SOC. INQUIRY 806 (2017); Joshua Page, Michelle Phelps & Philip Goodman, *Consensus in the Penal Field: Revisiting Breaking the Pendulum*, 44 L. & SOC. INQUIRY 822 (2017). This project examines macro-level trends and

subordinate position within the field, this time constitutionalizing their position. A modern version of the hands-off era emerged—one characterized in terms of carceral deference—leading eventually to the entrenchment of the principle across prison law doctrine today.¹⁴⁸

This project looks at moments and trends in the punishment field from a macro level and through the above-described framework. 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 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.¹⁴⁹ 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.¹⁵⁰

This part tells the story of how the United States ended up in the modern hands-off era. This part first chronicles the evolution of American punishment practices and then details the struggle for power across the punishment field, beginning in the nineteenth century and culminating in an exploration of the current carceral deference state.¹⁵¹

A. *Slaves of the State*

Imprisonment as a means of punishment is a relatively recent phenomenon. Prior to the nineteenth century, the primary means of

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* (discussing the role of unseen struggle and antagonism in penal change).

148. *See infra* Parts II.E–F.

149. *See* GOTTSCHALK, *supra* note 16, at 13 (“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.”).

150. *See, e.g.,* Page et al., *supra* note 147, 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).

151. 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 2 *CRIMINAL JUSTICE HISTORY: AN INTERNATIONAL ANNUAL* 115 (1981) (summarizing one historian’s opinion on the literature as “bad logic and bad history”).

punishment were physical: public beatings, whippings, and executions.¹⁵² Confinement was a means to an end—a practice to keep track of people before they were corporally, and often publicly, punished.¹⁵³

The work of Enlightenment-era philosophers like Cesare Beccaria, Jeremy Bentham, and Voltaire led to changes in the preferred methods of punishment.¹⁵⁴ 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 themselves from the punished: “The public execution became ‘a hearth in which violence bursts against into flame,’ and corporal punishment fell into disfavor.”¹⁵⁵ Carceral punishment, a method of punishment occurring outside of the public spectacle, emerged.

With the emergence of carceral punishment¹⁵⁶ came the penitentiary.¹⁵⁷ Auburn State Prison opened in New York around 1820, and Eastern State Penitentiary opened in Pennsylvania a few years later.¹⁵⁸ Those two prisons became synonymous with the divergent models of incarceration that they implemented. On the one hand, the “Auburn system” required prisoners to perform assembly-line labor throughout the day in total silence, retreating in the evening to cramped, solitary cells.¹⁵⁹ This became known as the “silent system.”¹⁶⁰ They “wore striped uniforms, they marched in lockstep to and from their cells, and misbehavior was punished at the end of a lash.”¹⁶¹ Proponents of the Auburn system believed that forcing prisoners to perform hard labor under harsh conditions would instill discipline and, in consequence, reform criminal behavior.¹⁶²

152. 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).

153. Lima-Marín & Jefferis, *supra* note 152, at 968–69; see also FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE 12–13 (1981); EDWARD J. LATESSA, ALEXANDER HOLSINGER, JAMES W. MARQUART & JONATHAN R. SORENSON, CORRECTIONAL CONTEXTS: CONTEMPORARY AND CLASSICAL READINGS 3 (2d ed. 2001).

154. LATESSA ET AL., *supra* note 153, at 3.

155. Lima-Marín & Jefferis, *supra* note 152, at 968 (quoting MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 9 (Alan Sheridan trans., Vintage Books 1995) (1977)).

156. 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* Parts II.A–B; Pisciotta, *supra* note 151, 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.”).

157. Robertson, *supra* note 152, at 1012 (“Hereafter, imprisonment would be synonymous with punishment itself.”).

158. See, e.g., RUBIN, *supra* note 150, at xxiii; Robertson, *supra* note 152, at 1011–12.

159. RUBIN, *supra* note 150, at xxiv.

160. ALLEN, *supra* note 153, at 13.

161. RUBIN, *supra* note 150, at xxiv.

162. *Id.*

The “Pennsylvania system,” on the other hand, rejected the hard labor element of incarceration.¹⁶³ Instead, prisoners were isolated in cells for most of the day and night.¹⁶⁴ They worked, slept, read, prayed, exercised, and did virtually all other activities in their cells.¹⁶⁵ 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 guards.”¹⁶⁶ But unlike the Auburn system, the Pennsylvania system leaned on silence *and* isolation to punish and reform.¹⁶⁷

Although 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 states¹⁶⁸—and the convict-leasing system in post-Emancipation southern states¹⁶⁹—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 Supreme Court of Virginia in *Ruffin v. Commonwealth*.¹⁷⁰ There, Woody Ruffin, a prisoner in Virginia, was convicted of killing a prison guard during an escape attempt.¹⁷¹ The trial was held in Richmond; the homicide occurred more than a hundred miles away.¹⁷² 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.¹⁷³

The Supreme Court of Virginia disagreed. The court stated that the state constitutional right to a jury of one’s peers must be construed consistently with the document’s other provisions and declarations.¹⁷⁴ One of those other declarations stated that 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

163. *See id.* at xxiv–xxv.

164. *Id.*

165. *Id.* at xxiv.

166. *Id.* at xxv.

167. *See id.* at xxiv; *see also* ALLEN, *supra* note 153, at 4 (discussing Judeo-Christian origins of notions of punishment and rehabilitation).

168. *See* RUBIN, *supra* note 150, at xxiv–xxvi (discussing the rise in popularity of the Auburn system).

169. Jefferis, *supra* note 10.

170. 62 Va. (21 Gratt.) 790, 796 (1871). *Ruffin* is the seminal case in which a court expressly identified a prisoner as a “slave of the State.” *Id.*; *see also* Shaw v. Murphy, 532 U.S. 223, 228 (2001) (“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. N.C. Prisoners’ Lab. Union, Inc., 433 U.S. 119, 139 (1977) (Marshall, J., dissenting))).

171. *Ruffin*, 62 Va. (21 Gratt.) at 791–92.

172. *See id.*

173. *See id.* at 792.

