THE PRISON PENALTY: USE OF FORCE LITIGATION AFTER *KINGSLEY V. HENDRICKSON*[*]

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With the Supreme Court's 2015 ruling in Kingsley v. Hendrickson*, a new chapter in the judicial oversight and constitutional regulation of carceral conditions appeared to unfold.* Kingsley *introduced what many perceived to be an important shift in the excessive force doctrine, mandating the application of an objective reasonableness standard for force challenges brought by pre-trial detainees. The holding departed from the longstanding subjective intent standard, derived from the Eighth Amendment, that had until then governed civil force claims arising in both prisons and jails. The Court justified its decision on the premise that pre-trial detainees are not yet convicted of a crime and, therefore, not subject to "punishment" within the scope of the Eighth Amendment's Cruel and Unusual Punishments Clause as people incarcerated after a criminal conviction are. Instead, pre-trial detainees' force claims arise under the Due Process Clause. Many scholars praised* Kingsley *and predicted that it marked a new doctrinal frontier with the potential to upset long-settled doctrine beyond even its specific holding.*

Almost a decade later, this Article tests those predictions by embarking on the first empirical study of Kingsley*'s impact on the excessive force doctrine as applied to prisons and jails. The findings are simultaneously affirming and profound: Pre-trial detainees contesting force under the* Kingsley *framework now have greater access to counsel and achieve more favorable civil case outcomes compared to their post-conviction counterparts. These findings are affirming because they are consistent with what one might expect—objective liability standards are generally easier for plaintiffs than subjective standards. The findings are profound because they lay bare just how poorly post-conviction plaintiffs' civil challenges to uses of force continue to fare, revealing what this*

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Article calls the "prison penalty." Indeed, these findings rebut the predictions of Kingsley*'s broader doctrinal impact. Not much has changed for post-conviction prisoners and their claims of unlawful force analyzed under the Eighth Amendment.*

This study raises new considerations in longstanding debates over the proper interpretation of the Eighth Amendment and the role of physical force within the criminal legal system. Is there something inherently different about official uses of force against those who are in state custody because they have been convicted of a crime versus those who are in state custody because they have been merely charged *with a crime? Do post-conviction prisoners somehow deserve greater brutality—specifically, the prison penalty—than their pre-conviction counterparts? Ultimately, this Article begs an enduring question: Where is the line between an acceptable and an unacceptable level of corporal state violence in America's prisons?*

INTRODUCTION

What had long been a "dismal legal landscape"[1] appeared to change in 2015 with a Supreme Court decision that one scholar predicted would "reverberate

1. David M. Shapiro, *To Seek a Newer World: Prisoners' Rights at the Frontier*, 114 MICH. L. REV. FIRST IMPRESSIONS 124, 124 (2016); *see also* David M. Shapiro & Charles Hogle, *The Horror Chamber: Unqualified Impunity in Prison*, 93 NOTRE DAME L. REV. 2021, 2021 (2018); Margo Schlanger, *The Constitutional Law of Incarceration, Reconfigured*, 103 CORNELL L. REV. 357, 359–60 (2018); Rosalie Berger Levinson, Kingsley *Breathes New Life into Substantive Due Process as a Check on Abuse of Government Power*, 93 NOTRE DAME L. REV. 357, 358 (2017); Michael S. DiBattista, Note, *A Force to Be Reckoned with: Confronting the (Still) Unresolved Questions of Excessive Force Jurisprudence After* Kingsley, 48 COLUM. HUM. RTS. L. REV. 203, 209 (2017); Jordan A. Shannon, Note, *Reasonableness*

in prison jurisprudence for decades to come."[2] The decision seemed to mark a turning point in federal courts' historic disinterest in and disengagement from allegations of prison and jail abuse,[3] making space for greater judicial scrutiny of certain conditions of confinement. Some attributed this hoped-for sign to changing societal perceptions of carceral spaces and incarcerated people.[4] Others felt the decision "breathe[d] new life into substantive due process as a check on abuse of government power."[5] The leading prediction, for those who study the doctrine of incarceration, was that this decision would have a lasting and broad impact.

Michael B. Kingsley could not have known his experience in 2010 would lead to a potential change in the legal landscape five years later. At the time, he was confined in a Wisconsin county jail awaiting trial on a single criminal charge.[6] Early one morning, according to a pro se federal civil complaint Mr. Kingsley filed, Sergeant Stan Hendrickson noticed a piece of paper covering the ceiling light in Mr. Kingsley's cell—a practice that violated jail rules.[7] The officer awoke Mr. Kingsley and ordered him to remove the paper.[8] Mr. Kingsley replied that he was not the one who put the paper on the light and refused to remove it.[9] Several other officers then approached Mr. Kingsley's cell and, again, ordered him to remove the paper from the light.[10] Mr. Kingsley reiterated that he was not the one who put the paper on the light, and he refused to "attempt to jump off the cell bed and reach and grab the paper off the [ceiling] light cover."[11] Mr. Kingsley alleged one of the officers then threatened him with disciplinary action for failing to obey their orders to remove the paper.[12]

as Corrections Reform in Kingsley v. Hendrickson, 62 LOY. L. REV. 577, 591–92 (2016); Kyla Magun, Note, *A Changing Landscape for Pretrial Detainees? The Potential Impact of* Kingsley v. Hendrickson *on Jail-Suicide Litigation*, 116 COLUM. L. REV. 2059, 2061–62 (2016).

2. *See* Shapiro, *supra* note 1, at 124–25 (discussing Kingsley v. Hendrickson, 576 U.S. 389 (2015)); *see also id.* (first discussing Holt v. Hobbs, 574 U.S. 352 (2015); and then discussing Davis v. Ayala, 576 U.S. 257 (2015)).

3. *See generally* Danielle C. Jefferis, *Carceral Deference: Courts and Their Pro-Prison Propensities*, 92 FORDHAM L. REV. 983 (2023) [hereinafter Jefferis, *Carceral Deference*] (detailing the origins of carceral deference on issues concerning the legality of prison conditions).

4. *See* Shapiro, *supra* note 1, at 136–37 (discussing how public perception of prisons has shaped carceral policy and noting that now "the goal of ending mass incarceration enjoys broad bipartisan support").

5. Levinson, *supra* note 1, at 357; *see also* Lee Kovarsky, *Suffering Before Execution*, 109 VA. L. REV. 1429, 1486–90 (2023) (arguing for the application of the *Kingsley* framework in challenges to pre-execution confinement conditions).

6. Kingsley v. Hendrickson, 576 U.S. 389, 392 (2015).

7. Complaint ¶¶ 7, 13, Kingsley v. Pedersen, No. 10-cv-832 (W.D. Wis. Dec. 28, 2010).

8. *Id.*

9. *Id.* ¶ 13.

10. *Id.*

11. *Id.* ¶ 14.

12. *Id.*

Soon thereafter, four officers approached Mr. Kingsley's cell and ordered him to stand with his back up against his cell door so they could take him to a segregation cell (presumably the previously threatened disciplinary action).[13] Mr. Kingsley alleged in his complaint that one of the officers pointed a taser at his face.[14] Mr. Kingsley placed his hands behind his back, and the officers entered his cell.[15] One officer pinned Mr. Kingsley's feet to the cell bed; another again pointed a taser at him; yet another pinned his knee into Mr. Kingsley's back and tightly handcuffed him.[16] The officers then dragged Mr. Kingsley off the bed and through the cellblock.[17] Mr. Kingsley alleged his foot was injured in the process, causing extreme pain and discomfort.[18]

The officers took Mr. Kingsley to the segregation unit where he alleged they placed him face down on the cell bed and held his feet down.[19] One officer kneed Mr. Kingsley in the back and shoved his head into the concrete frame of the cell bed.[20] Mr. Kingsley yelled for the officers to get off him, and one suddenly tased him.[21] Mr. Kingsley was still tightly handcuffed when the officers left the cell, leaving him to suffer what he described as excruciating pain.[22] He alleged in his complaint that his hands and wrists were "discolored, cold, and tingling."[23]

Mr. Kingsley sued several jail officials in federal court pursuant to 42 U.S.C. § 1983,[24] the federal civil rights cause of action, alleging the officers used excessive force in violation of his constitutional rights.[25] He sought declaratory and injunctive relief and damages.[26] After the district court granted partial summary judgment in the defendants' favor on other claims,[27] the excessive force claim against the two defendants went to trial.[28] Mr. Kingsley was held as a pre-trial detainee at the time of the alleged force, so his claim arose under the

13. *Id.* ¶¶ 15–18.
14. *Id.* ¶ 17.
15. *Id.* ¶ 19.
16. *Id.*
17. *Id.* ¶¶ 20–22.
18. *Id.* ¶¶ 20–21.
19. *Id.* ¶¶ 24–25.
20. *Id.* ¶ 26.
21. *Id.* ¶ 27.
22. *Id.* ¶¶ 27–28.
23. *Id.* ¶ 30.
24. *Id.* ¶ 1.
25. *Id.* ¶¶ 44–47. Mr. Kingsley also alleged a *Monell* claim against Monroe County and a claim for deprivation of his procedural due process rights against individual officers after they charged him with disciplinary infractions arising from the incident in the cell. *See id.* ¶¶ 32–43, 47. Neither claim is relevant to the Supreme Court's decision and, thus, neither is discussed at length here. *See id.* ¶¶ 32–43, 47.
26. *Id.* at 11–13.
27. *See* Opinion and Order at 10, Kingsley v. Pedersen, No. 10-cv-832 (W.D. Wis. Jan. 31, 2011).
28. Kingsley v. Hendrickson, 744 F.3d 443, 444 (7th Cir. 2014).

Fourteenth Amendment's Due Process Clause. At the time, however, the governing legal standard was the same as the standard would have been if he were a post-conviction prisoner raising a claim pursuant to the Eighth Amendment's Cruel and Unusual Punishment Clause.[29] To prevail, Mr. Kingsley had to demonstrate (among other elements) the officers *knowingly or recklessly* applied the force, a subjective standard. The jurors were, therefore, instructed to consider whether Mr. Kingsley had proven that the defendants "*knew* that using force presented a risk of harm to plaintiff, but they recklessly disregarded plaintiff's safety by failing to take reasonable measures to minimize the risk of harm to plaintiff."[30] The jury returned a verdict for the defendants.[31]

The Supreme Court vacated and remanded the judgment, pointing to a circuit split[32] on the question of "whether, to prove an excessive force claim, a pretrial detainee must show that the officers were *subjectively* aware that their use of force was unreasonable, or only that the officers' use of that force was *objectively* unreasonable."[33] In other words, should the Fourteenth Amendment's due process protection continue to mirror the Eighth Amendment's protection from force, such that the law would treat force used against convicted prisoners and force used against pre-trial detainees the same? Or should there be some distinction between the physical force a government actor may lawfully use against a person who has been convicted of a crime versus a person who has been detained and charged with a criminal offense but not yet convicted?

Justice Breyer, writing for the majority, held that the relevant intent standard[34] is "solely an objective one."[35] A plaintiff like Mr. Kingsley, who had been detained and charged with but not yet convicted of a crime must prove only "that the force purposely or knowingly used against him was *objectively* unreasonable."[36] Such a plaintiff does not, in contrast to the district court's instructions to the jury in Mr. Kingsley's case, have to prove any sort of

29. The governing standard at the time was derived from the Court's decisions in *Whitley v. Albers*, 475 U.S. 312 (1986), and *Hudson v. McMillian*, 503 U.S. 1 (1992). *See infra* Section I.A.

30. *Kingsley*, 744 F.3d at 447 (emphasis added).

31. *Id.* at 444.

32. Kingsley v. Hendrickson, 576 U.S. 389, 395 (2015) ("Kingsley filed a petition for certiorari asking us to determine whether the requirements of a § 1983 excessive force claim brought by a pretrial detainee must satisfy the subjective standard or only the objective standard. In light of disagreement among the Circuits, we agreed to do so.").

33. *Id.* at 391–92.

34. The Court acknowledged there are actually "two separate state-of-mind questions" in an excessive force case like Mr. Kingsley's. *Id.* at 395. First, was the physical act constituting the force intentional? *Id.* 395–96. In other words, did the actor intend for his actions to occur, or were the acts accidental? *See id.* For example, did the actor employ a purposeful strike with a closed fist versus an unintentional swinging of the arm? *See id.* And second, for what purpose or reason did the actor engage in such force? *Id.* 395–97. The latter state-of-mind question goes to whether the force was "excessive" and is where the *Kingsley* Court held that "courts must use an objective standard." *Id.* at 396–97.

35. *Id.* at 397.

36. *Id.* at 396–97 (emphasis added).

purposeful or reckless subjective intent on the part of the named defendant. The Court added that the inquiry is fact-dependent, must be considered from the perspective of a reasonable officer on the scene, and must account for the interests of officials in managing the jail or detention facility.[37]

The Court's majority justified its decision on the principle that pre-trial detainees' claims cannot be governed by Eighth Amendment standards because, in contrast to post-conviction prisoners, they "cannot be punished at all," let alone in such a way as to trigger the Eighth Amendment's protection against *cruel and unusual* punishment.[38] Pre-trial detainees' claims of unlawful force must, instead, be viewed through the lens of the Fourteenth Amendment's guarantee of substantive due process, as Mr. Kingsley had alleged, which does not require a showing of an intent to punish but rather prohibits "challenged governmental action [that] is not rationally related to a legitimate governmental objective or that is excessive in relation to that purpose."[39]

By many accounts, the *Kingsley v. Hendrickson*[40] decision was significant. Some scholars reasoned that *Kingsley*'s holding could have broader doctrinal impacts than the precise holding suggested. David Shapiro, for instance, took the decision as a "signal . . . that current law may set the bar too high for other [force] claims as well."[41] Because much of the Court's excessive force doctrine for pre-trial detainees borrowed from cases involving post-conviction prisoners, Shapiro inferred that those cases governing post-conviction force may be wrong, too.[42] Moreover, Shapiro interpreted *Kingsley* as a possible harbinger of just how misguided the Court's doctrine governing prison conditions more broadly may be.[43] "Given the tension," he wrote, "between the implications of *Kingsley* and a substantial body of court of appeals precedent, there is much for the lower courts to sort out in the years ahead."[44]

This Article empirically tests the predictions of *Kingsley*'s lasting and broad doctrinal impact on use of force litigation. Specifically, this Article explores and analyzes outcomes in federal civil actions challenging uses of force by pre-trial detainees and post-conviction prisoners for three sample years before *Kingsley* and three sample years after *Kingsley*, comparing a series of datapoints among jail and prison litigants at both the appellate level and the ultimate disposition

37. *Id.* at 397 (citing Bell v. Wolfish, 441 U.S. 520, 540, 547 (1979)); *see also* Jefferis, *Carceral Deference*, *supra* note 3, at 999–1026 (discussing the history and context of the sweeping deference federal courts afford to prison and jail officials).

38. *Kingsley*, 576 U.S. at 400–01 (citing Ingraham v. Wright, 430 U.S. 651, 671–72 n.40 (1977)).

39. *Id.* at 398.

40. 576 U.S. 389 (2015).

