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**REJECTING “UNCONTROLLED AUTHORITY OVER
THE BODY”: THE DECENCIES OF CIVILIZED
CONDUCT, THE PAST AND THE FUTURE OF
UNENUMERATED RIGHTS**

*Seth F. Kreimer**

It appears that *Roe v. Wade*¹ is again in play. As a newly reconstituted Court confronts a fourth decade of discord over unenumerated rights in the context of abortion, I want to take this opportunity to cast a glance backward and a glance forward.

When I entered law school in 1974, the phrase “substantive due process” reeked of the bad old days of *Lochner v. New York*² and the labor injunction. Many constitutional scholars viewed *Roe v. Wade* as a unique event, an aberrant invocation of unenumerated rights forged under the twin pressures of an occluded legislative process and women’s urgent demands for reproductive autonomy. The Court, it was often said, had no business addressing claims so untethered to the text of the Constitution.

Three decades later, this critique is a less persuasive reading of the constitutional landscape. A generation of constitutional development and a broader view of the sweep of constitutional history situates *Roe* as part of a pattern of protection for the bodies of “we the people” against the violence and control of the state. The pattern does not appear clearly in most constitutional law casebooks, for it has been woven under several doctrinal rubrics. Notwithstanding the absence of a canonical theory, federal judges have substantively confronted both brutal bureaucrats and callous legislators. In the course of those confrontations, they have elaborated an extratextual constitutional doctrine of moral minimalism that denies the state—even in pursuit of legitimate public ends—“uncontrolled authority over the bodies” of those who are subject to its power.

In this Essay, I trace the development of this constitutional practice, suggest three overlapping bases that undergird it, and speculate about the challenges that will confront it in the next decade.

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¹ 410 U.S. 113 (1973).

² 198 U.S. 45 (1905).

I. THE STATE, THE BODY, AND THE CONSTITUTION

A. *Slavery and its Repudiation*

My account begins before the Civil War, with the “peculiar institution” of slavery. At common law, as Justice Powell observed, “Blackstone catalogued among the ‘absolute rights of individuals’ the right ‘to security from the corporal insults of menaces, assaults, beating, and wounding.’”³ By contrast, in antebellum American law, one of the defining differences between slavery and other domestic relations was precisely that the body of the slave was subject to the master’s “uncontrolled authority”;⁴ physical assault was a master’s prerogative. As the North Carolina Supreme Court put the matter in reversing a conviction for shooting and wounding a runaway slave:

[A slave’s] services can only be expected from one who has no will of his own; who surrenders his will in implicit obedience to that of another. Such obedience is the consequence only of uncontrolled authority over the body. There is nothing else which can operate to produce the effect. The power of the master must be absolute, to render the submission of the slave perfect.⁵

³ *Ingraham v. Wright*, 430 U.S. 651, 661 (1977) (quoting WILLIAM BLACKSTONE, 1 COMMENTARIES *134); see also *id.* at 673 n.41 (citing BLACKSTONE, *supra*, for “the historic . . . right to be free from . . . unjustified intrusions on personal security”); *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891) (reversing order allowing inspection of the body of a personal injury plaintiff and observing that “[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law”).

⁴ *State v. Mann*, 13 N.C. (2 Dev.) 263, 266 (1829).

⁵ *Id.*; see also *Commonwealth v. Turner*, 26 Va. (5 Rand.) 678 (1827) (sustaining master’s demurrer to indictment on charge of beating his slave); ANDREW FEDE, *PEOPLE WITHOUT RIGHTS: AN INTERPRETATION OF THE FUNDAMENTALS OF THE LAW OF SLAVERY IN THE U.S. SOUTH* 3, 10–11 (1992) (describing the legal status of slaves); THOMAS D. MORRIS, *SOUTHERN SLAVERY AND THE LAW, 1619–1860*, at 182–97 (1996) (reviewing statutory and common law limitations on the master’s power over a slave and concluding that, although the law placed few real limits on a master’s power to inflict physical violence, it did provide certain “civil rights” by requiring masters to provide basic necessities of life to their slaves); ORLANDO PATTERSON, *SLAVERY & SOCIAL DEATH: A COMPARATIVE STUDY* 1–5 (1982) (discussing the violence and coercion underpinning the master-slave relationship); Andrew Fede, *Legitimized Violent Slave Abuse in the American South, 1619–1865: A Case Study of Law and Social Change in Six Southern States*, 29 AM. J. LEGAL HIST. 93, 101, 132 (1985) (tracing changing protections afforded to slaves while noting that “a fixed principle of slave law granted masters the unlimited right to abuse their slaves to any extreme of brutality and wantonness as long as the slave survived”); Andrew E. Taslitz, *Hate Crimes, Free Speech and the Contract of Mutual Indifference*, 80 B.U. L. REV. 1283, 1287, 1330–32, 1364 (2000) (describing rapes, whippings, brandings, mutilations, and other punishments).

The master’s authority did not extend to killing the slave. See, e.g., *State v. Will*, 18 N.C. (1 Dev. & Bat.) 121, 172 (1834) (holding that a slave’s death at a master’s hand, absent malice, was not murder but was a “felonious homicide”); see also A. Leon Higginbotham, Jr. & Anne F. Jacobs, *The “Law Only As An Enemy”: The Legitimization of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia*, 70 N.C. L. REV. 969, 1033–34 (1992) (describing prose-

Indeed, the standard form of a legal suit for freedom was an action for battery against the purported master.⁶

The Thirteenth Amendment repudiated slavery as a legitimate legal relation. It unambiguously forbade the existence of slavery “except as a punishment for crime whereof the party shall have been duly convicted . . . within the United States, or any place subject to their jurisdiction.”⁷ The eradication of slavery as an institution within the constitutional polity carries with it a presumption that, absent criminal conviction, the bodies of citizens are subject to neither the “uncontrolled authority” of the state nor that of any private party.⁸

cutions of owners who killed their slaves). Some states by statute prohibited “cruel and unusual” punishments of slaves. *See, e.g.*, *Wilson v. State*, 29 Tex. 240, 245–46 (1867) (citing Texas statute under which “abuse or cruel treatment” of a slave leading to death was murder); *Kelly v. Mississippi*, 11 Miss. (3 S. & M.) 518, 526 (1844) (“[T]he master or any other person entitled to the service of the slave shall not inflict upon such slave cruel or unusual punishment, under the penalty, upon conviction thereof, of a fine of five hundred dollars.”); *Turnipseed v. State*, 6 Ala. 664, 665 (1844) (citing Alabama penal code prohibiting “cruel or unusual punishment” of slaves). Whipping, however, was the normal mode of punishment on plantations, *see* LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 85–87 (1993), and for antebellum antislavery forces, “whipping symbolically condensed the evils of tyranny and barbarism,” MICHAEL MERANZE, *LABORATORIES OF VIRTUE: PUNISHMENT, REVOLUTION, AND AUTHORITY IN PHILADELPHIA, 1760–1835*, at 296 (1996). *Cf.* Elizabeth B. Clark, “*The Sacred Rights of the Weak: Pain, Sympathy, and the Culture of Individual Rights in Antebellum America*,” 82 J. AM. HIST. 463, 463 (1995) (examining “the story of the suffering slave, a trope that in the 1830s began to play a crucial role in an unfolding language of individual rights”).

⁶ *See, e.g.*, *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 454 (1856) (dismissing, for want of diversity jurisdiction, slave’s suit for battery committed by master).

⁷ U.S. CONST. amend. XIII, § 1.

⁸ *See* *United States v. Kozminski*, 487 U.S. 931, 942 (1988) (“[F]rom the general intent to prohibit conditions ‘akin to African slavery,’ as well as the fact that the Thirteenth Amendment extends beyond state action, we readily can deduce an intent to prohibit compulsion through physical coercion.”) (citations omitted); *id.* at 950 (“[T]he use or threat of physical or legal coercion was a necessary incident of pre-Civil War slavery . . .”). *Kozminski* goes on to note several exceptions to the prohibition of physical coercion, in addition to punishment for crime. *Id.* at 943–44; *see* *Selective Draft Law Cases*, 245 U.S. 366, 390 (1918) (upholding government-mandated military service); *Butler v. Perry*, 240 U.S. 328, 333 (1916) (recognizing historical “duties which individuals owe to the State, such as services in the army, militia, on the jury, etc.”); *Robertson v. Baldwin*, 165 U.S. 275, 282, 285 (1897) (naming “exceptional” cases well-established in the common law at the time of the Thirteenth Amendment, such as “the right of parents and guardians to the custody of their minor children or wards” or laws preventing sailors who contracted to work on vessels from deserting their ships); *see also* *Wilkes v. Dinsman*, 48 U.S. 89, 129 (1849) (noting that an officer is immune for lashes, leg irons, etc., in the absence of “malice” or “cruelty”); Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996). These historical exceptions are outliers that have been narrowed and isolated by subsequent case law.

B. Due Process, Brutality and Ordered Liberty

The potential of the Thirteenth Amendment to check brutality was given limited scope in its first half-century.⁹ The broad due process provisions of the companion Fourteenth Amendment were said to be both “guards against executive usurpation and tyranny” and “bulwarks also against arbitrary legislation”; the Court declared them to “guarantee not particular forms of procedure, but the very substance of individual rights to life, liberty, and property.”¹⁰ For two generations, however, those guards and bulwarks provided little shelter for the bodies of citizens.

Constraints on official violence lie at the heart of the Bill of Rights. Yet the Court did not view the newly adopted Due Process Clause of the Fourteenth Amendment as applying the Bill of Rights to the states. It is worth remembering that the procedure of defining “fundamental rights” began with the determination that due process bound the states only to observe “those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.”¹¹ The Court withheld, as insufficiently “fundamental,” the protections of the grand jury,¹² the bars to cruel and unusual punishment¹³ and self-incrimination,¹⁴ and the rights to indictment and trial by a twelve-person jury.¹⁵

At the same time, textual lacunae did not end constitutional discussion. In *Jacobson v. Massachusetts*,¹⁶ the Court confronted a claim that a compulsory vaccination order which made no exception for adverse physical reactions was an “unreasonable, arbitrary and oppressive . . . assault upon his person” and therefore a deprivation of

⁹ See, e.g., *Hodges v. United States*, 203 U.S. 1 (1906) (holding that the Thirteenth Amendment did not authorize federal intervention to protect African-Americans’ right to contract); *Clyatt v. United States*, 197 U.S. 207 (1905) (narrowly construing an anti-peonage statute); *Robertson v. Baldwin*, 165 U.S. 275 (1897) (interpreting the Thirteenth Amendment as inapplicable to the contracts of sailors); *United States v. Cruikshank*, 92 U.S. 542 (1875) (holding that the Thirteenth Amendment does not empower the national government to protect the rights of African-Americans where those rights are not held vis-à-vis the national government).

¹⁰ *Hurtado v. California*, 110 U.S. 516, 532 (1884).

¹¹ *Id.* at 535. The Court’s discussion actually seemed to limit those principles to protections against “partial and arbitrary” exercises of power unjustified by the general public good.

¹² *Id.* at 521.

¹³ See *O’Neil v. Vermont*, 144 U.S. 323, 332 (1892); *McElvaine v. Brush*, 142 U.S. 155, 158 (1891); *In re Kemmler*, 136 U.S. 436, 449 (1890).

¹⁴ See *Twining v. New Jersey*, 211 U.S. 78, 106 (1908) (assessing whether the right against self-incrimination is “a fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen of such a government”). *But cf. id.* at 113 (identifying “the right to hearing before condemnation, immunity from arbitrary power not acting by general laws, and the inviolability of public property” as fundamental).

¹⁵ See *Maxwell v. Dow*, 176 U.S. 581, 586 (1900).

¹⁶ 197 U.S. 11 (1905).

liberty without due process.¹⁷ The Court recognized a potential basis for a constitutional claim, though it rejected the claim on its merits. The Court observed that “[t]here are manifold restraints to which every person is necessarily subject for the common good,”¹⁸ up to and including the obligation “to take his place in the ranks of the army of his country and risk the chance of being shot down in its defense.”¹⁹ It held unanimously that in an impending smallpox epidemic “it cannot be adjudged that the present regulation of the Board of Health was not necessary in order to protect the public health and secure the public safety.”²⁰

Nonetheless, the Court closed its opinion in *Jacobson* by adumbrating constitutional limits on state brutality even in the pursuit of legitimate ends. *Jacobson* recognized the possibility of “regulations so arbitrary and oppressive in particular cases as to justify the interference of the courts to prevent wrong and oppression.”²¹ A person who could make a showing that “a particular condition of his health or body” would render vaccination “cruel and inhuman in the last degree” would be entitled to a court’s intervention to “protect the health and life of the individual concerned.”²²

These intimations of constitutional protection for the person lay dormant for the next two decades;²³ they began to take root as the Court turned to address brutality in state criminal justice systems. The process began in *Moore v. Dempsey*, where a majority of the Court

¹⁷ *Id.* at 26.