174. *See id.* at 795.

prevention of crime.”¹⁷⁵ 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.”¹⁷⁶ He had forfeited his liberty and personal rights “except those which the law in its humanity accord to him.”¹⁷⁷ He was “the slave of the State” and, thus, could not assert his jury trial right.¹⁷⁸

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.¹⁷⁹ The spirit and import of the slave status¹⁸⁰ may—and certainly did, for the Supreme Court of Virginia¹⁸¹—derive in part from civil death statutes in force in this era, a practice inherited from English common law.¹⁸² 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.¹⁸³ The practice effectively removed many incarcerated people from society and rendered them invisible.¹⁸⁴ Forgotten.¹⁸⁵

175. *Id.*

176. *Id.* at 796.

177. *Id.*

178. *Id.*

179. *See, e.g.*, D.H. Wallace, *Prisoners; Rights: Historical Views*, in LATESSA ET AL., *supra* note 153, at 229 (disputing that *Ruffin* was a precursor to or controlling influence on the judicial “hands-off” attitude that followed).

180. The word that 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 10.

181. After declaring that Mr. Ruffin was a slave of the state, the court explained, “[h]e is *civiliter mortuus*; and his estate, if he has any, is administered like that of a dead man.” *Ruffin*, 62 Va. (21 Gratt.) at 796.

182. *Civil Death Statutes—Medieval Fiction in a Modern World*, 50 HARV. L. REV. 968, 968–69 (1937); *see also* James Michael Kovach, *Life and Civil 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 that civil death has been practiced “since at least the Romans”); 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 form of 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).

183. *Civil Death Statutes*, *supra* note 182, at 968, 972 (noting some civil death statutes still in effect in the twentieth century that permitted prisoners to pursue habeas corpus actions and appeals to their sentence); *see also* ERIC CUMMINS, *THE RISE AND FALL OF CALIFORNIA’S RADICAL PRISON MOVEMENT* 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).

184. *See, e.g.*, James B. Jacobs, *The Prisoners’ Rights Movement and Its Impacts*, in LATESSA ET AL., *supra* note 153, at 213.

185. The American civil death statute 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. Chin, *supra* note 182, at 1794–95. As Professor Gabriel J. Chin explains, “[t]he consequences of attainder were on the minds of our Constitution’s drafters,” who in the Constitution’s text prohibited the forfeiture of property

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 *civiler 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.¹⁸⁶

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.”¹⁸⁷ 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.¹⁸⁸

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.¹⁸⁹ The “hands-off” judicial philosophy of the era was premised on the notion that prison oversight was simply not within courts’ purview. Prison officials were best equipped to design and implement prison policy, given their position and, at times, unique expertise in the field. That presumption of expertise, however, is suspect—almost mythical—given the 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

and conveyance rights but not the loss of civil rights. *Id.* This absence of a constitutional prohibition left the door open for states to adopt civil death statutes, and many did. *Id.*

186. FRANK TANNENBAUM, *DARKER PHASES OF THE SOUTH* 75 (1924).

187. LEO CARROLL, *HACKS, BLACKS, AND CONS: RACE RELATIONS IN A MAXIMUM SECURITY PRISON* 23 (1974).

188. PAGE, *supra* note 134, 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.”).

189. *See infra* Part II.B.2; *see also* MIN S. YEE, *THE MELANCHOLY HISTORY OF SOLEDAD PRISON 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.”).

of high-capacity, industrial prisons known as “big houses”;¹⁹⁰ the opening of Alcatraz;¹⁹¹ and the move away from convict leasing in southern states.¹⁹²

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.”¹⁹³ There was a “growing confidence in the effectiveness of industrial discipline as the foundation of social order[, and it] imparted to prison managers a surer sense that the purpose of incarceration should be to tame and channel criminal energies into productive work.”¹⁹⁴ Accordingly, every prisoner was expected to work unless they were in solitary confinement.¹⁹⁵ The same was true of southern prisons, where “road projects” and chain gangs proliferated with the end of the convict-leasing era.¹⁹⁶

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

1. Prison Discipline

Most scholarly attention to prisoners’ rights jurisprudence of the nineteenth through mid-twentieth centuries is focused on the federal courts.¹⁹⁷ 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.”¹⁹⁸ Although the term is a bit misleading¹⁹⁹—courts *did* review

190. 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 152, at 1013.

191. Shaiq, *supra* note 190, at 333–34.

192. VIVIENE M. L. MILLER, *HARD LABOR AND HARD TIME* 20 (2012) (“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.”).

193. BRIGHT, *supra* note 146, at 71.

194. *Id.* at 72; see also MILLER, *supra* note 192, at 26–27 (describing a prison farm in Florida) (“Emphasis 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.”).

195. See, e.g., MILLER, *supra* note 192, at 111.

196. See Jefferis, *supra* note 10, at 335–36.

197. See, e.g., MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE* 30–31 (2000).

198. Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506, 506 (1963) (crediting the term “hands-off doctrine” to Fritch, *Civil Rights of Federal Prison Inmates* 31 (1961) (unpublished document prepared for the Federal Bureau of Prisons), and using it to describe this doctrine); see also FEELEY & RUBIN, *supra* note 197, 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 79, at 530; Margo Schlanger, *The Constitutional Law of Incarceration, Reconfigured*, 103 CORNELL L. REV. 357, 368–69 (2018).

199. 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,

some prisoners' claims²⁰⁰—the dominant judicial attitude toward prisoners' challenges to prison conditions was that the grievances had no place in court, as articulated by the Maine Supreme Judicial Court in 1882 when it declared that only the warden may enforce prison discipline—and “no one else.”²⁰¹

Courts' justifications for their disinterest and nonintervention in prison affairs in this era varied. Some were procedural, whereas others were substantive. Some judges asserted separation-of-powers²⁰² or federalism concerns;²⁰³ others cited jurisdictional barriers. As to the latter, for example, prisoners' primary mode of asserting constitutional challenges to prison conditions was via a petition for a writ of habeas corpus.²⁰⁴ After all, the federal civil rights statute, 42 U.S.C. § 1983, had fallen into disuse until the

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. INT'L & COMP. L. 1, 9 (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) (“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 179, at 234 (“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.”).