41. Shapiro, *supra* note 1, at 125.

42. *Id.* at 132.

43. *Id.* at 132–33.

44. *Id.* at 133.

of the action. Though there are limitations to this sort of empirical work,[45] federal civil actions are a crucial dataset to examine in this realm because they are one of the few, if only, ways available to an incarcerated person to legally challenge government actors' uses of force in carceral settings.[46] Federal civil rights law and procedure are where this doctrine is primarily operationalized, and federal courts' treatment of these claims yields valuable insights into the evolution and function of the constitutional doctrine of force.[47]

The empirical findings presented in this Article show that, in some ways, the scholarly predictions of *Kingsley*'s impact were correct. Pre-trial detainees challenging uses of force under the *Kingsley* standard achieve greater success when compared to their pre-trial detention counterparts who challenged uses of force before *Kingsley* under the subjective standard, sometimes by wide margins. Pre-trial detainees raising force challenges after *Kingsley* have also seemed to have greater access to counsel than their counterparts did before the decision, likely because lawyers see value in force cases now that they may have previously evaluated as unmeritorious. This makes *Kingsley*'s impact an access-to-justice issue as well as a substantive doctrinal change.

Post-conviction prisoners have also appeared to have greater access to counsel after *Kingsley*. However, the success rates of prisoners' post-*Kingsley* force challenges remain quite low. Therefore, *Kingsley* does not seem to have had any spillover effect or broader impact on the outcomes of those force cases that continue to be evaluated under the subjective standard or the Eighth Amendment force doctrine itself. The reverberations across prison law that some scholars predicted would result from *Kingsley* seem to have been muted, if they ever even rang out at all.

In one fundamental respect, therefore, the data shows just how much of a difference a subjective intent versus objective intent standard can have on the individual liability model of constitutional and civil rights doctrine. This insight may lend itself to considerations in other areas of constitutional doctrine, including equal protection jurisprudence and other areas of civil rights law.[48]

45. *See infra* Section II.C (discussing caveats to the study).

46. The Prison Litigation Reform Act requires incarcerated litigants to exhaust their administrative remedies before challenging conditions of incarceration, including allegations of excessive force, in federal court. Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, § 803(d), 110 Stat. 1321–66, 1321–71 (1996) (codified at 42 U.S.C. § 1997e(a)). Necessarily, then, plaintiffs may describe allegations of force in internal prison grievances. However, because prison policies generally prohibit awards of damages and are rarely adjudicated in the claimant's favor anyway, such claims often make their way to a federal court complaint.

47. *See* Avidan Y. Cover, *Reconstructing the Right Against Excessive Force*, 68 FLA. L. REV. 1773, 1798 (2016) ("Excessive force law is largely a product of § 1983 litigation."). *But see infra* Section II.C (emphasizing the barriers for prisoners' claims to reach federal courts).

48. *See infra* Part III.

This insight, when viewed through the lens of the excessive force doctrine, also reveals a phenomenon that this Article calls the "prison penalty"—a distinct handicap that post-conviction prisoners face on their chances of litigation success due solely to their status as post-conviction litigants. In the post-*Kingsley* legal landscape, the legality of a government official's use of force against a person in custody turns solely on the point in the life of a person's criminal case—before or after conviction—at which the force occurs. Was the force objectively unreasonable, or was it applied purposefully or recklessly? The data show post-conviction prisoners still operating under the subjective intent standard fare far worse than their pre-trial detainee counterparts.

Imagine a hypothetical to illustrate this point: Mr. Smith and Mr. Jones are incarcerated in a county jail. While jails are typically places of confinement for pre-trial detainees, they sometimes also incarcerate post-conviction prisoners, as in this scenario.[49] Mr. Smith is detained pending a criminal charge. Mr. Jones has recently been convicted of and sentenced for a criminal offense and is awaiting transport to a state prison where he will wait out his judicially imposed sentence. Mr. Smith and Mr. Jones are together in the housing unit playing cards. An officer approaches them and strikes each of them once with a club. Mr. Smith and Mr. Jones suffer similar injuries. Mr. Smith's challenge to the officer's use of force against him would be governed by the *Kingsley* standard because he was a pre-trial detainee.[50] Mr. Jones's challenge to the officer's use of force against him would be governed by the subjective standard. Mr. Smith prevails if he proves the officer's use of force was objectively unreasonable. Mr. Jones prevails only if he proves the officer subjectively knew the force was unreasonable and acted anyway.[51] This difference in the governing legal standard can be dispositive, meaning the officer may be held accountable for the strike of Mr. Smith but not for the strike of Mr. Jones, despite the shared circumstances between them.[52] This is the prison penalty.

This Article proceeds in three parts. Part I discusses the emergence and evolution of the constitutional force doctrine, as well as pertinent limits and criticisms of the governing standards. Part II presents the *Kingsley* study's methodology and findings, including the prison penalty, and discusses the study's limitations. Part III analyzes the prison penalty in greater depth and in light of the limitations and criticisms of the doctrine discussed in Part I. The Article ultimately asserts there is no doctrinal justification for maintaining a

49. In 2024, approximately 550,000 people were detained in local jails, and of those, more than 100,000 were post-conviction prisoners. *See* Press Release, Wendy Sawyer & Peter Wagner, Prison Pol'y Initiative, Mass Incarceration: The Whole Pie 2024 (Mar. 14, 2024), https://www.prisonpolicy.org/reports/pie2024.html [https://perma.cc/L7PX-WVS5].

50. *See* Kingsley v. Hendrickson, 576 U.S. 389, 397 (2015).

51. *See* Whitley v. Albers, 475 U.S. 312, 320–21 (1986) (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973)).

52. *See infra* Part II.

constitutional regime that penalizes post-conviction prisoners—condoning greater brutality than for their pre-conviction counterparts—as the law presently does.

I. REGULATING FORCE FROM POLICING TO PUNISHMENT

Over time, the Supreme Court has interpreted multiple constitutional provisions to regulate government actors' uses of force against individuals. Which provision applies depends solely on the status of the subject of the force.[53] The Fourth Amendment's guarantee of freedom from unreasonable search and seizure protects a free person from a police officer's use of objectively unreasonable force when making an arrest or investigatory stop.[54] The Fourteenth Amendment's promise of due process protects people charged with a crime and detained from officials' use of objectively unreasonable force, as *Kingsley* held.[55] The Eighth Amendment's prohibition on cruel and unusual punishment protects people incarcerated for criminal convictions from "punishment" that is applied "maliciously and sadistically for the very purpose of causing harm."[56] This legal regime reflects the many settings in which a citizen may encounter a state actor and, possibly, find themselves subject to that actor's use of physical force.[57]

None of those constitutional provisions, however, explicitly mention physical force in their prescriptions. The Fourth Amendment provides, in pertinent part, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."[58] The Fourteenth Amendment's Due Process Clause promises "nor shall any State deprive any person of life, liberty, or property, without due process of law."[59] And the Eighth Amendment states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[60] Rather than providing express protections, the constitutional regulation of state actors' uses of force has emerged through judicial interpretation of the express rights at issue. This part first examines the emergence and evolution of the constitutional doctrine regulating force, particularly as applied to places of confinement. The part then discusses some

53. *See infra* Part III (illustrating the law of force as it relates to the policing-punishment continuum).

54. Graham v. Connor, 490 U.S. 386, 388 (1989).

55. *Kingsley*, 576 U.S. at 397.

56. *Whitley*, 475 U.S. at 320–21 (quoting *Johnson*, 481 F.2d at 1033).

57. Cover, *supra* note 47, at 1802–03. For a discussion of the expressive dimensions of this constitutional regime, see Danielle C. Jefferis, *Our Progressively Brutal Constitution: A Legal Expressivist Account of the Force Doctrine*, 75 EMORY L.J. 1 (forthcoming 2025).

58. U.S. CONST. amend. IV.

59. *Id.* amend. XIV.

60. *Id.* amend. VIII.

pertinent limits and criticisms of the excessive force doctrine to contextualize the *Kingsley* study that follows in Part II.

A. *Emergence and Evolution*

The Supreme Court did not address the Constitution's application to government actors' uses of force until the 1980s,[61] leaving lower federal courts throughout the nineteenth and most of the twentieth century to determine whether the Constitution provides any protections from such conduct in the first instance. For much of that history, lower courts declined to regulate force, focusing more on the lawfulness of historically traditional policing functions, such as executing search and arrest warrants.[62] When lower courts did step in to regulate force, they did so almost exclusively through federal criminal proceedings rather than civil actions.[63] It was not until the 1960s, when the express and full protections of the Fourth Amendment were incorporated through the Fourteenth Amendment to apply to state actors,[64] that federal courts addressed the infrequent civil claim of unlawful police conduct by state (versus federal) actors. Those courts typically framed the claims as ones of due process violations arising from the Fourteenth Amendment.[65]

Federal courts paid even less attention to claims of force arising in America's prisons and jails in the nineteenth and early-to-mid-twentieth centuries, especially in terms of federal constitutional and/or civil rights concerns.[66] From the earliest days of American carceral punishment, federal

61. Tennessee v. Garner, 471 U.S. 1, 20–21 (1985); *see also infra* Section I.A.

62. *See, e.g.*, Cradle v. United States, 178 F.2d 962, 963–64 (D.C. Cir. 1949); District of Columbia v. Little, 178 F.2d 13, 20 (D.C. Cir. 1949); United States v. Diuguid, 146 F.2d 848, 848 (2d Cir. 1945); Gatterdam v. United States, 5 F.2d 673, 674 (1925).

63. *See, e.g.*, *supra* note 61 and accompanying text.

64. *See* Aguilar v. Texas, 378 U.S. 108, 110 (1964); Mapp v. Ohio, 367 U.S. 643, 650–51 (1961); *see also* Wolf v. Colorado, 338 U.S. 25, 27 (1949) ("The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the states through the Due Process Clause."), *aff'g* 187 P.2d 926 (Colo. 1947), *overruled by Mapp*, 367 U.S. 643.

65. *See, e.g.*, Jennings v. Nester, 217 F.2d 153, 154–55 (7th Cir. 1954); Mueller v. Powell, 203 F.2d 797, 800 (8th Cir. 1953); Yglesias v. Gulfstream Park Racing Ass'n, 201 F.2d 817, 818 (5th Cir. 1953); Hague v. Comm. for Indus. Org., 101 F.2d 774, 790–91 (3d Cir. 1939); Casserly v. Wheeler, 282 F. 389, 393 (9th Cir. 1922); Cox v. Shepherd, 199 F. Supp. 140, 142 (S.D. Cal. 1961); Crawford v. Lydick, 179 F. Supp. 211, 215 (W.D. Mich. 1959); Mackey v. Chandler, 152 F. Supp. 579, 581 (W.D.S.C. 1957); Refoule v. Ellis, 74 F. Supp. 336, 337–38 (N.D. Ga. 1947); Ghadiali v. Del. State Med. Soc'y, 28 F. Supp. 841, 844 (D. Del. 1939).

66. Federal courts reviewed some early claims of unlawful force in carceral settings, though typically under criminal law or state tort doctrines. *See, e.g.*, Bracken v. Cato, 54 F.2d 457, 458 (5th Cir. 1931) (analyzing survivors' claim against deputy sheriff for killing a prisoner under state wrongful death statute); Weigel v. Brown, 194 F. 652, 655 (8th Cir. 1912) (evaluating prisoner's claim of unlawful beatings under relevant sentencing framework). *But see* Pullen v. United States, 164 F.2d 756, 760 (5th Cir. 1947) ("The fact that a prisoner is assaulted, injured, or even murdered by state officials does not

courts exhibited disinterest and disengagement, at best, with the conditions inside prisons and jails. This judicial disposition has come to be known as the "hands-off" doctrine, which dominated prison law despite brutal conditions and treatment of people in state custody for much of the nineteenth and early-to-mid-twentieth centuries.[67] Moreover, the Eighth Amendment's explicit prohibition on cruel and unusual punishments was not incorporated to the states until 1962,[68] leaving many state and local officials' conduct beyond the reach of the Constitution's express protections.

Two Supreme Court interventions in the mid-twentieth century significantly changed the trajectory of the force doctrine. The first was the Court's 1945 decision in *Screws v. United States*,[69] which involved "a shocking and revolting episode in law enforcement."[70] The "episode," as the Court described it, consisted of law enforcement officers' extrajudicial killing of Robert "Bobby" Hall, a Black American, mechanic, and World War II veteran.[71] Federal prosecutors charged the sheriff and a deputy under the criminal provisions of the Civil Rights Act, accusing them of willfully depriving Mr. Hall of his constitutionally protected right to not be deprived of life without due process of law.[72] The jury returned a conviction, and the defendants appealed, challenging the statute both facially and as applied.[73] Their as-applied challenge contended that an element of the statute required that they were acting "under color of law" at the time of the charged offense, and how could

necessarily mean that he is deprived of any right protected or secured by the Constitution or laws of the United States." (quoting Screws v. United States, 325 U.S. 91, 108–09 (1945))).

67. Jefferis, *Carceral Deference*, *supra* note 3, at 999–1017; *see also* Bethea v. Crouse, 417 F.2d 504, 505–06 (10th Cir. 1969) ("We have consistently adhered to the so-called 'hands off' policy in matters of prison administration according to which we have said that the basic responsibility for the control and management of penal institutions, including the discipline, treatment, and care of those confined, lies within the responsible administrative agency and is not subject to judicial review unless exercised in such a manner as to constitute clear abuse or caprice upon the part of prison officials." (citations omitted)); Johnson v. Dye, 175 F.2d 250, 253 (3d Cir. 1949) (discussing testimony establishing that "it was the custom of the Georgia authorities to treat chain gang prisoners with persistent and deliberate brutality at or about the time the petitioner was suffering punishment and for some years thereafter" and "[Black] prisoners were treated with a greater degree of brutality than white prisoners though it is difficult to make fine distinctions as to degrees of brutality"), *rev'd*, 338 U.S. 864 (1949); *Weigel*, 194 F. at 653 ("The laws of the state of Arkansas empower the county court of any county in that state to let the labor of persons convicted and sentenced to the county jail to a contractor on condition that he agrees to maintain, keep, and work them . . . and they authorize the contractor to whip any such prisoner with a strap 2 feet long and 3 1/2 inches wide, attached to a wooden handle, with 10 licks once in 24 hours for his refusal to work.").

68. Robinson v. California, 370 U.S. 660, 667–68 (1962).

69. 325 U.S. 91 (1945).

70. *Id.* at 92.

71. *See* Paul J. Watford, Screws v. United States *and the Birth of Federal Civil Rights Enforcement*, 98 MARQ. L. REV. 465, 466–67 (2014).

72. *Screws*, 325 U.S. at 93.