¹⁸ *Id.*

¹⁹ *Id.* at 29.

²⁰ *Id.* at 28.

²¹ *Id.* at 38.

²² *Id.* at 38–39; *see id.* at 37 (“It is entirely consistent with [defendant’s] offer of proof that, after reaching full age he had become, so far as medical skill could discover, and when informed of the regulation of the Board of Health was, a fit subject of vaccination, and that the vaccine matter to be used in his case was such as any medical practitioner of good standing would regard as proper to be used.”). This protection reached beyond a simple requirement that the intervention be necessary to further important goals. *Id.* at 28 (announcing the power to protect public health “might be exercised in particular circumstances and in reference to particular persons in such an arbitrary, unreasonable manner, or might go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere for the protection of such persons”) (emphasis added).

²³ In *Buck v. Bell*, 274 U.S. 200, 202 (1927), Justice Holmes wrote for a unanimous Court, rebuffing a challenge to compulsory sterilization of an allegedly mentally retarded woman based on “the inherent right of mankind to go through life without mutilation of organs of generation.” Invoking the struggle that gave birth to the Thirteenth and Fourteenth Amendments, and the holding in *Jacobson*, he observed: “We have seen more than once that the public welfare may call upon the best citizens for their lives.” *Id.* at 207. Still, here again, the opinion noted the uncontroverted finding that the sterilization could be achieved “without serious pain or substantial danger to life.” *Id.* at 205; *cf. Skinner v. Oklahoma*, 316 U.S. 535, 540–43 (1942) (invalidating sterilization of three-time felons as violation of equal protection, but declining to revisit *Buck*); *Lambert v. Yellowley*, 272 U.S. 581, 596–97 (1926) (rejecting doctor’s claim that prohibition of use of liquor for medicinal purposes was unconstitutional).

held that the trial court could entertain a habeas corpus action on behalf of five African-Americans sentenced to death in the aftermath of racial violence in Arkansas.²⁴ Echoing the heritage of slavery, the due process claim was premised on a narrative that commenced with “the promise of some of the Committee of Seven and other leading officials that if the mob would refrain . . . they would execute those found guilty in the form of law” and concluded with “the Committee mak[ing] good their promise by calling colored witnesses and having them whipped and tortured until they would say what was wanted.”²⁵

In *Brown v. Mississippi*,²⁶ the Court reviewed capital murder convictions based on confessions extorted by repeated hangings and whippings that read “like pages torn from some medieval account.”²⁷ While the Court reiterated its refusal to view the prohibition against self-incrimination as a “principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,” it concluded that “[c]ompulsion by torture to extort a confession is a different matter.”²⁸ Such brutality was held to be unconstitutionally “revolting to the sense of justice,” impermissibly analogous to “the crowning infamy of the Star Chamber, and the Inquisition.”²⁹ *Brown* was the first in a line of cases that constitutionally condemned physical abuse in the pursuit of criminal confessions.³⁰ The Court did not

²⁴ 261 U.S. 86 (1923).

²⁵ *Id.* at 88–89.

²⁶ 297 U.S. 278 (1936).

²⁷ *Id.* at 282.

²⁸ *Id.* at 285.

²⁹ *Id.* at 286–87.

³⁰ See *Beecher v. Alabama*, 389 U.S. 35, 36 (1967) (recounting police chief’s threat to suspect, “If you don’t tell the truth I am going to kill you,” and officer’s subsequent firing of rifle next to suspect’s ear); *Clewis v. Texas*, 386 U.S. 707, 709–11 (1967) (describing a suspect arrested without probable cause, interrogated for nine days with little food or sleep); *Reck v. Pate*, 367 U.S. 433, 435, 439 n.3 (1961) (involving a mentally retarded youth interrogated for a week “during which time he was frequently ill, fainted several times, vomited blood on the floor of the police station and was twice taken to the hospital on a stretcher”); *Leyra v. Denno*, 347 U.S. 556, 558–61 (1954) (depicting a sleep-deprived suspect suffering from an “acutely painful attack of sinus” confessing after being questioned by state psychiatrist who interrogated him rather than providing the treatment that had been promised to the suspect); *Malinski v. New York*, 324 U.S. 401, 403 (1945) (describing a defendant held naked or in his underwear for ten hours while being questioned in a hotel room); *Ashcraft v. Tennessee*, 322 U.S. 143, 150–51 (1944) (portraying a defendant questioned for thirty-six straight hours without sleep); *Ward v. Texas*, 316 U.S. 547, 555 (1942) (involving a defendant moved “by night and day to strange towns, [told] of threats of mob violence, and question[ed] continuously” before he confessed); *Lisenba v. California*, 314 U.S. 219, 230 (1941) (describing a defendant held incommunicado, slapped and allegedly beaten, leaving both ears swollen); *White v. Texas*, 310 U.S. 530, 532–33 (1940) (describing a suspect who was repeatedly taken by armed state rangers into the woods where he was whipped and interrogated); *Chambers v. Florida*, 309 U.S. 227, 238–39 (1940) (describing defendants, black tenant farmers, who were arrested without warrants and questioned in a “protracted” fashion, “under circumstances calculated to break the strongest nerves and the stoutest resistance”); see also *Palko v. Connecticut*, 302 U.S. 319, 325–26 (1937) (observ-

reject abuses for want of a legitimate governmental purpose, but because they were inconsistent with the proper practice of government in the American republic. As Justice Black put the matter:

The rack, the thumbscrew, the wheel, solitary confinement . . . had left their wake of mutilated bodies and shattered minds along the way to the cross, the guillotine, the stake and the hangman's noose . . . We are not impressed by the argument that law enforcement methods such as those under review are necessary to uphold our laws. The Constitution proscribes such lawless means irrespective of the end.³¹

Nor was the principle limited to coerced confessions injected into the criminal process. Where government officers assaulted suspected wrongdoers extrajudicially, in efforts either to exact their own justice or to procure information that could be used in subsequent law enforcement efforts, the Court held the assaults equally repugnant to the sense of justice, notwithstanding the absence of textual "enumeration" more specific than the Due Process Clause.³² The capstone of this development was set in *Rochin v. California*.³³ The case began when Los Angeles deputy sheriffs pursued a tip that Antonio Rochin had been dealing narcotics.³⁴ The deputies burst into his apartment and observed two suspicious capsules on the night stand beside the bed on which Rochin sat partly undressed.³⁵ When Rochin swallowed the capsules, the deputies handcuffed him and took him to a hospital where "[a]t the direction of one of the officers[,] a doctor forced an emetic solution through a tube into Rochin's stomach against his will."³⁶ Rochin vomited, revealing the suspect capsules.³⁷ Over Ro-

ing that "protection against torture" is part of "the very essence of a scheme of ordered liberty").

³¹ *Chambers*, 309 U.S. at 237–38, 240–41.

³² *Williams v. United States*, 341 U.S. 97, 101 (1951) ("[W]here police take matters in their own hands, seize victims, beat and pound them until they confess, there cannot be the slightest doubt that the police have deprived the victim of a right under the Constitution."); *see also* *United States v. Price*, 383 U.S. 787, 793 & n.6 (1966) (holding that police officers who assaulted, shot, and killed civil rights workers violated due process rights, and quoting *Williams* for the proposition that "beat[ing] and pound[ing] them until they confess" violates the Constitution); *Screws v. United States*, 325 U.S. 91, 106 (1945) (proclaiming that where police officers beat suspect to death, "[t]hose who decide to take the law into their own hands and act as prosecutor, jury, judge, and executioner" violate due process); *id.* at 129 (Rutledge, J., concurring) ("[M]urder by state officers in the course of official conduct . . . is outlawed."); *id.* at 136 (Murphy, J., dissenting) (admonishing "state officials who, in the course of their official duties, have unjustifiably beaten and crushed the body of a human being, thereby depriving him of trial by jury and of life itself"); *cf.* *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (noting that sterilization implicates a "fundamental" interest).

³³ 342 U.S. 165 (1952).

³⁴ *Id.* at 166.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

chin's objection, the capsules and the morphine they contained were introduced into evidence at his subsequent trial.³⁸

Justice Frankfurter, writing without dissent, found this course of conduct to violate the demands of due process, invoking the "respect for those personal immunities which . . . are so rooted in the traditions and conscience of our people as to be ranked as fundamental, or are implicit in the concept of ordered liberty."³⁹ Declaring that due process requires the state to "respect certain decencies of civilized conduct," the opinion held that Mr. Rochin's treatment at the hands of the deputies violated those decencies.⁴⁰

This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.⁴¹

While the issue before the Court in *Rochin* was the use of evidence in a criminal prosecution, it became clear that the conscience of the Court turned on the "coercion, violence or brutality to the person" involved.⁴² *Carolene Products* famously suggested that more intrusive judicial review was called for "when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth."⁴³ But the cases between *Brown* and *Rochin* were decided before the guarantees of criminal procedure had been "embraced within the Fourteenth [Amendment]";⁴⁴ the Court held that protection against official brutality was itself part of "the very essence of a scheme of ordered liberty."⁴⁵

³⁸ *Id.*

³⁹ *Id.* at 169 (citations omitted). Justice Minton did not participate, and Justices Black and Douglas concurred on self-incrimination grounds. *Id.* at 174 (Black, J., concurring); *id.* at 177 (Douglas, J., concurring).

⁴⁰ *Id.* at 173.

⁴¹ *Id.* at 172; *accord id.* at 173 ("It would be a stultification of the responsibility which the course of constitutional history has cast upon this Court to hold that in order to convict a man the police cannot extract by force what is in his mind but can extract what is in his stomach.").

⁴² *Irvine v. California*, 347 U.S. 128, 133 (1953). The Court also decided that involuntary blood tests are not sufficiently "brutal" or "offensive" to invoke *Rochin*. *Breithaupt v. Abram*, 352 U.S. 432, 435 (1957); *accord Schmerber v. California*, 384 U.S. 757 (1966).

⁴³ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

⁴⁴ *Id.*

⁴⁵ *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

C. "Privacy," Brutality and Fundamental Rights: *The World of Roe v. Wade*

As the viability of open-ended substantive due process claims sounding in alleged "arbitrariness" continued to ebb in regulatory fields under the Warren Court,⁴⁶ the doctrinal burden of controlling official brutality shifted. No longer did courts focus explicitly on discerning the demands of "ordered liberty" according to the facts of each case. Most citizens encounter the rough edges of state brutality in the context of law enforcement and criminal punishment, and with the application of the Fourth, Fifth and Eighth Amendments to the states,⁴⁷ constitutional constraints on state brutality increasingly assumed the form of inquiry into the "meaning" of those amendments. The completeness of that shift led many constitutional analysts to forget how many "textual" rights against official brutality are "enumerated" only in the sense that a majority of the Court determined that their enumeration in the Bill of Rights applies to state action as a matter of due process.⁴⁸ By the 1970s, the emerging focus on the text of the "incorporated" provisions had begun to obscure the protection of citizens' bodies against official brutality as a part of the definition of ordered liberty.⁴⁹

In drafting *Roe*, Justice Blackmun did not turn to any protection for bodily integrity,⁵⁰ but rather staked his opinion on "a right of per-

⁴⁶ *E.g.*, *Ferguson v. Skrupa*, 372 U.S. 726, 727 (1963) (upholding Kansas statute regulating debt adjustment against challenge that debt adjusting cannot be "absolutely prohibited" because it is not against the public welfare).

⁴⁷ See *Miranda v. Arizona*, 384 U.S. 436 (1966) (holding that Fifth Amendment protections apply against the states); *Mallo v. Hogan*, 378 U.S. 1 (1964) (same); *Robinson v. California*, 370 U.S. 660 (1962) (applying Eighth Amendment to the states); *Mapp v. Ohio*, 367 U.S. 643 (1961) (applying Fourth Amendment exclusionary rule to the states).

⁴⁸ Thus, Professor Ely chastised the *Roe* opinion on the ground that unlike the Warren Court, the *Roe* majority did not "attempt[] to defend its decisions in terms of inferences from values the Constitution marks as special." John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 943 (1973) (emphasis omitted). This seems more than a little unfair since the Warren Court's incorporation of the Bill of Rights "marked as special" only the "values" identified by the Justices themselves as "fundamental." See *Duncan v. Louisiana*, 391 U.S. 145, 150 n.14 (1968) (posing the issue as whether the provision is "necessary to an Anglo-American regime of ordered liberty"); *Gideon v. Wainwright*, 372 U.S. 335, 341 (1963) (considering whether "guarantees of the Bill of Rights . . . are fundamental safeguards of liberty" protected by the Fourteenth Amendment).

This criticism cannot be leveled against those who agree with Justice Black that the specific intent of the Framers of the Fourteenth Amendment was to apply the entire Bill of Rights against the states, but that position never commanded a majority of the Court.