200. See Wallace, *supra* note 179, at 230–32; see also Schlanger, *supra* note 198, at 367–68 (discussing late nineteenth- and early twentieth-century cases). See generally *Weems v. United States*, 217 U.S. 349 (1910) (holding that the Eighth Amendment prohibits not only torture but also punishments grossly disproportionate to the crime). But see *Robertson*, *supra* note 152, at 1039 (noting that courts of this era intervened mostly to ban egregious instances of corporal punishments).

201. *State v. Haynes*, 74 Me. 161, 162 (1882).

202. See, e.g., *Williams v. Steele*, 194 F.2d 32, 34 (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 . . .” (citation omitted)); *Powell v. Hunter*, 172 F.2d 330, 331 (10th Cir. 1949) (“The prison system is under the administration of the Attorney General, and not of the district courts. The court has no power to interfere with the conduct of the prison or its discipline.” (citation omitted)).

203. See, e.g., *United States v. Jones*, 207 F.2d 785, 786 (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.” (first citing *In re Civil Rights Cases*, 109 U.S. 3 (1883); and then citing *Siegel v. Ragen*, 180 F.2d 785 (7th Cir. 1950)); *Adams v. Ellis*, 197 F.2d 483, 485 (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.” (first citing *Sarshik v. Sanford*, 142 F.2d 676 (5th Cir. 1994) (per curiam); and then citing *Platek v. Aderhold*, 73 F.2d 173 (5th Cir. 1934))).

204. See, e.g., *Sarshik*, 142 F.2d at 676; *Beard v. Bennett*, 114 F.2d 578, 579 (D.C. Cir. 1940); *Platek*, 73 F.2d at 174.

Supreme Court reinvigorated it with its 1961 decision in *Monroe v. Pape*.²⁰⁵ In reviewing these habeas petitions, federal courts held consistently that the habeas statute was an improper procedural vehicle with which to bring challenges to prison conditions, reasoning that the only relief a court could award on a habeas petition was release from prison.²⁰⁶ 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.”²⁰⁷ Incarcerated people in this era did not fare better in the state courts, many of which mirrored federal courts’ reasons for declining to review challenges to prison conditions.²⁰⁸

Courts’ disinterest in prison affairs persisted during this period in which the paramount penal philosophy was one of brutalizing incarcerated people, and the people carrying out that philosophy had little to no training or experience, as the next two sections explain.²⁰⁹

2. Brutality

William Richard Wilkinson, a thirty-year veteran employee of the California Department of Corrections, described in his memoir the dominant punishment philosophy of the first phase of his career in the 1950s—a time when, for many preceding decades, prisons were sites of intense brutality and physical violence²¹⁰: “First you hit them with a two-by-four if they don’t conform.”²¹¹ Wilkinson explained the persistent, driving ethos of *civiler 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.²¹²

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

205. 365 U.S. 167 (1961).

206. *See, e.g., Sarshik*, 142 F.2d at 676; *Kelly v. Dowd*, 140 F.2d 81, 82–83 (7th Cir. 1944); *Platek*, 73 F.2d at 175.

207. *Stroud v. Swope*, 187 F.2d 850, 851–52 (9th Cir. 1951).

208. 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 192, at 89–95 (discussing criminal proceedings around homicide of prisoner Arthur Maillefert).

209. Unlike in the Fourth Amendment context, in which courts began relying on the presumption of police expertise to expand police authority, *see, e.g., Lvovsky, supra* note 16, courts assumed prison administrators’ expertise from the beginning—before any such expertise could be credibly claimed.

210. *See, e.g., TANNENBAUM, supra* note 186, at 79.

211. *WILKINSON, supra* note 143, at 103.

212. *Id.* at 102.

“The guards on these [prison] farms were hardened against human sympathy and of a rather shiftless nature,” and in another place, “[w]e 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.”²¹³

A supervisor of Florida’s road prisons characterized the early part of the era as the “Beat Em” period.²¹⁴ The “Keep Em” period followed.²¹⁵ Another former warden explained: “Prewar, the old [prison] system was: lock them up, don’t deal with them unless you have to deal with them.”²¹⁶

The racialized brutality of prisons of this era was even worse.²¹⁷ Mortality rates for incarcerated people in southern states, who were predominately Black, were in double digits most years.²¹⁸ In Louisiana, a person was more likely to die while incarcerated than if they had lived in enslavement.²¹⁹ 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.²²⁰ Although the devaluing of life was certainly an issue for all incarcerated people, it was doubly so for Black prisoners.²²¹ As historian Vivien Miller notes, “[e]ven the most sympathetic white southerners did not automatically recoil from the crack of the strap on the black male body.”²²² Thus, prison officials in this period were clearly violent and brutal. Experts, however, they were not.

3. Little to No Training

The dominant actors holding the power in the punishment field during this era were often unskilled and untrained.²²³ This was true of prison leadership and first-line officials, calling into question the propriety of the judiciary’s hands-off attitude.

Wilkinson 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 the thought at that time that I could work the midnight shift at the prison and do my studying.”²²⁴ He could read, so he got the job, recalling that “[t]he

213. TANNENBAUM, *supra* note 186, at 79.

214. *See* MILLER, *supra* note 192, at 2.

215. *See id.* (discussing a shift to longer sentences and less outright brutality).

216. WILKINSON, *supra* note 143, at 22.

217. *See generally* Jefferis, *supra* note 10, at 329–38.

218. *Id.* at 332.

219. *Id.*

220. *Id.* (quoting SHANE BAUER, *AMERICAN PRISON: A REPORTER’S UNDERCOVER JOURNEY INTO THE BUSINESS OF PUNISHMENT* 130 (2019)).

221. By most accounts, it took the agonizing death of a white man imprisoned in Florida, Martin Tabert, to finally bring an end to the convict-leasing system. *See id.* at 334–36.