73. *Id.* at 94.

they be acting *under color of law* when committing murder in violation of state law?[74]

In a fractured opinion, four justices concluded that Congress did intend for the statute to cover state officials acting under the *pretense* of law, even where their conduct ultimately violated the law.[75] In other words, even though the defendants' conduct was criminal, they acted under the cloak of their authority as state law enforcement officers.[76] "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law."[77] In a line that would be echoed throughout the force doctrine for decades to come, the four justices noted, however, that certain force against individuals in state custody, even lethal force, may well be constitutional.[78]

Following *Screws*, federal prosecutors brought criminal charges against some prison officials who used force against incarcerated targets, seemingly testing legal theories and standards.[79] In Florida, for instance, the federal government alleged that the defendant-official willfully whipped prisoners to extort confessions from them and inflict "summary corporal punishment upon them in violation of the laws of Florida and the [C]onstitution of the United States."[80] Since the case arose before the incorporation of the Eighth Amendment, the government alleged that the officer's conduct violated the Fourteenth Amendment's guarantee of due process.[81] In reviewing the sufficiency of the criminal complaint, the Fifth Circuit expressly acknowledged that there are some constitutional protections from violence in prisons: "[F]ederal laws may be violated within prison walls, and federal crimes committed therein . . . ."[82]

The *Screws* decision paved the way for the Court's second major intervention—the 1961 decision in *Monroe v. Pape*[83]—which marked the dawn of modern civil rights enforcement through the civil cause of action found

74. *Id.*

75. *Id.* at 109–11 (citing United States v. Classic, 313 U.S. 299, 326 (1941)).

76. *Id.*

77. *Id.* at 109 (quoting *Classic*, 313 U.S. at 326).

78. *Id.* at 108–09 ("The fact that a prisoner is assaulted, injured, or even murdered by state officials does not necessarily mean that he is deprived of any right protected or secured by the Constitution or laws of the United States.").

79. *See, e.g.*, United States v. Jones, 207 F.2d 785, 786 (5th Cir. 1953); Williams v. United States, 179 F.2d 656, 657–58 (5th Cir. 1950).

80. *Jones*, 207 F.2d at 786.

81. United States v. Jones, 108 F. Supp. 266, 267 (S.D. Fla. 1952).

82. *Jones*, 207 F.2d at 786; *see also* United States v. Jackson, 235 F.2d 925, 929 (8th Cir. 1956); United States v. Walker, 216 F.2d 683, 684 (5th Cir. 1954); Crews v. United States, 160 F.2d 746, 749–50 (5th Cir. 1947) (federal prosecution of police officer).

83. 365 U.S. 167 (1961).

within the Civil Rights Act of 1871, 42 U.S.C. § 1983.[84] Section 1983 permits individuals to sue government officials acting under color of law for constitutional violations.[85] Although the statute was passed in 1871, it was rarely used until the *Monroe* decision, which opened the channels through which federal courts would soon be asked to evaluate substantive constitutional protections, including protections against physical force, at much greater rates than in the ninety preceding years of the Civil Rights Act's existence.[86]

James Monroe and his family sued, under § 1983, thirteen Chicago police officers[87] who broke into their home early one morning, forced them out of bed, made them stand naked in the living room, and ransacked every room of the house.[88] In contrast to the *Screws* decision, where the right at issue was the Fourteenth Amendment's due process protection because Mr. Hall was an arrestee, the plaintiffs in *Monroe* raised their claims under the Fourth Amendment's search and seizure protections[89] (which had by that time been incorporated to the states).[90]

The officers sought dismissal on the grounds that the complaint failed to state a cause of action, arguing, like the *Screws* defendants, that if their conduct violated the Fourth Amendment, as the plaintiffs alleged, they could not be considered to have acted "under color of law" as § 1983 requires.[91] In other words, how could the police defendants have been acting "under color of law" *while* violating the law? The Court disagreed with the defendants' interpretation of the statute, relying on *Screws* to conclude that § 1983, like its criminal analog, covers even "those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it."[92]

The Court's decision in *Monroe* permitted plaintiffs to challenge a wider swath of state official conduct than before.[93] But the doctrinal slate on which to

84. *Id.* at 168–70; *see also* Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13, 13 (codified as amended at 42 U.S.C. § 1983).

85. *See* 42 U.S.C. § 1983.

86. *See Monroe*, 365 U.S. at 191–92 (finding that a complaint against a city police officer for deprivation of constitutional rights was sufficient to state a cause of action under federal statute).

87. The plaintiffs also sued the City of Chicago. *Id.* at 187. The Court analyzed that municipal liability claim under a different legal standard than the standard it applied to the claims against the individual officers. *Id.* at 187–92.

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

89. *See id.* at 170.

90. *See supra* note 64 and accompanying text.

91. *Monroe*, 365 U.S. at 170.

92. *Id.* at 171–72.

93. *See, e.g.*, United States *ex rel.* Atterbury v. Ragen, 237 F.2d 953, 954–55 (7th Cir. 1956) (finding, before *Monroe*, that a prisoner's § 1983 claim for excessive beatings and abuse "do[es] not state a claim upon which relief can be granted under the federal Civil Rights Act").

challenge such conduct was largely clean. Prior to *Monroe* (and the parallel actions of the Supreme Court in incorporating constitutional provisions to the states), federal courts had not yet articulated clear standards for many express constitutional rights, let alone rights based on implied principles such as what became the force doctrine.[94] Litigants raising constitutional challenges through federal civil actions then began testing theories and approaches in this new legal landscape.

Shortly after the *Monroe* decision, for example, some lower federal courts began permitting incarcerated litigants' civil claims of unlawful force to proceed beyond the motion to dismiss stage, albeit reluctantly.[95] Few of these decisions, however, articulated the precise constitutional right and governing legal standard at issue, speaking only vaguely to claims of physical abuse or beatings brought under "the Civil Rights Act" (specifically, § 1983), and examining whether the claim of force arose in the context of prison discipline (specifically, whether it appeared the prisoner provoked or otherwise warranted the abuse).[96] If it did appear that the force was warranted, the claim did not proceed; if, on the other hand, the allegations did not involve internal facility discipline or perceived provocation, courts generally allowed the claim to proceed.

94. *See, e.g.*, Sina Kian, *The Path of the Constitutional: The Original System of Remedies, How It Changed, and How the Court Responded*, 87 N.Y.U. L. REV. 132, 188 (2012) ("[U]ntil incorporation, there simply were not many federal constitutional rights that could give rise to a cause of action (to say nothing of the pragmatic difficulties of bringing lawsuits during Jim Crow). Equal protection claims were notoriously difficult, the Privileges or Immunities Clause suffered narrow interpretation, and pre-incorporation Fourteenth Amendment did little for civil rights plaintiffs. In the First Amendment context, the right to free speech was incorporated in 1925, free assembly in 1937, free exercise in 1940, and establishment in 1947. Even then, many of these clauses did not enjoy robust interpretation until later decisions. Although *Wolf* notably incorporated the right against unreasonable searches and seizures in 1949, it explicitly relegated plaintiffs to state common law remedies, and the Fourth Amendment's warrant jurisprudence was not applied to states until three years after *Monroe* and *Mapp*. This left only a handful of federal rights that could be invoked by § 1983." (footnotes omitted)).

95. *See, e.g.*, Tolbert v. Bragan, 451 F.2d 1020, 1020 (5th Cir. 1971) ("Tolbert has alleged more than a mere matter of prison administration or of state law. Severe physical abuse of prisoners by their keepers without cause or provocation is actionable under the Civil Rights Act."); Allison v. Cal. Adult Auth., 419 F.2d 822, 823 (9th Cir. 1969) (allowing incarcerated plaintiff's claim of physical abuse by prison employees to proceed despite "recogniz[ing] that frivolous Civil Rights suits by prison inmates have become a matter of concern to district courts"); Brown v. Brown, 368 F.2d 992, 993 (9th Cir. 1966) (reviewing a claim that prison agents "beat [the plaintiff] and caused various other deprivations of his civil rights" and stating, "[t]he pleadings filed by appellant contain allegations which could be said to tax a reader's credulity. . . . On remand we invite the district court's attention to . . . [the fact] that although a cause of action is formally alleged the proceeding is nonetheless frivolous." (internal quotation omitted)); Wiltsie v. Cal. Dep't of Corr., 406 F.2d 515, 517 (9th Cir. 1968) (allowing incarcerated plaintiff's claim of force under the Civil Rights Act to proceed in light of *Brown v. Brown*); Dodd v. Spokane Cnty., Wash., 393 F.2d 330, 333, 335 (9th Cir. 1968) (permitting jail detainee's civil claim alleging "threats of violence, actual assaults, and other punishment treatment" against three jail officials, among others, to proceed).

96. *See supra* note 66. *But see* Bethea v. Crouse, 417 F.2d 504, 505–06 (10th Cir. 1969) (analyzing incarcerated plaintiff's claim against warden alleging responsibility for a severe beating inflicted on him by another prisoner under the Eighth Amendment).

Other lower federal courts allowed claims challenging force in prisons and jails to proceed under more precise legal theories, including challenges to the Eighth Amendment's prohibition on cruel and unusual punishment. In *Bethea v. Crouse*,[97] the Tenth Circuit evaluated whether two co-plaintiffs' Eighth Amendment claim against a prison warden could proceed on the theory that the warden was legally answerable for a severe beating inflicted on them by another prisoner.[98] The court considered the hands-off doctrine and the general principle of judicial noninvolvement in prison matters but concluded that the severe beating could be found to amount to cruel and unusual punishment.[99] In its attempt to articulate a workable standard for evaluating force within the scope of the Eighth Amendment, the court first noted the need to separate force used against prisoners as disciplinary measures and nondisciplinary force, echoing several cases that came before it.[100] For, the court acknowledged, "[w]hat force amounts to simple assault and battery and how much *more* force amounts to cruel and unusual punishment is a difficult question of degree."[101] The court ultimately concluded that the governing standard was "whether the assault as found by the factfinder is sufficiently severe in the circumstances to *shock the conscience of a reasonable man*. If so, the verdict should be for the plaintiffs."[102]

Judicial confusion persisted, nonetheless, around the governing standard and principles for use of force in carceral settings.[103] Several federal courts in the 1970s evaluated arrestees' claims of excessive force under the Eighth Amendment, interpreting the provision to protect against reckless or arbitrary conduct.[104] Other courts that evaluated carceral force claims under the Eighth Amendment, even those brought by arrestees, looked to whether the alleged

97. 417 F.2d 504 (10th Cir. 1969).

98. *Id.* at 505.

99. *Id.* at 508–09.

100. *Id.* at 509.

101. *Id.* (emphasis added).

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

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

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

force amounted to "barbarous" treatment.[105] Any alleged justification for the force connected to jail or prison discipline or safety and security (or the lack thereof) did not play an express role in those decisions, as it had for earlier cases arising out of prisons, though the latter were brought by post-conviction plaintiffs.

The Second Circuit, in *Johnson v. Glick*,[106] seized the opportunity in 1973 to interpret the Eighth Amendment and its application to carceral uses of force much more robustly than previous courts had done.[107] Looking to the history of the Eighth Amendment, the court, in an opinion written by Judge Friendly, stated that,

> [T]here can be no disagreement that what sparked the English provision [from which the Eighth Amendment takes its language] was the conduct of judges under James II. The background of our own Bill of Rights, however, makes clear that the Eighth Amendment was intended to apply not only to the acts of judges but as a restraint on legislative action as well.[108]

In light of that history, the Second Circuit concluded that the Eighth Amendment's cruel and unusual punishments protections apply only to judicial or legislative acts of "punishment" and the manner in which such punishment is carried out (that is, any executive actions that have "been deliberately administered for a penal or disciplinary purpose, with the apparent authorization of high prison officials charged by the state with responsibility for care, control, and discipline of prisoners").[109] Accordingly, unless a person had been given a formal, legislatively authorized, judicially imposed sentence, the Eighth Amendment's cruel and unusual punishments protection simply did not apply.[110] This meant the Eighth Amendment, in Judge Friendly's view, did not protect pre-trial detainees who may be confined but who have not yet been convicted and formally sentenced.

Crucially, the court expressly extended the due process protection to *all uses of force*, including against post-conviction prisoners. It would "be absurd," the court wrote, to conclude that the constitutional protection against excessive

105. *See, e.g.*, Smartt v. Lusk, 373 F. Supp. 102, 104 (E.D. Tenn. 1973) ("There is no evidence that the punishment inflicted on Mr. Smartt by Mr. Stalcup was 'barbarous,' which is the meaning of cruelty as it relates to punishment.").

106. 481 F.2d 1028 (2d Cir. 1973).

107. *Id.* at 1032–33.

108. *Id.* at 1031 (first citing *In re* Kemmler, 136 U.S. 436, 446–47 (1890); then citing Weems v. United States, 217 U.S. 349, 371–73, 378–79 (1910); and then citing Furman v. Georgia, 408 U.S. 238, 266–69 (1972) (Brennan, J., concurring)).

109. *Id.* at 1032.

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

force is limited to what is proscribed by the Eighth Amendment.[111] Rather, "*both before and after sentence* . . . quite apart from any specific of the Bill of Rights, application of undue force by law enforcement officers deprives a suspect of liberty without due process of law."[112] That same principle "should extend to acts of brutality by correctional officers, although the notion of what constitutes brutality may not necessarily be the same."[113]

To evaluate the constitutionality of force under the Due Process Clause, therefore, courts should look to the factual circumstances before, during, and after the use of force, including the officer's justification for the force.[114] Prisoners, the court noted, are "not usually the most gentle or tractable of men and women" and thus the "occasional use of a degree of intentional force" may be required and justified.[115] The court added, "[n]ot every push or shove, even if it may later seem unnecessary *in the peace of a judge's chambers*, violates a prisoner's constitutional rights."[116]

By the mid-1970s, the force doctrine was finally taking shape, though it was far from settled. The Supreme Court stepped in shortly thereafter with a series of cases that defined the excessive force doctrine for both carceral and noncarceral settings for the next four decades. The first decision was *Tennessee v. Garner*,[117] in which the Court held that the Fourth Amendment governs a police officer's use of force, including *lethal* force, against a free person.[118] The legality of such force is determined by its reasonableness, evaluated by balancing the nature of the force against the governmental interest alleged to justify the use of force.[119] *Lethal* force, the Court held, is constitutional, even against a person who is fleeing, only where "the officer has probable cause to believe that the [person] poses a threat of serious physical harm, either to the officer or to others."[120]

The next case was *Whitley v. Albers*,[121] which involved the use of force in a carceral setting. Specifically, the plaintiff was a post-conviction prisoner. The Court, in a decision authored by Justice O'Connor, explicitly cabined its

111. *Id.*

112. *Id.* (emphasis added).

113. *Id.* at 1032–33 (first citing Collum v. Butler, 421 F.2d 1257, 1259–60 (7th Cir. 1970); then citing Tolbert v. Bradan, 451 F.2d 1020, 1020 (5th Cir. 1971); and then citing Wiltsie v. Cal. Dep't of Corr., 406 F.2d 515, 517 (9th Cir. 1968)).

114. *Id.* at 1033.

115. *Id.*

116. *Id.* (emphasis added).

117. 471 U.S. 1 (1985).

118. *Id.* at 7 ("Whenever an officer restrains the freedom of a person to walk away, he has seized that person. . . . [T]here can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment.").

119. *Id.* at 7–8.

120. *Id.* at 11.