⁴⁹ Professor Ely, for example, professed to find it "difficult to find a basis for thinking" that a protection of bodily integrity "was meant to be given constitutional sanction." Ely, *supra* note 48, at 931.

⁵⁰ *Roe v. Wade*, 410 U.S. 113, 154 (1973) ("[I]t is not clear to us that the claim asserted by some *amici* that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court

sonal privacy.”⁵¹ Still, even as the Court and commentators agonized over the parameters and justification of the “right of personal privacy” in the aftermath of *Roe*, the federal courts, both high and low, forged extratextual protections for the bodies of American citizens at the mercy of the state in the areas of prisoners’ rights, police assault, and medical treatment.

The first doctrinal initiative advanced the application of the Eighth Amendment to limit brutal treatment of prisoners under the control of the state; it depended on the extension of the textual protection against cruel and unusual punishment from the federal to the state governments, and on the further extension from judicially determined punishments to administrative impositions. Justice Blackmun could not have been entirely insensitive to these stirrings, since his own opinion five years earlier in *Jackson v. Bishop*,⁵² which forbade the practice of whipping prisoners in Arkansas prisons, constituted a leading precedent in the application of the recently-incorporated Eighth Amendment to prison practices.⁵³ As Justice Blackmun drafted *Roe*, lower federal judges were struggling to bring a minimum measure of civilized physical decency to the conditions faced by the incarcerated population of the United States.⁵⁴ By the mid-1980s,

has refused to recognize an unlimited right of this kind in the past. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (vaccination); *Buck v. Bell*, 274 U.S. 200 (1927) (sterilization).”

⁵¹ *Id.* at 152. Justice Blackmun declared that privacy rights were protected where they were “deemed ‘fundamental’ or ‘implicit in the concept of ordered liberty.’” *Id.* at 152 (citing *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

⁵² 404 F.2d 571 (8th Cir. 1968).

⁵³ The trial court had granted relief against “[t]he use of any such devices as the crank telephone or teeter board” and against “[t]he application of any whipping to the bare skin of prisoners.” *Jackson v. Bishop*, 268 F. Supp. 804, 816 (E.D. Ark. 1967). It also restrained the “use of the strap . . . until additional rules and regulations are promulgated with appropriate safeguards.” *Id.* On appeal, then-Judge Blackmun determined that whipping prisoners with “the strap” itself “offends contemporary concepts of decency and human dignity.” *Jackson*, 404 F.2d at 579.

⁵⁴ Following *Jackson v. Bishop*, for example, federal courts spent a decade and a half in the effort to reform what the Court referred to as the “‘dark and evil world’” of the Arkansas prison system. *Hutto v. Finney*, 437 U.S. 678, 681 (1978) (quoting *Holt v. Sarver*, 309 F. Supp. 362, 381 (E.D. Ark. 1970)); *see, e.g., Holt v. Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970), *aff’d.*, 442 F.2d 304 (8th Cir. 1971), *on remand sub nom. Holt v. Hutto*, 363 F. Supp. 194 (E.D. Ark. 1973), *aff’d. in part, rev’d. in part sub nom. Finney v. Ark. Bd. of Corr.*, 505 F.2d 194 (8th Cir. 1974), *on remand sub nom. Finney v. Hutto*, 410 F. Supp. 251 (E.D. Ark. 1976), *aff’d.*, 548 F.2d 740 (8th Cir. 1977), *aff’d.*, 437 U.S. 678 (1978) (finding isolation cells violative of the Eighth Amendment); *Finney v. Mabry*, 455 F. Supp. 756 (E.D. Ark. 1978) (limiting the scope of prison disciplinary committee authority); *Finney v. Mabry*, 458 F. Supp. 720 (E.D. Ark. 1978) (approving consent decree); *Finney v. Mabry*, 528 F. Supp. 567 (E.D. Ark. 1981) (finding practice of administrative segregation to violate due process); *Finney v. Mabry*, 534 F. Supp. 1026 (E.D. Ark. 1982) (approving reform efforts, but specifically finding past policies unconstitutional); *Finney v. Mabry*, 546 F. Supp. 626 (E.D. Ark. 1982) (ordering prisons to keep records to ensure compliance with the Constitution); *Finney v. Mabry*, 546 F. Supp. 628 (E.D. Ark. 1982) (finding compliance and dismissing action).

about a quarter of the nation's prisons, and more than forty percent of the incarcerated population, operated under reform regimes supervised by federal courts seeking to implement constitutional mandates.⁵⁵

In the two decades that followed *Roe*, the Supreme Court blessed this enterprise of holding prison conditions to “concepts of dignity, civilized standards, humanity, and decency.”⁵⁶ The Court read into the Eighth Amendment as applied to the states by the Fourteenth Amendment the rights of convicted prisoners to be free of “deliberate indifference to serious medical needs,”⁵⁷ “serious deprivations of basic human needs,” “wanton and unnecessary infliction of pain,” “physical torture,” or of the deprivation of “the minimal civilized measure of life’s necessities.”⁵⁸

The process was replicated in other circuits. *See, e.g.*, *Inmates of Attica Corr. Facility v. Rockefeller*, 453 F.2d 12, 22 (2d Cir. 1971) (holding that “beatings, physical abuse, torture, running of gauntlets, and similar cruelty” violated the Eighth Amendment); *Martinez v. Mancusi*, 443 F.2d 921, 924 (2d Cir. 1970) (holding that the Eighth Amendment was violated when a prisoner was forced to return to a prison cell immediately after leg surgery, forced to walk on the leg, and denied pain medication).

For accounts of prison litigation before federal courts, see MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA’S PRISONS* (1998); Susan P. Sturm, *The Legacy and Future of Corrections Litigation*, 142 U. PA. L. REV. 639 (1993) [hereinafter Sturm, *Corrections Litigation*]; Susan Sturm, *Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons*, 138 U. PA. L. REV. 805 (1990).

⁵⁵ Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994, 2004 (1999). The numbers climbed to 40 states under decree a decade later. Sturm, *Corrections Litigation*, *supra* note 54, at 641.

⁵⁶ *Hutto*, 437 U.S. at 685 (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (quoting *Jackson*, 404 F.2d at 579)).

⁵⁷ *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). The Court in *Estelle* proclaimed that government cruelty was “repugnant to the conscience of mankind.” *Id.* at 105 (quoting *Palko v. Connecticut*, 302 U.S. 319, 323 (1937)).

⁵⁸ *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981); *see, e.g.*, *Hudson v. McMillian*, 503 U.S. 1, 8 (1992) (holding that prison officials may not “maliciously and sadistically use force to cause harm”); *Whitley v. Albers*, 475 U.S. 312, 320–21 (1986) (same); *see also Hudson*, 503 U.S. at 9 (“[T]hose deprivations denying the minimal civilized measure of life’s necessities are sufficiently grave to form the basis of an Eighth Amendment violation.”) (internal quotation marks omitted).

Rhodes reversed the finding of liability below, but emphasized that “deplorable” and “sordid” conditions of confinement could amount to cruel and unusual punishment and that, in such cases, “federal courts will discharge their duty to protect constitutional rights.” *Rhodes*, 452 U.S. at 352 (internal quotation marks omitted). *See also id.* at 352 n.17 (approving the orders in *Ramos v. Lamm*, 639 F.2d 559 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981) (finding numerous violations of prisoner’s rights in the Colorado prison system)); *Pugh v. Locke*, 406 F. Supp. 318 (M.D. Ala. 1976), *aff’d as modified*, 559 F.2d 283 (5th Cir. 1977), *rev’d in part on other grounds*, 438 U.S. 781 (1978) (per curiam) (approving class action status of inmates’ suit against Alabama penal institutions for constitutional violations); *Williams v. Edwards*, 547 F.2d 1206 (5th Cir. 1977) (finding totality of conditions at Louisiana State Penitentiary at Angola to violate the Constitution); *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974) (finding numerous constitutional violations in the Mississippi State Penitentiary).

In a modern bureaucratic state, the prospect of unconscionable state brutality and deprivation of the “minimal civilized measure of life’s necessities” is not limited to convicted prisoners. Yet the Eighth Amendment’s ban on cruel “punishment” could not plausibly be applied to those who had not yet been convicted, or indeed to those who were not eligible for punishment at all. On the other hand, if certain physical impositions cannot legitimately be inflicted on prisoners in retaliation for even the most heinous of crimes, it would be an odd constitutional system that allowed the state to inflict them on the wholly innocent. Notwithstanding the absence of a clear textual mandate, in the two decades after *Roe*, constitutional protection against official brutality did not stop at the prison gate. The Supreme Court regularly looked to Eighth Amendment standards in according unenumerated rights against physical harm to non-prisoners in state custody. As Justice Rehnquist summarized the development:

In *Youngberg v. Romeo*, we extended this analysis beyond the Eighth Amendment setting, holding that the substantive component of the Fourteenth Amendment’s Due Process Clause requires the State to provide involuntarily committed mental patients with such services as are necessary to ensure their “reasonable safety” from themselves and others. . . . As we explained: “If it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional [under the Due Process Clause] to confine the involuntarily committed—who may not be punished at all—in unsafe conditions.” . . . See also *Revere v. Massachusetts General Hospital* (holding that the Due Process Clause requires the responsible government or governmental agency to provide medical care to suspects in police custody who have been injured while being apprehended by the police) . . . [W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. . . . The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual’s liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the . . . Due Process Clause.⁵⁹

⁵⁹ *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 199–200 (1989) (citations omitted); see *Collins v. City of Harker Heights*, 503 U.S. 115, 127 (1992) (“We have held, for example, that apart from the protection against cruel and unusual punishment provided by the Eighth Amendment, . . . the Due Process Clause of its own force requires that conditions of confinement satisfy certain minimal standards for pretrial detainees, see *Bell v. Wolfish*, 441 U.S. 520, 535 n.16, 545 (1979), for persons in mental institutions, *Youngberg v. Romeo*, 457 U.S. 307, 315–16 (1982), . . . and for persons under arrest, see *Revere v. Massachusetts General Hospital*, 463 U.S. 239, 244–45 (1983).”).

Here, again, the lower courts took the Supreme Court at its word, and regularly intervened to protect those in state custody. *E.g.*, *Or. Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1121 (9th Cir.

Nor was the recognition of rights against bodily abuse limited to those in official custody. Once the Fourth Amendment was judicially extended to apply to state actions, the Court recognized the importance of bodily integrity in evaluating the constitutionality of physically intrusive searches in a series of cases balancing the degree of physical intrusion involved against the claims of public need in determining the “reasonableness” of a search.⁶⁰

During the 1970s, it appeared that police assaults unconnected to searches for evidence could not easily be assimilated to the set of “searches and seizures” constrained by the Fourth Amendment any more than they could be shoe-horned into the category of “punishment” in the Eighth Amendment. Yet this textual lacuna rendered the federal courts no less willing to confront official brutality as an infringement on unenumerated rights. As Judge Friendly put the matter in a leading case:

[I]t would be absurd to hold that a pre-trial detainee has less constitutional protection against acts of prison guards than one who has been convicted.

2003) (holding that purposeful delay in transferring mentally ill defendants from jail to mental hospital violated substantive due process); *Gibson v. County of Washoe*, 290 F.3d 1175, 1187 (9th Cir. 2002) (reversing summary judgment for defendant county after detainee with manic depression died of a heart attack while in custody); *Patten v. Nichols*, 274 F.3d 829, 838 (4th Cir. 2001) (entertaining denial-of-medical care claim by estate of involuntarily committed mental patient); *Carnell v. Grimm*, 74 F.3d 977, 979 (9th Cir. 1996) (“[P]ersons in custody ha[ve] the established right to not have officials remain deliberately indifferent to their serious medical needs.”); *Thomas S. ex rel. Brooks v. Flaherty*, 902 F.2d 250, 253 (4th Cir. 1990) (affirming judgment that deficiencies in North Carolina’s public psychiatric hospitals infringed on the rights of the mentally retarded); *Boring v. Kozakiewicz*, 833 F.2d 468, 472 (3d Cir. 1987) (“[P]retrial detainees are entitled to at least as much protection as convicted prisoners”); *Jones v. Johnson*, 781 F.2d 769, 771 (9th Cir. 1986) (reversing dismissal of complaint alleging deliberate indifference to pretrial detainee’s serious medical needs); *Ohlinger v. Watson*, 652 F.2d 775, 777 (9th Cir. 1980) (holding that sex offenders committed indefinitely on basis of mental illness are constitutionally entitled to rehabilitative treatment). Even Justice Scalia was willing to hold that

a physician who acts on behalf of the State to provide needed medical attention to a person involuntarily in state custody (in prison or elsewhere) and prevented from otherwise obtaining it, and who causes physical harm to such a person by deliberate indifference, violates the Fourteenth Amendment’s protection against the deprivation of liberty without due process.

West v. Atkins, 487 U.S. 42, 58 (1988) (Scalia, J., concurring) (citing, *inter alia*, *Rochin v. California*, 342 U.S. 165 (1952)).