222. MILLER, *supra* note 192, at 73.

223. *See id.*

224. *Id.*

requirements were that you could read the procedure manual and memos and things pertaining to the job—but nothing else.”²²⁵

In Florida, before 1957, the commissioner of agriculture held primary responsibility for the state’s prisoners.²²⁶ One of those commissioners, William A. McRae, worked in sawmilling, farming, teaching, and local politics before he was appointed to lead the prisons.²²⁷ His successor, J.S. Blitch, was a farmer, stock raiser, and state senator before he assumed the position.²²⁸ 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.”²²⁹ 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 a job for which he had no qualifications.²³⁰ Similarly, George J. Beto was educated in ministry and president of Concordia College when he was appointed to a seat on the Texas Prison Board.²³¹

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.”²³² Similarly, Joseph Edward Ragen, a warden of Joliet-Statesville prisons in Illinois 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.”²³³ Some did not even know how to read.²³⁴

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

225. WILKINSON, *supra* note 143, at 1.

226. See MILLER, *supra* note 192, at 5.

227. See *id.* at 5–6.

228. See *id.* at 40–41.

229. *Id.* at 41.

230. See *id.* at 136–37.

231. See DAVID M. HORTON & GEORGE R. NIELSEN, WALKING GEORGE: THE LIFE OF GEORGE JOHN BETO AND THE RISE OF THE MODERN TEXAS PRISON SYSTEM 3–4 (2005).

232. PAGE, *supra* note 134, at 18 (quoting CAL. DIST. OF CORR., 1959–60 BIENNIAL REPORT (1960)).

233. JOSEPH EDWARD RAGEN & CHARLES FINSTON, INSIDE THE WORLD’S TOUGHEST PRISON 703 (1962).

234. See MILLER, *supra* note 192, at 81–82 (quoting TANNENBAUM, *supra* note 186, at 77–78, 94).

to rehabilitation or the preparation of inmates for the inevitable return of a vast percentage to society.²³⁵

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, they searched intentionally for people who had no prison experience whatsoever so that they could be molded into the 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.”²³⁶ In Florida, most applicants to guard positions at the state’s first prison farm, established in 1910, were local farmers and merchants.²³⁷

Second, prison leadership did little to nothing by way of training new prison officials. One official recalled that, “[g]uards were handed a list of state prison rules and regulations, but there were few official checks to ensure that 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.’”²³⁸ Ragen stated:

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.²³⁹

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, 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.²⁴⁰

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.²⁴¹ Many officials likely

235. RAGEN & FINSTON, *supra* note 233, at 119.

236. WILKINSON, *supra* note 143, at 16.

237. See MILLER, *supra* note 192, at 25. *But see id.* at 23 (describing qualifications of the 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”).

238. MILLER, *supra* note 192, at 26.

239. RAGEN & FINSTON, *supra* note 233, at 119–20.

240. Jacobs, *supra* note 184, at 222.

241. See *supra* note 192 and accompanying text.

internalized their dominant position and retention of significant power in the field, reflecting what Professor Joshua Page refers to as an “intuitive[] grasp [of] the mores, expectations, and acceptable actions of that field.”²⁴² 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.”²⁴³ 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.’”²⁴⁴ After all, the name of that game was: “Prison discipline is to be enforced by the warden . . . and by no one else.”²⁴⁵

C. Change from Inside

The mid-twentieth century 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.²⁴⁶

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.

1. The “Rehabilitative Ideal”

If the prior era of punishment was one of “Beat Em” and “Keep Em,” as discussed above, the mid-twentieth century ushered in the era of “Treat Em.”²⁴⁷ Prison officials began to reconsider the warehousing model of confinement and moved toward a model that centered around rehabilitation rather than retribution or incapacitation.²⁴⁸ The theory, termed the

242. PAGE, *supra* note 134, at 11.

243. WILKINSON, *supra* note 143, at 102.

244. PAGE, *supra* note 134, at 11.

245. *State v. Haynes*, 74 Me. 161, 162 (1882).

246. MILLER, *supra* note 192, at 270.

247. *Id.* at 2.

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

“rehabilitative ideal,”²⁴⁹ was presented as being grounded in science²⁵⁰ with a focus on therapeutic intervention,²⁵¹ and it gained a foothold in California in the postwar period led by Ragen and Wilkinson.²⁵² Officials reasoned, “if the Allies could defeat Fascism abroad, surely California could transform socially and psychologically afflicted offenders into well-adjusted, law-abiding citizens.”²⁵³ Prison systems across the country followed.²⁵⁴

States endeavored to transform places of punishment into places of treatment, where the source of a person’s criminal tendencies could be diagnosed, classified, and cured.²⁵⁵ Penitentiaries across the country became “correctional institutions,” and officials became “correctional officers.”²⁵⁶ Even the Supreme Court took note of this change in punishment practices, observing in 1949 “a prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence.”²⁵⁷

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.²⁵⁸ Prison officials’ titles changed. They were no longer guards, but correctional officers.²⁵⁹ Accordingly, some training and professionalization were needed.

249. ALLEN, *supra* note 153, at 2–5 (explaining the complex conception of the “rehabilitative ideal” but stating that “[o]ne may begin by saying that the rehabilitative ideal is the notion that a primary purpose of penal treatment is to effect changes in the characters, attitudes, and behavior of convicted offenders, so as to strengthen the social defense against unwanted behavior, but also to contribute to the welfare and satisfaction of offenders.”).

250. See Ryan, *supra* note 248, at 274; RAGEN & FINSTON, *supra* note 233, at 130.

251. ALLEN, *supra* note 153, at 5.

252. See WILKINSON, *supra* note 143, at 18–19 (describing the progressivism of Chino, an institution in eastern Los Angeles County, 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 134, at 17 (noting that in 1944, then-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 183, 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.”).

253. PAGE, *supra* note 134, at 3.

254. See generally ALLEN, *supra* note 153, at 3.

255. PAGE, *supra* note 134, at 3.

256. *Id.*; MILLER, *supra* note 192, at 134, 153–57.

