State Constitutions and the Humane Treatment of Arrestees and Pretrial Detainees

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With the United States Supreme Court's repeated moves to roll back federal constitutional protections for people arrested or in jail, the time has come to reconsider the potential of state constitutions to promote protection of civil liberties of these groups. This Article explores the oft-overlooked world of state constitutional protections for arrestees and pretrial detainees, with a focus on provisions guaranteeing humane treatment, and evaluates strategies for encouraging interpretation of and, ultimately, compliance with these constitutional guarantees.

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INTRODUCTION

The rights of arrestees and pretrial detainees have taken a beating lately. In the last two terms, the Supreme Court has upheld the constitutionality of invasive strip searches of all pretrial detainees, no matter how minor the crime for which they were arrested,[1] and taking the DNA of anyone arrested for a serious crime.[2] These decisions are but the latest examples of the Supreme Court's parsimonious interpretation of federal constitutional rights for arrestees and pretrial detainees.[3] The

[1] Florence v. Bd. of Chosen Freeholders, 132 S. Ct. 1510, 1513 (2012).

[2] Maryland v. King, 133 S. Ct. 1958, 1978 (2013).

[3] This Article uses the term "pretrial detainee" to describe those held in state custody pending resolution of criminal charges against them. Recognizing that there is

United States Constitution, at least as interpreted by the Court, sets a low bar for the treatment of these groups. Barriers to litigating federal constitutional rights, such as qualified immunity, compound the limitations of the underlying substantive rights.

The plight of people arrested and in jail matters, if for no other reason than that so very many people are arrested or in jail. Not including traffic violations, law enforcement made some 12 million arrests in 2011.[4] There are roughly half a million people in pretrial detention in the United States at any given time.[5]

This Article explores the potential for state constitutions to help protect arrestees and pretrial detainees from mistreatment. Some forty state constitutions contain provisions with no federal analog that could be used to advocate for arrestees and pretrial detainees.[6] Seven offer protections guaranteeing the humane treatment of arrestees and pretrial detainees by prohibiting states from treating arrestees or pretrial detainees with "unnecessary rigor," "acts of severity" or "abuse."[7] These provisions arguably offer protections greater than the federal constitution's in such contexts as invasive searches, the use of force, conditions of confinement, visitation rights, medical care and actions that impinge on the dignity of arrestees and pretrial detainees, to name just a few.[8]

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disagreement over just when pretrial detention begins, *see infra* notes 23-24, the article also uses the term "arrestees" to refer to people who have been arrested and are in state custody who may not yet technically be pretrial detainees.

[4] FEDERAL BUREAU OF INVESTIGATION, *Crime in the United States, Persons Arrested*, http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/persons-arrested (last visited Aug. 16, 2013) ("Nationwide, law enforcement made an estimated 12,408,899 arrests in 2011. Of these arrests, 534,704 were for violent crimes, and 1,639,883 were for property crimes. (Note: the UCR Program does not collect data on citations for traffic violations.)"). The FBI cautions: "Because a person may be arrested multiple times during a year, the UCR arrest figures do not reflect the number of individuals who have been arrested; rather, the arrest data show the number of times that persons are arrested, as reported by law enforcement agencies to the UCR Program." *Id*.

[5] Samuel Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 1344, 1346 (2014).

[6] *See* Part II.A *infra*.

[7] *See* Part II.B *infra*.

[8] Although this Article focuses on the potential of state constitutions to protect people arrested or in pretrial detention, many of the relevant provisions apply either explicitly or implicitly to the process of effecting an arrest and to convicted prisoners. Both the Indiana Supreme Court and the Oregon Supreme Court have suggested that their unnecessary rigor provisions apply not only after one has been arrested but also to the

The argument that litigants and courts should turn to state constitutions for the protection of civil liberties is far from novel. In response to the Burger Court's increasingly conservative interpretation of the federal constitution, Justice Brennan advocated just this in his 1977 article in the Harvard Law Review, entitled "State Constitutions and the Protection of Individual Rights."[9] Although it is now established that states can interpret their constitutions independently of the Supreme

process of effecting an arrest. *See* Sterling v. Cupp, 625 P.2d 123, 130 (Or. 1981) (quoting the Indiana Supreme Court's discussion of its unnecessary rigor provision in Bonahoon v. State, 178 N.E. 570, 570 (Ind. 1931)) ("The law protects persons charged with crime from ill or unjust treatment at all times. Only reasonable and necessary force may be used in making an arrest, . . . 'no person arrested, or confined in jail, shall be treated with unnecessary rigor' . . . . 'While the law protects the police officer in the proper discharge of his duties, it must at the same time just as effectively protect the individual from the abuse of the police.'"). The Oregon and Utah Supreme Courts have also applied the states' unnecessary rigor provisions to convicted prisoners. *See* Dexter v. Bosko, 184 P.3d 592, 596 n.16 (Utah 2008) (citing Sterling v. Cupp, 625 P.2d at 130) ("Other states have construed their unnecessary rigor provisions to also protect persons from inhumane prison conditions. Oregon, for example, has said that its unnecessary rigor provision extends to the conditions of a prisoner's incarceration."); *see also* Robert Lough, *Tennessee Constitutional Standards for Conditions of Pretrial Detention: A Mandate for Jail Reform*, 49 TENN. L. REV. 688, 711 n.157 (1981) (explaining why Tennessee's unnecessary rigor provision applies to prisoners).

[9] *See* William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977) ("[T]he very premise of the cases that foreclose federal remedies constitutes a clear call to state courts to step into the breach. With the federal locus of our double protections weakened, our liberties cannot survive if the states betray the trust the Court has put in them. And if that trust is, for the Court, strong enough to override the risk that some states may not live up to it, how much more strongly should we trust state courts whose manifest purpose is to expand constitutional protections. With federal scrutiny diminished, state courts must respond by increasing their own."). A number of state Supreme Court Justices likewise championed this move toward state constitutions. For example, Oregon Supreme Court Justice Hans Linde has been called "the intellectual godfather of New Federalism." James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 774 (1992) (quoting Jeffrey Toobin, *Better Than Burger*, NEW REPUBLIC, Mar. 4, 1985, at 10, 11). Justice Linde's calls for vigorous state constitutional interpretation preceded Justice Brennan's. *See* Justin Long, *Intermittent State Constitutionalism*, 34 PEPP. L. REV. 41, 51 (2006) ("The real ground-breaking had already been accomplished seven years earlier, by Hans Linde, then a professor and later a Justice of the Oregon Supreme Court."); *see also* Gardner, *supra*, at 771 (stating that New Federalism was born of the liberal reaction to the conservative Burger court in the late 1970s and a "much older and sparser tradition of criticizing state courts for ignoring state constitutions as a source of law and for failing to develop vigorous and independent bodies of state constitutional law irrespective of the character of the constitutional jurisprudence of the U.S. Supreme Court" and situating Justice Linde in this older tradition).

Court's reading of the United States Constitution,[10] the turn to state constitutions has been episodic[11] and has left large and unnecessary holes in the protection of civil liberties.[12]

The neglect of explicit state constitutional protections for people arrested or in jail is a prime example of the divergence between the promise and the reality of state constitutions. Explicit state constitutional protections for arrestees and pretrial detainees, including such admonitions as "no person arrested or in jail shall be treated with

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[10] Michigan v. Long, 463 U.S. 1032, 1040-41 (1983) ("[W]hen, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. . . . If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision."). *See also* Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 NOTRE DAME L. REV. 1015, 1016-17 (1997) (stating the "idea that state courts may interpret their "potentially applicable state constitutional provisions" to provide more, or broader, rights protections than are recognized by the United States Supreme Court under the Federal Constitution should no longer be seen as a cute trick or "simply a flexing of state constitutional muscle. . . . It has now become an accepted, albeit still sometimes controversial, feature of our jurisprudence"); Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353 (1984).

[11] As Professor Gardner has observed: "One of the most striking aspects of state constitutional decisions is their relative infrequency." Gardner, *supra* note 9, at 780-81 (positing that, although it is not clear from the data, "the dearth of state constitutional cases is [likely] due to the failure of litigants to raise such claims").

[12] There have, however, been some notable areas where state courts have found more protection of individual liberties in state constitutions. *See* Arthur L. Burnett, *An Irony—Greater Protection of Individual Rights Now Found in State Courts*, CRIM. JUST., Spring 2007, at 20 (noting decisions finding greater protection under state constitutions in the areas of search and seizure, self-incrimination and due process, double jeopardy, the right to counsel and cruel and unusual punishment); *see also* JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES 11-3 (4th ed. 2006) ("State law-based opinions frequently reject the United States Supreme Court's lead in order to impose higher restraints on governmental investigations, but many also choose, as a general rule, to model state constitutional standards on that court's fourth Amendment decisions."); *id.* at 5-2 (despite "the slow development of independent state constitutional free speech doctrine," "some state courts have nevertheless rendered important opinions in the area of free speech, occasionally with results radically different from what federal rules would dictate").

unnecessary rigor,"[13] have seldom been litigated despite the state constitutional movement of the late 1970s and 1980s.[14]

This Article examines state constitutional guarantees of humane treatment of arrestees and pretrial detainees and offers some thoughts on the meaning and utility of these rights.[15] Although others have offered helpful commentary on individual state constitutional provisions on unnecessary rigor or abuse,[16] this Article attempts to add to the discussion by looking more comprehensively at the language, history and caselaw of these humane treatment provisions and evaluating strategies for using them more effectively.

This Article proceeds in three parts. Part I explains the limitations of the federal constitution in ensuring the humane treatment of arrestees and pretrial detainees, particularly with respect to the use of force and conditions of confinement. Part II discusses state

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[13] *See infra* Part II.B.

[14] *See infra* note 146.

[15] Ronald Collins, *Foreword: The Once New Judicial Federalism and Its Critics*, 64 WASH. L. REV. 5, 18 (1989) ("[T]he critics [of judicial federalism] and their counterparts need to direct more of their attention to examining state constitutional substantive and procedural law arguments and less time to developing yet more grand relational focus theories of judicial review.").

[16] Judge Dorothy Beasley reviewed the history and the scant caselaw on Georgia's abuse clause as part of her article on the Georgia Bill of Rights. *See* Dorothy Beasley, *The Georgia Bill of Rights: Dead or Alive?*, 34 EMORY L.J. 341 (1985). Robert Lough examined Tennessee's unnecessary rigor provision as part of his 1981 article examining Tennessee constitutional law on pretrial detention. *See* Lough, *supra* note 8. Dean Stephen Kanter examined Oregon's unnecessary rigor provision in his Article assessing the constitutionality of Oregon's death penalty. *See* Stephen Kanter, *Confronting Capital Punishment: A Fresh Perspective on the Constitutionality of the Death Penalty Statutes in Oregon*, 36 WILLAMETTE L. REV. 313 (2000). More recently, a few commentators have examined Utah Supreme Court's decisions on its unnecessary rigor provision. *See* Tina Eckert, *Developments in State Constitutional Law*, Dexter v. Bosko, *184 P.3d 592 (Utah 2008)*, 40 RUTGERS L.J. 885, 893 n.32 (2009); Scott Sandberg, *Developing Jurisprudence on the Unnecessary Rigor Provision of the Utah Constitution*, 1996 UTAH L. REV. 751, 752 (1996) (discussing the Utah Supreme Court's decision in Bott v. Deland, 922 P.2d 732 (Utah 1996), and criticizing the *Bott* court for "fail[ing] to analyze whether, and to what extent, Article I, section 9 [Utah unnecessary rigor provision] expands the protections provided by the Eighth Amendment" or "to devise an analytical approach for balancing analysis of dual claims made under both Article I, section 9 and the Eighth Amendment"); James McLaren, *The Meaning of the "Unnecessary Rigor" Provision in the Utah Constitution*, 10 BYU J. PUB. L. 27 (1996) (writing before the Utah Supreme Court's decision in *Bott v. Deland* and predicting, as it turned out, incorrectly that Utah courts would not find unnecessary rigor provisions to be self-executing).

constitutional protections for arrestees and pretrial detainees, with a focus on guarantees that arrestees and pretrial detainees not be treated with unnecessary rigor, acts of severity not necessary to secure the accused, or abused. Part III offers some thoughts on interpreting these humane treatment provisions and strategies to foster interpretation, implementation and enforcement of state constitutional rights to humane treatment. It advocates, where politically feasible, legislation or rulemaking that implements or facilitates judicial enforcement of these constitutional rights. Recognizing that pro-arrestee or pretrial detainee legislation and rulemaking often may not be possible, Part III also considers judicial strategies to ensure judicial scrutiny of state constitutional rights to humane treatment. These strategies include the recognition of a constitutional tort; a merits-first based approach to qualified immunity analysis for constitutional torts; awarding attorney fees pursuant to courts' equitable powers to encourage suits seeking injunctive relief; and a doctrine tying humane treatment to the criminal case against the arrestee or pretrial detainee.