⁶⁰ *E.g.*, *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 616 (1989) (acknowledging “society’s concern for the security of one’s person”); *Winston v. Lee*, 470 U.S. 753, 755 (1985) (holding use of a surgical incision to obtain evidence unconstitutional); *Bell v. Wolfish*, 441 U.S. 520, 560 (1979) (holding that suspicionless visual body cavity searches of pretrial detainees can be constitutional if “conducted in a reasonable manner”); *Terry v. Ohio*, 392 U.S. 1, 17, 21 (1968) (acknowledging that frisking is “a serious intrusion upon the sanctity of the person,” but holding that it can be justified by articulable suspicion); *Schmerber v. California*, 384 U.S. 757, 765 (1966) (finding blood testing for alcohol constitutional because it is a minor physical intrusion carried out in medically appropriate fashion).

The solution lies in the proposition that, both before and after sentence, constitutional protection against police brutality is not limited to conduct violating the specific command of the Eighth Amendment or . . . of the Fourth. *Rochin v. California* must stand for the proposition that, 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.⁶¹

A decade later, in *Tennessee v. Garner*,⁶² the Court confronted the actions of a police officer who had shot and killed an eighth grader fleeing the scene of an apparent burglary, under the apprehension that it was “the only reasonable and practicable means of preventing [the suspect’s] escape.”⁶³ The Court eschewed due process rubrics, holding instead that the deployment of deadly force was a “seizure” under the Fourth Amendment, to be judged by “balancing the extent of the intrusion against the need for it.”⁶⁴ Use of deadly force would be a reasonable seizure as means to prevent escape, the Court held, only “[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others.”⁶⁵ In *Graham v. Connor*, the Court went on to extend the Fourth Amendment to

all claims that law enforcement officers have used excessive force . . . in the course of an arrest [or] investigatory stop 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.⁶⁶

This gesture toward textually confining rights to bodily integrity was both somewhat mysterious and largely ineffective. On its face, a doctrine requiring an election of constitutional rights is anomalous; the usual analysis recognizes that state action can violate more than one constitutional provision. The baseless arrest of a peaceful demonstrator without probable cause in order to silence her would seem to violate both the First and Fourth Amendments as incorporated against the states through the Due Process Clause.⁶⁷ Whatever the vir-

⁶¹ *Johnson v. Glick*, 481 F.2d 1028, 1032 (2d Cir. 1973) (citations omitted); see also *Graham v. Connor*, 490 U.S. 386, 393 (1989) (“In the years following *Johnson v. Glick*, the vast majority of lower federal courts have applied its four-part ‘substantive due process’ test indiscriminately to all excessive force claims lodged against law enforcement and prison officials under § 1983 . . .”).

⁶² 471 U.S. 1 (1985).

⁶³ *Id.* at 5.

⁶⁴ *Id.* at 7.

⁶⁵ *Id.* at 11.

⁶⁶ 490 U.S. 386, 395 (1989).

⁶⁷ *Cf. United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 52 (1993) (“Though the Fourth Amendment places limits on the Government’s power to seize property for purposes of

tues of Fourth Amendment “reasonableness” as a guide to the limits on state action, moreover, they hardly arise from the textual enumeration of the phrase in the original Bill of Rights, which applies against the states only by grace of the Court’s account of a well-ordered society. Neither does the reference to the Fourth Amendment text substantially confine judicial discretion; the task of construing the class of “unreasonable seizures” is equally amenable to historical inquiry, which the Court largely avoided, moral casuistry or free-form balancing of the sort the Court undertook. Finally, given both that government officials other than “law enforcement officers” can brutalize citizens,⁶⁸ and that law enforcement officers can execute physical assaults against individuals they do not seek to arrest, lower courts rapidly returned to the question of whether particular pieces of brutality and callousness shocked their judicial consciences.

By the beginning of the 1990s a majority of the Supreme Court had also begun to move toward recognizing unenumerated constitutional rights to bodily integrity on a third front. In the context of medical treatment, as early as *Mills v. Rogers*, the Court entertained claims that involuntary administration of antipsychotic medication could violate the substantive constraints of the Due Process Clause.⁶⁹ The principle was adopted by the Court eight years later in *Washington v. Harper*.⁷⁰ And in *Cruzan v. Director, Missouri Department of Health*,

forfeiture, it does not provide the sole measure of constitutional protection that must be afforded property owners in forfeiture proceedings. So even assuming that the Fourth Amendment were satisfied in this case, it remains for us to determine whether the seizure complied with our well-settled jurisprudence under the Due Process Clause.”); *Soldal v. Cook County*, 506 U.S. 56, 70 (1992) (“Certain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution’s commands. Where such multiple violations are alleged, we are not in the habit of identifying as a preliminary matter the claim’s ‘dominant’ character. Rather, we examine each constitutional provision in turn.”).

⁶⁸ While *Ingraham v. Wright*, 430 U.S. 651 (1977), found the Eighth Amendment inapplicable to disciplinary assaults on students, the case also adopted the proposition that bodily integrity is a liberty interest protected by the Due Process Clause. Justice Powell’s further discussion focused on the procedures required for the imposition of paddling, because the grant of certiorari had excluded the plaintiffs’ substantive due process claim. *Id.* at 659 n.12, 679. Justice White’s dissent for himself and Justices Brennan, Marshall and Stevens disagreed with Justice Powell’s analysis of the Eighth Amendment issues and suggested—without contradiction—that, given the recognition of a liberty interest in bodily autonomy, review of physical assaults by school officials and other executive officers could take place under the rubric of substantive due process. *Id.* at 689 n.5. Such, indeed, has been the subsequent development by the courts.

⁶⁹ 457 U.S. 291 (1982). In *Mills*, both parties assumed that the Due Process Clause provided a substantive basis for the challenge, but the Court remanded the matter to be addressed under state law. *Id.* at 306.

⁷⁰ 494 U.S. 210 (1990). The *Harper* Court recognized that “[t]he forcible injection of medication into a nonconsenting person’s body represents a substantial interference with that person’s liberty.” *Id.* at 229; *see id.* at 221 (discussing the “right to be free from the arbitrary administration of antipsychotic medication”). But it determined that substantive due process permitted this intrusion on the liberty of a prisoner where “a mental disorder exists which is likely to cause harm if not treated. . . . [and the treatment] is in the prisoner’s medical interests,

eight members of the Court were willing to assume the Constitution protected the right of a competent adult to refuse medical treatment.⁷¹

D. “Bodily Integrity” and the Conscience of the Rehnquist Court

When the Supreme Court revisited *Roe v. Wade* in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the plurality opinion of Justices O’Connor, Souter and Kennedy and the separate opinions of Justices Blackmun and Stevens invoked a right to “bodily integrity” enumerated in no clause of the Constitution.⁷² That right had not underpinned prior reasoning in abortion cases, but as the prevailing Justices pointed out, it had blossomed elsewhere in the years between

given the legitimate needs of his institutional confinement.” *Id.* at 222; *see id.* at 227 (holding that antipsychotic drugs may be administered if the inmate is “dangerous to himself or others and the treatment is in the inmate’s medical interest”); *cf.* *United States v. Stanley*, 483 U.S. 669, 710 (1987) (O’Connor, J., concurring in part and dissenting in part) (stating that “our Constitution’s promise of due process of law guarantees” at least compensation for violations of the principle stated by the Nuremberg Military Tribunals “that the ‘voluntary consent of the human subject is absolutely essential . . . to satisfy moral, ethical and legal concepts’”) (quoting *United States v. Brandt (The Medical Case)*, 2 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 181 (1949)).

⁷¹ 497 U.S. 261, 278–79 (1990) (recognizing the “principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment,” but distinguishing incompetent patient); *id.* at 287 (O’Connor, J., concurring) (“Because our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination, the Court has often deemed state incursions into the body repugnant to the interests protected by the Due Process Clause.”); *id.* at 305 (Brennan, J., dissenting) (recognizing that a fundamental “right to be free from medical attention without consent, to determine what shall be done with one’s own body, is deeply rooted in this Nation’s traditions”); *id.* at 331 (Stevens, J., dissenting) (“[A] competent individual’s decision to refuse life-sustaining medical procedures is an aspect of liberty protected by the Due Process Clause of the Fourteenth Amendment.”). *But see id.* at 294 (Scalia, J., concurring) (asserting that a right to refuse life-saving treatment was not “historically and traditionally protected”).

⁷² *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 849–50 (1992) (plurality opinion) (noting constitutional limits on state’s right to interfere with bodily integrity) (citing, *inter alia*, *Washington v. Harper*, 494 U.S. 210, 221–22 (1990); *Winston v. Lee*, 470 U.S. 753 (1985); *Rochin v. California*, 342 U.S. 165 (1952)); *id.* at 857 (explaining that *Roe* is part of a set of “rule[s] . . . of personal autonomy and bodily integrity”) (citing, *inter alia*, *Cruzan*, 497 U.S. at 278; *Harper*, 494 U.S. 210; *Rochin*, 342 U.S. 165; *Jacobson v. Massachusetts*, 197 U.S. 11, 24–30 (1905)); *id.* at 915 (Stevens, J., concurring in part and dissenting in part) (“Our whole constitutional heritage rebels at the thought of giving government the power to control men’s minds. The same holds true for the power to control women’s bodies.”) (citation and internal quotation marks omitted); *id.* at 926–27 (Blackmun, J., concurring in part and dissenting in part) (relying on “long recognized rights of . . . bodily integrity”) (citing *Winston*, 470 U.S. 753; *Rochin*, 342 U.S. 165; *Cruzan*, 497 U.S. 261); *see also id.* at 869 (O’Connor, J., concurring) (recognizing the “urgent claims of the woman to retain the ultimate control over her destiny and her body”); *id.* at 896 (plurality opinion) (deferring to the “bodily integrity of the pregnant woman”); *id.* at 852 (“The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear.”).

Roe and *Casey*.⁷³ The four *Casey* dissenters, by contrast, acknowledged a line of cases holding constitutional liberty “extends beyond freedom from physical restraint”⁷⁴ but omitted reference to any protection of the body. They concluded that, like the practice of optometry, a woman’s liberty “interest in having an abortion” could be regulated in any way “rationally related to a legitimate state interest.”⁷⁵

In the ensuing decade and a half, it has become increasingly difficult to refuse to discern rights against bodily violation as part of the constitutional fabric. The Court has continued to entertain claims by prisoners that invoke constitutional protection against a “prison official’s ‘deliberate indifference’ to a substantial risk of serious harm to an inmate,”⁷⁶ against “imminent dangers as well as current unnecessary and wanton infliction of pain and suffering,”⁷⁷ against painful and humiliating shackling,⁷⁸ physical assaults,⁷⁹ degrading refusals to accommodate physical limitations,⁸⁰ and painful and bizarrely disfiguring medical procedures.⁸¹ Nor is extensive application of these

⁷³ See *id.* at 857 (recognizing *Roe*’s “doctrinal affinity to cases [decided since *Roe*] recognizing limits on governmental power to mandate medical treatment or to bar its rejection”). The prevailing Justices also reaffirmed the grounding of *Roe* in the continuing line of cases protecting “liberty relating to intimate relationships, the family, and decisions about whether or not to beget or bear a child,” *id.* at 857, and highlighted the connections between reproductive autonomy and women’s equality. *Id.* at 856 (“The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.”); see *id.* at 928 (Blackmun, J.) (“restrictions on a woman’s right to terminate her pregnancy also implicate constitutional guarantees of gender equality”). These lines of reasoning have flourished in the last decade as well, providing additional bulwarks against repudiation of *Roe*.

⁷⁴ *Id.* at 951 (Rehnquist, C.J., concurring in part and dissenting in part).

⁷⁵ *Id.* at 966; see also *id.* at 951 (construing “liberty”).

⁷⁶ *Farmer v. Brennan*, 511 U.S. 825, 828 (1994); see *id.* at 832 (“[P]rison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must ‘take reasonable measures to guarantee the safety of the inmates.’”) (quoting *Hudson v. Palmer*, 468 U.S. 517, 526–27 (1984)).

⁷⁷ *Helling v. McKinney*, 509 U.S. 25, 34 (1993). But see *id.* at 41 (Thomas, J., dissenting) (rejecting *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968), and its application of the Eighth Amendment to prison deprivations).

⁷⁸ See *Hope v. Pelzer*, 536 U.S. 730, 736–37 (2002) (holding that shackling a prisoner to a hitching post violated the Eighth Amendment). But see *id.* at 764 (Thomas, J., dissenting) (arguing that the prison guard’s conduct did not violate clearly established law).

⁷⁹ See *Hudson v. McMillian*, 503 U.S. 1, 4 (1992) (“[U]se of excessive physical force against a prisoner may constitute cruel and unusual punishment when the inmate does not suffer serious injury.”). But see *id.* at 18 (Thomas, J., dissenting) (arguing that force causing only minor harm does not constitute cruel and unusual punishment).