257. *Williams v. New York*, 337 U.S. 241, 247–48 (1949); see also ALLEN, *supra* note 153, at 5 (“There can be no doubt that Justice Black’s dictum [in *Williams*] expressed the enlightened opinion, not only of the judiciary, but also of the public at large.”).

258. See PAGE, *supra* note 134, at 18.

259. See *id.*

2. 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.”²⁶⁰

Professionalizing an industry²⁶¹ 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.²⁶² 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.²⁶³ Texas’s George J. Beto even recruited college and university graduates and instituted more selectivity in the hiring process.²⁶⁴ Emphasis shifted away, at least explicitly, from sharpshooting skills and sheer physicality.

Officials also committed to formalized and standardized training, instituting prison guard “schools” and on-the-job programs.²⁶⁵ At the federal level, new hires 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.²⁶⁶ James A. Johnston, former warden of Alcatraz, 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,

260. *Id.*

261. Lvovsky, *supra* note 16, at 2003–04 (“‘Professionalization’ became something of a byword in the 1950s and 1960s The term ‘professionalization’ was broad enough to encompass almost any occupational improvement . . .”).

262. HORTON & NIELSEN, *supra* note 231, at 136–38.

263. JAMES A. JOHNSTON, *ALCATRAZ ISLAND PRISON AND THE MEN WHO LIVE THERE* 102 (1949); HORTON & NIELSEN, *supra* note 231, at 138.

264. HORTON & NIELSEN, *supra* note 231, at 137–38.

265. RAGEN & FINSTON, *supra* note 233, at 120–21; *id.* at 205–07 (describing Illinois prison guard training program).

266. JOHNSTON, *supra* note 263, at 101.

criminology, behaviorism and they were put on posts for a tryout 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.²⁶⁷

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.²⁶⁸ 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.²⁶⁹

Additionally, the prison industry’s professionalization movement coincided with the professionalization movement within policing, which similarly cast police officers as experts within their field.²⁷⁰ Police departments at the time worked toward bureaucratizing their ranks, centralizing authority with police chiefs, and emphasizing the need to self-regulate and adhere to a professional code of ethics.²⁷¹ And like prison officials did, police officers “emphasized the unique skills and knowledge of individual officers as professionals in their field.”²⁷²

What was the source of this newfound expertise? Professor Anna 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.²⁷³ No longer was policing a matter of pure brawn, but rather “brain over brawn.”²⁷⁴ 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 deserves to be regarded for the depths of intellectual rigor and the depth of expertise its prominent figures claimed.²⁷⁵

267. *Id.* at 101–02.

268. PAGE, *supra* note 134, at 17.

269. RAGEN & FINSTON, *supra* note 233, at vii.

270. Lvovsky, *supra* note 16, at 2003.

271. *Id.* at 2004–05.

272. *Id.* at 2005.

273. *See id.* at 2006.

274. *Id.* at 2005.

275. *See id.* at 2005–06.

The professionalization and “expertization” of policing in this era changed the industry—and, critically, the judiciary’s perception of police officers and their claimed expertise—in ways strikingly similar to how 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,²⁷⁶ just as prison officials began to vie for judicial recognition of their claimed expertise and, accordingly, their retention of penal power.²⁷⁷

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 claims 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.²⁷⁸ Federal courts exercised hands-on authority, issuing structural injunctions across numerous prison systems in efforts to remedy the dehumanizing conditions that had been permitted to flourish for decades.²⁷⁹

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 that outsiders were exacerbating the risks of an already dangerous profession.²⁸⁰ The struggle mounted, and the rhetoric of danger intensified.

1. 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

276. *Id.* 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.”).

277. *See infra* Part II.E.

278. PAGE, *supra* note 134, at 20.

279. *See, e.g.*, *Jackson v. Bishop*, 404 F.2d 571, 581 (8th Cir. 1968) (reversing district court and remanding with instructions to enjoin Arkansas prison officials from inflicting corporal punishment as a disciplinary measure); *Holt v. Sarver*, 309 F. Supp. 362, 385 (E.D. Ark. 1970) (ordering numerous remedies of conditions in Arkansas prisons), *aff’d*, 442 F.2d 304 (8th Cir. 1971). *See generally* Schlanger, *supra* note 198, at 365–69.

280. *See infra* Part II.E.

many prisoners soon came to believe that those promises were empty.²⁸¹ “After initially welcoming the advent of the Era of Treatment, prisoners increasingly felt that rehabilitation was more symbol than substance.”²⁸²

Growing frustrations of unfulfilled commitments led to prisoners’ increasingly vocal (and sometimes violent) opposition to prison policies and practices and general politicization among incarcerated populations.²⁸³

“[P]risoners developed political identities and 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.’)”²⁸⁴

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.²⁸⁵

Black people, who were (and still are) incarcerated at higher rates than other demographics, led much of the mobilization of incarcerated people.²⁸⁶ The Black Panthers, led in part by Eldridge Cleaver incarcerated at Folsom and San Quentin Prisons, spearheaded education campaigns from within the walls.²⁸⁷ George Jackson’s public writings were deeply influential, as he became one of the era’s major theorists of the politicization of incarceration.²⁸⁸ Members of the Black Muslim Movement coordinated legal challenges among prisons across the country.²⁸⁹

281. 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, creating 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].”).

282. PAGE, *supra* note 134, at 20.

283. MILLER, *supra* note 192, 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.”).

284. PAGE, *supra* note 134, at 20.

285. See, e.g., Mamo, *supra* note 281, 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).

286. See generally Allegra M. McLeod, *Confronting the Carceral State*, 104 GEO. L.J. 1405, 1414–15 (2016).

287. See, e.g., Mamo, *supra* note 281, at 548–49.

288. *Id.* 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.’”).