I. THE LIMITATIONS OF THE UNITED STATES CONSTITUTION IN ENSURING THE HUMANE TREATMENT OF ARRESTEES AND PRETRIAL DETAINEES

The United States Constitution, at least as currently interpreted by the Supreme Court of the United States, has significant limitations as a tool for ensuring humane treatment of arrestees and pretrial detainees. The Supreme Court has interpreted arrestees' and pretrial detainees' federal constitutional rights narrowly. Compounding the problem, even these anemic substantive protections are usually out of reach for wronged arrestees and pretrial detainees. Truer now than when Justice Brennan wrote it in 1977, "a series of decisions has shaped the doctrines of jurisdiction, justiciability, and remedy, so as increasingly to bar the federal courthouse door in the absence of showings probably impossible to make."[17] Concerns about federalism play a role in both the narrow interpretation of the rights and barriers to enforcement. The substantive weakness of federal constitutional rights and procedural barriers to enforcing them underscore the importance of state constitutional protections for arrestees and pretrial detainees.

[17] Brennan, *supra* note 9, at 498.

A. The Limitations of the Substantive Rights

The Supreme Court has construed federal constitutional rights of arrestees and pretrial detainees ever more narrowly. Often, it is unclear when the Fourth Amendment even applies to arrestees and pretrial detainees.[18] Where it does, it appears to provide little protection to those arrested or in jail when the interests of running a jail or investigating crimes are on the line.[19] Likewise, the due process clause of the Fourteenth Amendment, which governs the federal constitutional claims of pretrial detainees, offers strikingly little protection.[20] Absent a proven intent to punish, courts use a rational basis test to assess alleged violations of federal constitutional rights for pretrial detainees.[21] The Supreme Court has also emphasized that federal courts must give great deference to the decisions of state jail officials.[22]

There is disagreement over which federal constitutional protections apply once a person has been arrested. In the context of excessive force, the Supreme Court held in *Graham v. Connor* that claims of excessive force in the course of an arrest, investigatory stop or other "seizure" are governed by the Fourth Amendment, but claims of excessive force during pretrial detention are governed by the due process clause of the Fourteenth Amendment.[23] The problem is that it is unclear

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[18] *See* discussion *infra* notes 23-26.

[19] *See* discussion *infra* notes 29-31.

[20] The Fifth Amendment applies to federal detainees; the Fourteenth to state detainees.

[21] The excessive focus on intent has significantly weakened any protection the guarantee of due process might offer. Commentators have argued that the same complaint applies to the Supreme Court's analysis of prisoners' rights cases under the Eight Amendment. *See* Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881 (2009); Alice Ristroph, *State Intentions and the Law of Punishment*, 98 J. CRIM. L. & CRIMINOLOGY 1353 (2008).

[22] The Court has confirmed the importance of deference to correctional officials and explained that a regulation impinging on an inmate's constitutional rights must be upheld "if it is reasonably related to legitimate penological interests." Florence v. Bd. of Chosen Freeholders, 132 S. Ct. 1510, 1527-28 (2012). (quoting Turner v. Safley, 482 U.S. 78, 89 (1987)).

[23] *See* Graham v. Connor, 490 U.S. 386, 395 n.10 (1989) (stating "it is clear . . . that the Due Process clause protects a pretrial detainee from the use of excessive force that amounts to punishment" and holding that claims of excessive force during arrest were to be assessed under the Fourth Amendment objective reasonableness standard. After conviction, the Eighth Amendment '"serves as the primary source of substantive protection . . . in cases . . . where the deliberate use of force is challenged as excessive and unjustified.' . . . Any protection that 'substantive due process' affords convicted prisoners against excessive force is, we have held, at best redundant of that provided by the Eighth Amendment"). However, *Graham* left open the question "whether the Fourth

where an arrest ends and pretrial detention begins.[24]

The choice of federal constitutional right matters, at least in theory. In claims of excessive force, for example, the relevant legal tests differ markedly. The Fourth Amendment inquiry makes unreasonable uses of force unconstitutional regardless of the subjective state of mind of state officials.[25] A Fourteenth Amendment due process violation is harder to prove. Courts have asked either whether the state official's conduct "shocks the conscience,"[26] which most federal circuits deem to require intent or at least recklessness, or whether it amounts to punishment without due process of law.[27]

Even where the Fourth Amendment test of objective unreasonableness applies to arrestees, however, it seems not to provide much protection. In *Atwater v. Lago Vista*, for example, the Supreme Court found no Fourth Amendment violation in the arrest and jailing of a mother driving with her children for violation of seatbelt laws, a traffic

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Amendment continues to provide . . . protection against the deliberate use of excessive force beyond the point at which arrest ends and pretrial detention begins." *Id*. This open question has attracted the attention of many commentators. *See, e.g*., Mitchell Karsch, *Excessive Force and the Fourth Amendment: When Does Seizure End?*, 58 FORDHAM L. REV. 823, 823 (1990); Megan Glowacki, *The Fourth or Fourteenth? Untangling Constitutional Rights in Pretrial Detention Excessive Force Claims*, 78 U. CIN. L. REV. 1159 (2010) (discussing the circuit split over the applicability of the Fourth Amendment to excessive force claims after an arrest). Although some courts recognize the continuing applicability of the Fourth Amendment to excessive force cases in pretrial detention, it is the minority view. *See* Eamonn O'Hagan, *Judicial Illumination of the Constitutional "Twilight Zone": Protecting Post-Arrest, Pretrial Suspects From Excessive Force at the Hands of Law Enforcement*, 44 B.C. L. REV. 1357 (2003).

[24] *See Graham*, 490 U.S. at 396 (1989) ("Our cases have not resolved the question whether the Fourth Amendment continues to provide individuals with protection against the deliberate use of excessive physical force beyond the point at which arrest ends and pretrial detention begins, and we do not attempt to answer that question today. It is clear, however, that the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment.").

[25] *See* Glowacki, *supra* note 23, at 1160.

[26] *See* Rosalie Levinson, *Reigning in Abuses of Executive Power through Substantive Due Process*, 60 FLA. L. REV. 519 (2008) (stating that circuits that choose Fourteenth Amendment due process use the "shocks the conscience" test); Karsch, *supra* note 23, at 823 (stating that the due process inquiry is whether the official's conduct is punishment without due process).

[27] Levinson, *supra* note 26 (arguing that courts should continue to give meaning to substantive due process and that, for arrestees and pretrial detainees, a showing of objective deliberate indifference, combined with some showing of more than *de minimis injury*, shocks the conscience and thus should sustain a substantive due process claim).

violation only punishable by fine, even though the Court "recognize[d] it was a 'pointless indignity' that served no discernible state interest."[28] The United States Supreme Court has recently upheld a Fourth Amendment challenge to a Maryland statute allowing the state to take the DNA of anyone arrested on a serious crime. The Court justified the DNA testing on the basis of the state aim of identifying the arrestee,[29] a claim the dissent found incredible.[30] In his dissent, Justice Scalia lamented that DNA testing of those arrested even for minor crimes will ensue, since the majority's logic applies equally in minor cases.[31] Justice Scalia's prediction has already begun to play out. The Ninth Circuit Court of Appeals has approved DNA testing in all felony arrests, not just serious, violent felonies.[32]

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[28] Atwater v. City of Lago Vista, 532 U.S. 318, 360 (2001) (O'Connor, J., dissenting) (interpreting the Fourth Amendment's prohibition against unreasonable seizures). The officer yelled at Atwater and threatened to take the children to jail too (neighbors intervened and prevented it), all in front of Atwater's small children, one of whom remained traumatized by the event. *Id.* at 368-70.

[29] Maryland v. King, 133 S. Ct. 1958, 1978 (2013) **(**"DNA identification of arrestees, of the type approved by the Maryland statute here at issue, is 'no more than an extension of methods of identification long used in dealing with persons under arrest.'"). *See also* Erin Murphy, *Legal and Ethical Issues in Forensic DNA Phenotyping* (NYU Sch. of Law, Pub. Law Research Paper No. 13-46, 2013), *available at* http://ssrn.com/abstract=2288204 (disputing the contention that the DNA obtained is "junk" DNA).

[30] *King*, 133 S. Ct. at 1980 (Scalia, J, dissenting) ("The Court's assertion that DNA is being taken, not to solve crimes, but to identify those in the State's custody, taxes the credulity of the credulous.").

[31] *Id.* (internal citations omitted) ("The Court disguises the vast (and scary) scope of its holding by promising a limitation it cannot deliver. The Court repeatedly says that DNA testing, and entry into a national DNA registry, will not befall thee and me, dear reader, but only those arrested for 'serious offense[s].' . . . (repeatedly limiting the analysis to 'serious offenses'). I cannot imagine what principle could possibly justify this limitation, and the Court does not attempt to suggest any. If one believes that DNA will 'identify' someone arrested for assault, he must believe that it will 'identify' someone arrested for a traffic offense. This Court does not base its judgments on senseless distinctions. At the end of the day, *logic will out.* When there comes before us the taking of DNA from an arrestee for a traffic violation, the Court will predictably (and quite rightly) say, 'We can find no significant difference between this case and *King*.' Make no mistake about it: As an entirely predictable consequence of today's decision, your DNA can be taken and entered into a national DNA database if you are ever arrested, rightly or wrongly, and for whatever reason.").

[32] *See* Haskell v. Harris, 745 F.3d 1269 (9th Cir. 2014) (en banc) (rejecting a facial and as applied challenge to a California law providing for DNA testing of all felony arrestees). Felonies are any crime with a potential prison sentence greater than a year, including, for example, false statement. The decision is not restricted to serious

Once a person is considered a pretrial detainee, things go even further downhill. The *Bell v. Wolfish* due process framework governs the constitutional claims of pretrial detainees. In *Bell*, the United States Supreme Court rejected the Second Circuit Court of Appeal's conclusion that, under the presumption of innocence, a defendant had the right to be free from conditions of confinement that are not justified by "compelling necessity."[33] The Court held that the presumption of innocence is inapplicable to pretrial detention and "has no application to a determination of the rights of a pretrial detainee before his trial has even begun."[34]

The due process test for pretrial detainees asks whether a particular condition or restriction "amount[s] to punishment of the detainee."[35] The punishment inquiry turns on state intent.[36] Justice Brennan and Marshall wrote dissents criticizing the majority opinion for this excessive focus on the subjective intent of jail officials. Justice Brennan cautioned that this focus on subjective intent of officials would "encourage hypocrisy and unconscious self-deception."[37]

Without an express showing of intent to punish, the Court

felonies.

[33] In *Bell*, the Supreme Court faced a class action challenge to several "conditions of confinement and practices, including everything from double bunking to body cavity searches to restrictions on communications," at a "federally operated short-term custodial facility in New York City designed primarily to house pretrial detainees." Bell v. Wolfish, 441 U.S. 520, 523, 531, 535-39 (1979). Prior to *Bell*, using an inquiry similar to the one explicitly required by state constitutional prohibitions against unnecessary rigor or abuse, most courts held that to comport with the federal constitutional guarantee of due process, "pretrial detainees could be subjected only to those "restrictions and privations . . . which inhere in their confinement itself or which are justified by *compelling necessities* of jail administration." Lough, *supra* note 8, at 695 (emphasis added).

[34] *Bell*, 441 U.S. at 533; *cf.* Stack v. Boyle, 342 U.S. 1, 4 (1951).

[35] *Bell*, 441 U.S. at 535. Although the "only" seems to suggest that a different test might apply if rights other than due process are implicated," the Supreme Court has doggedly followed the *Bell* framework in assessing all constitutional claims by pretrial detainees. *See* Florence v. Bd. of Chosen Freeholders, 132 S. Ct. 1510 (2012) (applying the *Bell* framework to a pretrial detainee's claim that the state violated his rights under the Fourth Amendment by strip searching him without reasonable suspicion when he was detained for minor charges on a bogus warrant).

[36] To determine whether "particular restrictions and conditions amount to punishment in the constitutional sense," a "court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose." *Bell*, 441 U.S. at 538.