⁸⁰ See *United States v. Georgia*, 126 S. Ct. 877, 879 (2006) (Scalia, J., for a unanimous Court) (describing a paraplegic inmate who was confined in his cell twenty-three to twenty-four hours per day, denied assistance, and left to sit in his own bodily waste).

⁸¹ See *Hill v. McDonough*, 126 S. Ct. 2096, 2102 (2006) (ordering consideration of challenge to lethal injection procedure that is alleged to subject prisoner to “a foreseeable risk of . . . gratuitous and unnecessary pain”) (internal quotation marks omitted); *Nelson v. Camp-*

norms by trial courts a phenomenon limited to the salad days of judges appointed by Presidents Kennedy and Johnson. By the year 2000, the number of facilities under federal supervision had shrunk substantially from its height during the 1980s, but almost two-fifths of the state prison population and a third of those incarcerated in jails remained under the supervision of federal court decrees.⁸² Granted to convicted inmates, these protections are difficult to deny to innocent individuals in the power of the state.

Every member of the Rehnquist Court, indeed, recognized extratextual protections against physical violation by the state.⁸³ The first intimations of this *détente* came in *Washington v. Glucksberg*.⁸⁴ In addressing the claims for a right to assisted suicide, Justices Souter and Stevens reiterated their position that the Constitution provides protections for bodily integrity and the right to refuse unwanted medical treatment.⁸⁵ Justices O'Connor, Breyer, and Ginsburg suggested as well the possibility that "suffering patients have a constitutionally cognizable interest in obtaining relief from the suffering that they may experience in the last days of their lives," though as interpreted the challenged statutes did not raise the issue.⁸⁶ More surprising, Chief Justice Rehnquist, writing for himself, Justices O'Connor, Kennedy, Scalia and Thomas, acknowledged that

[t]he Due Process Clause guarantees more than fair process, and the "liberty" it protects includes more than the absence of physical restraint. The Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests. In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the "liberty" specially protected by the Due Process Clause includes the rights . . . to bodily integrity and to abortion. We have also assumed, and strongly suggested, that the Due Process

bell, 541 U.S. 637, 639, 641 (2004) (entertaining an Eighth Amendment claim regarding preparation for lethal injection by having non-medical prison personnel "make a 2-inch incision in petitioner's arm or leg").

⁸² Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 583 (2006).

⁸³ The issue was prefigured in *Herrera v. Collins*, 506 U.S. 390 (1993), where a constellation of seven Justices reached beyond constitutional text to affirm the proposition that, as Justice O'Connor put the matter in concurrence, "the execution of a legally and factually innocent person would be a constitutionally intolerable event." *Id.* at 419. *But see id.* at 427–28 (Scalia, J., concurring) ("There is no basis in text, tradition, or even in contemporary practice (if that were enough) for finding in the Constitution a right to demand judicial consideration of newly discovered evidence of innocence brought forward after conviction.").

⁸⁴ 521 U.S. 702 (1997).

⁸⁵ *Id.* at 744 (Stevens, J., concurring); *id.* at 777–78 (Souter, J., concurring).

⁸⁶ *Id.* at 737 (O'Connor, J., concurring); *see also id.* at 791 (Breyer, J., concurring) (discussing patients' interest in "avoidance of severe physical pain (connected with death)").

Clause protects the traditional right to refuse unwanted lifesaving medical treatment.⁸⁷

Subsequent cases have reiterated the recognition of an unenumerated constitutional right to refuse unwanted medical treatment.⁸⁸

As the twentieth century drew to a close, new illustrations of the limits of the constitutional text in addressing the brutality of state functionaries came before the Court, along with an emerging consensus that egregious assaults on bodily integrity violate unenumerated constitutional rights. In *United States v. Lanier*,⁸⁹ the Court reviewed the case of a Tennessee chancery judge who sexually assaulted women—including his employees and a woman whose daughter’s custody case remained before him—in his chambers. Convicted of depriving the women of constitutional rights under color of law, the judge maintained that he had no fair warning that his actions violated clearly established constitutional rights.⁹⁰ For a skeptic of unenumerated rights, the claim would have some plausibility: the sexual assaults were neither “searches or seizures” under the Fourth Amendment nor “punishments” under the Eighth. The Court, however, unanimously reversed dismissal of the conviction, observing:

[A]lthough *DeShaney v. Winnebago County Dept. of Social Servs.* generally limits the constitutional duty of officials to protect against assault by private parties to cases where the victim is in custody, *DeShaney* does not hold . . . that there is no constitutional right to be free from assault committed by state officials themselves outside of a custodial setting. . . . *Graham v. Connor* does not hold that all constitutional claims relating to physically abusive government conduct must arise under either the Fourth or Eighth Amendments⁹¹

⁸⁷ *Id.* at 719–20 (citing *Rochin v. California* for the right to bodily integrity, *Casey* for the right to abortion, and *Cruzan* for the right to refuse medical treatment); see also *Vacco v. Quill*, 521 U.S. 793, 807 (1997) (“In *Cruzan*, we concluded that ‘[t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions,’ and we assumed the existence of such a right for purposes of that case. . . . [O]ur assumption of a right to refuse treatment was grounded . . . on well-established, traditional rights to bodily integrity and freedom from unwanted touching.”) (citations omitted).

⁸⁸ See, e.g., *Sell v. United States*, 539 U.S. 166, 176–79 (2003) (reversing order requiring involuntary administration of antipsychotic medications); *Riggins v. Nevada*, 504 U.S. 127, 134–35 (1992) (recognizing a constitutionally protected liberty “interest in avoiding involuntary administration of antipsychotic drugs”—an interest that only an “essential” or overriding state interest might overcome).

⁸⁹ 520 U.S. 259 (1997).

⁹⁰ *Id.* at 263.

⁹¹ *Id.* at 272 n.7 (citations omitted). The Court remanded the reversed conviction for evaluation by the Court of Appeals of whether the judge’s actions violated “clearly established” rights of bodily autonomy when judged by the proper standards, but when the defendant absconded to Mexico, his appeal was dismissed. *United States v. Lanier*, 123 F.3d 945, 946 (6th Cir. 1997) (en banc). He was later recaptured. See *United States v. Lanier*, 201 F.3d 842, 845 (6th Cir. 2000) (explaining Lanier’s failure to appear and subsequent guilty plea).

The next year, in *County of Sacramento v. Lewis*, the Court reviewed an action against a police officer who had killed a third party during a high speed car chase.⁹² Justice Souter wrote an opinion with which only Justices Thomas and Scalia took issue, beginning with the proposition that the Due Process Clause bars “certain government actions regardless of the fairness of the procedures used to implement them.”⁹³ To judge whether the actions of the defendant officer were such an “abuse of power,” the Court turned to the benchmark of *Rochin v. California*: “for half a century now we have spoken of the cognizable level of executive abuse of power as that which shocks the conscience.”⁹⁴ *Lewis* reiterated the proposition that deliberate indifference to the basic human needs of those in official custody would shock the Court’s conscience,⁹⁵ but said that “conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level.”⁹⁶ Looking to precedents from Eighth Amendment doctrine, the opinion held that “when unforeseen circumstances demand an officer’s instant judgment” only an “intent to harm suspects physically” sparks “the shock that implicates ‘the large concerns of the governors and the governed.’”⁹⁷ Since the police defendant in *Lewis* was unexpectedly “faced with a course of lawless behavior for which the police were not to blame,” his “instinctive response,” though reckless and deadly, did not shock the conscience of the Court.⁹⁸

⁹² 523 U.S. 833, 836 (1998).

⁹³ *Id.* at 840 (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)).

⁹⁴ *Id.* at 846 (stating the question as whether “conduct . . . ‘shocks the conscience’ and ‘violates the decencies of civilized conduct’”). The opinion quoted *Rochin v. California*, 342 U.S. 165, 172–73 (1952), then continued by citing with approval *Breithaupt v. Abram*, 352 U.S. 432, 435 (1957), which discussed conduct that “was so brutal and offensive that it did not comport with traditional ideas of fair play and decency,” and *Whitley v. Albers*, 475 U.S. 312, 327 (1986), which referred to “prison security measures” that are “repugnant to the conscience of mankind.” *Lewis*, 523 U.S. at 847.

⁹⁵ 523 U.S. at 849–50 (citing *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)); *id.* at 851 (“[I]n the custodial situation of a prison, forethought about an inmate’s welfare is not only feasible but obligatory under a regime that incapacitates a prisoner to exercise ordinary responsibility for his own welfare.”); *id.* at 853 (“When such extended opportunities to do better are teamed with protracted failure even to care, indifference is truly shocking.”).

⁹⁶ *Id.* at 849.

⁹⁷ *Id.* at 853–54 (quoting *Daniels v. Williams*, 474 U.S. 327, 332 (1986)). The Court also used the phrase “purpose to cause harm,” *id.* at 854, but it noted that in *Rochin* “it was not the ultimate purpose of the government actors to harm the plaintiff, but they apparently acted with full appreciation of what the Court described as the brutality of their acts,” *id.* at 849 n.9.

⁹⁸ *Id.* at 834–35. Justices Kennedy and O’Connor filed a concurrence emphasizing that the “shocks the conscience” test “mark[s] the beginning point in asking whether or not the objective character of certain conduct is consistent with our traditions, precedents, and historical understanding of the Constitution and its meaning” in light of an “objective assessment of the necessities of law enforcement” and “the primacy of the interest in life which the State . . . is bound to respect.” *Id.* at 857–58.

Justice Scalia's concurrence, joined by Justice Thomas, objected tartly to what Justice Scalia perceived as the subjectivity of the "shocks-the-conscience" test.⁹⁹ But even that opinion ultimately acknowledged that the Due Process Clause obligates federal courts to evaluate egregious government abuses for constitutional legitimacy. Rather than the judicial conscience, in Justice Scalia's view, the "Nation's history, legal traditions, and practices . . . provide the crucial guideposts for responsible decisionmaking."¹⁰⁰ A proper analysis would acknowledge the obligation to avoid deliberate indifference to the basic human needs of those in official custody, but find no "support for a substantive-due-process right to be free from reckless police conduct during a car chase."¹⁰¹

The Court did not revisit *Lewis* and the judicial conscience for five years, though lower federal courts regularly sustained causes of action for conscience-shocking official abuses of the person.¹⁰² The issue returned to the Court in *Chavez v. Martinez*, an action brought by a plaintiff who had been interrogated for forty-five minutes while screaming in sightless agony and awaiting medical treatment after being shot in the face by the police.¹⁰³ *Chavez* was argued a little over a year after the September 11 attacks, against the backdrop of the "war on terror," and government briefs invited the Court to rely on exigencies of law enforcement to approve physically coercive interrogation so long as its fruits were not used in criminal prosecutions.¹⁰⁴

⁹⁹ *Id.* at 861 (Scalia, J., concurring).

¹⁰⁰ *Id.* at 862 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

¹⁰¹ *Id.* at 863.

¹⁰² *E.g.*, *Johnson v. Newburgh Enlarged Sch. Dist.*, 239 F.3d 246, 251–52 (2d Cir. 2001) (concluding that gym teacher's disciplinary response of dragging student across the floor by neck and slamming student's head against bleachers gave rise to a substantive due process claim); *Neal ex rel. Neal v. Fulton County Bd. of Educ.*, 229 F.3d 1069, 1071 (11th Cir. 2000) (holding that corporal punishment by football coach that blinded student in one eye gave rise to a substantive due process claim); *Rogers v. City of Little Rock*, 152 F.3d 790, 793 (8th Cir. 1998) (affirming judgment against police officer who stopped plaintiff for traffic violation, followed her home, entered her residence, and raped her); *Hemphill v. Schott*, 141 F.3d 412, 419 (2d Cir. 1998) (holding that alleged conduct of police officers in assisting a private citizen to shoot plaintiff survived qualified immunity claim).

A Westlaw review of district court opinions for the period between *Lewis* and *Chavez* suggests that roughly 160 reported opinions sustained substantive due process claims of "conscience-shocking" behavior on the merits, against motions to dismiss, or against motions for summary judgment, while another 370 dismissed such claims. Eli Segal, Analysis of Federal District Court Substantive Due Process "Shock-the-Conscience" Claims 3–4 (Oct. 1, 2006) (unpublished manuscript, on file with the *University of Pennsylvania Journal of Constitutional Law*).

¹⁰³ 538 U.S. 760, 764 (2003).