289. FEELEY & RUBIN, *supra* note 197, at 37–38 (“Most prisoner complaints were brought pro se, by a prisoner whose motivation was a sense of grievance and a lot of spare time; a few

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."²⁹⁰

2. From Judicial Hands-Off to Hands-On

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 and, thus, gave incarcerated "plaintiffs a jurisdictional path into federal court."²⁹¹ Shortly thereafter, the 1962 decision in *Robinson v. California*²⁹² incorporated the Eighth Amendment into the Fourteenth Amendment, thereby making its provisions applicable to states and municipalities.²⁹³

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, which alleged that they barred him from purchasing religious materials and freely exercising his religion as well as discriminating against him based on his religion.²⁹⁴ The district court dismissed Mr. Cooper's complaint, and the U.S. Court of Appeals for the Seventh Circuit affirmed, taking judicial notice on a motion to dismiss of the dangerousness of the Black Muslim Movement.²⁹⁵ The panel asserted the need for carceral deference, relying on decades of judicial precedent and custom.²⁹⁶ 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.²⁹⁷

The swift uptick in federal court adjudications of prisoners' cases has been well-documented, and thus a thorough doctrinal analysis is not necessary here.²⁹⁸ Professor Margo Schlanger, specifically, chronicles the evolution of

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.").

290. PAGE, *supra* note 134, at 21.

291. Schlanger, *supra* note 198, at 368.

292. 370 U.S. 660 (1962).

293. *Id.* at 666–67.

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

295. *Id.* at 167.

296. *Id.*

297. *Cooper v. Pate*, 378 U.S. 546 (1964).

298. See generally Schlanger, *supra* note 198; Dolovich, *supra* note 15; FEELEY & RUBIN, *supra* note 197.

the law in this period, summarizing the post-*Cooper v. Pate*²⁹⁹ 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.³⁰⁰

Within five years, federal courts had declared prisons in Alabama, Florida, Louisiana, Mississippi, and Oklahoma unconstitutional in whole or in part.³⁰¹ Over the next five years, courts reached similar decisions regarding prisons in twenty-eight more jurisdictions.³⁰² At one point, “forty-eight of America’s fifty-three jurisdictions had at least one facility declared unconstitutional by the federal courts.”³⁰³

The effect of this wave of federal court intervention³⁰⁴ 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.³⁰⁵ 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 that this era inspired created the conditions for the deference retrenchment that soon came.

E. The Backlash

Prison officials felt the changes imposed by outside forces on a structural, and deeply personal, level. Wilkinson recalled that “[a]ll American prisons experienced tremendous change between the mid-1960s and the mid-1970s.”³⁰⁶ After the Court’s decision in *Cooper*, officials perceived

299. 378 U.S. 546 (1964).

300. Schlanger, *supra* note 198, at 369.

301. FEELEY & RUBIN, *supra* note 197, at 39–40.

302. *Id.*

303. *Id.*

304. 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 that they had mistreated prisoners and violated the prisoners’ 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.” MILLER, *supra* note 192, at 285. The guards were ultimately acquitted but not before a jury, the press, and Congress heard the allegations against them. *See id.* at 285–86.

305. GOTTSCHALK, *supra* note 16, at 177 (“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.’”).

306. WILKINSON, *supra* note 143, at xiv–xv.

their entire way of doing things as under attack: “Penal practices and policies that in earlier times were considered acceptable were soon falling under the definition of unconstitutional acts.”³⁰⁷ The rehabilitative ideal of the preceding era had come under widespread attack from an array of ideological positions and motivations, soon supplanted by competing notions of the purpose of incarceration.³⁰⁸

One factor for such hostile perceptions within the industry may have been the growing politicization of punishment. Prior to the mid-twentieth century, prison officials and leaders, and even prisoner researchers, were overtly apolitical.³⁰⁹ Recognition, let alone discussion, of the political dimensions of criminal law enforcement were largely absent.³¹⁰ Professor Francis Allen observed that devotion to the rehabilitative ideal and its emphasis on treatment may have been the reason, leading to a dangerous neglect of political analysis of carceral practices: “The possibilities of malicious or even mistaken uses of power in rehabilitative programs were rarely adverted to, revealing a largely unquestioned reliance on the therapist’s dedication to science and his professionalism as sufficient guarantees against abuses of authority.”³¹¹ In other words, crime was viewed historically as an aberration, “a product of weaknesses of individual character or of the propensities of various ethnic and racial groups,” all of which could be treated through hard labor, discipline, religious devotion, or therapy.³¹² As courts, advocates, and incarcerated people began to identify and call attention to the political dimensions of the industry, and of criminal law in general, expertise was questioned and backlash ensued.³¹³

1. “Besieged”

Legal actors’ involvement in prison affairs felt personal for many prison officials, who were deeply offended, troubled, or both. One official described prisoners as having “besieged” courts with lawsuits during this era, which in turn burdened an already overworked and frustrated staff.³¹⁴ The lawsuits were a nuisance, at best, and a deeply destabilizing safety concern in the eyes of many.³¹⁵ The near-total control that prison officials had wielded in the punishment field for a century was suddenly vulnerable.³¹⁶

307. HORTON & NIELSEN, *supra* note 231, at 145.

308. ALLEN, *supra* note 153, at 10.

309. *Id.* at 34–35.

310. *Id.*

311. *Id.* at 34.

312. *Id.* at 35.

313. For discussion of the modern dangers of apolitical reliance on presumed expertise, see my forthcoming piece. Jefferis, *supra* note 8; see also ALLEN, *supra* note 153, at 35–36.

314. Jacobs, *supra* note 184, at 211.

315. *See id.*

316. WILKINSON, *supra* note 143, 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.”).

Wilkinson remembered the lawyers representing incarcerated people 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.³¹⁷

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.”³¹⁸ These “supposedly intelligent people” were simply “pushing their agenda.”³¹⁹ 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 “firmly believed that a national movement, assisted by some lawyers, was underway which was aimed at breaking down prison authority.”³²⁰

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* administered prisons.”³²¹ Wilkinson decried “every Podunk judge in California [who] was establishing case law.”³²² The judges “completely misunderstood.”³²³

Moreover, officials felt that the courts were favoring the incarcerated people, an especially significant upset to the status quo of the hands-off era

317. *Id.* at 106.

318. *Id.* at 122; *see also id.* at 103–04 (“Now, in the late 1960s, you give them everything 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.”).