[37] *Id.* at 585.

applies a rational basis test.[38] In his dissent, Justice Brennan argued that the Court's rational basis test provides no meaningful protection against punishment, since any measure that lowers cost survives the test.[39] Lowering the bar further, the *Bell* majority prescribed deference to state jail officials based on separation of powers and institutional competence concerns.[40]

Compounding the problem, a majority of circuits have tethered the Fourteenth Amendment due process inquiry to the restrictive Eighth Amendment tests for cruel and unusual punishment,[41] even though the Eighth Amendment technically does not apply until after conviction.[42] Under the Supreme Court's Eighth Amendment caselaw, "prisoner plaintiffs must show that prison officials acted with bad intentions—'deliberate indifference' to grossly inadequate conditions or 'malicious and sadistic' intentions in using force."[43] The deficiencies of the Eighth

[38] According to the Court, "[a]bsent a showing of an expressed intent to punish on the part of detention facility officials, that determination generally will turn on "whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned to it." *Id.* at 538.

[39] *Id.* at 585 ("Any restriction that may reduce the cost of the facility's warehousing function could not be characterized as 'arbitrary or purposeless' and could not be 'conclusively shown' to have no reasonable relation to the Government's mission.").

[40] *Id*. at 547 (reasoning that deference to corrections officials is needed since "the problems that arise in day-to-day operation of a corrections facility are not susceptible of easy solutions and officials should be 'accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security'").

[41] *See also* David Gorlin, *Evaluating Punishment in Purgatory: The Need to Separate Confinement Claims from Inadequate Eighth Amendment Analysis*, 108 MICH. L. REV. 417 (2009); CT Turney, *Give Me Your Tired, Your Poor, and Your Queer: The Need and Potential for Advocacy for LGBTQ Immigrant Detainees*, 58 UCLA L. REV. 1343 (2011).

[42] Ingraham v. Wright, 430 U.S. 651, 671-72 (1977) ("Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions . . . . The State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law. Where the State seeks to impose punishment without such an adjudication, the pertinent constitutional guarantee is the Due Process Clause of the Fourteenth Amendment.").

[43] Ristroph, *supra* note 21, at 1380-81 (noting that this deliberate indifference standard "requires that prison officials have actual knowledge of substantial deprivations—such as grossly inadequate medical care—or substantial risks of serious harm—such as credible threats from other inmates—and that the officials fail to take reasonable measures to address the known deprivations or risks" and that this actual knowledge

Amendment analysis in protecting prisoners are well documented.[44] In particular, the requirement of a state intent equivalent to criminal recklessness encourages officials to turn a blind eye to potential problems.[45]

Although not implicated by *Bell*, which involved a federal detention facility, federalism has played a significant role in the Supreme Court's call for deference to state jail and prison officials.[46] In *Preiser v. Rodriguez*, which preceded *Bell v. Wolfish* by a few years, the Court emphasized federalism as a reason for federal courts' staying out of state prison administration. Noting that "internal problems of state prisons involve issues so peculiarly within state authority and expertise," the Court stated that it was "difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of

requirement was "a higher threshold than a civil recklessness standard (failure to act in face of an unjustifiable risk of which the defendant knew or should have known), and is instead equivalent to a criminal recklessness standard: 'a person disregards a risk of harm of which he is aware.'").

[44] There is abundant scholarship on the inadequacies of the Eight Amendment in protecting prisoners from intolerable prison conditions and the use of excessive force by prison officials. *See, e.g.*, Dolovich, *supra* note 21 (decrying existing Eight Amendment jurisprudence and advocating a negligence or modified strict liability standard for Eighth Amendment violations); Ristroph, *supra* note 21 (lamenting courts' focus on state intent in Eighth Amendment cases). Since even these scholars acknowledge that their arguments for reform are likely to go nowhere with Supreme Court, at least for the foreseeable future, seeking alternatives outside of the federal courts seems wise for those seeking to protect the rights of pretrial detainees. *See, e.g.*, Dolovich, *supra* note 21, at 971-72 ("[T]here is at present little reason to expect doctrinal reform in the direction [she] advocate[s]. Not only is there no sign that the Supreme Court is inclined to revisit *Farmer*, but were it to do so, it is not clear that it would be to expand, rather than to further limit, the possible scope of governmental liability. And in any case, even assuming the judicial inclination, court orders consistent with more protective doctrinal standards may well have little practical effect absent real political will to guard against cruel prison conditions.").

[45] *See* Ristroph, *supra* note 21, at 1380-81; Dolovich, *supra* note 21.

[46] Professor Williams has argued that "federalism and other institutional concerns, either explicitly or implicitly, pervade Supreme Court decisions declining to recognize rights against states" and that "such decisions must always be viewed partially attributable to 'underenforcement' of the federal Bill of Rights against the states and therefore not of precedential value for state constitutional interpretation beyond the persuasiveness of their reasoning." ROBERT WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 137, 173 (2009) (citing Lawrence Sagar, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1218-20 (1978)).

its prisons."[47]

In his concurrence in *Lewis v. Casey*, a 1996 decision that overturned a district court's permanent injunction granting prisoners means of accessing the law library, Justice Thomas reiterated the federalism arguments of *Rodriguez.* Contending that federal judges are ill-suited to making judgments about state programs and allocation of state resources, he made the originalist argument that the Framers would not have envisioned federal judges making policy decisions for states.[48] According to Justice Thomas, in the area of prison administration, "perhaps more than any other, [the Supreme Court has] been faithful to the principles of federalism and separation of powers that limit the Federal Judiciary's exercise of its equitable powers in all instances."[49]

In the 2012 case upholding strip searches of all pretrial detainees, *Florence v. Burlington*, the Supreme Court made clear that these federalism arguments extended not only to state prisons but also to jails. The majority explained *Bell*'s deference requirement on the basis of not only the "professional expertise" of prison administrators and separation of powers, but also federalism.[50] In *Florence*, the Supreme Court reaffirmed that the test set out in *Bell* governs pretrial detainees' federal constitutional claims, even for violations of the Fourth Amendment.[51]

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[47] Lough, *supra* note 8, at 694 n.31 (quoting Preiser v. Rodriguez, 411 U.S. 475, 491-92 (1973)) (justifying the exhaustion requirement before federal courts will get to the merits of state prisoners' petitions for habeas corpus relief).

[48] Lewis v. Casey, 518 U.S. 343, 386 (1996).

[49] *Id*. ("The federal judiciary is ill-equipped to make these types of judgments [about state programs and allocation of state resources], and the Framers never imagine that federal judges would displace state executive officials and state legislatures in charting state policy.").

[50] Florence v. Bd. of Chosen Freeholders, 132 S. Ct. 1510, 1517 (2012) (citing Bell v. Wolfish, 441 U.S. 520, 548 (1979)). *Bell* does not in fact actually mention federalism, presumably because Bell dealt with a federal, not state, detention facility. *Id.* at 523 ("This lawsuit was brought as a class action in the United States District Court for the Southern District of New York to challenge numerous conditions of confinement and practices at the Metropolitan Correctional Center (MCC), a federally operated short-term custodial facility in New York City designed primarily to house pretrial detainees.").

[51] *Florence*, 132 S. Ct. at 1516 (2012) (using the framework in *Bell*, 441 U.S. at 535-39, to answer the question, on which "[t]he Federal Courts of Appeals ha[d] come to differing conclusions, as to whether the Fourth Amendment requires correctional officials to exempt some detainees who will be admitted to a jail's general population from the searches here at issue [strip searches not involving touching]") Prior to *Florence*, there was some disagreement over whether *Bell* left pretrial detainees with

In sum, federal courts have adopted a very deferential attitude to state officials in interpreting the substance of federal constitutional claims of state arrestees and pretrial detainees. This deference stems, at least in part, from concerns about federalism—a concern that is irrelevant when state courts review state constitutional claims.

B. Federal Barriers to Judicial Review

In recent years, the Supreme Court has also erected substantial barriers to litigating federal constitutional rights, particularly through the doctrine of qualified immunity.[52] Undergirding these barriers, as with narrow interpretation of federal constitutional rights, is a concern over federalism.

Since the exclusionary rule seldom applies because violations often do not occur in the context of evidence-gathering[53] and federal prosecutions of state officials for violating federal constitutional rights are rare,[54] Section 1983 of the United States Code is the primary vehicle through which state pretrial detainees may challenge the violation of their federal constitutional rights.[55] Section 1983 provides a remedy to any individual whose federal constitutional rights are violated by a person acting under color of state law.[56] A prevailing party under

any Fourth Amendment rights. *See* David James, *Constitutional Limits on Body Searches in Prison*, 82 COLUM. L. REV. 1033 (1982); Gabriel M. Helmer, *Strip Search and the Felony Detainee: A Case for Reasonable Suspicion*, 81 B.U. L. REV. 239, 258 (2001). *Florence* suggests that the Fourth Amendment applies, at least nominally, but the analysis to be used is the *Bell* intent to punish one.

[52] *See* Maya Manian, *Rights, Remedies and Facial Challenges*, 36 HASTINGS CONST. L.Q. 611, 615 (2009) ("Across different areas of law, the Roberts Court tended to 'close the courthouse doors' to individual rights claimants by manipulating seemingly technical rules and thereby obscuring its rollback of individual rights.").

[53] *See infra* notes 228-230.

[54] *See* Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 46 (2009) (arguing that criminal prosecutions are too rare to deter police misconduct); *cf.* Rachel Harmon, *Limited Leverage: Federal Remedies and Policing Reform*, 32 ST. LOUIS U. PUB. L. REV. 33, 37 (2012) (noting that while criminal prosecutions of police officers are relatively rare, they are well publicized and have serious sanctions).

[55] *See generally* Michael Wells, *Constitutional Torts, Common Law Torts, and Due Process of Law*, 72 CHI.-KENT L. REV. 617, 617-18 (1997) (stating that "[t]he growth of damage remedies for constitutional violations in the decades following *Monroe v. Pape* has encouraged litigants to frame their cases as breaches of the Constitution" and arguing that the "whole field of 'constitutional tort for common law wrongs' [should be grounded] in the Due Process Clauses of the Fifth and Fourteenth Amendments").

[56] 42 U.S.C. § 1983 (2012) provides that:

Section 1983 may recover damages, obtain injunctions or declaratory relief, and, importantly, recover attorney's fees.[57] Although state constitutional claims can be joined to these federal claims, federal courts typically "decline to exercise their discretionary, supplemental jurisdiction when the state law is unclear."[58]

Although Section 1983 is a valuable tool for enforcing constitutional rights,[59] it too has its limitations. First, there are limitations on who can be sued under Section 1983. Since the United States Supreme Court has held that states are not "persons" acting under color of state law, states cannot be sued under Section 1983, and state officials may only be sued for injunctive relief.[60] Although a municipality is a "person" for Section 1983 purposes and therefore may be sued under the statute, "[m]unicipalities . . . are liable only when their policies or customs cause constitutional violations."[61] Second, Section 1983 suits permit only certain theories of liability. Negligence and gross negligence are not actionable under 1983.[62]

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

See also Lance Chism, *Bivens-Type Actions Under State Constitutions—Will Tennessee Give You A Remedy?*, 30 U. MEM. L. REV. 409, 413 (2000).

[57] *See* 42 U.S.C. § 1983; *see also* 42 U.S.C. § 1988 (1994) (providing for attorney's fees); Hutto v. Finney, 437 U.S. 678 (1978); Chism, *supra* note 56, at 413.

[58] FRIESEN, *supra* note 12, at 7-5, § 7.02 ("The judicial creation of civil remedies for state constitutional rights can occur only in state court, not in federal courts."). She explains that "[w]hen the plaintiff asserts a right, untested in the state courts, to recover damages against public officials under the state constitution, federal judges will be especially reluctant to act." *Id.*

[59] *See, e.g.*, Jean C. Love, *Damages: A Remedy for the Violation of Constitutional Rights*, 67 CALIF. L. REV. 1242, 1242 (1979) ("One of the most significant developments in the field of civil rights litigation has been the emergence of damages as a remedy for the enforcement of constitutional guarantees."); *cf.* Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1, 19 (1985) (observing that the United States Supreme Court's decision in *Monroe v. Pape* extended Section 1983 to cover violations even where there is an adequate remedy at common law and "is correctly credited as being a watershed in the development of § 1983").

[60] Chism, *supra* note 56, at 414.

[61] *Id*.