121. 475 U.S. 312 (1986).

decision as one interpreting the Eighth Amendment to determine the specific standard that should govern a post-conviction prisoner's claim brought under it.[122] In doing so, the Court rejected—with thin and dubious reasoning[123]—any argument that the Fourteenth Amendment's due process protections might apply, in addition to the Eighth Amendment's protections, to claims of force brought by post-conviction prisoners as lower courts had done. The Eighth Amendment, the Court held, is the "primary source of substantive protection to convicted prisoners in cases such as this one," and any Fourteenth Amendment protection would likely duplicate what the Eighth Amendment already proscribes.[124]

To support that conclusion, the Court relied on its 1952 decision in *Rochin v. California*,[125] a criminal case in which the defendant alleged investigating officers violated his due process rights by directing a hospital doctor to pump his stomach, which resulted in the recovery of two morphine pills for which he was prosecuted.[126] In discussing the bounds of the due process protections at issue, the Court noted that the constitutional prescriptions, while indefinite and vague, are not fixed or frozen in time.[127] Courts must instead evaluate them according to the values of both tradition and a progressive society.[128] But this was an easy case: forcing a person to undergo a stomach pump "is conduct that shocks the conscience" and "is bound to offend even hardened sensibilities."[129] The officers acted unconstitutionally, and therefore, the judgment of conviction on the basis of the morphine pills was reversed.[130]

In *Whitley*, however, the Court read *Rochin* to conclude that the only applicable standard for due process protections was *Rochin*'s "shocks the conscience" standard.[131] Thus, the Fourteenth Amendment could not *also* apply to force against post-conviction prisoners because it would duplicate the Eighth Amendment's protections: "It would indeed be surprising if, in the context of forceful prison security measures, 'conduct that shocks the conscience' or 'afford[s] brutality the cloak of law,' and so violates the Fourteenth Amendment were not also punishment [in violation of the Eighth Amendment]."[132] *Whitley* found that the Due Process Clause affords a post-conviction prisoner "no

122. *Id.* at 314.
123. *See infra* Section I.B.
124. *Whitley*, 475 U.S. at 327.
125. 342 U.S. 165 (1952).
126. *Id.* at 166–68.
127. *Id.* at 171.
128. *Id.* at 171–72.
129. *Id.* at 172.
130. *Id.* at 174.
131. Whitley v. Albers, 475 U.S. 312, 327 (1986).
132. *Id.* (quoting *Rochin*, 342 U.S. at 172–73); *see also id.* at 327 ("[I]n these circumstances the Due Process Clause affords respondent *no greater protection* than does the Cruel and Unusual Punishments Clause." (emphasis added)).

greater protection than does the Cruel and Unusual Punishments Clause."[133] The Court concluded by holding that the governing standard for force claims brought by post-conviction prisoners and in the context of a prison riot is "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm," borrowing from the Second Circuit's language in *Johnson*.[134]

The Court jumped back to police officers' use of force in noncarceral settings in 1989 with *Graham v. Connor*,[135] holding for the first time that the Fourth Amendment's protection from unreasonable seizures, not the Fourteenth Amendment's due process protections, governs a free citizen's claim of excessive force during an arrest or investigatory stop.[136] Chief Justice Rehnquist authored the majority opinion and, in doing so, explicitly addressed Judge Friendly's analysis in *Johnson v. Glick*.[137] Judge Friendly ignored, the Court stated, "the two most textually obvious sources of constitutional protection against physically abusive governmental conduct"—the Fourth and Eighth Amendments—and looked instead to substantive due process, articulating the factors on which the Second Circuit and many lower courts after relied to evaluate excessive force claims in varying contexts.[138]

But the Court then rejected the notion that a single standard or principle governs all force claims.[139] In the Court's view, the Fourth and Eighth Amendments are clearer textual sources for protections against official uses of force than the Fourteenth Amendment's due process language, despite the fact that neither the Fourth nor the Eighth Amendment mentions force expressly.[140] The governing standard, then, is the Fourth Amendment's "reasonableness" standard, which, as lower courts had discussed in the context of force claims in the preceding decades, "requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the

133. *Id.* at 327; *see also infra* Section I.B.

134. *Id.* at 320–21.

135. 490 U.S. 386 (1989).

136. *Id.* at 388; *see also id.* at 395 ("Today we make explicit what was implicit in *Garner*'s analysis, and hold that *all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach.").

137. *Id.* at 392–93; *see also supra* notes 106–16 and accompanying text (discussing Judge Friendly's analysis in *Johnson v. Glick*).

138. *Id.*

139. *Id.* at 393–94.

140. *Graham*, 490 U.S. at 395 ("Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims."); *see also supra* notes 58–60 and accompanying text (discussing the absence of an explicit mention of force in the Fourth and Eighth Amendments).

countervailing governmental interests at stake."[141] Critically, the inquiry is an objective one, "judged from the perspective of a reasonable officer on the scene" and "without regard to [the officer's] underlying intent or motivation."[142]

The Court settled the question of the shape of the force doctrine for post-conviction prisoners in *Whitley*, and decided in *Graham* the scope of the doctrine governing police officers' interactions with free people.[143] The Court then addressed pre-trial detainees in a footnote—those people who had progressed past the arrest, investigatory stop, or other "seizure" point, and so were beyond the reach of the Fourth Amendment, but were not yet convicted and sentenced and, thus, also beyond the reach of the Eighth Amendment.[144] Citing *Bell v. Wolfish*,[145] the Court noted, "[i]t is clear . . . that the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment."[146]

Readers of that footnote may have been surprised to learn that the reach of *Bell* to pre-trial detainees' force claims "[wa]s clear" at the time the Court decided *Graham*.[147] The 1979 *Bell* decision itself examined claims of unconstitutional *conditions* at a federal jail, such as overcrowded cells, prohibitions on the receipt of certain books and magazines, prohibitions on the receipt of packages and personal items from outside the jail, and the practice of strip-searches.[148] None of the plaintiffs raised any force challenges.[149] The *Graham* Court concluded that pre-trial detainees are not yet subject to formal punishment because they have not been convicted of a criminal offense.[150] Therefore, when a pre-trial detainee challenges an aspect of pre-trial detention that does not violate any express guarantee of the Constitution (such as the First or Fourth Amendment), the right at issue is the "right to be free from punishment," which the Court located within the right to due process.[151] "Absent a showing of an expressed intent to punish on the part of detention facility officials," whether a condition of pre-trial detention is constitutional

141. *Id.* at 396 (internal quotations omitted).

142. *Id.* at 396–97.

143. *Id.* at 395 n.10 ("After conviction, the Eighth Amendment 'serves as the primary source of substantive protection . . . in cases . . . where the deliberate use of force is challenged as excessive and unjustified.' Any protection that 'substantive due process' affords convicted prisoners against excessive force is, we have held, at best redundant of that provided by the Eighth Amendment." (quoting Whitley v. Albers, 475 U.S. 312, 327 (1986))).

144. *Id.*

145. 441 U.S. 520 (1979).

146. *Graham*, 490 U.S. at 395 n.10 (citing *Bell*, 441 U.S. at 535–39).

147. *Id.*

148. *Bell*, 441 U.S. at 526–27.

149. The *Bell* plaintiffs did challenge the practice of body cavity searches in the jail, which the Court analyzed under the Fourth Amendment's privacy framework, not under the theory that the searches constituted unlawful force or otherwise violated due process principles. *Id.* at 558.

150. *Graham*, 490 U.S. at 397–99.

151. *Bell*, 441 U.S. at 534–35.

"will turn on whether an alternative purpose to which the restriction may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned to it."[152] The *Graham* Court interpreted this holding to apply to force challenges as well as the sorts of condition challenges the *Bell* plaintiffs actually raised.[153]

The Court's expression of the force doctrine at this point generated confusion among lower courts. Some conflated the objective due process standard with the subjective Eighth Amendment standard.[154] In a pre-trial detainee's force challenge, for example, a panel of the Fifth Circuit stated that "[l]aw enforcement officers are within their rights to use objectively reasonable force to obtain compliance from prisoners," but it cited Eighth Amendment cases.[155]

Other lower federal courts continued to conflate the objective and subjective standards. A panel of the Eighth Circuit reasoned:

> [T]he Due Process Clause affords pretrial detainees at least as much protection as the Eighth Amendment provides to convicted prisoners. Therefore, if the use of force in this case would have violated the Eighth Amendment had the plaintiffs been prisoners, that conduct necessarily violated the plaintiffs' rights under the Fourteenth Amendment.[156]

Similarly, a panel of the Eleventh Circuit held:

> We analyze a pretrial detainee's claim of excessive force under the Fourteenth Amendment as if it were an excessive-force claim under the Eighth Amendment. A prison official's use of force against a pretrial detainee is excessive under the Fourteenth Amendment if it "shocks the

152. *Id.* at 538 (internal quotations omitted) (citing Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69 (1963)).

153. *Graham*, 490 U.S. at 396–97.

154. *See, e.g.*, Dawson v. Anderson Cnty., Tex., 566 F. Appx. 369, 370–71 (5th Cir. 2014).

155. *Id.* at 370.

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

> conscience," meaning that it is applied "maliciously and sadistically to cause harm."[157]

The Second Circuit agreed: "We have equated the standard used for excessive force claims brought by detainees under the Fourteenth Amendment with that used to analyze Eighth Amendment excessive force claims."[158]

Other courts not only conflated the claims but failed to identify or otherwise confused the plaintiff's status and the governing legal standard. A panel of the Fifth Circuit, for instance, correctly identified a plaintiff as a pretrial detainee but went on to evaluate the plaintiff's force claims under the Eighth Amendment.[159] A panel of the Tenth Circuit succinctly framed the task before lower courts on these sorts of claims:

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

157. Spaulding v. Poitier, 548 F. App'x 587, 593 (11th Cir. 2013) (quoting Fennell v. Gilstrap, 559 F.3d 1212, 1216 n.5 (11th Cir. 2009)).

158. DeBoe v. Du Bois, 503 F. App'x 85, 87 (2d Cir. 2012) (citing United States v. Walsh, 194 F.3d 37, 47–48 (2d Cir. 1999)); *see also* Husnik v. Engles, 495 F. App'x 719, 721 (7th Cir. 2012) ("It is true that '[t]he Fourteenth Amendment right to due process provides at least as much, and probably more, protection against punishment as does the Eighth Amendment's ban on cruel and unusual punishment.'" (alternation in original) (quoting Forrest v. Prine, 620 F.3d 739, 744 (7th Cir. 2010))).

159. Edwards v. Loggins, 476 F. App'x 325, 326–27 (5th Cir. 2012) ("Edwards is correct. At all relevant event times, Edwards was a pretrial detainee. As a pretrial detainee, Edwards's constitutional rights were derived from the Fourteenth Amendment. . . . [But] the standards . . . to measure the defendants' culpability and evaluate Edwards's claims were correct."); *see also* Wright v. Langford, 562 F. App'x 769, 772 (11th Cir. 2014) (per curiam) (describing plaintiff as a "state prisoner" but noting he asserted excessive force claims "based on a series of incidents that occurred at the Baldwin County Jail"); Toliver v. New York, 530 F. App'x 90, 92 n.1 (2d Cir. 2013) (noting "the record in this case is unclear, [and] Toliver may have been a pretrial detainee at Rikers[,]" not a post-conviction prisoner).

> protection before a probable cause hearing than after? All these questions remain very much in play.[160]

Such was the state of the excessive force doctrine until 2015 when the Court issued its opinion in *Kingsley*.[161] As stated above, Mr. Kingsley brought his claim under the Fourteenth Amendment's Due Process Clause.[162] On appeal to the Seventh Circuit after the jury returned a verdict in the defendants' favor, Mr. Kingsley challenged the instructions the district court provided to the jury at trial, contending they improperly instructed the jury to consider the defendants' subjective intent when evaluating their use of force.[163] He argued on appeal that the district court conflated the Eighth Amendment's subjective intent standard with the Fourteenth Amendment's objective standard and, thus, improperly required him to convince the jury that the defendants acted with reckless disregard for his safety akin to *Whitley*'s "maliciously and sadistically to cause harm" standard.[164] The specific instruction at issue told the jury Mr. Kingsley had to prove, among other elements, that the defendants "*knew* that using force presented a risk of harm to plaintiff, but they recklessly disregarded plaintiff's safety by failing to take reasonable measures to minimize the risk of harm to plaintiff."[165]

The appellate panel agreed that Mr. Kingsley's right to be free from excessive force derived from the Fourteenth Amendment's Due Process Clause rather than the Eighth Amendment due to his status as a pre-trial detainee.[166] The panel, however, affirmed the judgment on the ground that the intent instruction was a proper statement of the law.[167] Relying on the Court's decision in *Bell*, the Seventh Circuit determined the relevant inquiry was whether the challenged force amounted to "punishment."[168] For an act to be punitive, there must be some measure of intent: "[O]ur cases are clear that the existence of intent—at least recklessness—*is* a requirement in Fourteenth Amendment excessive force cases."[169] Therefore, Mr. Kingsley had to prove the defendants

160. Blackmon v. Sutton, 734 F.3d 1237, 1240 (10th Cir. 2013).

161. *See* Hudson v. McMillian, 503 U.S. 1, 7 (1992) (extending *Whitley*'s holding to all claims of excessive force brought by post-conviction prisoners, including claims that do not necessarily implicate prison discipline or a prison riot).

162. Kinglsey v. Hendrickson, 576 U.S. 389, 393 (2015).

163. *Id.* at 401.

164. *Id.*

165. *Id.* at 393 (emphasis added).

166. Kingsley v. Hendrickson, 744 F.3d 443, 461 (7th Cir. 2014).

167. *Id.* at 453 ("A faithful adherence to the case law that we have discussed precludes our accepting this contention [that the instruction should have allowed the jury to consider wholly objective factors going to intent]. . . . [O]ur cases are clear that the existence of intent—at least recklessness—*is* a requirement in Fourteenth Amendment excessive force cases."), *rev'd*, *Kingsley*, 576 U.S. 389.

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

169. *Id.* at 453.

acted with "an actual intent to violate [his] rights or reckless disregard for his rights."[170]

As discussed above, the Court, in an opinion written by Justice Breyer, reversed the Seventh Circuit and held that the relevant intent standard[171] is "solely an objective one."[172] A plaintiff like Mr. Kingsley, who had been charged with but not yet convicted of a crime must prove only "that the force purposely or knowingly used against him was objectively unreasonable."[173] They do not, in contrast to the district court's instructions to the jury in Mr. Kingsley's case, have to prove any sort of purposeful or reckless intent on the part of the specific named defendant. The inquiry is fact-dependent, must be made from the perspective of a reasonable officer on the scene, and must account for the interests of officials in managing the facility.[174]

So stands the constitutional doctrine governing government officials' uses of force. Tracing the meandering path on which the doctrine emerged, it is now clear that the Fourth Amendment's protection against unreasonable seizures protects free people from "objectively unreasonable" uses of force during arrests, investigatory stops, and other "seizures" that stop short of detention.[175] Due process protections govern officials' uses of force against people who have been arrested and charged with a crime but are not yet convicted.[176] Their claims are also evaluated according to an objective reasonableness standard.[177] And the Eighth Amendment's protection against cruel and unusual punishments governs force claims raised by people who have been convicted of a crime and sentenced to a term of imprisonment.[178] Their claims are governed by the subjective "malicious and sadistic for the purpose of causing harm" standard.[179] Open questions remain, including how to evaluate the force claims of people detained on probation violations, for example.[180]

170. *Id.* at 451 (citations and internal quotations omitted).