¹⁰⁴ Although at the time, the administration publicly disavowed "torture," the Solicitor General, on behalf of the United States amicus curiae, argued for "breathing space" needed "for law enforcement to confront imminent threats," Brief for the United States as Amicus Curiae Supporting Petitioner at 19, *Chavez*, 538 U.S. 760 (No. 01-1444), 2002 WL 31100916, at 24, setting before the Court the picture of police seeking "life-saving information" from a suspect regarding a "bomb . . . about to explode," *id.* at 25, and inviting the Court to approve such measures as

The Court declined these invitations. Though a majority of Justices held that Fifth Amendment protections against self-incrimination were inapplicable because the prisoner was never prosecuted, five of the six opinions in the case renounced the position that torture to obtain officially relevant information is a constitutionally acceptable law enforcement technique.¹⁰⁵ All of the Justices in *Chavez* accepted the proposition, grounded in *Rochin* and *Sacramento v. Lewis*, that egregious physical abuses in police questioning that “shock the conscience” of the Court would violate the substantive requirements of the Due Process Clause, though the multiplicity of opinions masked this fact.¹⁰⁶

“grabbing of [the] throat” and threatening to “knock the suspect’s remaining teeth out of his mouth if he remained silent,” *id.* at 21, 29. See also Reply Brief for the Petitioner at 7 n.2, *Chavez*, 538 U.S. 760 (No. 01-1444), 2002 WL 31655026, (reciting the “bomb . . . about to explode” scenario); Transcript of Oral Argument at 34, *Chavez*, 538 U.S. 760 (No. 01-1444), 2002 WL 31748545 (“QUESTION: [L]et’s assume . . . you think he’s going to blow up the World Trade Center. I suppose if . . . we have . . . this necessity exception, . . . you could beat him with a rubber hose.”); Brief for the Petitioner at 27 & n.8, *Chavez*, 538 U.S. 760 (No. 01-1444), 2002 WL 31016589 (invoking the image of an official questioning a “suspect [who] has been arrested for kidnapping a small child who cannot survive without immediate adult intervention. The child is being hidden somewhere, and time is running out on his life,” and inviting the Court to refer to Professor Dershowitz’s analysis advocating torture) (citing ALAN DERSHOWITZ, WHY TERRORISM WORKS 135, 247 n.3 (2002)).

¹⁰⁵ *Chavez*, 538 U.S. at 773 (Thomas, J., plurality opinion) (“Our views on the proper scope of the Fifth Amendment’s Self-Incrimination Clause do not mean that police torture or other abuse that results in a confession is constitutionally permissible so long as the statements are not used at trial . . .”); *id.* at 783–84 (Stevens, J., concurring in part and dissenting in part) (concluding that the law is clear that “an attempt to obtain an involuntary confession from a prisoner by torturous methods. . . [is the] type of brutal police conduct [that] constitutes an immediate deprivation of the prisoner’s constitutionally protected interest in liberty”); *id.* at 796 (Kennedy, J., concurring in part and dissenting in part) (“[U]se of torture or its equivalent in an attempt to induce a statement violates an individual’s fundamental right to liberty of the person.”); *id.* at 801 (Ginsburg, J., concurring in part and dissenting in part) (quoting Justice Stevens on “torturous methods” and characterizing the type of procedure to be avoided: “[i]t is far pleasanter to sit comfortably in the shade rubbing red pepper into a poor devil’s eyes than to go about in the sun hunting up evidence”). Justice Souter, joined by Justice Breyer, was more measured in his comments, concluding that Justice Stevens had set forth a “serious argument” that the police conduct was unconstitutionally “outrageous.” *Id.* at 779 (Souter, J., concurring). Justice Scalia, who joined Justice Thomas’s opinion, filed a separate opinion focused on a procedural objection to the outcome in the case. *Id.* at 780 (Scalia, J., concurring in part and dissenting in part).

¹⁰⁶ *Chavez*, 538 U.S. at 774 (Thomas, Rehnquist, O’Connor & Scalia, JJ.); *id.* at 779 (Souter & Breyer, JJ.); *id.* at 787 (Stevens, J., concurring in part and dissenting in part); *id.* at 796 (Kennedy, Stevens & Ginsburg, JJ., concurring in part and dissenting in part) (citing *Rochin* by noting that under the Due Process Clause of the Fourteenth Amendment “use of torture or its equivalent in an attempt to induce a statement violates an individual’s fundamental right to liberty of the person”).

Justice Kennedy, joined by Justices Stevens and Ginsburg, thought it plain that because “the suspect thought his treatment would be delayed, and thus his pain and condition worsened, by refusal to answer questions,” there was a clear constitutional violation. *Id.* at 797. “[N]o reasonable police officer would believe that the law permitted him to prolong or increase pain to obtain a statement.” *Id.* at 798; see also *id.* at 799 (Ginsburg, J., concurring in part and dissenting

Since *Chavez*, federal courts have continued to entertain claims of bodily injury that “shock the conscience.”¹⁰⁷ To be sure, claims against official physical abuse did not always prevail in the last decade and a half.¹⁰⁸ But in light of its case law, the Court cannot disavow the constitutional status of rights of bodily integrity without uprooting a substantial and mutually supporting set of modern constitutional practices.

II. GROUNDING THE RIGHT TO BODILY INTEGRITY

Nor should the Court feel any impulse to abandon this work, for the protection of bodily integrity has roots in the preconditions of

in part) (“[I]nterrogation in this case would remain a clear instance of the kind of compulsion no reasonable officer would have thought constitutionally permissible.”).

Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, would have relied on an absence of evidence that Officer Chavez “acted with a purpose to harm Martinez,” interfered with his treatment, or “exacerbated [his] injuries or prolonged his stay in the hospital,” along with the legitimate “need to investigate” the circumstances of the shooting to conclude that no substantive due process violation had been alleged. *Id.* at 775.

Justice Souter, joined by Justice Breyer, filed a brief and cryptic opinion for the Court stating that there was a “serious argument in support of” that claim, but that whether the actions were indeed conscience-shocking should be resolved on remand. *Id.* at 779. Oddly, Justice O’Connor’s position on this issue does not seem to be recorded.

On remand, the Ninth Circuit was abrupt but emphatic in *Martinez v. City of Oxnard*, holding tersely that the plaintiff’s claim was viable because “[a] clearly established right, fundamental to ordered liberty, is freedom from coercive police interrogation.” 337 F.3d 1091, 1092 (9th Cir. 2003).

¹⁰⁷ *E.g.*, *Smith v. District of Columbia*, 413 F.3d 86 (D.C. Cir. 2005) (sustaining verdict for juvenile detainee who died as a result of deliberate indifference of the city in choosing a residential program); *Torres-Rivera v. O’Neill-Cancel*, 406 F.3d 43 (1st Cir. 2005) (upholding verdict against officer who stood by, training his gun on a 15-year-old boy, while the boy was beaten by another officer); *Rodriguez-Rodriguez v. Ortiz-Velez*, 391 F.3d 36 (1st Cir. 2004) (reversing grant of summary judgment to police officer who allegedly assaulted plaintiff without justification); *A.M. ex rel. J.M.K. v. Luzerne County Juvenile Det. Ctr.*, 372 F.3d 572, 575 (3d Cir. 2004) (reversing summary judgment in favor of juvenile detention facility on claim by juvenile detainee that his repeated brutalization by other detainees was the result of deliberate indifference).

A Westlaw review of district court opinions referring to the constitutional “shock-the-conscience” standard in the two-and-a-half years following *Chavez* suggests that roughly 100 reported opinions sustained substantive due process claims of “conscience-shocking” behavior on the merits, against motions to dismiss, or against motions for summary judgment, and that another 300 cases dismissed such claims. Segal, *supra* note 102, at 4.

¹⁰⁸ *See Brousseau v. Haugen*, 543 U.S. 194 (2004) (per curiam) (recognizing a qualified immunity for shooting a fleeing suspect reasonably believed to be dangerous); *Saucier v. Katz*, 533 U.S. 194 (2001) (discussing qualified immunity in excessive force cases); *cf. Town of Castle Rock v. Gonzales*, 125 S. Ct. 2796, 2810 (2005) (holding that plaintiff did not have a property interest in the enforcement of temporary restraining order granted against her husband and therefore could not maintain a due process claim against the town for its alleged policy of non-enforcement); *id.* at 2813 (Stevens, J., dissenting) (“It is perfectly clear, on the one hand, that neither the Federal Constitution itself, nor any federal statute, granted respondent or her children any individual entitlement to police protection.”); *Gonzales v. Raich*, 125 S. Ct. 2195, 2201 (2005) (upholding a prohibition of medical marijuana).

ordered liberty, the traditions of American constitutional history, and the comparative competence of an independent judiciary.

A. Democracy, Fear and Ordered Liberty

Protections against cruel and unusual punishment, compelled confessions, kangaroo courts, and abridgements of free expression are central to the continued operation of a regime of ordered liberty. In their absence, the structures of democratic self rule can succumb all too easily to creeping despotism, and the Court has recognized in this proposition the basis for applying the First, Fourth, Fifth, and Eighth Amendments against the states. Ordered liberty requires, as well, that government officials be denied unchecked discretion to impose extrajudicial violence, physical brutality, and degradation.

The Court has regularly reiterated that the recognition of extratextual constitutional protections must be reserved for “the large concerns of the governors and the governed.”¹⁰⁹ Largest among these concerns is the necessity of constraining physical harm that can be wreaked by the state. The plausible Weberian definition of the state as the legitimate monopolist of coercive violence¹¹⁰ makes clear that within an effective legal order the government is a most potent source of fear. The need to constrain the exercise of official violence lies at the heart of the Bill of Rights, and no less at the heart of a legitimate liberal polity. As Judith Shklar has put the matter:

The first right is to be protected against the fear of cruelty. People have rights as a shield against this greatest of public vices. . . . Justice itself is only a web of legal arrangements required to keep cruelty in check, especially by those who have most of the instruments of intimidation closest at hand. . . . [L]aws . . . have one primary object: to relieve each one of us of the burden of fear, so that we feel free because the government does not, indeed cannot, terrorize us.¹¹¹

¹⁰⁹ *County of Sacramento v. Lewis*, 523 U.S. 833, 848, 853 (1998) (quoting *Daniels v. Williams*, 474 U.S. 327, 332 (1986)); see also *id.* at 864 (Scalia, J., concurring) (same).

¹¹⁰ MAX WEBER, *Politics as a Vocation*, in *FROM MAX WEBER: ESSAYS IN SOCIOLOGY* 78 (H. H. Gerth & C. Wright Mills eds. & trans., 1958) (1919) (defining the state as “a human community that (successfully) claims the monopoly of the legitimate use of physical force”) (emphasis omitted).

¹¹¹ JUDITH N. SHKLAR, *ORDINARY VICES* 237–38 (1984); *id.* at 244 (“Throughout history, war and punishment have been the primary functions of government. . . . [These functions root] demands for limited government for justice as the sole public virtue, and underline[] the political significance of putting cruelty first.”); see also Judith N. Shklar, *The Liberalism of Fear*, in *LIBERALISM AND THE MORAL LIFE* 29 (Nancy L. Rosenblum ed., 1989) (noting that the obligation of the liberal state is to avoid fear created by “arbitrary, unexpected, unnecessary, and unlicensed acts of force and by habitual and pervasive acts of cruelty and torture performed by military, paramilitary, and police agents in any regime”).

This focus is hardly idiosyncratic. In a parallel discussion in political philosophy, Professor Barry has suggested that avoiding physical harm is a good candidate for a consensus value be-

The threat of physical abuse is more than cause for apprehension in its own right—it is potentially toxic to the independence of the citizenry that American democracy presupposes. A sense of personal self-determination and independence from the state is the *sine qua non* of a free people that can participate as agents in the process of self-governance, and a populace that finds the bodies of its members at the mercy of public expedience is unlikely to be such a people. As Justice O'Connor observed, "our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination."¹¹²

Modern states have both a burgeoning capacity to enforce physical brutality, and an increasing range of plausible excuses for doing so. They suffer, therefore, from an ever-expanding temptation to exercise those capacities in ways that ease the burden of governance, a temptation that requires continued constraint.¹¹³ Justice Frankfurter observed that

[t]he security of one's privacy against arbitrary intrusion by the police . . . is basic to a free society. . . . The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights¹¹⁴

The same can be said of the security of one's person.

cause such harm is "deleterious from the point of view of a very wide range of conceptions of the good. . . . life goes better, on virtually any conception of the good, in the absence of physical injury." BRIAN BARRY, JUSTICE AS IMPARTIALITY 88 (1995) (citation omitted); *see id.* at 25 (describing the "common-sense morality" that teaches that one should avoid imminent harm to another if one can do so without danger to oneself); SISSELA BOK, COMMON VALUES 15–16, 18–19, 30, 57 (1995) (citing duties to refrain from coercion and violence as "moral minimalism" common across cultures); STUART HAMPSHIRE, INNOCENCE AND EXPERIENCE 90 (1989) ("[T]he great evils of human experience, reaffirmed in every age . . . : murder and destruction of life, imprisonment, enslavement, . . . physical pain and torture . . ."); MICHAEL WALZER, THICK AND THIN 10 (1994) (arguing for universal applicability of "negative injunctions . . . against murder, deceit, torture, oppression, and tyranny" that "respond to other people's pain and oppression"); Jeremy Waldron, *How to Argue for a Universal Claim*, 30 COLUM. HUM. RTS. L. REV. 305, 305 (1999) (invoking the "standard, predictable abhorrence of torture in every culture and every society").