[62] Matthew J. Martin, Note, *Improving the Carceral Conditions of Federal Immigrant Detainees*, 125 HARV. L. REV. 1476, 1487-88 (2012) (noting that, in the prison context,

Moreover, justiciability and immunity doctrines increasingly place formidable hurdles for would-be claimants relying on Section 1983 as a vehicle litigating constitutional rights. Qualified immunity protects individual defendants exercising discretionary functions.[63] To recover against a state official covered by qualified immunity, a plaintiff must show not only the violation of a constitutional right, but also that "the right was clearly established . . . in light of the specific context of the case" and that "a reasonable officer would have known that he was violating this clearly established right."[64]

In recent cases, the United States Supreme Court has limited supervisor and entity liability in 1983 suits.[65] The Supreme Court stated that "[a]bsent vicarious liability, each government official, his or her title notwithstanding, is only liable for his or her own misconduct."[66] Some federal circuit courts have interpreted this language to eliminate or restrict supervisor liability under Section 1983; others say that it applies only to *Bivens* suits[67] and is *dicta* as to Section 1983.[68]

As with narrow interpretation of the substantive rights, federalism concerns underlie federal courts' expansion of qualified immunity.[69] Of course, these federalism concerns do not apply when

negligence and gross negligence are not actionable under § 1983).

[63] In the case introducing the doctrine, *Harlow v. Fitzgerald*, the Supreme Court stated: "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person should have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). *See also* Nathan Pittman, *Unintentional Levels of Force in § 1983 Excessive Force Claims*, 53 WM. & MARY L. REV. 2107, 2125 (2012).

[64] Scott v. Harris, 550 U.S. 372, 377 (2007).

[65] *See generally* Rosalie B. Levinson, *Who Will Supervise the Supervisors? Establishing Liability for Failure to Train, Supervise, or Discipline Subordinates in a Post*-Iqbal/Connick *World*, 47 HARV. C.R.-C.L. L. REV. 273 (2012).

[66] Ashcroft v. Iqbal, 556 U.S. 662, 677 (2009).

[67] *Bivens* suits are tort suits based on federal officers' violation of an individual's federal constitutional rights. In *Bivens*, the United States Supreme Court held that Bivens was "entitled to recover money damages for any injuries he . . . suffered as a result of [federal] agents' violation of the Amendment." Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971). It has since been extended to other constitutional rights.

[68] *See* William Evans, Case Comment, *Supervisory Liability after* Iqbal*: Decoupling* Bivens *from Section 1983*, 77 U. CHI. L. REV. 1401, 1401-03 (2010); *see also* Sheldon Nahmod, *Constitutional Torts, Over-Deterrence and Supervisory Liability After* Iqbal, 14 LEWIS & CLARK L. REV. 279 (2010).

[69] *See* Sheldon Nahmod, *The Long and Winding Road from* Monroe *to* Connick, 13

state courts evaluate claims of state arrestees and pretrial detainees under state constitutional law.[70]

This section demonstrates that there are significant limitations, both substantive and procedural, to the protections of the federal constitution for arrestees and pretrial detainees. Federal courts' reluctance to second-guess state officials plays a significant role in these limitations. If federal courts increasingly are giving the cold shoulder to wronged arrestees' and pretrial detainees' based on federalism concerns, state constitutional protections become ever more important.

II. STATE CONSTITUTIONAL PROTECTIONS FOR ARRESTEES AND PRETRIAL DETAINEES

State constitutions offer a number of additional protections for arrestees and pretrial detainees. Since the federal constitution provides a baseline below which the state cannot sink, these protections by definition can only add to the protections of the federal constitution.[71]

This Section examines these state constitutional protections for arrestees and pretrial detainees. Part A describes some of the state constitutional provisions with no federal analog of potential use to arrestees and pretrial detainees.[72] Part B examines state constitutional guarantees that arrestees and pretrial detainees not be treated with unnecessary rigor, acts of severity, or abused. It contends that the

LOY. J. PUB. INT. L. 427, 427-28 (2012) (noting that the Supreme Court's "interest in federalism in the § 1983 setting includes an increasing concern with federal judicial intervention in, and second-guessing of, the decisions of local governments. . . . Federalism, broadly defined, has affected not only § 1983 local government failure to train liability, but also the scope of constitutional rights and the extent of the absolute and qualified immunity of state and local government officials"); *see also* Gary Gildin, *Redressing Deprivations of Rights Secured by State Constitutions Outside the Shadow of the Supreme Court's Constitutional Remedies Jurisprudence*, 115 PENN ST. L. REV. 877, 905 (2011) (discussing the federalism concerns animating barriers to recovery under Section 1983, including qualified immunity).

[70] *See* Gilden, supra note 69, at 905-11 (noting that federalism concerns do not apply in the context of state court actions involving constitutional claims).

[71] *See* Judith S. Kaye, *In Memoriam: William J. Brennan, Jr*., 111 HARV. L. REV. 14, 17 (1997) (noting that Justice Brennan "reminded us that 'one of the strengths of our federal system is that it provides a double source of protection for the rights of our citizens,' that our nation's infrastructure includes both a federal constitutional floor and a state constitutional ceiling").

[72] *See* WILLIAMS, *supra* note 46, at 117 (arguing that state constitutional rights provisions with no federal counterpart or "analog," are the "right to remedy," "access to court" guarantees, rights of arrestees and prisoners and victims' rights).

language and history of these provisions demonstrates that they were intended to guarantee humane treatment of arrestees and pretrial detainees. Part B also examines courts' enforcement of these provisions.[73]

A. Overview of Unique State Constitutional Protections with Implications for Arrestees and Pretrial Detainees

Some forty states have constitutional protections with no federal analogs that provide potentially useful protections to arrestees and pretrial detainees. This section gives an overview of these state constitutional provisions. As is discussed in detail in Part B, seven states have provisions prohibiting states from treating arrestees or pretrial detainees with unnecessary rigor, acts of severity, or abuse. Although the bulk of this Article focuses on these state humane treatment provisions, this section starts with an overview of state constitutional protections with no explicit federal analog. This Article does not tackle state constitutional provisions with the same or similar wording to provisions of the United States Constitution, in part, due to space constraints and, in part, because they seem less likely to be overlooked.[74]

It bears reiterating that even where state constitutions have language that is similar or identical to federal constitutional provisions, states are free to interpret their constitutions to offer greater protection than the federal constitution.[75] In certain contexts, as with their search

[73] There are some unnecessary rigor decisions that this Article does not discuss, because they are not relevant, or only tangentially relevant, to humane treatment of arrestees and pretrial detainees. For example, some litigants have attempted to use unnecessary rigor provisions to support claims of trial error. *See, e.g.*, State v. Maestas, 299 P.3d 892, 964-65 (Utah 2012) (rejecting the claim of Maestas, who had been convicted of capital murder and sentenced to the death penalty, that his waiver of the right to present mitigating evidence violated Utah's unnecessary rigor provision and reaffirming previous holdings that "the unnecessary rigor clause 'is focused on the circumstances and nature of the process and conditions of confinement'"). Others have attempted to use unnecessary rigor provisions to argue that a particular sentence, including the death penalty is excessive. *See, e.g.*, State v. Montez, 789 P.2d 1352, 1379 (Or. 1990); State v. Guzek, 797 P.2d 1031, 1035 (Or. 1990) (holding that imposition of the death penalty is not an unnecessary rigor violation and noting that Article 1, Section 13 is concerned with conditions within a prison, not the imposition of a sentence).

[74] Of course, sometimes courts and litigants assume, incorrectly, that federal provisions have state analogs, when they do not. *See* Hans Linde, *Oregon Due Process, Unconstitutional Law in Oregon*, 49 OR. L. REV. 125, 135 (1970) (discussing the tendency of Oregon courts to decide cases based on a nonexistent state due process clause).

[75] *See supra* note 10.

and seizure and due process protections, they have often done so.[76] Conversely, the absence of a directly analogous federal constitutional provision does not mean that state courts will not follow federal precedent on a sometimes even tangentially related right.[77]

Many states have constitutional provisions that, at least on their face, appear to make it less likely that arrestees become pretrial detainees in the first place. Unlike the federal constitution, which guarantees only a right to be free from excessive bail, a majority of state constitutions explicitly guarantee a right to bail.[78] State courts, however,

[76] State search and seizure provisions have been one major area of divergence between state and federal constitutional interpretation. *See, e.g.*, FRIESEN, *supra* note 12, at 11-3 (The last three decades have seen an exponential increase in the number of opinions rendered by state supreme courts interpreting state constitutional prohibitions on unreasonable searches and seizures."). Pretrial detainees and prisoners have been the beneficiaries of decisions finding more protection in state constitutional guarantees of due process in contexts like rules on visitation and the provisions of educational and treatment programs. In a case involving female pretrial detainees, the New York Court of Appeals relied on its state constitution's guarantee of due process to require that a jail allow direct contact visits for reasonable periods of time. *Id.* at 13-73 (discussing Cooper v. Morin, 49 N.Y.2d 69 (1979), *cert. denied*, 446 U.S. 984 (1980) (citing N.Y. CONST. art. I, § 6)). Likewise, "a substantive due process analysis based on the state constitution assisted the West Virginia Supreme Court in finding that prisoners could enforce a right to rehabilitation established by a state statute. The court held that the Commissioner of Corrections had not fulfilled his constitutional duty to execute the pertinent statutes requiring the establishment and maintenance of programs of classification, education and treatment." FRIESEN, *supra* note 12, at 13-74 (discussing Cooper v. Gwinn, 298 S.E.2d 781 (W. Va. 1981)).

[77] *See* Justin Long, *State Constitutional Prohibitions on Special Laws*, 60 CLEV. ST. L. REV. 719, 742 (2012) (noting that many states have followed federal equal protection analysis in deciding cases based on state constitutional prohibitions on special laws, even though the Fourteenth Amendment equal protection clause and state provisions on special laws look nothing alike); *see also* JAMES GARDNER, INTERPRETING STATE CONSTITUTIONS 258 (2005) (arguing that, although unique state constitutional provisions "are less amenable than are duplicative rights provisions to an analysis that includes consideration of federalism effects," the argument that they "self-evidently offer the strongest possible case for an adjudicatory approach that is completely independent of federal decisional law" is "overstated").

[78] *See generally* Ariana Lindemeyer, *What the Right Hand Gives: Prohibitive Interpretations of the State Constitutional Right to Bail*, 78 FORDHAM L. REV. 267, 274-75 (2009) (discussing differing interpretations of the provisions and noting that "[m]ost of these bail provisions (and the 1787 bill of rights of the Northwest Ordinance) are modeled after the Pennsylvania Frame of Government of 1682, which stated 'all prisoners shall be bailable by sufficient sureties, unless for capital offences, where the proof is evident, or the presumption great'").

often have interpreted these provisions restrictively.[79]

A few states have constitutional provisions making reformation a key concern of criminal administration. Alaska's constitution requires that all criminal administration to be based on "the principle of reformation" (as well as on public protection, community condemnation, victims rights, and restitution)."[80] In a provision labeled "Foundation principles of criminal law," Oregon's constitution guarantees that "Laws for the punishment of crime shall be founded on these principles: protection of society, personal responsibility, accountability for one's actions and reformation."[81] The Indiana and Wyoming constitutions also insist that their criminal codes be based on principles of reformation.[82]

Although these "reformation" provisions can be read narrowly to apply only to punishment of persons convicted of crimes, they can be read more broadly to mean that the treatment of arrestees and pretrial detainees, subjects of "criminal administration," must be consistent with the principle of reformation.[83] This principle could be important, for example, with respect to the availability of treatment programs and educational opportunities for pretrial detainees, as well as decisions on where to house people, such as juveniles, to maximize their potential for reformation or rehabilitation.[84] Several states with provisions of this sort, however, have amended their constitutions to add public safety and restitution to the purposes of punishment.[85]

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[79] *See id.*

[80] Richard Frase, *Limiting Excessive Prison Sentences Under State and Federal Constitutions*, 11 U. PA. J. CONST. L. 39, 64 (2008); ALASKA CONST. art. I, § 12.

[81] OR. CONST. art. I, § 15.

[82] IND. CONST. art. I, § 18 ("The penal code shall be founded on the principles of reformation, and not of vindictive justice."); WYO. CONST. art. I, § 15 ("The penal code shall be framed on the humane principles of reformation and prevention.").

[83] The decisions on these reformation provisions thus far have addressed punishment after conviction adjudications of delinquency, *see, e.g.*, State v. Rogers, 288 P.3d 544, 553 (Or. 2012) (rejecting Roger's claim that the death penalty violated his rights under the state's reformation provision), but no court appears to have been presented with the question of the applicability of the constitutional provision pretrial.

[84] *Cf.* Edgardo Rotman, *Criminal Law: Do Criminal Offenders Have a Constitutional Right to Rehabilitation?*, 77 CRIM. L. & CRIMINOLOGY 1023, 1062 (1986) (arguing that there is a right to rehabilitation under customary international law and that, under a humanistic view of this right, the state must respect the dignity of prisoners and provide for their basic needs, including rehabilitative services, and the right to performance of rehabilitative services is legally enforceable in court).