171. The Court acknowledged there are actually two separate state-of-mind questions in an excessive force case like Mr. Kingsley's. Kinglsey v. Hendrickson, 576 U.S. 389, 395–97 (2015); *see supra* note 34 and accompanying text.

172. *Kingsley*, 576 U.S. at 397.

173. *Id.* at 396–97.

174. *See supra* note 37 and accompanying text.

175. *See, e.g.*, Graham v. Connor, 490 U.S. 386, 388 (1989).

176. Peterson v. Heinen, 89 F.4th 628, 634–35 (8th Cir. 2023).

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* ("While alleged probation violators are afforded certain protections under the Due Process Clause . . . neither we nor the Supreme Court have afforded alleged probation violators 'a substantive liberty interest' to be free from excessive force under the Fourteenth Amendment while detained . . . . We decline 'to expand the concept of substantive due process' unnecessarily, . . . as the Eighth Amendment provides the 'explicit textual source of constitutional protection' against excessive force applied to an individual incarcerated on an unadjudicated probation violation . . . ." (citations omitted)).

The force doctrine, as it has evolved, is thin as compared to other areas of constitutional law.[181] What doctrine there is, is riddled with leaps in reasoning and holdings that either limit or stretch the law in ways that do not stand up to scrutiny, as the next section discusses.

B. *Limits and Criticism*

Scholars have identified the limits and discussed their criticisms of the force doctrine from an array of perspectives for some time, most of which are beyond the scope of this Article.[182] For the purposes of this Article, the pertinent limits and criticisms center on the internal inconsistencies of the doctrine as applied to force in carceral settings. These limits and criticisms begin with the Court's textual justification for treating force differently depending on the status of its target and then pull back to focus more broadly

181. Several legal scholars have criticized the arguable shallowness of the Court's excessive force doctrine, particularly with respect to its application to police officers' uses of force, though the same could be said for the force doctrine as applied to carceral settings, as this Article examines. *See, e.g.*, Rachel A. Harmon, *When Is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1119 (2008) ("The Supreme Court's Fourth Amendment doctrine regulating the use of force by police officers is deeply impoverished. Although lower courts frequently rely on this doctrine in civil and criminal cases alleging excessive force by police officers, the Court's standard is indeterminate and undertheorized, particularly as applied to nondeadly force."); William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1043–44 n.93 ("The law of police use of nondeadly force consists of the requirement that the force be constitutionally reasonable under all the circumstances . . . One searches in vain for any body of case law that gives this standard some content.").

182. For a recent sampling of scholarship, see generally Osagie K. Obasogie & Anna Zaret, *Plainly Incompetent: How Qualified Immunity Became an Exculpatory Doctrine of Police Excessive Force*, 170 U. PA. L. REV. 407 (2022) (explaining how qualified immunity has evolved to prevent civil liability for police officers who use excessive force); Jesse Chang, Note, *Who Is the Reasonable Police Officer? A Localized Solution to a Nationwide Problem*, 122 COLUM. L. REV. 87 (2022) (highlighting the difficulty of applying the reasonable police officer analysis and the deference given to police officers as a result); Alexander J. Lindvall, *The Jury's Role in Excessive-Force Cases*, 71 U. KAN. L. REV. 77 (2022) (criticizing the use of juries to determine whether excessive force, a constitutional violation, has occurred); Christiana Prater-Lee, Note, *Reformulating* Graham v. Connor*'s Excessive Force Test to ADApt for Individuals with Disabilities*, 47 AM. J.L. & MED. 477 (2021) (arguing that the test for excessive force needs to account for individuals with disabilities); Mitch Zamoff, *Determining the Perspective of a Reasonable Police Officer: An Evidence-Based Proposal*, 65 VILL. L. REV. 585 (2020) (criticizing the current excessive force jurisprudence and proposing the addition of "evidentiary rigor" to excessive force decisions); Latasha M. James, Comment, *Excessive Force: A Feasible Proximate Cause Approach*, 54 U. RICH. L. REV. 605 (2020) (proposing a framework that uses proximate cause in the objective analysis of excessive force cases); Osagie K. Obasogie & Zachary Newman, *The Futile Fourth Amendment: Understanding Police Excessive Force Doctrine Through an Empirical Assessment of* Graham v. Connor, 112 NW. U. L. REV. 1465 (2018) (arguing that narrowing the excessive force claims analysis to the Fourth Amendment "has contributed to the perpetuation of police use of excessive force" in communities of color); Donald F. Tibbs & Tyron P. Woods, *Requiem for Laquan McDonald: Policing as Punishment and Abolishing Reasonable Suspicion*, 89 TEMP. L. REV. 763, 764–65 (2017) (proposing that "reasonable suspicion" should be declared unconstitutional and that doing so would "significantly recalibrate the relations of force" to keep policing within the confines of the Constitution); Daria Roithmayr, *The Dynamics of Excessive Force*, 2016 U. CHI. LEGAL F. 407 (2016) (explaining that surges of use of excessive force can happen in any police department, not just those with "'bad apple' officers").

on the strict definition of "punishment" that underlies the Court's interpretation of the Constitution's application to post-conviction prisoners. The results of the *Kingsley* study, discussed in Part II, shine a new and focused light on these criticisms, begging enduring questions that this Article then revisits and centers in Part III: Do post-conviction prisoners somehow *deserve* greater brutality—that is, the prison penalty—than their pre-conviction counterparts? Where is the line between an acceptable and an unacceptable level of corporal state violence in America's prisons?

To begin, as discussed above, the Court purports to rely on constitutional text to justify treating force differently depending on the status of its target. In *Graham v. Connor*, the Court rejected the *Johnson v. Glick* view that a single standard—substantive due process—governs all claims of excessive force because, according to the Court, the Fourth and Eighth Amendments provide the "two most textually obvious sources of constitutional protections against physically abusive government conduct."[183] The Court criticized lower federal courts for "indiscriminately" applying the substantive due process standard to all excessive force claims "without considering whether the particular application of force might implicate a more specific constitutional right governed by a different standard."[184]

At best, this is a strained reading of the relevant constitutional text. The Fourth Amendment's text protects "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures."[185] The Eighth Amendment, in relevant part, reads, "nor cruel and unusual punishments inflicted."[186] Nothing in the text of those provisions suggests that they apply to applications of physical force by government officials more or less than the Fourteenth Amendment's proscription against "depriv[ing] any person of life, liberty, or property, without due process of law."[187] Each provision requires interpretation to conclude they govern uses of physical force. The conclusion that such an interpretation is any more "obvious" from the text of the Fourth or Eighth Amendment than the text of the Fourteenth is dubious.

The Court's strained textual conclusion in *Graham* led to a second dubious conclusion in *Whitley*. Recall *Rochin v. California*, the case on which the Court based its conclusion that post-conviction prisoners have no express due process protections from excessive force.[188] Justice O'Connor, writing for the *Whitley* majority, held that the Eighth Amendment is the "primary source of substantive

183. Graham v. Connor, 490 U.S. 386, 392–93 (1989).

184. *Id.* at 393.

185. U.S. CONST. amend. IV.

186. *Id.* amend. VIII.

187. *Id.* amend. XIV, § 1.

188. *See* Whitley v. Albers, 475 U.S. 312, 327 (1986); *see also supra* notes 125–30 and accompanying text (discussing *Rochin v. California*).

protection to convicted prisoners" and that any additional substantive due process protection would be merely duplicative.[189] Therefore, the governing standard for post-conviction prisoners' force claims derives only from the Eighth Amendment.[190]

Again, the Court's interpretation of its own holding in *Rochin* is strained. In *Rochin*, discussed above, the defendant challenged the government's introduction into evidence of two morphine pills obtained through an involuntary stomach-pump.[191] The Court was tasked with determining whether such an act by the government violated the defendant's due process rights. To do so, the Court began by discussing the "vague contours of the Due Process Clause," which necessitate judicial interpretation.[192] Judges, however, should not rely on their own preferences or private notions but should look rather to "considerations deeply rooted in reason and in the compelling traditions of the legal profession."[193] Such considerations are not fixed in time and, in fact, evolve according to "the needs both of continuity and of change in a progressive society."[194]

The facts of Mr. Rochin's case, however, were so egregious that the Court did not *need* to resort to a bigger exercise in judicial interpretation of due process principles derived both from continuity and change in a progressive society. Rather, law enforcement's conduct in forcing Mr. Rochin to undergo a stomach-pumping procedure "[was] conduct that shock[ed] the conscience."[195] Their conduct was "bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation."[196] In other words, this was not a close call for the *Rochin* Court. Other cases, however, presenting different, less egregious facts may demand a closer, more nuanced due process analysis that accounts for the careful considerations the Court identified above.

But in *Whitley*, the Court interpreted *Rochin* to stand for the proposition that a person's due process rights are violated *only* where the challenged conduct shocks the conscience.[197] The majority in *Whitley* did not acknowledge the careful analysis and balancing the majority in *Rochin* identified were necessary to define the "vague contours" of the Due Process Clause,[198] nor did the majority in *Whitley* mention the importance of basing that interpretation on "the needs

189. *Id.*
190. *Id.*
191. Rochin v. California, 342 U.S. 165, 166–67 (1952).
192. *Id.* at 170.
193. *Id.* at 170–71.
194. *Id.* at 172.
195. *Id.*
196. *Id.*
197. Whitley v. Albers, 475 U.S. 312, 327 (1986).
198. *Rochin*, 342 U.S. at 170.

both of continuity and of change in a progressive society."[199] Instead, the majority in *Whitley* read *Rochin* exceedingly narrowly, seizing its "shocks the conscience" language to conclude that any substantive due process protection a prisoner might claim is duplicative of their Eighth Amendment protections; therefore, the Eighth Amendment—and the Eighth Amendment alone—governs post-conviction prisoners' force claims.[200] Again, the conclusion is dubious.

One strained conclusion begets another, which begets another. The Court's strict and narrow holding in *Graham* led to its strict and narrow holding in *Whitley*, which interplays with its other strict and narrow interpretations of the Eighth Amendment's proscription on cruel and unusual punishments. All these cases, in turn, limit the Eighth Amendment doctrine, from challenges to uses of force to challenges to conditions of confinement, in ways that make it exceptionally difficult for post-conviction prisoners to invoke their constitutional rights. By adopting a purportedly originalist view of the Eighth Amendment and, specifically, the term "punishment," the Court has limited the provision's application to formal, legislatively approved, judicially imposed criminal punishments.[201] Accordingly, the Eighth Amendment does not protect, for example, corporal punishment inflicted on a school child. Nor does it protect a pre-trial detainee, as discussed herein. Neither is subject to a formal, legislatively approved, judicially imposed sentence.

Such an originalist view of the Eighth Amendment may have been an acceptable starting place, but the Court has narrowed the provision's application even further, finding that the *methods* by which an executive official carries out or effectuates the formal, legislatively approved, judicially sanctioned sentence are generally not punishment and, therefore, not governed by the Eighth Amendment.[202] Only where the specific methods of punishment, such as the treatment of post-conviction prisoners by executive-branch prison officials, are carried out *knowingly* will the Eighth Amendment's protections apply[203]: "[O]nly the unnecessary *and wanton* infliction of pain implicates the Eighth Amendment."[204] Whether a particular act is wanton does not depend on the effect of the act on the prisoner but rather on the circumstances facing the official.[205] Hence, the "knowing or reckless" standard has governed post-conviction prisoners' force claims since, leading to the differential treatment of

199. *Id.* at 172; *Whitley*, 475 U.S. at 327.

200. *Whitley*, 475 U.S. at 327.

201. *See, e.g.*, Wilson v. Seiter, 501 U.S. 294, 300–01 (1991); Ingraham v. Wright, 430 U.S. 651, 668 (1977); Weems v. United States, 217 U.S. 349, 371–73 (1910); *In re* Kemmler, 136 U.S. 436, 446–47 (1890).

202. *See, e.g.*, *Wilson*, 501 U.S. at 294; Estelle v. Gamble, 429 U.S. 97, 102–03 (1976).

203. *Wilson*, 501 U.S. at 294.

204. *Id.* at 297 (citing *Estelle*, 429 U.S. at 104).

205. *Id.* at 303.

pre-trial detainees' and post-conviction prisoners' force claims that the *Kingsley* study examines in the next part before returning to these criticisms of the doctrine in light of the study's findings in Part III.

II. THE *KINGSLEY* STUDY

Incarcerated litigants, whether pre-trial detainees or post-conviction prisoners, face significant obstacles to advancing their civil claims in federal courts. From the Prison Litigation Reform Act of 1995,[206] to the substantive legal standards within the overall prison law doctrine,[207] to the practical challenges of litigating a claim while incarcerated,[208] to the risk of retaliation by prison staff,[209] to the sweeping deference federal courts afford to prison officials defending such claims,[210] the chances of ultimate success for incarcerated plaintiffs are low.[211]

Kingsley has upset these odds in certain respects. This part presents the results of the first empirical study of *Kingsley*'s impact on the force doctrine with respect to claims brought by pre-trial detainees and post-conviction prisoners. The part begins with a discussion of the study's dataset and methodology, followed by a discussion of the primary findings. The part concludes with a discussion of the study's limitations, caveats, and areas for further inquiry.

As a threshold matter, I approached this study from an exploratory perspective. While I was interested in testing the predictions of *Kingsley*'s impact, I held no preconceived notions or hypothesis as to what the data would reveal. I coded the elements of the data that I believed may yield insights worth analyzing. Some did, and some did not.

The analysis ultimately reveals three statistically significant results. First, the total number of relevant cases is consistent before and after *Kingsley*, but the distribution of plaintiffs has shifted since *Kingsley*'s issuance. Second, both pre-trial and post-conviction plaintiffs seem to have greater access to counsel since *Kingsley*. And third, the ultimate case outcomes now favor pre-trial detainees more than they did before *Kingsley*. Every other measure appears to remain quite

206. Pub. L. No. 104-134, 110 Stat. 1321–66 (1996) (codified as amended in in scattered sections of 11, 18, 28, 42 U.S.C.).

207. *See generally* Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555 (2003) [hereinafter Schlanger, *Inmate Litigation*] (arguing that the use of the Prison Litigation Reform Act as a model for broader litigation reforms should proceed with caution).

208. *Id.* at 1605–09.

209. *Id.* at 1578.

210. *See generally* Jefferis, *Carceral Deference*, *supra* note 3 (detailing the origins of carceral deference on issues concerning the legality of prison conditions); Danielle C. Jefferis, *Carceral Intent*, 27 MICH. J. RACE & L. 323 (2022) (arguing that carceral effect should be the focus rather than carceral intent in order to reduce the harms of incarceration).