319. *Id.* at 105; *see also id.* 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 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 tell 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.”).

320. HORTON & NIELSEN, *supra* note 231, at 149.

321. *Id.* at 145 (emphasis added).

322. WILKINSON, *supra* note 143, at 102.

323. *Id.*

in which the officials had enjoyed the judiciary's deference.³²⁴ 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 limited 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.³²⁵

In the officials' view, the courts were unfairly refusing to accept their authority and expertise in the field, capital that 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."³²⁶ Officials felt that this put them in vulnerable positions in which "an aggrieved inmate might easily assault them."³²⁷ Courts had abandoned them, despite their efforts to convince judges that prisoners were inherently dishonest³²⁸ and manipulative,³²⁹ whereas the officials were inherently credible and working in good faith.³³⁰

324. PAGE, *supra* note 134, 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.").

325. Jacobs, *supra* note 184, at 211.

326. CARROLL, *supra* note 187, at 54.

327. *Id.*

328. See RAGEN & FINSTON, *supra* note 233, 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."); *id.* at 187 (discussing "the problem of malingering" and describing it as "a big one in a penitentiary"); WILKINSON, *supra* note 143, 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.").

329. See WILKINSON, *supra* note 143, 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 *id.* at 106 ("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.").

330. See RAGEN & FINSTON, *supra* note 233, 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

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;³³¹ the effect was demoralizing.

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.³³²

Without a doubt, this era changed the way that officials did their jobs. Court decrees required prison administrators to draft policies and procedures, many for the first time.³³³ Conditions arguably improved for many incarcerated people across the country, if only because they had been resurrected from

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."); *id.* 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 id.* at 164 (noting that "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"); *id.* 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.").

331. CARROLL, *supra* note 187, 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 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.").

332. M. KAY HARRIS & DUDLEY P. SPILLER, JR., *AFTER DECISION: IMPLEMENTATION OF JUDICIAL DECREES IN CORRECTIONAL SETTINGS* 213–14 (1977).

333. Jacobs, *supra* note 184, 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.'").

their civil death. The Supreme Court 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.³³⁴ But to achieve such progress required the federal courts to destroy the absolute power that 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.

2. Perceived Interference

“[P]olitical interference of any kind disrupts and disorganizes the serenity of a well operated institution.”³³⁵ 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.³³⁶ Prison officials across the country seemed to share his sentiment, as reflected in this era’s rise of prison unions—new characters in the punishment field whose missions were to exercise political influence and seemingly claw back officials’ ceded power.³³⁷

California’s Correctional Officers Association (CCOA) provides a poignant example of this development and a good bellwether for this sort of change.³³⁸ Disgruntled officers started the organization in 1957, reportedly frustrated with their wages.³³⁹ The CCOA was not especially active in its early years; the group functioned more like a club or fraternal organization than a labor union.³⁴⁰ 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.”³⁴¹

That sentiment changed, however, amid the backlash to the outside interventions described above. The CCOA, which became the California Correctional Peace Officers Association (CCPOA), had several thousand members in the early 1980s; by 1992, its membership had nearly tripled.³⁴² The CCPOA began making substantial campaign contributions and “could really sway an election.”³⁴³ Wilkinson recalls the group was “a really militant union” that focused solely on correctional officers’ interests.³⁴⁴

334. *See supra* Part II.D.2.

335. RAGEN & FINSTON, *supra* note 233, at viii.

336. *Id.*

337. *See, e.g.*, PAGE, *supra* note 134, at 5, 25.

338. *See id.* 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.”).

339. *See id.* at 15.

340. *See id.*

341. *Id.*

342. *Id.* at 5.

343. WILKINSON, *supra* note 143, at 161.

344. *Id.* at 160.

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 the courts is a topic for further study. 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.³⁴⁵ Such strategies included staging sick outs (in which officials declined to come to work en masse), pressuring courts to revoke certain rules, and chastising officers for actions seen as irresponsible.³⁴⁶ Given their influence, “[i]t is not far-fetched to consider prison officials’ key professional association . . . as playing a role in the prisoners’ rights movement.”³⁴⁷

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.³⁴⁸ The safety rhetoric coincided with societal concerns of rising crime and the War on Drugs.³⁴⁹ Prison populations skyrocketed.³⁵⁰ The rehabilitation ideal had failed, and the public was scared.³⁵¹ Prisons returned to the harsh, punitive model that the focus on rehabilitation was designed to eradicate.³⁵² Professor Page observed:

For most of the first half of the twentieth century, the central purpose of imprisonment and related forms of punishment was rehabilitation. But from the mid-1970s onward, the central aim and logic of incarceration

345. See CARROLL, *supra* note 187, at 60.

346. See *id.*

347. Jacobs, *supra* note 184, at 221.

348. See CARROLL, *supra* note 187, 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 to prisoners, the reforms have provided inmates with the capacity to develop a significant degree of countervailing power.”).

349. See Dolovich, *The Coherence of Prison Law*, *supra* note 4, 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.’” (first quoting KELSEY KAUFFMAN, PRISON OFFICERS AND THEIR WORLD 119 (1988); then quoting DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 136 (2001))); see also ALLEN, *supra* note 153, at 62.

350. See WILKINSON, *supra* note 143, at 135 n.1 (noting that changes in laws “caused a crisis in overcrowding” in California prisons between 1977 and 1981); Robertson, *supra* note 152, at 1014–15, 1026–27.

351. See ALLEN, *supra* note 153, at 29–30.

352. See PAGE, *supra* note 134, at 4 (“As the penal system ballooned [since the 1980s], state policy and funding decisions made prisons increasingly stark, depressing, and punitive.”); ALLEN, *supra* note 153, at 62 (“Repressive regimes both in the prisons and on the streets prove attractive, not only because they are seen as solutions to the crime problem, but also because they express the values of discipline, vigor, and self-confidence largely lacking in contemporary American society.”).