[85] *See* Robert Williams, SUPPLEMENT TO STATE CONSTITUTIONAL LAW: CASES AND MATERIALS 26 (4th Ed. 2011) (citing MONT. CONST. art. II, § 28; OR. CONST. art. I, § 15; Michele Cotton, *Back With a Vengeance: the Resilience of Retribution as an*

Relatedly, a few state constitutions provide guarantees directed at the construction of safe jails and prisons. The Delaware constitution's bail provision guarantees access to pretrial detainees for friends and counsel and insists that "in the construction of jails a proper regard shall be had to the health of prisoners."[86] The Wyoming and Tennessee constitutions state: "that the erection of safe prisons, the inspection of prisons, and the humane treatment of prisoners, shall be provided for."[87]

Unlike the federal constitution, a number of state constitutions also provide a right to a remedy and a right to privacy, both of which may provide protection to arrestees and pretrial detainees not captured by any federal constitutional right.[88] For example, a right to a remedy arguably requires state courts to craft a remedy for inhumane treatment of arrestees and pretrial detainees, even where a common law or statutory barrier exists.[89] Likewise, a state constitution's explicit recognition of a right to privacy may make an arrestee or pretrial detainee's case against a given police or jail practice, such as searching

Articulated Purpose of Criminal Punishment, 37 AM. CRIM. L. REV. 1313 (2000)).

[86] DEL. CONST. art. I, §§11-12 ("Excessive bail or fines; cruel punishments; health of prisoners. Section 11. Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted; and *in the construction of jails a proper regard shall be had to the health of prisoners*.") (emphasis added).

[87] TENN. CONST. art. I, § 32; WYO. CONST. art. I, § 16; *see* Lough, *supra* note 8, at 715-18 (arguing that the Tennessee provision, and by implication the Wyoming provision, apply to jails as well as prisons). *But see* Grubbs v. Bradley, 552 F. Supp. 1052, 1124-25 (M.D. Tenn. 1982) (stating that Tennessee's constitutional provision on "the erection of safe and comfortable prisons, the inspection of prisons, and the humane treatment of prisoners" does not substantially extend the rights guaranteed to lawfully incarcerated persons under the Eighth Amendment to the U.S. Constitution "despite the rather unique language of the state constitution" but finding that conditions in at least some Tennessee prisons amounted to cruel and unusual punishment under the Eighth Amendment).

[88] The constitutions of ten states (Alaska, Arizona, California, Florida, Hawaii, Illinois, Louisiana, Montana, South Carolina, and Washington) protect privacy, either as an independent right or as an aspect of protection against unreasonable searches and seizures. Barbara Kritchevsky, *What States Can and Cannot Do—Protecting Privacy*, HUM. RTS., Winter 1992, at 16, 17. The constitutions of some forty states guarantee the right to a remedy through open courts, a right absent from the United States Constitution. *See generally* Thomas Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. REV. 1309, 1309, 1317 (2002) (discussing state constitutional provisions guaranteeing a right to a remedy).

[89] *Cf.* Phillips, *supra* note 88, at 1317 ("[T]hese traditional words are invoked to challenge procedural impediments to judicial access or to block substantive modifications to established causes of action or remedies.").

of their persons or possessions, stronger.[90]

Although an in-depth analysis of all of these state constitutional provisions is beyond the scope of this Article, this Section shows that there are a number of state constitutional provisions with no explicit federal equivalents that may offer useful protection to arrestees and pretrial detainees.

B. State Constitutional Guarantees of Humane Treatment for Arrestees and Pretrial Detainees

This Section examines explicit state constitutional provisions prohibiting treating arrestees and pretrial detainees with unnecessary rigor, acts of severity, or abuse and argues that the language and history of the provisions show that the provisions were intended to guarantee humane treatment of arrestees and pretrial detainees. This Section also describes courts' interpretations of these humane treatment guarantees and their handling of claims based on alleged violations of the guarantees, including with respect to remedies and barriers to judicial intervention. This discussion illustrates the potential for state constitutional rights to expand on federal protections for arrestees and pretrial, as well as some of the obstacles to enforcing these state constitutional rights.

1. The Text and History of State Constitutional Prohibitions on Unnecessary Rigor, Acts of Severity and Abuse

Seven state constitutions guarantee the humane treatment of people arrested or in jail. Indiana, Oregon, Tennessee, Utah, and Wyoming prohibit "unnecessary rigor" in the treatment of persons arrested or in jail.[91] The Rhode Island Constitution provides that

[90] In the Oregon Supreme Court's decision in Sterling v. Cupp, discussed in Part II.B, for example, the court declines to base its decision on privacy grounds in part due to the absence of a clear textual mandate since neither the Oregon nor the federal constitution had a privacy provision. *See infra* note 127 (discussing Sterling v. Cupp, 625 P.2d 123, 127-30 (Or. 1981)). However, as Professor Gardner notes, just because the U.S. Constitution lacks an explicit "privacy" provision, it does not follow that the document has nothing to say on the matter. GARDNER, *supra* note 77, at 258 ("The national Constitution does not mention the word 'privacy,' yet a constitutionally protected right to privacy inferred from the Due Process Clause has become one of the most powerful and far-reaching aspects of federal constitutional rights jurisprudence.").

[91] In a section entitled "Rights of Persons Arrested," Indiana's Constitution states, "[N]o person arrested, or confined in jail, shall be treated with unnecessary rigor." IND.

"[e]very man being presumed innocent until he is pronounced guilty by the law, no act of severity which is not necessary to secure an accused person shall be permitted."[92] The Georgia constitution prohibits abusing a person who has been arrested or is in prison.[93]

The ordinary meaning of the terms unnecessary rigor, abuse and "act of severity" suggest that the terms may refer to physical and non-physical mistreatment and require no bad intention on the part of the state or state official. The Merriam Webster Dictionary's relevant definitions of rigor are: "an act or instance of strictness, severity, or cruelty" or "a condition that makes life difficult, challenging, or uncomfortable; especially: extremity of cold."[94] Although the dictionary uses the word "cruel," which also appears in the Eighth Amendment, as a synonym for rigor, it does not follow that the unnecessary rigor inquiry, like the Eighth Amendment one, implicates state intent. Rather, the Eighth Amendment caselaw's focus on state intent stems not from the word "cruel," but from the word punishment.[95] Of use in interpreting

CONST. art. I, § 15. In a section entitled "Treatment of arrested or confined persons," Oregon's Constitution states, "No person arrested, or confined in jail, shall be treated with unnecessary rigor." OR. CONST. art. I, § 13. In a section entitled "Treatment of Prisoners," Tennessee's Constitution states: "[N]o person arrested and confined in jail shall be treated with unnecessary rigor." TENN. CONST. art. I, § 13. In a section entitled "Conduct of jails," Wyoming's Constitution states: "No person arrested and confined in jail shall be treated with unnecessary rigor. The erection of safe and comfortable prisons, and inspection of prisons, and the humane treatment of prisoners shall be provided for." WYO. CONST. art. I, § 16. Utah's Constitution puts the unnecessary rigor guarantee in a section that also prohibits excessive bail and cruel and unusual punishment: "Excessive bail shall not be required; excessive fines shall not be imposed; nor shall cruel and unusual punishments be inflicted. Persons arrested or imprisoned shall not be treated with unnecessary rigor." UTAH CONST. art. I, § 9; *see also* Frase, *supra* note 80, at 64 (examining state constitutional provisions relating to excessive punishment); Eckert, *supra* note 16, at 893 n.32.

[92] R.I. CONST. art. I, § 14.

[93] GA. CONST. art. I, § 1, para. XVII ("*Bail; fines; punishment; arrest, abuse of prisoners.* Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted; *nor shall any person be abused in being arrested, while under arrest, or in prison*.") (emphasis added).

[94] *Rigor Definition*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/rigor (last visited May 10, 2014).

[95] *See* Dolovich, *supra* note 21, at 895 (citing Farmer v. Brennan, 511 U.S. 825, 836-37 (1994)) (noting that in reaching the conclusion that the Eighth Amendment deliberate indifferent standard required awareness of and disregarding a substantial risk of harm, the [United States] Supreme Court "based its holding on the language of the Eighth Amendment, specifically the requirement that the challenged treatment constitute 'punishment[].' As the Court put it, "[t]he Eighth Amendment does not

Rhode Island's act of severity provision, the dictionary defines "severe" as "strict in judgment, discipline, or government" or "causing discomfort or hardship."[96] In turn, the definition of "necessary" indicates that a rigor or act of severity is not permissible unless "absolutely needed," "required," or "inescapable."[97]

For Georgia, the dictionary's definition of abuse likewise indicates that the term extends beyond physical mistreatment. The dictionary defines abuse as "1: a corrupt practice or custom; 2: improper or excessive use or treatment : misuse <drug abuse>; 3 obsolete : a deceitful act : deception; 4: language that condemns or vilifies usually unjustly, intemperately, and angrily; 5: physical maltreatment."[98] Thus, physical maltreatment is but one definition of abuse; "improper or excessive treatment," "improper or excessive treatment," or even "intemperate language" are others.

These state constitutional guarantees of humane treatment are more than just the Eighth Amendment cruel and unusual punishment prohibition expressed in different words. They expressly apply to people arrested or in jail, and thus, unlike the Eighth Amendment, were clearly meant to apply prior to conviction. Moreover, each of these state constitutions also has a separate prohibition on cruel and unusual punishment.[99]

State unnecessary rigor provisions entered state constitutions in the late 18th and early 19th Centuries. Tennessee's unnecessary rigor provision entered the state's constitution in the state constitutional

outlaw cruel and unusual 'conditions'; it outlaws cruel and unusual 'punishments'").

[96] *Severe Definition*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/severe (last visited May 10, 2014).

[97] The Merriam Webster dictionary defines "necessary" as: "1: absolutely needed: required; 2 a: of an inevitable nature: inescapable, b (1): logically unavoidable (2): that cannot be denied without contradiction, c: determined or produced by the previous condition of things, d : compulsory." *Necessary Definition*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/necessary (last visited May 10, 2014).

[98] *Abuse Definition*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/abuse (last visited May 10, 2014).

[99] *See* OR. CONST. art. I, § 16; IND. CONST. art. I, § 16; TENN. CONST. art. I, § 16; R.I. CONST. art. I, § 8; WYO. CONST. art. I, § 14; DEL. CONST. art. I, § 11. Although Utah's unnecessary rigor and Georgia's abuse provisions are contained in the same section as their cruel and unusual punishment and excessive bail provisions, the provisions plainly offer three distinct protections. The state unnecessary rigor, act of severity, and abuse provisions, refer explicitly to people arrested or in jail. *See* UTAH CONST. art. I, § 9; GA. CONST. art. I, § 1, para. XVII.

convention of 1796.[100] Indiana's prohibition against unnecessary rigor formed part of the constitution of 1816, the state's first constitution, and was maintained in the 1851 constitutional convention.[101] Oregon's unnecessary rigor provision likewise appeared in the state's first constitution, the constitution of 1857, which appears to have been modeled on Indiana's.[102] Wyoming's unnecessary rigor provision likewise appeared in the state's first constitution of 1889.[103] Rhode Island's provision guaranteeing the presumption of innocence and prohibiting "act[s] of severity not necessary to secure[] an accused person" entered the state's first constitution in 1843.[104] Georgia's abuse

[100] *See* Lough, *supra* note 8, at 705.

[101] *See* IND. CONST. of 1816, art. I, § 12; IND. CONST. of 1851, art. I, § 16.

[102] *See* W.C. Palmer, *The Sources of the Oregon Constitution*, 5 OR. L. REV. 200, 200-201 (1926) (comparing the Oregon Constitution of 1857 to other state constitutions, particularly the Indiana Constitution of 1851 and concluding that "[w]hile some provisions were elsewhere derived, a very large part of the entire instrument [including the unnecessary rigor provision] was taken literally from the Indiana draft of 1851"); *see also* Claudia Burton & Andrew Grade, *A Legislative History of the Oregon Constitution of 1857—Part I (Articles I & II)*, 37 WILLAMETTE L. REV. 469, 483-84 (2001) ("[T]he evidence is circumstantial, but strong, that the members of the Committee on Bill of Rights drew heavily on the Bill of Rights of the Indiana Constitution of 1851 when drafting Oregon's Bill of Rights. [One delegate] Delazon Smith had spoken approvingly of the Indiana Constitution and its Bill of Rights when he argued in favor of including a bill of rights in Oregon's Constitution. The order of the sections in the Report of the Committee on Bill of Rights is remarkably similar to the order of the corresponding sections in the Indiana Bill of Rights. Finally, the text of the corresponding sections is frequently identical or greatly similar."). A copy of the Oregon Constitution of 1857 is available at
http://bluebook.state.or.us/state/constitution/constitution.htm
("The Oregon Constitution was framed by a convention of 60 delegates chosen by the people. The convention met on the third Monday in August 1857 and adjourned on September 18 of the same year. On November 9, 1857, the Constitution was approved by the vote of the people of Oregon Territory. The Act of Congress admitting Oregon into the Union was approved February 14, 1859, and on that date the Constitution went into effect."). *See also* Burton & Grade, *supra*, at 520-21.