¹¹² *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 287 (1990).

¹¹³ *See, e.g.*, Jeremy Waldron, *Torture and Positive Law; Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1742–43 (2005) ("Modern states suffer from a standing temptation to try to get their way by terrorizing the populations under their authority with the immense security apparatus they control The rule of law offers a way of responding to that apprehension . . . [by ensuring] exercise of power is imbued with this broader spirit of the repudiation of brutality.").

¹¹⁴ *Wolf v. Colorado*, 338 U.S. 25, 27–28 (1949), *quoted with approval in Coolidge v. New Hampshire*, 403 U.S. 443, 453 (1971); *see also Monroe v. Pape*, 365 U.S. 167, 209 (1961) (Frankfurter, J., dissenting) ("Modern totalitarianisms have been a stark reminder, but did not newly teach, that the kicked-in door is the symbol of a rule of fear and violence fatal to institutions founded on respect for the integrity of man.").

B. The Constitution of Our Nation: Traditions and History

The regnant account of the appropriate procedure for discerning the metes and bounds of extratextual constitutional protections gives substantial weight to “[o]ur Nation’s history, legal traditions, and practices.”¹¹⁵ In evaluating accommodations between order and liberty, as Justice Harlan observed, the Court must have regard to traditions of our country, both “the traditions from which it developed as well as the traditions from which it broke.”¹¹⁶ One of the defining elements of American constitutional practice has been its decisive breach with the lures of official brutality.

From the early days of the Republic, security from government force deployed against the bodies of the citizenry has been a signature of the American constitutional tradition. The Fourth Amendment protects “persons” against unreasonable searches and seizures;¹¹⁷ the protection of “liberty” against deprivation without due process builds on Blackstone’s definition of liberty as including personal security.¹¹⁸ Protection against physical assault by their government has been regarded as one of the hallmarks of a free people; slavery, abhorred as the antithesis of free citizenship from the outset, and exiled from the constitutional pale by the Thirteenth Amendment, was defined by the “uncontrolled authority over the body of the slave.”¹¹⁹

The Framers of the Constitution were clear in their repudiation of what they saw as the elements of despotism, and one of those elements was the prospect of state abuse of the body. Thus, Patrick Henry objected, during the Virginia ratifying convention, to the ab-

¹¹⁵ *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997); *see also Lawrence v. Texas*, 539 U.S. 558, 572 (2003) (“[O]ur laws and traditions . . . are of the most relevance”); *Chavez v. Martinez*, 538 U.S. 760, 775 (2003) (“[F]undamental rights and liberties which are ‘deeply rooted in this Nation’s history and tradition’ and ‘implicit in the concept of ordered liberty’ qualify for such protection.”) (quoting *Glucksberg*, 521 U.S. at 721); *County of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (“[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.”); *cf. Roper v. Simmons*, 543 U.S. 551, 560 (2005) (interpreting the Eighth Amendment in light of “history, tradition and precedent”).

¹¹⁶ *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting from dismissal) (“The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke.”), *quoted in Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992); *cf. Lawrence*, 539 U.S. at 571–72 (“In all events we think that our laws and traditions in the past half century are of most relevance here.”); *Glucksberg*, 521 U.S. at 710 (beginning due process analysis “by examining our Nation’s history, legal traditions, and practices”) (citing *Casey*, 505 U.S. at 849–50, and *Cruzan*, 497 U.S. at 269–79); *id.* at 764 (Souter, J., concurring) (“[C]lashing principles . . . [are] to be weighed within the history of our values as a people.”).

¹¹⁷ U.S. CONST. amend. IV, §1.

¹¹⁸ *See supra* note 3 and accompanying text (describing Blackstone’s definition of liberty).

¹¹⁹ *State v. Mann*, 13 N.C. (2 Dev.) 263, 266 (1829).

sence of a prohibition on torture as opening the door for practices alien to the free polity the Constitution sought to secure:

What has distinguished our ancestors?—That they would not admit of tortures, or cruel and barbarous punishment. But Congress may introduce the practice of the civil law, in preference to that of the common law. They may introduce the practice of France, Spain, and Germany—of torturing, to extort a confession of the crime. They will say that they might as well draw examples from those countries as from Great Britain, and they will tell you that there is such a necessity of strengthening the arm of government, that they must have a criminal equity, and extort confession by torture, in order to punish with still more relentless severity.¹²⁰

By the middle of the twentieth century, “third degree” brutality by police officials was judged constitutionally anathema by the Supreme Court in the aftermath of the exposure and condemnation of the practice by such authorities as the American Bar Association and the Wickersham Commission Report.¹²¹ That official rejection was reinforced by revulsion against physical brutality as a signature of America’s totalitarian enemies.¹²² A number of commentators have ob-

¹²⁰ 3 J. ELLIOT, DEBATES 447–48 (1863). See generally WILLIAM PENN, THE EXCELLENT PRIVILEGE OF LIBERTY AND PROPERTY BEING THE BIRTH-RIGHT OF THE FREE-BORN SUBJECTS OF ENGLAND 3–12 (Philobiblon Club ed. 1687) (“In France, and other Nations, . . . if any two Villains will but swear against the poor Party, his Life is gone; nay, if there be no witness, yet he may be put on the Rack, the Tortures whereof make many an innocent Person confess himself guilty, and then, with seeming Justice is executed.”). For further discussion of the hostility to torture in the American constitutional tradition, see Seth F. Kreimer, *Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror*, 6 U. PA. J. CONST. L. 278 (2003).

¹²¹ NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, PUB. NO. 11, *Report on Lawlessness in Law Enforcement* 5 (1931) (“[T]he practice is shocking in its character and extent, violative of American traditions and institutions and not to be tolerated.”); EMANUEL H. LAVINE, THE THIRD DEGREE: A DETAILED AND APPALLING EXPOSE OF POLICE BRUTALITY (photo reprint 1974) (1930) (describing the system of official police brutality observed by the author during his twenty-five years as a police reporter); see also JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE 61–66 (1993) (discussing more recent forms of police misconduct and their treatment by the Rehnquist Court).

For opinions citing the Wickersham Commission report and condemning police use of third degree methods as unconstitutional, see, for example, *Culombe v. Connecticut*, 367 U.S. 568, 583 n.25 (1961) (citing Wickersham Report); *Williams v. United States*, 341 U.S. 97, 101 (1951) (condemning brutal interrogation techniques); *Malinski v. New York*, 324 U.S. 401, 407 (1945) (criticizing the use of fear to obtain confessions); *Ashcraft v. Tennessee*, 322 U.S. 143, 150 n.5, 152 n.6 (1944) (citing Wickersham Commission); *Ward v. Texas*, 316 U.S. 547, 555 (1942) (holding inadequate a confession that was “the product of coercion and duress”); *White v. Texas*, 310 U.S. 530, 533 (1940) (criticizing inhumane treatment of prisoner leading up to his confession) (citing *Chambers v. Florida*, 309 U.S. 227, 241 (1940)); and *Chambers*, 309 U.S. at 238 n.11, 240 n.15 (citing Wickersham Commission).

¹²² See, e.g., *Chambers*, 309 U.S. at 236–38; cf. *Chavez v. Martinez*, 538 U.S. 760, 788 (2002) (Stevens, J., concurring in part and dissenting in part) (deploring “the kind of custodial interrogation that was once employed by the Star Chamber, by ‘the Germans of the 1930’s and early 1940’s,’ and by some of our own police departments only a few decades ago”) (quoting *Oregon v. Elstad*, 470 U.S. 298, 371 (1985) (Stevens, J., dissenting)).

served that during the 1930s and 1940s, the rejection of totalitarian assaults on the citizenry established itself as a defining element of the American constitutional tradition.¹²³ At the beginning of the twenty-first century, therefore, the Court is fully warranted in viewing the practice of official brutality as an outlaw of constitutional tradition, even where the constitutional enumeration of rights fails explicitly to bar it.

C. Moral Vision and Bureaucracy: The Comparative Institutional Competence of the Courts

A third basis for affording judicial protection against official brutality finds root in the fact that assaults on physical integrity of the sort examined by federal courts occur most often at the behest, not of legislative mandate, but of bureaucratic discretion. The demands of minimal physical decency are not openly debated in the halls of Congress so much as stunted by the demands of officials' professional roles. A distinctive and dominant function of constitutional adjudication in the federal trial courts today, a function somewhat obscured from view when Supreme Court decisions featured in constitutional law casebooks are the principal unit of analysis, applies constitutional norms of decent treatment against street-level bureaucrats authorized to use coercive violence.¹²⁴ The doctrine elaborated under the "enumerated" rights of the Constitution would require such actions be

¹²³ E.g., RICHARD A. PRIMUS, *THE AMERICAN LANGUAGE OF RIGHTS* 177–233 (1999) (discussing American concepts of rights and justice as developing in response to Nazi and Soviet totalitarianism); Michael Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 65 (1996) (noting that the rise of police states in Europe and Asia "intensified the Court's sense of responsibility for careful evaluation of the administration of justice") (internal quotation marks omitted); Richard Primus, Note, *A Brooding Omnipresence: Totalitarianism in Postwar Constitutional Thought*, 106 YALE L.J. 423 (1996); Margaret Raymond, *Rejecting Totalitarianism: Translating the Guarantees of Constitutional Criminal Procedure*, 76 N.C. L. REV. 1193, 1196 (1998) ("Throughout the postwar period, judges invoked the specter of totalitarianism as part of the struggle to define the scope of constitutional limits on police authority."); David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1740 (2005) (depicting totalitarianism as "the chief 'contrast-model' for American institutions, including the machinery of criminal justice").

¹²⁴ Seth F. Kreimer, *Exploring the Dark Matter of Judicial Review: A Constitutional Census of the 1990s*, 5 WM. & MARY BILL RTS. J. 427 (1997). This finding from a 1995 review of trial court decisions remains robust a decade later regarding the exercise of the judicial conscience under due process analysis.

A Westlaw review of district court opinions referring to the constitutional "shock-the-conscience" standard in the seven-and-a-half years following *Sacramento v. Lewis* suggests that roughly 260 reported opinions sustained substantive due process claims of "conscience-shocking" behavior either on the merits, against motions to dismiss, or against motions for summary judgment. The opinions in the sample focused on claims of bodily injury resulting from actions by law enforcement officers (31%); school officials (19%); and correctional officers and officials (19%). These figures do not include sustained "textual" claims under the Eighth or Fourth Amendments. Segal, *supra* note 102, at 4–5.

approved by proper legal form. But many a brutal bureaucrat will meet those requirements and the relative characteristics of bureaucrat and judge suggest a single virtue in making judicial review available beyond the bounds of constitutional text.

A modern bureaucracy's mission tends to dwarf competing values; the police officer sees herself as charged with suppressing crime, a jailer with keeping order in prison, the auditor with maximizing efficiency in health care delivery. None is trained or encouraged to attend too closely to the demands of human dignity; that is viewed as someone else's job or as a secondary concern. Moreover, where the state deploys coercive violence against the citizenry, the costs of brutality are usually concentrated on isolated individuals, while the benefits accrue to the polity at large, and political control is likely to be an ineffective guardian for the individual. When the interests of a particular (often) low-status individual are balanced against an organizational mission, the incentive of the bureaucrat is to slight individual rights.

Many of the situations in which the constitutional conscience of the federal court is deployed—indeed a vast majority of the constitutional cases in the trial courts—involve confrontations with street-level bureaucrats¹²⁵ who can neither be tightly bound by rules nor be required to give reasons for their actions. Experience suggests little basis for faith that street-level bureaucrats will have a comparative advantage in addressing the trade-offs between bodily integrity and public needs. The station house water cooler is not likely to be the locus of transformative constitutional dialogue and the discretion of street-level bureaucrats is characteristically difficult to constrain prospectively by legislative mandate.

Both of these concerns—the single-mindedness of the focus on bureaucratic missions and the relative unreliability of street-level bureaucrats as constitutional decision-makers—are particularly salient in the areas of corrections, education, health care and law enforcement, which account for such large portions of the trial courts' cases protecting bodily integrity. In each setting, a bureaucratically monochromatic view of the world is exacerbated in total institutions where officials confront potentially hostile "clients," often where danger imposes the need for mutual loyalty among an insular corps of officials, and where individual "clients" are disenfranchised or powerless.¹²⁶

¹²⁵ The term "street-level bureaucrat" is Professor Lipsky's. MICHAEL LIPSKY, *STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES* 3 (1980) ("Most citizens encounter government . . . not through letters to congressmen or by attendance at school board meetings but through their teachers and their parents' teachers and through the policeman on the corner or in the patrol car.").