211. Schlanger, *Inmate Litigation*, *supra* note 207, at 1621 ("In recent years, inmates have won only fifteen percent or fewer of their federal civil rights trials, a very low rate.").

static, including the ultimate success rates of post-conviction prisoners, which are significantly low.

A. *Methodology*

The Court's decision in *Kingsley* underscored that the governing legal standard for a state official's use of force is determined solely by the status of the victim of the force.[212] To measure whether *Kingsley* has had any impact on the force doctrine for incarcerated litigants, therefore, I compiled two datasets: (1) appellate cases involving force claims brought by pre-trial detainees, and (2) appellate cases involving force claims brought by post-conviction prisoners. For each dataset, I gathered cases brought in a random three-year period before *Kingsley* (2012 to 2014) and a random three-year period after *Kingsley* (2021 to 2023).

To identify responsive cases and build the dataset, I ran a series of searches on Westlaw.[213] Westlaw's algorithmic search technology meant that multiple

212. Kingsley v. Hendrickson, 576 U.S. 340, 401–02 (2015).

213. For the "Before *Kingsley*" cases, the searches were:

> 1. [adv: "excessive force /p (prison! or jail or detain!)], then limited to federal circuit court opinions decided in 2012, 2013, and 2014, which yielded 263 total cases.
>
> 2. [adv: "excessive force"], then search within results "prison! jail detain!", then limited to federal circuit court opinions decided in 2012, 2013, and 2014, which yielded 292 total cases.
>
> 3. citing references for *Whitley v. Albers*, then limited to federal circuit court opinions decided in 2012, 2013, and 2014, which yielded 91 total cases.
>
> 4. citing references for *Hudson v. McMillian*, then limited to federal circuit court opinions decided in 2012, 2013, and 2014, which yielded 134 total cases.

Those four searches yielded a combined dataset of 499 unique cases. For the "After *Kingsley*" cases, the searches were:

> 1. [adv: "excessive force /p (prison! or jail or detain!)], then limited to federal circuit court opinions decided in 2021, 2022, and 2023, which yielded 241 total cases.
>
> 2. [adv: "excessive force"], then search within results "prison! jail detain!", then limited to federal circuit court opinions decided in 2021, 2022, and 2023, which yielded 267 total cases.
>
> 3. citing references for Whitley v. Albers, then limited to federal circuit court opinions decided in 2021, 2022, and 2023 which yielded 67 total cases.
>
> 4. citing references for Hudson v. McMillian, then limited to federal circuit court opinions decided in 2021, 2022, and 2023, which yielded 87 total cases.
>
> 5. citing references for *Kingsley v. Hendrickson*, then limited to federal circuit court opinions decided in 2021, 2022, and 2023, which yielded 148 total cases.

Those five searches yielded a combined dataset of 522 unique cases.

searches were necessary to ensure sufficient coverage. I then hand-coded each case according to the status of the plaintiff at the time the alleged violation occurred;[214] the nature of the claim(s);[215] whether the appellant was the plaintiff or defendant in the court below; whether the plaintiff litigated their case pro se, with a civil rights attorney, or with generalist counsel;[216] the procedural posture on which the appeal was taken;[217] the outcome of the appeal;[218] and the overall disposition/ultimate outcome of the case.[219]

To further refine the data to the cases relevant to this study, I then excluded all cases involving force challenges in noncarceral settings and those where the plaintiff's status at the time the claim arose was an arrestee, a probation violator, or a civil detainee. As a result, the relevant case totals are 201 "Before *Kingsley*" cases and 203 "After *Kingsley*" cases.

I then input the relevant raw case data[220] into either 2x3 or 2x5 contingency tables,[221] with the column variables being "Before *Kingsley*" and "After *Kingsley*," as depicted below in Sections II.B.1 and II.B.2. I used the chi-squared test of independence with the Yates Correction[222] to measure the statistical significance between those two variables against a significance level (or "alpha") of 0.05. The chi-squared test of independence is a statistical method that evaluates whether two categorical variables are independent among a dataset or whether there is a relationship among the two (that is, whether one variable "says something" about the other variable).[223] For example, a chi-squared test

214. "1 – Arrestee," "2 – Pre-Trial Detainee," "3 – Post-Conviction Prisoner," "4 – Probation Violator," or "5 – Civil Detainee." I also coded cases that arose in noncarceral settings "NA."

215. "1 – Medical Care," "2 – Excessive Force," "3 – Conditions of Confinement/Failure to Protect," "4 – Retaliation/Disability/Etc.," and "NA – Not a Detention Case."

216. "1 – Pro Se," "2 – Civil Rights/Specialist Counsel," or "3 – Other Firm/Generalist Counsel."

217. "1 – Motion to Dismiss," "2 – Summary Judgment," "3 – Post Verdict," or "4 – Something Else."

218. "1 – Reversed/Vacated and Remanded," "2 – Affirmed or Appeal Dismissed, Case Terminated," "3 – Affirmed in Part/Reversed in Part," "4 – Affirmed and Remanded," or "5 – Other."

219. "1 – Judgment for Plaintiff," "2 – Judgment for Defendant or Case Dismissed," "3 – Settlement and Dismissal," "4 – Something Else," and "5 – Pending." For this stage of analysis, I consulted the district court docket post-appeal via PACER and Bloomberg Law, reviewing docket entries related to the ultimate case outcome/termination up to and including November 22, 2023.

220. By "relevant raw case data," I mean the data from the case brought by either pre-trial detainees or post-conviction prisoners with at least one force claim.

221. All relevant data, code, and figures for this Article's study are available through UNC's open data repository at Danielle C. Jefferis, *Data & Code for Danielle C. Jefferis, The Prison Penalty: Use of Force Litigation After* Kingsley v. Hendrickson*, 103 N.C. L. Rev. 685 (2025)*, UNC DATAVERSE (Mar. 27, 2025), https://doi.org/10.15139/S3/7PHDCU [https://perma.cc/7ZCS-ZWXY] [hereinafter Jefferis, *Data & Code*].

222. Because the value of several of the cells was fewer than five, I applied the Yates Correction to account for potentially biased calculations. *See* JULIEN I.E. HOFFMAN, BIOSTATISTICS FOR MEDICAL & BIOMEDICAL PRACTITIONERS 183–217 (2015).

223. *See, e.g.*, Daniel B. Listwa & Lydia K. Fuller, Note, *Constraint Through Independence*, 129 YALE L.J. 548, 593–94 (2019).

would provide a statistical measure on whether *Kingsley*'s objective standard is related to—or says something about—the ultimate disposition of a case since the comparison is between cases that came before *Kingsley* and those that came after.[224] This statistical test serves as a valuable tool for assessing the significance of observed differences in this study's sample of cases. By analyzing the data using the chi-squared test, one can determine if the variations identified among these cases are likely to be representative of the entire population of cases. In essence, this test helps to draw conclusions about whether the patterns and associations illustrated below hold true beyond the dataset of this study and are generalizable to all cases of the same type.

B. *Findings*

This section first compares certain measures for pre-trial detainees' force cases before and after *Kingsley* and then compares those same measures for post-conviction prisoners' force cases before and after *Kingsley*. The purpose of these comparisons is to assess the extent to which *Kingsley* has impacted the force doctrine for both groups of incarcerated plaintiffs. The final part of this section compares the pre-trial detainees' cases against post-conviction prisoners' cases after *Kingsley* to examine the current state of affairs for both groups of litigants.

As an initial matter, it is rather remarkable to note that the raw totals of relevant cases in the periods before and after *Kingsley* are nearly identical. However, as the below table shows, the distribution between pre-trial detainee cases and post-conviction prisoner cases changed:

Table 1. Status of Plaintiff

	Before *Kingsley*		**After *Kingsley***	
Pre-Trial Detainee	52	26%	74	36%
Post-Conviction Prisoner	149	74%	129	64%
Total	**201**		**203**	

This is the first of three statistically significant findings in the data. The statistical significance here suggests that *Kingsley* has had an impact on how many appeals are taken from pre-trial detainees' force challenges versus post-conviction prisoners' challenges. The latter category is still greater, but to a lesser degree. In other words, more pre-trial detainees litigated force challenges

224. *See, e.g.*, *Chi-Square Independence Test—What and Why?*, SPSS TUTORIALS, https://www.spss-tutorials.com/chi-square-independence-test/ [https://perma.cc/HV83-EYQ6 (staff-uploaded archive)].

through appeal after *Kingsley* than they did before *Kingsley*, but at the same time fewer post-conviction prisoners litigated their cases through appeal after *Kingsley*. Recall that these data mark cases that were decided by a federal appellate court within the relevant time period. One might expect an increase in the number of appeals for pre-trial detainees after *Kingsley*, given that the decision disrupted the doctrine and created greater uncertainty in the application of the doctrine, and that does seem to be the case. But fewer appeals were taken from post-conviction prisoners' force cases.

There are a few further observations worth noting here. First, the number of post-conviction prisoners' force challenges has remained disproportionately higher than pre-trial detainees' force challenges, even after *Kingsley* (149 versus 52 before *Kingsley*, 129 versus 74 after *Kingsley*). There is a myriad of reasons why this might be the case, and a full exploration of them is beyond the scope of this Article. However, one might consider the fact that post-conviction prisoners are generally less transient than pre-trial detainees, meaning that they remain incarcerated for longer periods, often in the same prison, as compared to their pre-trial counterparts.[225] This relative stability, coupled with the fact that they are not awaiting (and likely not preparing for) a criminal trial, may mean more capacity to pursue civil litigation. The prison population is also higher than the jail population by nearly twofold,[226] meaning that there simply are more potential victims of state violence in prisons than in jails. A conclusion one should hesitate to draw, however, is that prisons and jails are any more or less violent when compared to each other. That consideration is explored further below.[227]

Another explanation for the shifting distribution of plaintiffs before and after *Kingsley* may be in the shifting rates of plaintiffs' access to counsel before and after *Kingsley*. To measure access to counsel, I coded, for each case, whether the plaintiff was acting pro se or was represented by counsel. I then further divided the counseled cases into two categories: cases where counsel was a civil rights specialist, as identified via their firm profile and/or firm practice areas, and cases where counsel was more fairly a generalist (or not a self-identified civil rights specialist). The data are as follows:

225. *See, e.g.*, William J. Rich, *The Path of Mentally Ill Offenders*, 36 FORDHAM URB. L.J. 89, 100–01 (2009) (describing jail confinement as transient in nature).

226. *See generally* Sawyer & Wagner, *supra* note 49 (noting approximately 509,000 pre-trial detainees among local and federal jails and more than 1.2 million post-conviction prisoners among state and federal prisons).

227. *See infra* Part III.

Table 2.A. Plaintiff's Representation—Pre-Trial Detainees

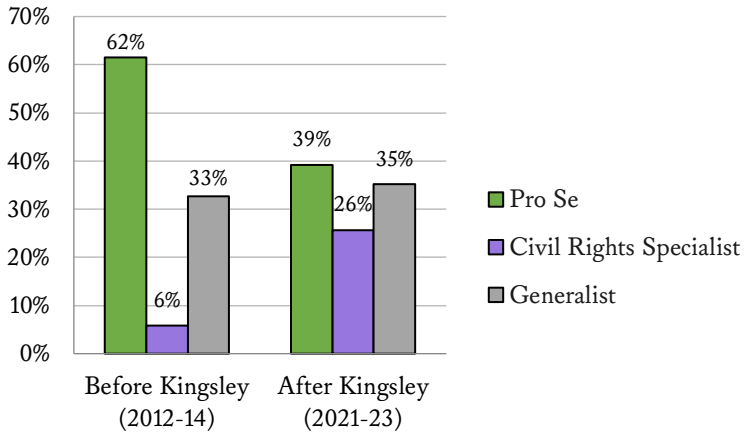
	Before *Kingsley*		After *Kingsley*	
Pro Se	32	62%	29	39%
Civil Rights Specialist	3	6%	19	26%
Generalist	17	33%	26	35%
Total	**52**		**74**	

Table 2.B. Plaintiff's Representation—Post-Conviction Prisoners

	Before *Kingsley*		After *Kingsley*	
Pro Se	117	79%	86	67%
Civil Rights Specialist	8	5%	22	17%
Generalist	24	16%	21	16%
Total	**149**		**129**	

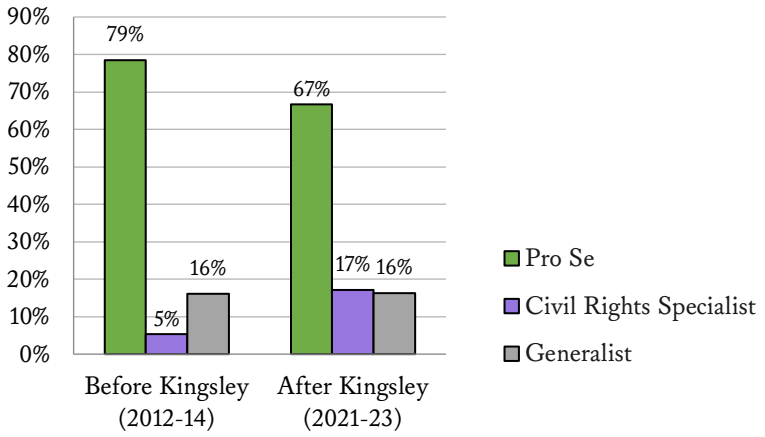
The percentage distributions are illustrated in the below figures:

Figure 1.A. Plaintiff's Representation—Pre-Trial Detainees[228]



228. $p = 0.0056$ ($\alpha = 0.05$, $n = 126$).

Figure 1.B. Plaintiff's Representation—Post-Conviction Prisoners[229]



This data reveals a statistically significant increase in access to counsel for both pre-trial detainees and post-conviction prisoners after *Kingsley*. This observation is most striking for pre-trial detainees where, prior to *Kingsley* 62% of plaintiffs proceeded pro se compared to 39% after *Kingsley*. The rate of civil rights specialists representing pre-trial detainees rose from just 6% to 26% after *Kingsley*. One explanation for this association between pre-trial detainees' access to counsel before and after *Kingsley* may be the plaintiffs' bar's assessment in the greater likelihood of success on force claims after *Kingsley*, which may also partially explain the increased rates of pre-trial detainees' appeals.

It is worth noting as well that post-conviction prisoners enjoyed greater access to counsel after *Kingsley*, with more civil rights specialists representing these plaintiffs than before *Kingsley* (compare 5% to 17%). An explanation for this change may be the prisoners' rights bar's efforts to extend *Kingsley*'s holding to post-conviction prisoners' claims, though that assumption is based on the author's anecdotal observations and discussions with lawyers practicing in this area.