[103] *See* ROBERT B. KEITER & TIM NEWCOMB, THE WYOMING STATE CONSTITUTION: A REFERENCE GUIDE 1, 12 (1993) (arguing that the delegates intended for liberal construction of the state's Bill of Rights); State v. Bd. of Comm'rs, 55 P. 451, 459 (Wyo. 1898) (discussing the unnecessary rigor provision of the Wyoming constitution).

[104] *See* PATRICK T. CONLEY & ROBERT J. FLANDERS, THE RHODE ISLAND STATE CONSTITUTION 94-95 (2011) (noting that the provision has not changed other than the shift to gender neutral language in the 1986 constitutional convention); *see also* Reid Wilson, *Rhode Island Could Be the First State in 30 Years to Hold a Constitutional Convention*, WASHINGTON POST (March 13, 2014, 11:49 AM),
http://www.washingtonpost.com/blogs/govbeat/wp/2014/03/13/rhode-island-could-

provision entered the Georgia Constitution in 1868 with the state's first Bill of Rights.[105]

Although there was often little or no discussion of the unnecessary rigor provisions at the state constitutional conventions,[106] where it occurred, it indicated that the provisions stemmed from a desire to ensure humane treatment of people detained by the state. In Utah, for example, the constitutional delegates explicitly explained the provision in terms of humane treatment:

> Mr. VARIAN: I don't know what the purpose of that last phrase or clause is . . . . I don't want to raise any unnecessary question, and I suggest to the chairman of the committee whether there is any particular reason for putting that in there.
>
> Mr. WELLS. The object [is] to protect persons in jail if they shall be treated inhumanely while they are in prison.[107]

The delegates discussed removing the provision, because they were unaware of another state with such a provision, but they ultimately

become-the-first-state-in-30-years-to-hold-a-constitutional-convention/ (noting that Rhode Island's full constitution took effect in 1843 and that it has held eleven constitutional conventions, the latest in 1984).

[105] *See* Beasley, *supra* note 16, at 364, 384 (noting that the abuse provision "was introduced into the constitution in 1868 and has remained to this day, except for the change of the word "whilst"' to "'while"' in 1877 to modernize the language")

[106] *See, e.g.*, Burton & Grade, *supra* note 102, at 520-21 (discussing the passage of Oregon's unnecessary rigor provision and stating "The discussion of section 15 that followed the second reading of article I occurred on September 9, 1857 (a.m.) and September 11, 1857 (a.m.). At the September 9, 1857 (a.m.) session, when sitting as a committee of the whole, the delegates voted to delete section 15. However, when the Convention took up the amendments proposed by the Committee of the Whole on September 11, 1857 (a.m.), they did not approve this deletion of section 15. The contemporary newspaper accounts do not reveal what led the delegates first to delete the section and then to reverse that decision"); Lough, *supra* note 8, at 704-5 (noting that there was no discussion of Tennessee's unnecessary rigor provision at the state's constitutional convention).

[107] *See* McLaren, *supra* note 16, at 28 (positing that the unnecessary rigor clause may have stemmed from a desire of framers, who included the son of a prominent Mormon polygamist, to protect the high number of Mormons in prison for polygamy at the time); *see also* Kathleen Weron, *Rethinking Utah's Death Penalty Statute: A Constitutional Requirement for the Substantive Narrowing of Aggravating Circumstances*, 1994 UTAH L. REV. 1107, 1158 (1994).

retained it.[108]

Rhode Island's provision guaranteeing the presumption of innocence and prohibiting any "act of severity not necessary to secure the accused" likewise appears to be rooted in the principle of humane treatment of people accused of crimes. One commentator, Francois Moreno-Quintard, has argued that this Rhode Island constitutional provision is taken directly from the French Declaration of Rights of 1789.[109] The French Declaration of Rights provided: "Every man being presumed innocent until he has been found guilty, if it shall be deemed absolutely necessary to arrest him, every kind of rigor used, not necessary to secure his person, ought to be severely repressed by the law."[110] The French provision, according to Quintard-Morenas, was "[v]iewed not as a rule of proof but as the right of suspects to be treated with humanity."[111] Rhode Island's explicit linking of the presumption of

[108] Eckert, *supra* note 16, at 890 n.18. (citing McLaren, *supra* note16, at 42) ("The motion to strike out was accepted because the proposer could cite no support from any other constitution. A change of heart apparently occurred between March 21, 1895 and April 3, 1895, perhaps because the proponents of the provision discovered the precedential support they needed in other state constitutions."); Sandberg, *supra* note 16, at 759 n.64 (stating that "[o]bviously unknown to the framers" in their discussions about the possible deletion of the unnecessary rigor provision due to lack of an analog in other state constitutions "was that provisions almost identical to the Unnecessary Rigor Provision appeared in the constitutions of Indiana, Oregon, Tennessee, and Wyoming" and arguing that "the framers' entire reason for striking the Unnecessary Rigor Provision had no merit" and suggesting that "is entirely plausible, if not likely, that after rejecting the provision because it was not 'copied from some other constitution' the framers discovered that it was and elected to reinsert the provision").

[109] Francois Quintard-Morenas contends that the presumption of innocence and act of severity language of the Rhode Island Constitution of 1841 was borrowed from the French Declaration of Rights of 1789, by way of the Rhode Island Bill of Rights of 1798. Francois Quintard-Morenas, *The Presumption of Innocence in the French and Anglo-American Legal Traditions*, 58 AM. J. COMP. L. 107, 125 & n. 171 (2010) (noting that Section 10 of the Rhode Island Bill of Rights of 1798 copied almost verbatim the provision contained in Article 9 of the French Declaration of Rights of 1789 and arguing that "[t]he similarities between the two texts can hardly be a coincidence" and that "[w]e can assume that the drafters of the Rhode Island Bill of Rights were familiar with the text of the French Declaration, which was published in English and American newspapers shortly after its adoption").

[110] *Id*. at 122-23.

[111] *Id*. at 122 ("At the National Assembly in Paris on August 22, 1789, a young deputy of the nobility named Adrien-Jean-François Duport, shocked by the 'barbarian usage' in France to punish individuals before conviction, proposed that the presumption of innocence be inscribed in the Declaration of Rights, which was unanimously adopted.").

innocence and the rights of a pretrial detainees is significant, since the United States Supreme Court rejected the "compelling necessity" test in *Bell v. Wolfish* on the basis that the presumption was a rule of evidence that applied at trial and was inapplicable pretrial.[112]

Commentators on Indiana's constitution and Indiana courts have situated the state's first Bill of Rights in the tradition of populism and a desire to ensure public scrutiny of the public affairs.[113] The 1851 constitutional convention continued this tradition of populism and "emphasis on individual rights."[114] The unnecessary rigor provision, like most of the Bill of Rights, was untouched.[115]

Early caselaw examined unnecessary rigor through the lens of humane treatment. An early Indiana Supreme Court case discussing unnecessary rigor, albeit without expressly mentioning the Indiana constitution, situates the concept in the tradition of humane treatment of prisoners. In a case in which plaintiffs challenged a prison's practice of hiring out prisoners, which detrimentally impacted the plaintiffs' business, the court noted:

> The very essence of punishment, and the sole use of the prison walls, is the confinement of the convict within them . . . Humanity indeed forbids, as unnecessary rigor, that his confinement should be absolutely solitary, or that all his natural and civil rights should be temporarily annihilated; but actual enclosure within its walls, is essential to the idea of imprisonment in the penitentiary.[116]

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[112] *See* discussion *supra* note 34.

[113] *See* Jon Laramore, *Indiana Constitutional Developments*, 37 IND. L. REV. 929, 955 (2004); *see also* Price v. State, 622 N.E.2d 954, 961-62 n.11 (Ind. 1993) (noting that "[t]he frontier democrats who dominated the first Constitutional Convention countered the risk that reactionary elements might fashion a non-majoritarian government by adopting measures to guarantee popular participation and protect scrutiny of public affairs" and that the framers of the 1850 constitution continued this tradition).

[114] According to Justice Boehm of the Indiana Supreme Court, the same emphasis on individual rights and populism dominated Indiana's 1851 constitutional convention, which "essentially carried out the agenda set in 1816." Humphreys v. Clinic for Women, Inc., 796 N.E.2d 247, 270 (Ind. 2003) (Boehm, J., dissenting) (citing *Price*, 622 N.E.2d at 962 n.11) (arguing that, in the same vein, the Indiana Equal Privileges Clause elevates individual rights by requiring more than some recognized governmental interests before legislation can override the interests of the individual).

[115] *See supra* note 34.

[116] Helton v. Miller, 14 Ind. 577, 585 (1860).

It concluded that "the state should . . . provide herself with grounds and buildings sufficiently extensive to accommodate at work and at repose all her convicts."[117] A Wyoming Supreme Court case decided shortly after the adoption of Wyoming Constitution, the only Wyoming state court case to address the state's unnecessary rigor provision, likewise viewed Wyoming's unnecessary rigor provision as a product of the "humanitarian theory" of administering criminal law.[118]

These provisions entered state constitutions in an era of significant penal reform.[119] As the Oregon Supreme Court explained in *Sterling v. Cupp*, discussed below, these humane treatment-style provisions "reflect a widespread interest in penal reform in the states during the post-Revolutionary decades" and that "while constitutional texts differ, . . . many states thought a commitment to humanizing penal laws and the treatment of offenders to rank with other principles of constitutional magnitude independently of any concern of the Congress or of Madison's Bill of Rights."[120] In her article on the Georgia Bill of Rights, Judge Dorothy Beasley notes that, although there was no discussion of Georgia's abuse provision at the 1868 Constitutional Convention, the provision came fast on the heels of a call for jail reform.[121]

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[117] *Id*.

[118] State v. Bd. of Com'rs, 55 P. 451, 459 (Wyo. 1898) (situating the Wyoming Constitution's unnecessary rigor provision within the context of penal reform and the principle of "reformation of the offender" and drawing from the Wyoming Constitution's prohibitions against excessive bail, cruel and unusual punishment, and unnecessary rigor and its express statement that and the "Penal Code shall be framed on the humane principles of reformation and prevention" the conclusion that Wyoming's "fundamental law [declares] that the Penal Code shall be founded upon the humane principles of reformation and prevention"); *see also* KEITER & NEWCOMB, *supra* note 103, at 67.

[119] *See generally* DAVID ROTHMAN, THE DISCOVERY OF THE ASYLUM 60-61, 69 (1971); BLAKE MCKELVEY, AMERICAN PRISONS: A HISTORY OF GOOD INTENTIONS 8, 34, 51 (1977) (discussing penal reform and jail reform efforts in the late 18th and early 19th Century).

[120] Sterling v. Cupp, 625 P.2d 123, 128-29 (Or. 1981); *see also* Raedle v. Townsend, No. C/A 117, 1987 WL 7721, at *2 (Tenn. Ct. App. Mar. 12, 1987) (noting that these unnecessary rigor or abuse provisions are related to "[a] common law duty [that] requires a sheriff and his jailer to treat prisoners 'kindly and humanely'"); State *ex rel.* Morris v. Nat'l Sur. Co., 39 S.W.2d 581 (Tenn. 1931); Hale v. Johnston, 203 S.W. 949 (Tenn. 1918).

[121] Beasley, *supra* note 16, at 385-86 (noting that immediately before "the taking up of the report of the committee on the bill of rights on January 15, a resolution was passed," which requested "the major general in command to examine all the jails and other

In short, the language, drafting history and historical context indicate that these state constitutional prohibitions on unnecessary rigor, acts of severity, and abuse were animated by states' desires to ensure the humane treatment of arrestees and pretrial detainees.

2. Judicial Interpretations of Humane Treatment Rights

State courts have differed in their interpretation of the state constitutional guarantees of humane treatment for arrestees and pretrial detainees. Oregon and Utah courts have recognized that needless impositions on "personal dignity" can constitute unnecessary rigor; whereas Indiana courts require physical abuse.[122] Other than the Wyoming Supreme Court's 1898 decision in *Laramie* discussed above, the courts of the remaining states with humane treatment provisions have offered little guidance on the meaning of these provisions.[123]

prisons, and to release all persons unlawfully deprived of their liberties, and all persons tried *ex parte*, or whose right of appeal was denied or bail refused "in violation of the Constitution and Laws of the United States and the State of Georgia" and observing that "the convention adopted this provision . . . in the context of Georgia's attempt to reconstruct while still under military orders and while Georgia was desperately attempting to obtain money from Congress for relief from the war's devastation").