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.’³⁵³

For law-and-order advocates especially, a belief emerged “that modern prisons [were] country clubs and that American judges [were] involved in an inexplicable conspiracy to subvert the public order by erecting obstacles to the detection and conviction of the guilty.”³⁵⁴

During this period, the Court’s view of prisoners’ rights and the deference owed to prison officials explicitly shifted with the 1987 decision in *Turner*.³⁵⁵ 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.³⁵⁶ Prison officials persuaded the Court, under new Chief Justice William H. Rehnquist, of their superior expertise in the field³⁵⁷ and reassumed their position as the dominant actor in the punishment field. And just like that, the prisoners’ rights revolution came to an end, sacrificed to the sweeping power of carceral deference.³⁵⁸

III. 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) that has persisted throughout eras of change in American incarceration.³⁵⁹ The above history compels us to reevaluate courts’ reasoning for this sweeping deference that they afford prison officials, particularly considering recent doctrinal developments outside of prison law that call into question courts’ traditionally deferential postures.

353. PAGE, *supra* note 134, at 9.

354. ALLEN, *supra* note 153, at 62.

355. *See supra* Part I.B.

356. *See supra* Part I.B.

357. 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 142, 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.”).

358. *See* Driver & Kaufman, *supra* note 79, at 535–37 (“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.”).

359. *See supra* Parts I.B, II.B.2–3.

Two areas in which 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 violations³⁶⁰ when the defendant's challenged conduct "[did] not violate clearly established law of which a reasonable person should have known."³⁶¹ 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.³⁶² Notably, the doctrine provides not only a defense to *liability* but also to the litigation process itself.³⁶³

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."³⁶⁴ And just a year after that, the Court solidified the power of the doctrine with its decision in *Anderson v. Creighton*,³⁶⁵ 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."³⁶⁶ Over time, this requirement, coupled with several other procedural and substantive shifts to the standard,³⁶⁷ has morphed the doctrine into a near-total liability shield for many government officials.³⁶⁸

Scholars, lawyers, activists, jurists, legislators, and others 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.³⁶⁹ Professor Adam A. Davidson has noted that "[a]ttacking qualified

360. There is some debate about whether the defense applies to statutory claims, such as those brought under RFRA, as well as constitutional claims in which it has traditionally been applied. See Nicole B. Godfrey, *The Religious Freedom Restoration Act, Federal Prison Officials, and the Doctrinal Dinosaur of Qualified Immunity*, 98 N.Y.U. L. REV. 1045 (2023).

361. *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).

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

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

364. *Malley*, 475 U.S. at 341.

365. 483 U.S. 635 (1987).

366. *Id.* at 640.

367. See, e.g., Davidson, *supra* note 362, at 1471–75.

368. See *id.* at 1472.

369. See generally *id.*; 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

immunity is seemingly one of the few things that everyone can agree on in our divided times.”³⁷⁰ The criticism comes from many directions, but many center on the way in which substantial judicial deference to government actors, often police officers, leads to absurd results. The Court’s modern articulation of the standard requires “maximal deference to officials.”³⁷¹

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 the 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.”³⁷² She continued, criticizing the majority’s deferential, pro-officer view of the facts, “the 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.³⁷³ She noted the disparity that the Court has exhibited in, on the one hand, summarily reversing lower courts for wrongly denying officers qualified immunity protection but rarely intervening when courts wrongly afford officers the same protection.³⁷⁴

Two years later, Justice Sotomayor joined the Court’s majority to reverse, in another per curiam decision, the U.S. Court of Appeals for 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.³⁷⁵ The conditions were so poor that Mr. Taylor did not eat or drink for four days because he feared that his food and water may have been contaminated.³⁷⁶ 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.³⁷⁷ The cell had no bed, and Mr. Taylor was confined with no clothing, so he was forced to sleep naked in the sewage.³⁷⁸

(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).

370. Davidson, *supra* note 362, at 1475.

371. Laurin, *supra* note 369, at 245.

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

373. *Id.* at 1155, 1158.

374. *Id.* at 1162.

375. *Taylor v. Riojas*, 141 S. Ct. 52, 53 (2020).

376. *Id.*

377. *Id.*

378. *Id.*

In an atypical decision, the Court found that 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.³⁷⁹ The Court concluded, “[c]onfronted with the particularly egregious facts of this case, any reasonable officer should have realized that Taylor’s conditions of confinement offended the Constitution.”³⁸⁰ 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.³⁸¹ The decision may signal some judicial willingness to, at minimum, narrow the near-complete defense that the qualified immunity doctrine has come to provide given courts’ readiness to defer to government actors.³⁸²

In recent years, the Supreme Court has also exhibited skepticism of judicial deference to administrative agencies, either expressly disclaiming the propriety of deference as in the major questions canon³⁸³ or implicitly rejecting the *Chevron* doctrine in decisions that would seemingly warrant deference to a regulatory agency.³⁸⁴ In each area, the Court has rejected the presumption of agency expertise that may otherwise warrant deference, shifting instead to what Professor Nathan Richardson calls an “antideference” position.³⁸⁵ 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 presumption of generalized expertise is at least as

379. *Id.*

380. *Id.* at 54.

381. *See id.*

382. *See, e.g.,* Laurin, *supra* note 369.

383. *West Virginia v. Env’t Prot. Agency*, 142 S. Ct. 2587 (2022); *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab.*, 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.F.* 693 (2022); Nathan Richardson, *Antideference: Covid, Climate, and the Rise of the Major Questions Canon*, 108 *VA. L. REV. ONLINE* 174 (2022).

384. *See generally* *Am. Hosp. Ass’n v. Becerra*, 142 S. Ct. 1896 (2022); *see also* 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*, 2021–2022 *CATO SUP. CT. REV.* 97.

385. Richardson, *supra* note 383, at 177.

questionable as the agency expertise that 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 reallocating state power among government bodies, it should do the same with the carceral deference principle.

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.³⁸⁶ This Article has 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.³⁸⁷ A companion piece to this Article dives 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 incarcerated people, prison officials, the judicial system, and American criminal and civil justice.³⁸⁸

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.

386. *See supra* Part II.

387. *See supra* Part III.

388. *See* Jefferis, *supra* note 8. 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; I also examine 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.