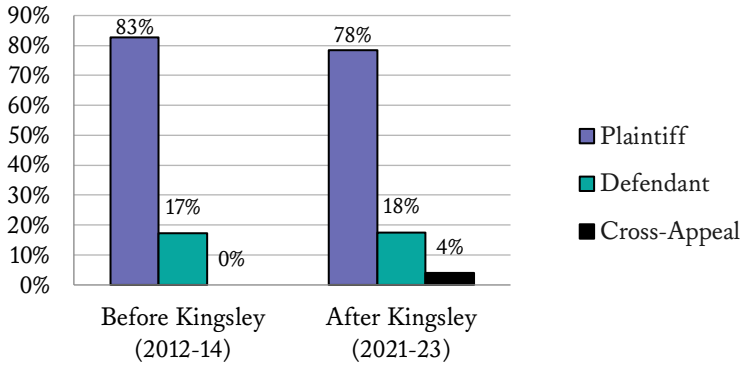
1. Pre-Trial Detainees

This section presents the analysis for each studied dataset, several of which yielded no statistically significant results. Nevertheless, the data are useful to discuss, if only for demonstrating the *lack* of significance. In other words, in an area in which change was predicted, the absence of change is worth noting and considering.

229. $p = 0.0066$ ($\alpha = 0.05$, $n = 278$).

The first figure compared the rates at which the plaintiff versus the defendant was the appealing party in pre-trial detainees' force cases before and after *Kingsley*.[230] This comparison yielded no statistically significant results, suggesting that *Kingsley* has not had a meaningful impact on the rates at which plaintiffs appeal district court decisions compared to defendants. Indeed, the rates at which the plaintiff was the appealing party, as opposed to the defendant, is nearly identical before and after *Kingsley* (pre-trial detainee plaintiffs appealing in 83% of cases before *Kingsley*; pre-trial detainee plaintiffs appealing in 82% of cases after *Kingsley*). This is an important dataset for analysis because it offers insights into the rates at which plaintiffs obtain adverse outcomes in district court, which has remained quite consistent despite *Kingsley*.[231]

Figure 2. Appealing Party—Pre-Trial Detainees[232]



The next dataset compared the posture on appeal for pre-trial detainees' cases before and after *Kingsley*. In other words, was the appeal taken from a decision on a motion to dismiss, a motion for summary judgment, after a verdict, or via some other procedural vehicle? This comparison also yielded no statistically significant results,[233] again suggesting that *Kingsley* has not had a meaningful impact on the point at which district courts are issuing decisions on dispositive motions in pre-trial detainees' force cases.

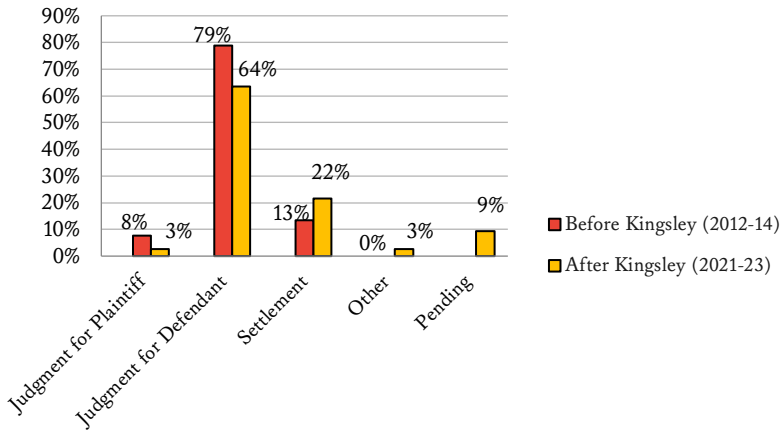
The next dataset compared outcomes on appeal for pre-trial detainees' force cases before and after *Kingsley*, looking to whether the judgment on appeal

230. *See* Jefferis, *Data & Code*, *supra* note 221.
231. *But see* Section II.C.
232. $p = 0.238$ ($\alpha = 0.05$, $n = 126$).
233. *See* Jefferis, *Data & Code*, *supra* note 221 ($p = 0.09$ ($\alpha = 0.05$, $n = 126$)).

was reversed and the case remanded, affirmed and the case dismissed, affirmed in part and reversed in part, affirmed and the case proceeded, or appeal dismissed. Again, this comparison yielded no statistically significant results.[234] Similar to the comparisons above, the distribution is quite consistent before and after *Kingsley*.

The final dataset for pre-trial detainees compared ultimate outcomes in pre-trial detainees' force claims before and after *Kingsley*. Here, there *is* a statistically significant result with this comparison, suggesting that *Kingsley* has had a meaningful impact on overall case outcomes. Notably, district courts are entering judgments for the defendants in fewer cases since *Kingsley* (62% compared to 79% before *Kingsley*). Slightly more cases are resulting in settlements since *Kingsley* as well, suggesting that litigants—particularly defendants—see greater risk in defending force cases after *Kingsley* than they perhaps did before (22% of cases after *Kingsley* have settled, compared to 13% of cases before *Kingsley*). The seven pending cases may yield even further insights into this analysis once they reach a final determination.

Figure 3. Ultimate Case Outcome—Pre-Trial Detainees[235]



To summarize the above findings with respect to pre-trial detainees' claims before and after *Kingsley*, the data show statistically meaningful results only when comparing the ultimate case outcomes. The data suggest that *Kingsley* has had an impact that helps pre-trial detainees' force claims and leads to more favorable results than did comparable claims brought before *Kingsley*.

234. *See* Jefferis, *Data & Code*, *supra* note 221 ($p = 0.9$ ($\alpha = 0.05$, $n = 126$)).

235. $p = 0.022$ ($\alpha = 0.05$, $n = 126$).

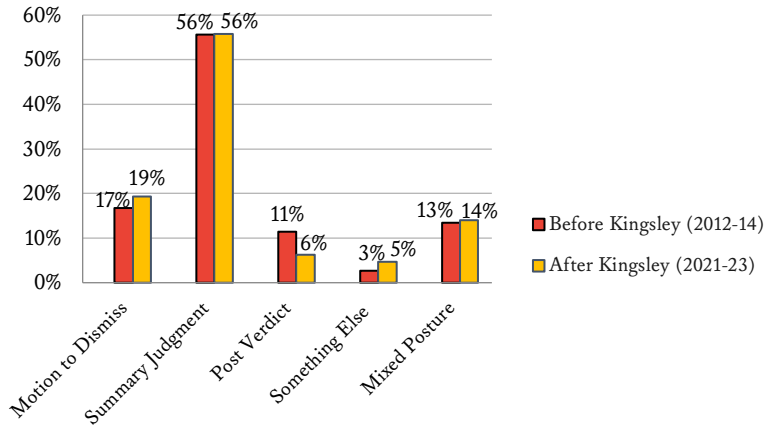
2. Post-Conviction Prisoners

This section mirrors the previous section but for post-conviction prisoners' force cases, with a similar distribution of statistically insignificant versus significant findings.

The first dataset compared the rates at which the plaintiff compared to the defendant was the appealing party in post-conviction prisoners' force cases before and after *Kingsley*. As with pre-trial detainees, this comparison yielded no statistically significant results,[236] suggesting that *Kingsley* has not had a meaningful impact on the rates at which plaintiffs appeal district court decisions as opposed to the rates at which defendants appeal. Similar to the above, this is an important dataset for analysis because it yields insights into the rates at which plaintiffs obtain adverse outcomes in the district court.

The next figure compares the posture on appeal for post-conviction prisoners' cases before and after *Kingsley*. Although the comparison is not statistically significant, one finding worth noting with this comparison is the rate at which appeals have been taken after a verdict. Since *Kingsley*, fewer parties have pursued appeals after verdicts than they did before *Kingsley*.

Figure 4. Procedural Posture on Appeal—Post-Conviction Prisoners[237]



The next dataset compared the outcomes on appeal for post-conviction prisoners' force cases before and after *Kingsley*. Again, there was no statistically

236. *See* Jefferis, *Data & Code*, *supra* note 221 ($p = 0.599$ ($\alpha = 0.05$, $n = 278$)).

237. $p = 0.655$ ($\alpha = 0.05$, $n = 278$).

significant difference.[238] In fact, the p-value for this comparison is 1; the results are nearly identical.[239]

The final dataset compared the ultimate case outcome for post-conviction prisoners' claims of excessive force before and after *Kingsley*. As with the other comparisons in this category, this comparison yielded no statistically significant results,[240] again suggesting that *Kingsley* has had no meaningful impact on post-conviction prisoners' claims of excessive force. As with the pre-trial detainees' pending cases, the six pending cases may yield even further insights into this analysis once they reach a final determination.

3. Overall Comparison

This section also mirrors the two above but in the present, comparing pre-trial detainees' force cases with post-conviction prisoners' force cases after *Kingsley* was decided to assess the ways in which courts are treating each group of litigants.

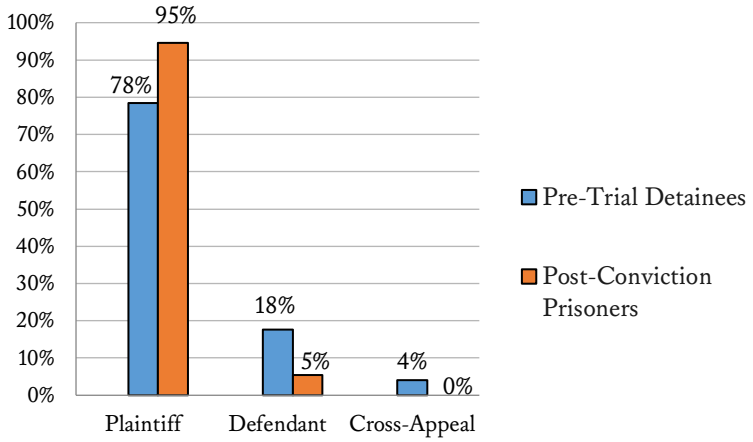
The first table below compares the rates at which the plaintiff versus the defendant was the appealing party. This comparison yields a statistically significant result, suggesting that district courts treat pre-trial detainees' force claims differently from post-conviction prisoners' force claims, perhaps ruling against post-conviction prisoners more often than pre-trial detainees. Since *Kingsley*, the plaintiff is the appealing party in post-conviction prisoners' cases far more frequently than in pre-trial detainees' cases (95% versus 78%). This finding supports the conclusion that federal courts are treating pre-trial detainees' force claims differently from post-conviction prisoners' force claims, undermining scholars' predictions that *Kingsley* would impact the doctrine broadly.

238. *See* Jefferis, *Data & Code*, *supra* note 221 ($p = 1$ ($\alpha = 0.05$, $n = 278$)).

239. *Id.*

240. *See* Jefferis, *Data & Code*, *supra* note 221 ($p = 0.807$ ($\alpha = 0.05$, $n = 277$)).

Figure 5. Appealing Party—After *Kingsley*[241]



The next dataset compares the posture on appeal for pre-trial detainees' force claims and post-conviction prisoners' force claims since *Kingsley*. The results here are not statistically significant,[242] suggesting that the stage at which district courts issue dispositive rulings in force cases does not depend much on whether the claim is brought by a pre-trial detainee or a post-conviction prisoner.

The next dataset compares the outcomes on appeal for pre-trial detainees and post-conviction prisoners' force cases after *Kingsley*. Again, there is not a statistically significant difference.[243] Federal appellate courts still affirm more appeals brought by post-conviction prisoners than pre-trial detainees, suggesting that in addition to district courts viewing these groups of litigants and their force claims differently, federal appellate courts are as well. This further undermines predictions of *Kingsley*'s broad doctrinal impact.

The final figure below compares the ultimate case outcomes for pre-trial detainees and post-conviction prisoners' claims of excessive force since *Kingsley*. This comparison suggests that *Kingsley*'s change in governing standard for pre-trial detainees' force claims has not had the broad doctrinal impact that some predicted. Post-conviction prisoners fare worse than their pre-trial detainee counterparts, with courts entering judgment for the defendant more frequently (73% for post-conviction prisoners versus 64% for pre-trial detainees). Post-conviction prisoners obtain judgment in their favor in just 2% of cases. Settlement prospects appear to be slightly worse for post-conviction prisoners,

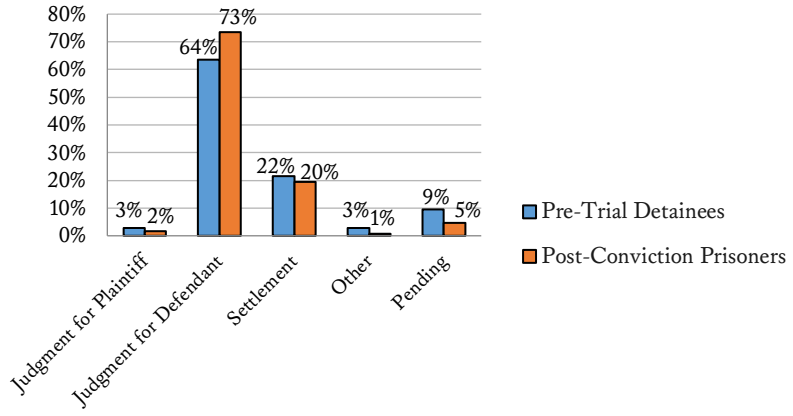
241. $p = 0.001$ ($\alpha = 0.05$, $n = 203$).

242. *See* Jefferis, *Data & Code*, *supra* note 221 ($p = 0.42$ ($\alpha = 0.05$, $n = 203$)).

243. *See* Jefferis, *Data & Code*, *supra* note 221 ($p = 0.14$ ($\alpha = 0.05$, $n = 203$)).

with just 20% of their cases terminating in settlements since *Kingsley* as compared to 22% of pre-trial detainees' cases ending with a settlement.

Figure 6. Ultimate Case Outcome—After *Kingsley*[244]



Overall, the findings of the *Kingsley* study lay bare just how poorly post-conviction prisoners' claims of unlawful force have fared and continue to fare in federal courts. *Kingsley* has not had the broad doctrinal impact that some predicted it would, and post-conviction prisoners remain subject to a distinct handicap with respect to their challenges to force due simply to their status as post-conviction prisoners. This is the prison penalty.

C. *Caveats*

Before exploring the prison penalty and its implications further, it is important to discuss some caveats of the above study. First, as stated in the methodology section, the study focused only on cases that included a federal court of appeals decision within the relevant time frames, which inherently limits the scope of possible claims subject to analysis. The vast majority of instances of force in carceral settings likely does not result in the target of the force filing a civil lawsuit, let alone that civil lawsuit reaching a federal appellate court.[245] As discussed above, there are a host of barriers in front of potential incarcerated plaintiffs, which often result in viable claims never reaching a federal court.[246] Moreover, many claims that do reach a federal court may result

244. $p = 0.412$ ($\alpha = 0.05$, $n = 202$).

245. *See* Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 556–57 (2001).

246. *See supra* notes 206–11 and accompanying text.

in some sort of adjudication in the district court without either party appealing the matter. Those disputes were not included in this study, though they may be in future works.

Second, the coding described above was done by hand, both by the author and research assistants, meaning that there are inherent limitations and may be errors in interpreting the decisions and turning qualitative pieces of data into quantitative pieces.[247] I mitigated this limitation as best as I could by doing quality-control on research-assistant coding and by confining codes to concrete pieces of information, as opposed to more subjective pieces that could turn on a reviewer's interpretation. My goal here was to keep interpretive discrepancies and errors to a minimum, though the limitation is still present.