¹²⁶ My colleague Ted Ruger points out that some health care institutions, like hospital ethics committees, may be structured to trigger broad ethical reflection by responsible professionals.

The trial judge seeking to weigh competing accounts of institutional necessity breaks free of these constraints. She views the parties from outside, on a basis of officially recognized equality. Trial courts are called upon to apply widely held norms of minimal decency, to disentangle competing factual narratives, and to map constitutional boundaries by established moral polestars. The judge in such situations seeks to engage her moral sense (and/or that of the jury) with the immediate situation before her.

Such interventions call for no extraordinary claims to moral insight; they take commonly accepted moral or political commitments as their basis and apply those commitments to particular facts. But they call upon courts to make moral judgments by confronting the personal narratives of the individual who has been harmed.

The strength of the trial courts in deploying such principles is precisely that they see the victims as individuals, rather than as part of an undifferentiated stream of clientele. And the prospect of such regard means that street-level bureaucrats must reckon with the possibility that their decisions will be evaluated as an exercise of power over individuals.

III. THE FUTURE OF BODILY INTEGRITY

Given the scope of the modern state and contemporary American practices of incarceration, there is no reason to believe that the need for constitutional doctrines to control street-level brutality by state officials is likely to recede in the immediate future. A growing population of prisoners will continue to confront the brutality and indifference of their guards. Official custodians will continue to confront social disorder and a burgeoning group of clients from the mental health, immigration, child welfare, and institutionalized health care systems will continue to confront keepers who are pressed between straitened budgets and the demands of minimal decency. In each of these areas, the decencies of civilized behavior will continue to cry out for protections that can be provided only by constitutional guarantee, and the Constitution will provide that protection only by reason of unenumerated rights to bodily integrity.

Equally important, it seems likely that the coming decade will see a continuation of efforts by the state to use physical brutality and intrusions on bodily integrity as means to pursue public goals. We have seen one such set of initiatives in the moves of the current administration to deploy torture and “torture lite” in the “global war on ter-

Where such institutions exist, there may be greater warrant for deferring to professional discretion.

ror.”¹²⁷ Congressional efforts to constrain these maneuvers turn on the definition of the limits on brutality read into the Due Process Clause.¹²⁸ As courts have begun to wrestle with constitutional challenges to coercive interrogation and abuse of alleged terrorists, unenumerated rights to bodily integrity form a crucial benchmark.¹²⁹

Finally, to return to my point of departure, federal courts in the next decade will be called upon to review public policies that predictably and intentionally—though not as direct ends—impose the

¹²⁷ The scope of the use of torture and torture lite is the subject of a continual drip of disclosures. See, e.g., Human Rights First, *Human Rights First Opposes Military Commissions Legislation*, http://www.humanrightsfirst.org/us_law/etn/index.asp; ACLU, *Torture: Seeking Truth and Accountability*, <http://www.aclu.org/safefree/torture/index.html>. For my own earlier discussion of the issues, see Kreimer, *supra* note 120, and Seth F. Kreimer, “Torture Lite,” “Full Bodied” Torture, and the Insulation of Legal Conscience, 1 J. NAT’L SEC. L. & POL’Y 187 (2005).

¹²⁸ Congress has manifested an intention to forswear “cruel inhuman and degrading treatment” of detainees, but that intention is tied to the parameters of due process. See Act of Oct. 28, 2004, Pub. L. No. 108-375, 118 Stat. 2068–69 (enacting a “sense of congress” that detainees should not be “subject[ed] to cruel, inhuman, or degrading treatment or punishment that is prohibited by the Constitution, laws, or treaties of the United States”); 42 U.S.C. § 2000dd (2000) (prohibiting “cruel, inhuman, or degrading treatment” of detainees and defining such treatment as prohibited by the “Fifth, Eighth, and Fourteenth Amendments”). President Bush, on the other hand, has reserved the right to ignore the law. See Charlie Savage, *3 GOP Senators Blast Bush Bid to Bypass Torture Ban*, BOSTON GLOBE, Jan. 5, 2006 (describing Republican condemnation of Bush’s assertion that, as commander-in-chief, he is not bound by law preventing torture of detainees).

¹²⁹ The results thus far have not been entirely heartening. See *United States v. Marzook*, 435 F. Supp. 2d 708 (N.D. Ill. 2006) (reviewing allegations of torture in Israel); *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 532–34 (D. Va. 2006) (dismissing because of the state secrets privilege a suit alleging that plaintiff had been kidnapped, beaten, sodomized and held for four months in a small, cold cell by the CIA, though the CIA quickly realized he was entirely innocent of connection with terrorism); *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 279–80 (E.D.N.Y. 2006) (dismissing suit by innocent Canadian resident detained by U.S. officials and rendered to Syria where he was tortured for ten months; the dismissal was based upon “special factors counseling hesitation”); *Rasul v. Rumsfeld*, 414 F. Supp. 2d 26, 27 (D.D.C. 2006) (dismissing suit by former detainees at Guantanamo alleging hooding, forced nakedness, deprivation of food, body cavity searches, extremes of heat and cold, beatings, and use of dogs; the court held that such actions would “typically” contravene the Fifth Amendment, but because the extraterritorial application of the Fifth Amendment was not clearly established, the defendants could assert qualified immunity); *Qassim v. Bush*, 407 F. Supp. 2d 198, 200–03 (D.D.C. 2005) (deploring “Kafkaesque” actions in indefinitely imprisoning innocent individuals at Guantanamo Bay but holding that, for procedural reasons, the “federal court has no relief to offer”); *United States v. Abu Ali*, 395 F. Supp. 2d 338, 341–43, 73–80 (E.D. Va. 2005) (reviewing claims that the defendant had been tortured in Saudi Arabia before being rendered for prosecution in the United States, stating that “torture will not be tolerated in the American justice system,” but rejecting the claims as factually unfounded); *O.K. v. Bush*, 377 F. Supp. 2d 102, 114 (D.D.C. 2005) (acknowledging the due process right of an eighteen-year-old detainee at Guantanamo not to be tortured, but refusing to issue a preliminary injunction against torture because the abuse had occurred three years ago, when the detainee was fifteen); cf. *Al-Shabany v. Bush*, No. 05-2029, 2005 WL 3211407 (D.D.C. Nov. 17, 2005) (denying injunction against force-feeding detainees in Guantanamo); *Hamlily v. Bush*, No. 05-0763 (D.D.C. Oct. 3, 2005) (denying anti-force-feeding injunction); *El-Banna v. Bush*, 394 F. Supp. 2d 76 (D.D.C. 2005) (denying request for injunction against force-feeding Guantanamo prisoners).

prospect of bodily intrusion or physical harm.¹³⁰ It is clear that the scope of physical risk that can be imposed on women for the benefit of the fetuses they carry will come before the Court as it reviews statutes that fail to provide for the “life or health of the mother” as an exception to restrictions on abortions.¹³¹ The question of assisted suicide is likely to return to the docket,¹³² and if last year’s proceedings around the death of Terri Schiavo are any indication,¹³³ it seems entirely possible that the right to refuse life-sustaining treatment will come under legal siege. Official limits on medical marijuana have been upheld against legal attack for the moment,¹³⁴ though the broader effects of legal interventions that prevent dispensation of pain control medication may be put at issue.¹³⁵ At least one court has

¹³⁰ In these cases, the third justification for appealing to the conscience of the courts is often weaker; contested cases often arise from premeditated legislative decisions, rather than myopic bureaucratic overreaching. The difficult question for the courts will be the extent to which bodily intrusions will be justifiable on the basis of contested moral commitments.

¹³¹ *E.g.*, *Ayotte v. Planned Parenthood of N. New Eng.*, 126 S. Ct. 961, 967 (2006) (“New Hampshire does not dispute, and our precedents hold, that a State may not restrict access to abortions that are necessary, in appropriate medical judgment, for preservation of the life or health of the mother.”) (internal quotation marks omitted); *id.* at 964 (declining to “revisit our abortion precedents today,” but remanding for redetermination of remedy); *see also* *Gonzales v. Carhart*, 126 S. Ct. 1314 (2006) (granting certiorari to consider constitutionality of prohibition of late-term abortion procedure where plaintiffs allege that prohibition endangers health); Monica Davey, *South Dakota Bans Abortion, Setting Up a Battle*, N. Y. TIMES, Mar. 7, 2006, at A1 (describing newly-adopted prohibition on abortion that makes no exception for abortions necessary to preserve the health of the pregnant woman).

¹³² *Cf.* *Gonzales v. Oregon*, 126 S. Ct. 904, 919 (2006) (enjoining unilateral effort by U.S. Attorney General to prevent physicians from prescribing medication under Oregon’s assisted suicide act, based on statutory construction).

¹³³ *Schiavo ex rel. Schindler v. Schiavo*, 358 F. Supp. 2d 1161 (M.D. Fla. 2005), *aff’d*, 403 F.3d 1289 (11th Cir. 2005); *Schiavo ex rel. Schindler v. Schiavo*, 357 F. Supp. 2d 1378 (M.D. Fla. 2005), *aff’d*, 403 F.3d 1223 (11th Cir. 2005).

¹³⁴ *Gonzales v. Raich*, 125 S. Ct. 2195, 2201 (2005) (holding that Commerce Clause authorizes federal prohibition of marijuana possession applied against state-authorized homegrown medical marijuana); *United States v. Oakland Cannabis Buyers’ Co-op.*, 532 U.S. 483 (2001) (declining to craft defense to federal prosecution for use of medical marijuana). *But cf.* *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002) (enjoining federal revocation of license of doctors who prescribe medical marijuana to prescribe controlled substances).

¹³⁵ *See* George J. Annas, *Congress, Controlled Substances, and Physician-Assisted Suicide*, 354 NEW ENG. J. MED. 1079, 1083 (2006) (“[T]he DEA lately has seemed much more menacing to physicians than it had been, especially since the agency withdrew its support for pain-prescribing guidelines that had been adopted by the Federation of State Medical Boards.”); Sandra H. Johnson, *The Social, Professional, and Legal Framework for the Problem of Pain Management in Emergency Medicine*, 33 J.L. MED. & ETHICS 741, 755 (2005) (describing threat of federal sanctions for pain control); *cf.* Todd Fredericks, *Doctors’ Dilemma: Prescription Pain Medications*, 105 J. AM. OSTEOPATHIC ASS’N 493 (2005), available at <http://www.jaoa.org/cgi/content/full/105/11/493> (discussing the abuse of prescription medications). *See generally*; Amy J. Dilcher, *Damned if They Do, Damned if They Don’t: The Need for a Comprehensive Public Policy to Address the Inadequate Management of Pain*, 13 ANNALS HEALTH L. 81 (2004); Timothy E. Quill & Diane E. Meier, *The Big Chill: Inserting the DEA into End-of-Life Care*, 354 NEW ENG. J. MED. 1 (2006); Tina Rosenberg, *Weighing the Difference Between Treating Pain and Dealing Drugs*, N. Y. TIMES, Mar. 26, 2005.

held that FDA rules may run afoul of the Due Process Clause where they interfere with efforts by terminally ill patients to seek potentially lifesaving medicine under a doctor's advice.¹³⁶ Conversely, as government-mandated cost control measures or rationing in government health care programs begin to limit access to life-sustaining treatment, the next decade is likely to see constitutional challenges to those programs.¹³⁷

In none of these areas do I maintain that the shape of our constitutional landscape ineluctably mandates judicial intervention. But without rending the constitutional fabric, federal courts cannot abandon the bodies of the citizenry to the convenience of the state and refuse to grapple with the issues on the grounds that the constitutional text enumerates no cognizable rights.

¹³⁶ See *Abigail Alliance for Better Access to Developmental Drugs v. Von Eschenbach*, 445 F.3d 470, 486 (D.C. Cir. 2006) (holding that patients have a due process right to drugs still being tested by the FDA but that have passed Phase I trials for being safe for human testing).

¹³⁷ Cf. Jack Fink, *Family Debates Hospital's Action in Woman's Death*, CBS11TV, Dec. 14, 2005, http://cbs11tv.com/topstories/local_story_348124802.html (giving account of Baylor hospital invoking Texas law to remove Tirhas Habtegeris from life support against her will); *Chaoulli v. Attorney General*, [2005] 254 D.L.R. (4th) 577, 607 *partial reh'g granted* (holding that prohibition of private health insurance, which effectively prevented Quebec residents from obtaining medical treatment for which public system imposed long waiting lists violated the right to "life, personal security, inviolability and freedom" under the Quebec Charter); *id.* at 621 (determining that the program violated the Canadian Charter); Evan Silverstein, *Feeling the Heat: Desert Aid Workers Face Felony Charges for Transporting Border-Crossers*, PRESBYTERIAN NEWS SERVICE, July 27, 2005, <http://www.pcusa.org/pcnews/2005/05394.htm> (discussing the prosecution of individuals giving aid to immigrants).