[122] *See* discussion *infra* notes 128-145.

[123] Georgia courts have said little about the state's abuse provision except to say that it provides at least as much protection as the federal constitution, *see* Long v. Jones, 432 S.E.2d 593 (Ga. Ct. App. 1993), and that a failure to provide medical care to an arrestee would amount to an abuse under the Georgia constitution. *See* discussion *infra* notes 178-80. Wyoming has not revisited the meaning of its unnecessary rigor provision since *Laramie* discussed above. *See* discussion *supra* note 118. Two federal courts have mentioned Wyoming's unnecessary rigor provision without discussing it. *See* Clappier v. Flynn, 605 F.2d 519 (10th Cir. 1979) (holding, in a case in which a pretrial detainees was beaten and sexually assaulted by another pretrial detainee, that the court had erred in allowing damages both under Section 1983 and state negligence theories); DiMarco v. Wyo. Dep't of Corr., 300 F. Supp. 2d 1183 (2004) (D. Wyo.) (addressing a transgender inmate's claims that her constitutional rights were violated when the prison kept her in segregation for fourteen months because they believed her to present a "safety risk" and mentioning that the complaint alleged a violation of Wyoming's unnecessary rigor provision, but deciding the case based on the violation of a federal right to due process), *rev'd sub nom.* Estate of DiMarco v. Wyo. Dep't of Corr., 473 F.3d 1334 (10th Cir. 2007) (holding that DiMarco's confinement in isolation did not violate due process and not mentioning Wyoming's unnecessary rigor provision). The sole Rhode Island case to address the prohibition of any unnecessary "act of severity" arose in the context of alleged delays in bringing the defendants before judicial officer. In this case, the court concluded without elaborating that detention overnight followed by arraignment the next morning did not constitute the kind of severity which Art. 1, §14 contemplated. State v. Wax, 116 A.2d 468, 473 (R.I. 1955).

The Oregon Supreme Court's 1981 case *Sterling v. Cupp*, authored by Justice Hans Linde, takes a broad view of unnecessary rigor.[124] In *Sterling*, male inmates of the Oregon State Penitentiary successfully sued to enjoin the superintendent "and other prison officials from assigning female guards to duties which involve frisking male prisoners or observation of prisoners in showers or toilets, or for such other relief as the court deemed proper."[125] Although *Sterling* involved convicted prisoners, the relevant parts of the court's analysis apply equally, if not with more force, to arrestees and pretrial detainees.[126]

Dissatisfied with the Court of Appeal's analysis, which relied on an implicit federal constitutional right to privacy,[127] the court requested that the parties brief the issue under the Oregon Constitution's unnecessary rigor prohibition and, ultimately, upheld the trial court's injunction on this ground.[128]

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[124] Sterling v. Cupp, 625 P.2d 123 (Or. 1981).

[125] *Id*. at 613.

[126] There may be an argument that different "rigors" will be necessary in dealing with convicted prisoners than with people merely arrested or charged with crimes, who are presumed innocent, albeit not according to *Bell v. Wolfish*. *See* discussion *supra* at note 34.

[127] *Sterling*, 625 P.2d at 616, 618-19 ("It may well be that the interest asserted by the prisoners in this case can be brought within one of the kinds of 'privacy' said to be protected by unexpressed penumbras of the United States Constitution. *See* Gunther v. Iowa State Men's Reform, 612 F.2d 1079 (8th Cir. 1980) *cert. denied*, 446 U.S. 966 (1980). But in three respects the guarantee not to be 'treated with unnecessary rigor' in Oregon's article I, section 13, is a more cogent premise than such a federal 'right of privacy.' First, it has an unquestioned source in a provision expressly included in the political act of adopting the constitution. Second, that provision is addressed specifically to the treatment of persons 'arrested, or confined in jail.' Unlike rights of privacy, there can be no argument that rights under this guarantee are forfeited by conviction of crime or under lawful police custody, as those are the circumstances to which its protection is directed. Third, 'privacy' poses the paradox that its elasticity in the face of important public policies contradicts its theoretical premise as a right so fundamental as to be implied in the national Constitution; by contrast, article I, section 13, itself makes necessity the test of the practices it controls.").

[128] As the concurrence notes, the case was tried and argued exclusively on the basis of a right to privacy. The Supreme Court of Oregon sent a letter to the parties requesting supplemental briefing on the questions whether prisoners, instead of having a constitutional 'right of privacy,' have a constitutional right to protection against treatment with 'unnecessary rigor' under Article I, section 13 of the Oregon Constitution as a basis for protection against such searches." *Sterling*, 625 P.2d at 633-34 (Tongue, J., concurring) (objecting to the court's basing its decision on a theory different to the one "on which the case was both tried and appealed to the Court of Appeals" and arguing that the "case c[ould] be properly decided without the necessity

According to *Sterling*, no physical abuse is required for an act or a practice to amount to an unnecessary rigor:

> The guarantee against "unnecessary rigor" is not directed specifically at methods or conditions of "punishment," which are the focus [of other Oregon constitutional provisions], [the guarantee] extends to anyone who is arrested or jailed; nor is it a standard confined only to such historically "rigorous" practices as shackles, the ball and chain, or to physically brutal treatment or conditions, though these are the most obvious examples.[129]

Noting that Georgia offers the same protection using the term "abuse," the *Sterling* court proposed a simple test: "whether a particular prison or police practice would be recognized as an abuse to the extent that it cannot be justified by necessity."[130] It interpreted the unnecessary rigor provision as a prohibition against "needlessly harsh, degrading, or dehumanizing treatment."[131]

In support of its conclusion that pat-down searches of male inmates by female guards amounted to unnecessary rigor,[132] the court turned to federal and international standards on human rights and treatment of prisoners, as well as non-government sources, such as the American Bar Association's Standards of Criminal Justice and the American Correctional Association's Manual of Correctional Standards.[133] It explained that it did so, not because the "various

of finding a constitutional basis for prisoners' rights" by founding a right to privacy for prisoners in ordinary tort law and Oregon statutes).

[129] *Sterling*, 625 P.2d at 129 (1981) (majority opinion) ("'Unnecessary rigor' is not to be equated only with beatings or other forms of brutality.").

[130] *Id.* at 129-30 (citing Roberts v. State, 307 N.E.2d 501 (Ind. Ct. App. 1974); Matovina v. Hult, 123 N.E.2d 893 (Ind. Ct. App. 1955)) ("The Indiana section has also been cited to support tort recovery for physical abuse.").

[131] *Id.* at 131.

[132] Precisely, the court asked "whether a practice of body searches including sexually intimate areas by officers of the opposite sex, even though the prisoner remains clothed, constitutes a cognizable indignity and if so, whether it is justified by necessity." *Id.* at 131-32.

[133] *Id.* at 130 (citing, *inter alia*, U.S. DEP'T OF JUSTICE, DRAFT FEDERAL STANDARDS FOR CORRECTIONS 7, 36 (1978); Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); International Covenant of Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966); Standard Minimum Rules for the Treatment of Prisoners, E.S.C. Res. 663C, U.N. Doc. A/CONF/611 (July 31, 1957); *see also* Johanna Kalb, *Litigating Dignity: A Human Rights Framework*, 74 ALB. L. REV. 1725 (2010).

formulations in these different sources in themselves are [] constitutional law," but rather were "contemporary expressions of the same concern with minimizing needlessly harsh, degrading, or dehumanizing treatment of prisoners that is expressed in article I, section 13."[134]

The Utah Supreme Court has cited *Sterling* with approval and likewise equated unnecessary rigor with abuse.[135] In *Bott v. Deland*, which recognized that violation of the state's unnecessary rigor provision could provide the basis for a constitutional tort,[136] the Utah Supreme Court stated that, in contrast to allegations based on cruel and unusual punishment,[137] the requisite culpability for the violation of an unnecessary rigor provision did not turn on the government employee's intent. Instead, the Utah Supreme Court followed the Oregon Supreme Court's lead when it asserted that "the main consideration is 'whether a particular prison or police practice would be recognized as an abuse to the extent that it cannot be justified by necessity."[138]

Bott echoed *Sterling*'s focus on whether the practice constituted "needlessly harsh, degrading, or dehumanizing treatment."[139] The court also reiterated that unnecessary rigor is treatment that is clearly excessive or deficient and unjustified, not merely the frustrations, inconveniences, and irritations that are common to prison life."[140] In a subsequent case, in which the Utah Supreme Court introduced a doctrine of qualified immunity for constitutional tort suits based on the state's unnecessary rigor provision,[141] the court explained that unnecessary rigor is "unreasonably harsh, strict, or severe treatment," which "may include being unnecessarily exposed to an increased risk of serious harm."[142]

Indiana courts, by contrast, have limited unnecessary rigor to

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[134] *Sterling*, 625 P.2d at 131-32.

[135] *See* Bott v. Deland, 922 P.2d 732, 740 (Utah 1996); FRIESEN, *supra* note 12, § 13.07(1)(c)(i) (citing *Bott*, 922 P.2d at 740); *cf.* Dexter v. Bosko, 184 P.3d 592, 597 (Utah 2008) ("A prisoner suffers from unnecessary rigor when subject to unreasonably harsh, strict, or severe treatment.").

[136] *See* discussion *infra* notes 166-176.

[137] For allegations of cruel and unusual punishment, the court followed the federal "deliberate indifference" standard, see *Bott*, 922 P.2d at 740.

[138] *Id.* at 740 (quoting *Sterling*, 625 P.2d at 131).

[139] *Id.* (citing *Sterling*, 625 P.2d at 131).

[140] *Id.* at 741.

[141] *See* discussion *infra* Part II.4.

[142] Dexter v. Bosko, 184 P.3d 592, 597 (Utah 2008) (examining unnecessary rigor as the basis for a constitutional tort and introducing a doctrine of qualified immunity).

extreme mistreatment or physical abuse. In *McQueen v. State*, the Indiana Supreme Court rejected McQueen's argument that his six-month detention before the murder trial in which he was convicted violated his rights under Indiana's unnecessary rigor provision. The Court noted that "the provision is not a "catch-all" applicable to every adverse condition that accompanies detention, rather, it serves to prohibit extreme instances of mistreatment and abuse."[143] In *Moore v. State*, Moore argued that being held on death row for 20 years was cruel and unusual punishment under the Eighth Amendment and the Indiana Constitution and an unnecessary rigor under the Indiana Constitution. The Indiana Supreme Court held that the delay in executing the petitioner did not constitute unnecessary rigor because unnecessary rigor requires physical abuse.[144] Lower Indiana appellate courts have rejected unnecessary rigor claims in other contexts due to the absence of physical abuse.[145]

These differing interpretations of unnecessary rigor may mean that the meaning and utility of the provisions will vary from state to state. In states with broad interpretations of unnecessary rigor, the right likely will protect arrestees and pretrial detainees from a wider range of mistreatment. Even where states adopt a narrower view, however, the

[143] 711 N.E.2d 503, 505 (Ind. 1999).

[144] 771 N.E.2d 46, 55 (Ind. 2002) (refusing to recognize emotional distress as a basis for an unnecessary rigor claim). Even Oregon courts have been unsympathetic to the argument that emotional distress in waiting for resolution of death penalty eligible charges amount to unnecessary rigor. *See* State v. Moen, 786 P.2d 111, 142 (Or. 1990) (holding that held that pretrial incarceration of a person who is charged with aggravated murder and potentially faces the death penalty does not constitute unnecessary rigor).

[145] *See* Smith v. Ind. Dep't of Corr., 871 N.E.2d 975, 984 (Ind. Ct. App. 2007) (holding that allegations that prison officials forced Smith to sit in a jail cell flooded with fecal matter (after other prisoners had blocked toilets in a protest) and sprayed him with mace, choked him and then shot him with ten to thirty rounds of mace pellets, when he refused to leave his cell, did not amount to physical abuse sufficient for unnecessary rigor); Grier v. State, 855 N.E.2d 1043, 1049 (Ind. Ct. App. 2006), *transfer granted, opinion vacated*, 869 N.E.2d 450 (Ind. 2007) *and rev'd*, 868 N.E.2d 443 (Ind. 2007) (finding that an officer's grabbing a person's neck in order to prevent him from swallowing a plastic bag of cocaine did not rise to the level of abuse or torture contemplated by the Indiana Constitution's unnecessary rigor prohibition); State v. Keller, 845 N.E.2d 154, 167 (Ind. Ct. App. 2006) (addressing allegations that his confession was the result of being treated with unnecessary rigor, when the officers asked him to remove his clothing and change into a prison jumpsuit while the video camera was recording and holding that there was no evidence that the defendant was mistreated during the interrogation or that he was asked to remove his clothing in order to "humiliate" him and that, regardless, humiliation did not amount to unnecessary rigor since it is not physical abuse).

provision arguably still offers protection greater than the federal constitution due to the absence of an inquiry into intent.