Above all, these limitations mean that the analysis should be approached cautiously, and the conclusions reached tentatively. Nevertheless, as other legal scholars who have done similar empirical work in other areas of the law have recognized,[248] there is immense value in this sort of study. The potential insights it may bring shine new light on debates concerning the proper interpretation of the Eighth Amendment and the ways in which federal courts view and treat litigants depending on their status as either a pre-trial detainee or a post-conviction prisoner. It is one thing to know that the governing legal standard purports to treat a class of litigants differently from another; it is another to *see* the results of such differential treatments, especially within the courts. The next part explores the prison penalty in greater depth, re-raising the doctrinal limitations and criticisms discussed above and pushing the conversation further.

III. THE PRISON PENALTY EXAMINED

The *Kingsley* study reveals just how poorly post-conviction prisoners' force challenges continue to fare in federal court. Indeed, the broad doctrinal impact

247. Federal district court decisions, especially in pre-screening dismissals of pro se cases brought by incarcerated plaintiffs, are often brief and thinly reasoned. Hand coding data of the sort examined in this study contains a qualitative element to it—interpreting from the courts' decisions the underlying claims and the stage at which they were disposed of, leading to potential errors. Moreover, this study is limited inherently by the reality that many uses of force in prisons and jails are never the subject of federal court litigation, leading to under-inclusiveness with respect to the conduct at issue. Procedural barriers to litigation, including the requirements of the Prison Litigation Reform Act, further limit the use-of-force claims that are ultimately reviewed on the merits. *See supra* notes 45–46 and accompanying text.

248. *See, e.g.*, Justin D. Levinson & Danielle Young, *Implicit Gender Bias in the Legal Profession: An Empirical Study*, 18 DUKE J. GENDER L. & POL'Y 1, 3 (2010) (studying the continued subordination of women in the legal profession); Lawrence M. Solan & John M. Darley, *Causation, Contribution, and Legal Liability: An Empirical Study*, 64 LAW & CONTEMP. PROBS. 265, 265 (2001) (presenting empirical evidence of the ways people compare judgments of liability with judgments of causation and contribution); Jan Palmer & Marvin Zalman, People v. Tanner*: A Legal and Empirical Impact Study in Sentencing*, 14 NEW ENG. L. REV. 82, 98 (1978) (running empirical tests on the impact of *Tanner* on judicial sentencing).

that some predicted *Kingsley* would have has not materialized. Compared to their pre-trial detainee counterparts, post-conviction prisoners rarely succeed in vindicating their constitutional right to be free from excessive force—hence, the prison penalty.

Having established the presence of the prison penalty, the next step is to interrogate its purpose. What justification exists for treating post-conviction prisoners' force claims differently than force claims raised by pre-trial detainees? Is there something inherently different, beyond their criminal conviction, that warrants the higher legal standard? Or is it warranted simply by their criminal conviction? In other words, should we continue to condone a constitutional regime in which people are subject to progressively brutal force simply because they have been convicted of a crime? Answers to those questions may exist in a number of sources.

Perhaps the facts "on the ground," so to speak, warrant treating pre-trial detainees' force claims differently than post-conviction prisoners' force claims. Put differently, perhaps the conditions in America's jails (where pre-trial detainees are generally confined) and prisons (where post-conviction prisoners are generally incarcerated) are so different that it is not necessarily the governing legal standard that explains the prison penalty but rather the fact that force is *more* brutal in jails than it is in prisons, thus warranting greater success for plaintiffs whose claims arise in those spaces. People detained in local jails spend less time in the facilities than people in prisons, either because they are detained in the weeks or months awaiting trial or because they are serving misdemeanor sentences of under one year.[249] Jail populations, therefore, are much more dynamic than prison populations, with people leaving and joining on a daily basis, thus risking more internal disorder (or the perception of it). Perhaps, then, the government officials staffing America's jails are more brutal and exhibit greater violence against pre-trial detainees than the government officials who staff America's prisons.

Either scenario is *possible*, perhaps on a micro level, though it begs credulity that such a possibility fully explains or justifies the prison penalty. Drawing generalities across thousands of carceral spaces in the country is always a difficult endeavor; however, the generalized violence of America's carceral spaces is beyond doubt, whether speaking of jails or prisons or both. Both types of institutions operate according to the same model—rigid, discipline-driven confinement and isolation. Both types of institutions show comparable, and

249. *Compare* ZHEN ZENG, BUREAU OF JUST. STATS., JAIL INMATES IN 2016, at 1 (2018), https://bjs.ojp.gov/content/pub/pdf/ji16.pdf [https://perma.cc/MB9C-NLET] (finding that the average "expected length of stay in jail was 25 days in 2016"), *with* DANIELLE KAEBLE, BUREAU OF JUST. STATS., TIME SERVED IN STATE PRISON, 2018, at 1 (2021), https://bjs.ojp.gov/document/tssp18.pdf [https://perma.cc/Y5WV-LAQZ] (finding that the average time served by people in state prison was 2.7 years in 2018).

high, rates of violence.[250] In fact, by some accounts, jails are *more* violent than prisons.[251] But *even if* jails are more violent than prisons, this fact alone cannot explain the prison penalty.

Or maybe post-conviction prisoners' force claims are somehow inherently weaker factually than the claims brought by their pre-trial detainee counterparts. Perhaps post-conviction prisoners "over-claim" or embellish their claims, or perhaps they "under-plead" their claims, leading to early dismissals. Perhaps they fail to ultimately gather the evidence they need to prove their allegations, leading to greater loss rates on the merits, thus accounting for the prison penalty.

This explanation is also plausible, though it likely fails to fully account for the prison penalty. The rates at which pre-trial detainees and post-conviction prisoners proceed pro se versus with counsel are roughly equivalent, as the *Kingsley* study demonstrates, meaning that both types of litigants have experienced counsel at roughly the same rates. While certain litigants may over-claim or under-plead their cases, there is nothing specific to post-conviction prisoners that would suggest they do so more frequently than their pre-trial counterparts. Again, it is unlikely that the prison penalty is due solely to shortcomings or failings on the part of the post-conviction prisoner litigants themselves.

Perhaps the Constitution itself warrants treating pre-trial detainees and post-conviction prisoners differently, particularly when it comes to the degree of force they must endure. Perhaps the drafters *intended* for there to be a prison penalty and crafted the Bill of Rights accordingly. This is certainly where the Court has anchored its doctrine. Recall that in *Graham* and *Whitley*, the Court held that no single constitutional provision governs all uses of force, and that the "two most textually obvious sources of constitutional protection against physically abusive governmental conduct" are the Fourth and Eighth Amendments.[252] Neither provision, however, uses the word "force." Neither provision contains any more "textually obvious" references to force than the Due Process Clause does. It seems, therefore, that the textual justification for treating pre-trial detainees and post-conviction prisoners differently—namely, imposing the prison penalty—is lacking.

250. *See, e.g.*, Nazish Dholakia, *Prisons and Jails Are Violent; They Don't Have to Be*, VERA INST. JUST. (Oct. 18, 2023), https://vera.org/news/prisons-and-jails-are-violent-they-dont-have-to-be [https://perma.cc/9NDT-XS7K]; Leah Wang & Wendy Sawyer, *New Data: State Prisons Are Increasingly Deadly Places*, PRISON POL'Y INITIATIVE (June 8, 2021), https://www.prisonpolicy.org/blog/2021/06/08/prison_mortality/ [https://perma.cc/8VQK-4BAQ].

251. Christopher Blackwell, *Two Decades of Prison Did Not Prepare Me for the Horrors of County Jail*, N.Y. TIMES (May 16, 2023), https://www.nytimes.com/2023/05/16/opinion/sunday/abuse-jail-prison.html [https://perma.cc/S4M5-7T23 (staff-uploaded, dark archive)].

252. Graham v. Connor, 490 U.S. 386, 392 (1989).

Perhaps, instead, the drafters' use of the word "punishment" in the Eighth Amendment justifies the prison penalty. Perhaps the original meaning of the term as it is used in the Eighth Amendment *is* restricted to formal, legislatively approved, judicially imposed methods of punishment for criminal offenses. Even so, nothing in the Constitution isolates the Eighth Amendment as the *only* provision applicable to post-conviction prisoners. After all, post-conviction prisoners retain a myriad of First and Fourth Amendment protections,[253] in addition to Eighth Amendment protections. Nothing in the Eighth Amendment or elsewhere in the Constitution states that post-conviction prisoners lose all rights *except* what is outlined in the Eighth Amendment. In fact, the Court has repeatedly held otherwise in spite of the limitations it has placed on the doctrine with respect to force claims, noting that "[t]here is no iron curtain drawn between the Constitution and the prisons of this country."[254] Certain constitutional protections may be restricted during lawful incarceration, to be sure, but not nearly so far as to conclude that the *only* applicable provision is the Eighth Amendment. Again, the Court's textualist or originalist justifications for limiting post-conviction prisoners' force claims to the Eighth Amendment are dubious.

Perhaps what is *really* going on is a normative statement of American punishment. Perhaps the prison penalty exists because of the operation of a constitutional regime that purports to be based on text and logical reasoning but it instead reflects the Court's normative view of punishment—what punishment *should* be, reflected in society's values and views on people who have been convicted of a crime.[255]

The force doctrine has evolved to reflect a continuum of policing to punishment, with increasing brutality condoned as a person advances along the continuum. A free person begins on one end of the continuum, where they enjoy as robust Fourth Amendment protections as exist. If they are arrested and charged with a crime—if they advance along the continuum to assume the status of a pre-trial detainee, force against them is then governed according to the *Kingsley* standard—which is not quite as robust as the Fourth Amendment

253. *See* Turner v. Safely, 482 U.S. 78, 91 (1987) (recognizing right to speak and associate with some degree of autonomy); Bell v. Wolfish, 441 U.S. 520, 558–59 (1979) (prohibiting "unreasonable" strip and body cavity searches of post-conviction prisoners and requiring courts to "consider the scope of the particular [privacy] intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted"); Procunier v. Martinez, 416 U.S. 396, 420–21 (1974) (recognizing the right to communicate with lawyers); Pell v. Procunier, 417 U.S. 817, 825 (1974) (same); Cruz v. Beto, 405 U.S. 319, 322 (1972) (recognizing the right to practice religion); Cooper v. Pate, 378 U.S. 546, 546 (1964) (same); Johnson v. Avery, 393 U.S. 483, 490 (1969) (recognizing the right to access the courts).

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

255. Didier Fassin, *The Police Are the Punishment*, 31 PUB. CULTURE 539, 545–47 (2019) (discussing distinction between normative definition of punishment and the reality of the act of punishment).

standard but still provides protection from *objectively* unreasonable uses of force. Once that person progresses further along the continuum, beyond trial and conviction, and assumes the status of a post-conviction prisoner, their constitutional right against unlawful force is at its weakest. Put differently, the law only protects post-conviction prisoners from the most egregious, intentional acts of force, thus condoning an increasingly brutal policing-punishment apparatus.

The pronouncement that the Fourteenth Amendment's Due Process Clause protects pre-trial detainees but not post-conviction prisoners expresses normative choices and values. Again, those normative choices and values seem to be that one's physical safety and bodily integrity matter less and less once they find themselves involved in the criminal legal system. We must assume the Court's interpretation and articulation of the governing legal doctrine has been deliberate. Thus, the imposition of the prison penalty must also be deliberate.

It bears noting that the prison penalty should not be viewed as a surprise or discovery, per se. Scholars and practitioners whose work focuses on this area of the law, as well as people whose lives are impacted directly by this area of the law, have known for decades that the governing legal standard for force claims brought by post-conviction prisoners is a difficult one to meet, especially in comparison to force claims arising in noncarceral settings. The *Kingsley* study has simply brought new light to the prison penalty, laying bare just how poorly post-conviction prisoners' force claims fare in federal court, especially in comparison to their pre-trial detainee counterparts.

It has been more than eight years since the Court chose to modify the standard governing pre-trial detainees' force claims. Keeping with the notion of the expressive power of the law, the Court's decision in *Kingsley* expressed a value concerning the physical safety and bodily integrity of people who have been charged and detained for a criminal offense. The Court's continued unwillingness to express a similar value with respect to post-conviction prisoners should be taken just as seriously. There is no textual or logical justification for the prison penalty. It is, instead, a normative choice and should be interpreted, evaluated, and critiqued as such.

CONCLUSION

Punishment is not a precondition nor is it preordained—it is a choice.[256] The same must be said for the methods and manners of punishment. A constitutional regime, like the one discussed herein, that condones progressively

256. Alice Ristroph, *The Thin Blue Line from Crime to Punishment*, 108 J. CRIM. L. & CRIMINOLOGY 305, 329–30 (2018); *see also* Alexandra L. Klein, *When Police Volunteer to Kill*, 74 FLA. L. REV. 205, 266 (2022) ("The legitimacy of punishment depends on how societies punish.").

brutal corporal violence the further along the criminal legal process a person finds themself is not a precondition—it is a choice. The prison penalty is a choice. These choices contain significant expressive messages about the physical safety and bodily integrity of people and, ultimately, their worth as individuals and citizens.[257]

The *Kingsley* study reveals that the Court's decision in *Kingsley* has likely had an impact on pre-trial detainees' force cases, leading to greater success for plaintiffs challenging state actors' uses of force than they did prior to *Kingsley*'s issuance. As a threshold matter, this result demonstrates the significance of a governing objective legal standard versus a subjective legal standard. Plaintiffs appear to achieve more favorable outcomes when operating under the former than under the latter. This finding alone may lend itself to areas across the law where scholars, litigants, and courts have engaged in similar debates.

More fundamentally, the *Kingsley* study reveals how poorly post-conviction prisoners continue to fare in their force challenges even after *Kingsley*. Indeed, *Kingsley* has not had the broad doctrinal impact that some predicted—and perhaps hoped—namely, that the decision would reveal the doctrine's inner inconsistencies and lead to a more holistic shift in the governing standards. That impact has not happened. Lower courts have not—and likely should not—act without an expression from the Court that a similar shift from a subjective to an objective standard is warranted for post-conviction prisoners' force claims.

Borrowing themes from the horror genre, Travis Linnemann asks us to consider whether violence at the hands of government officials is the exception, as we are expected to believe, or rather simply what is intended: "What if things are precisely as they appear? What if we saw what we saw?"[258] From this Article's perspective, what if the prison penalty is exactly what the Court intends for it to be—a normative expression of the devaluation of people's physical safety and bodily integrity by virtue of the sole fact that they have been convicted of a crime? What if the progressively brutal spectrum of corporal violence within America's criminal legal system is not a flaw in the system but evidence of intentional design? And if that *is* the case, what must we do about it?

257. *See* Klein, *supra* note 256, at 242 ("Decisions about punishment carry significant symbolism, even if the justification for punishment does not rely on that symbolism. Whom the state punishes, *how* the state punishes, and whom the state designates to punish all are significant decisions that carry expressive messages." (emphasis added)).

258. TRAVIS LINNEMAN, THE HORROR OF POLICE 9–10 (2022).