3. Judicial Enforcement of Humane Treatment Rights

The litigation of state constitutional protections for arrestees and detainees is sparse.[146] Nevertheless, arrestees and pretrial detainees have had some success using state guarantees against unnecessary rigor or abuse in claims of excessive force;[147] invasive searches;[148] inadequate medical treatment;[149] and failure to ensure the safety of detainees in transport.[150] Claims based on delay in bringing a criminal defendant before a judicial officer have yielded mixed results.[151]

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[146] The litigation of these state provisions pales in comparison to litigation of federal constitutional rights. To give just a rough sense of the discrepancy, whereas a WestlawNext search of "unnecessary rigor" turned up 33 Oregon cases in the Oregon combined state and federal cases database and 42 Utah cases in the Utah combined state and federal cases database, searches of the same databases using the terms "section 1983" & (jail detent! detain! arrest prison!) yielded 10,000 Oregon cases and 4,417 Utah ones. Indiana has 42 unnecessary rigor cases. Tennessee has one reported unnecessary rigor case from 1965. The Wyoming unnecessary rigor provision is mentioned twice in reported federal court opinions and once in a Wyoming Supreme Court case regarding property taxes from 1898. There are 10 Georgia cases that mention its abuse clause. Of the eight Rhode Island opinions examining Article I, Section 14 of the Rhode Island constitution, only two have discussed the prohibition of "act[s] of severity" "not necessary to secure an accused person." Last Westlaw check May 11, 2014. The author intentionally chose search terms that were not parallel in order to capture the claims of arrestees and pretrial detainees based on any federal constitutional provision, which by definition are at issue in Section 1983 suits, and to compare the number of claims to the number of claims based on alleged violations of state unnecessary rigor, act of severity, or abuse constitutional provisions. If anything, this selection understates the discrepancy in the number of cases, because it includes unnecessary rigor, act of severity, and abuse cases in all contexts but excludes suits based on federal constitutional violations that arise in contexts other than Section 1983 suits, such as motions to suppress, prosecution of state officials or petitions for writ of habeas corpus.

[147] *See infra* Parts II.B.3(c), II.B.3(d) (discussing Kokenes v. State, 13 N.E.2d 524, 530 (Ind. 1938); Suter v. State, 88 N.E.2d 386, 391 (Ind. 1949); Bonahoon v. State, 178 N.E. 570, 570 (Ind. 1931)).

[148] *See infra* Part III.B.2(b) (discussing Sterling v. Cupp, 625 P.2d 123 (Or. 1981)).

[149] *See infra* Part II.B.3(b) (discussing Bott v. Deland, 922 P.2d 732 (Utah 1996)).

[150] *See infra* Part II.B.4 (discussing Dexter v. Bosko, 184 P.3d 592, 597 (Utah 2008)).

[151] An Indiana Court of Appeals case suggested that the failure to arraign a person promptly, while holding him in vile conditions that made him ill violated the state's unnecessary rigor provision. Matovina v. Hult, 123 N.E.2d 893 (Ind. Ct. App. 1955); *see also* FRIESEN, *supra* note 12, at 7-27. By contrast, the Rhode Island Supreme Court concluded that detention overnight followed by arraignment the next morning did not

Though they have not always relied primarily on the unnecessary rigor prohibition, courts have cited the provision in various procedural and remedial contexts, including in suits seeking tort law damages, injunctions, suppression of evidence, the writ of habeas corpus and even in criminal cases against state officials who violate state constitutional rights.[152] In only one state, Utah, has a court recognized a damages remedy based directly on a violation of the state constitutional unnecessary rigor provision.[153]

a. Humane Treatment Rights as the Basis for an Injunction

In *Sterling*, the Oregon Supreme Court approved of enforcing Oregon's unnecessary rigor provision through an injunction. *Sterling* involved an appeal from a trial court's order enjoining prison officials from conducting cross-gender pat down searches, "except in the event that the immediate circumstances in a particular situation necessitate it."[154] *Sterling*, however, is an outlier. There appears to be no other case in which a plaintiff has succeeded in obtaining an injunction based on the violation of a state unnecessary rigor, severity, or abuse provision.[155]

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constitute the kind of severity which Art. 1, §14 contemplated. State v. Wax, 116 A.2d 468, 473 (R.I. 1955); *see also* State v. M.L.C., 933 P.2d 380, 384-85 (Utah 1997) (rejecting a juvenile's claim "that denying bail to juveniles charged under the serious youth offender statute pending a bindover determination [to determine whether he should be tried as a juvenile or as an adult in the district court] violates the unnecessary rigor clause"). It bears noting however, that prompt presentment is an area of law where federal rights, albeit statutory, may be stronger than state ones, since *McNabb v. United States*, 318 U.S. 332 (1943) (reversing murder convictions based the improper introduction of statements made in violation of petitioners' rights to be brought before a judicial officer) and *Mallory v. United States*, 354 U.S. 449 (1957) (reversing convictions based on improper admission of defendant's confession since it appeared that defendant was not properly arraigned), recently reaffirmed post-18 U.S.C. § 3501 in *Corley v. United States*, 556 U.S. 303 (2009), were based on the Supreme Court's inherent supervisory authority over federal courts.

[152] *See infra* Part II.B.3.

[153] *See infra* Part II.B.3(b).

[154] The Oregon Supreme Court modified the trial court's injunction to read: "officers and on the flexibility of OSP to accommodate those rights to the rights of the prisoners, as contemplated in HJR 29, *supra*. The injunction is therefore modified to enjoin only that guards of the opposite sex may not conduct a 'patdown,' 'frisk,' or other search of plaintiffs' anal-genital area except in the event that the immediate circumstances in a particular situation necessitate it." Sterling v. Cupp, 625 P.2d 123, 136-37 (Or. 1981).

[155] The Utah Supreme Court recently refused to decide an unnecessary rigor claim in which the plaintiff sought an injunction on the basis of mootness and inadequate

The Oregon Supreme Court decided the constitutional issue despite the potential mootness of the claim. Prior to the court's decision, the Oregon Corrections Division had amended its administrative rules to comply with the court of appeal's order enjoining the pat-down searches pending the appeal. The *Sterling* court reached the merits of the unnecessary rigor issue despite the state's policy change, because the court thought it important to issue a decision on the merits of the constitutional claim, lest state officials be "led to believe that they were legally free to resume the challenged practice."[156]

The court showed little deference to administrative law. The court noted that it considered its review of the prior rule allowing for cross-gender pat-downs to be permitted under state administrative law,[157] but suggested that it would have reviewed the rule, even if administrative law had erected barriers. The court stated that relief need not be withheld "when the impact of the assertedly unlawful agency action is present or immediately impending."[158]

According to the *Sterling* court, an injunction was a less intrusive measure than the alternative: the writ of habeas corpus.[159] A

briefing of the issue. In *Angilau v. Winder*, Angilau, a juvenile, sought to have the court enjoin the practice of housing juveniles charged with serious crimes and bound over for trial in ordinary criminal court. 248 P.3d 975, 977-78 (Utah 2011). He contended that "the incarceration of juveniles in adult facilities without the safety standards adopted by the Board [of juvenile justice services] violated the unnecessary rigor clause of the Utah Constitution," as well as Utah statutes and the federal constitution. *Id*. The Utah Supreme Court refused to decide Angilau's claims on the merits due to mootness, since Angilau had turned eighteen by the time of his appeal. It also declined to use the public interest exception to the mootness doctrine to decide the claim, since the parties had briefed the unnecessary rigor claim inadequately. *Id*. at 979-80.

[156] *Sterling*, 625 P.2d at 136.

[157] *Id.* at 135 (noting that when the challenge is to a rule, apart from a specific order, Oregon statutes give the Court of Appeals jurisdiction without the petitioner having to first request agency to pass on the validity of its rule, but "when a rule is challenged in the course of reviewing an order, its validity may be determined by the court that otherwise has jurisdiction to review the order," which may be the agency itself).

[158] *See id*. By contrast, the Oregon Court of Appeals has since refused to decide an unnecessary rigor constitutional challenge to Oregon prison rules since, pursuant to the Oregon Administrative Procedures Act, there was no evidentiary record for it to review and the court therefore believed it had no way of assessing the necessity behind the rule. Smith v. Dep't of Corr., 182 P.3d 250, 252 (Or. Ct. App. 2008).

[159] *Sterling*, 625 P.2d at 135 ("Specifically in the custodial setting, what we have called a 'flexible' remedy by injunction or temporary restraining order is proper to obviate expansive resort to the most urgent of all judicial scrutiny of executive action, the writ of habeas corpus.").

subsequent state appellate decision confirmed that a petition for writ of habeas corpus would be another way to vindicate this constitutional right.[160]

b. Humane Treatment Rights as the Basis for Constitutional Torts

A constitutional tort is "any action for damages for violation of a constitutional right against a government or individual defendants."[161] Constitutional torts are a relatively new phenomenon, and have been touted as "a new and important mechanism of enforcement to the existing constitutional scheme."[162] Absent the rare state statute recognizing tort suits for violations of state constitutions akin to the federal code's Section 1983, the doctrine of constitutional tort is a judge-made creation.[163] The best-known judicially created constitutional tort is the federal *Bivens* action.[164]

In what one commentator dubbed "a decision of national importance,"[165] *Bott v. Deland*, the Utah Supreme Court held that violations of Utah's unnecessary rigor provision can serve as the basis for a constitutional tort, but the decision has been significantly curtailed in subsequent Utah Supreme Court decisions. In *Bott*, the plaintiff, a state prisoner, alleged that a nurse's negligent medical care rendered him dependent on dialysis and reduced his life expectancy.[166] Naming the

[160] Schafer v. Maass, 858 P.2d 474, 477 (Or. Ct. App. 1993) (holding that "the allegation that petitioner is being subjected to 'ongoing and periodical assaults' is an allegation that he is being deprived of the constitutional right to be free from unnecessary physical abuse" sufficient to withstand a motion to dismiss).

[161] Brown v. State, 89 N.Y.2d 172 (1996); *see also* John C. Jeffries, Jr., *Compensation for Constitutional Torts: Reflections on the Significance of Fault*, 88 MICH. L. REV. 82, 100 (1989) (noting that constitutional torts use "compensatory damages to vindicate constitutional violations").

[162] Cantrell v. Morris, 849 N.E.2d 488, 499 (Ind. 2006) (holding that the free speech clause of Indiana's Constitution did not give rise to a constitutional tort).

[163] S*ee* FRIESEN, *supra* note 12, at 7-68 (surveying state legislation authorizing state constitutional claims and stating "[b]road legislative authorization for constitutional damages claims and attorney fees, long the rule with regard to federal constitutional rights asserted against state actors, is uncommon so far as the states").

[164] In *Bivens*, the United States Supreme Court recognized an implied constitutional tort and the availability of damages when federal officers violated a plaintiff's Fourth Amendment rights. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 396 (1971).

[165] FRIESEN, *supra* note 12, § 13(1)(c)(i).

[166] *See* Bott v. Deland, 922 P.2d 732, 737 (Utah 1996); *see also* FRIESEN, *supra* note 12, § 13(1)(c)(i).

nurse, the executive director of the Department of Corrections, and the medical administrator of the state prison, he sued for negligence and for the violation of his state constitutional right not to be treated with unnecessary rigor. The jury found for him and awarded almost $500,000 in damages, but the trial court halved it pursuant to a statutory damages cap on personal injury damages against the state.[167]

The Utah Supreme Court held that the unnecessary rigor clause was a self-executing provision that permitted an award of money damages.[168] It also concluded that self-executing constitutional provisions provided a basis for a damages award from state employees, not just from the state itself. It reasoned that "the actions of officials are apparently authorized by the law, and an 'agent acting . . . in the name of the state possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own.'"[169]

The court likewise held that the state constitutional right to be free from unnecessary rigor trumped both statutory governmental immunities and a statutory damages cap.[170] It reasoned that constitutional rights could never achieve their intended purpose of "restricting government conduct" if the state could use immunities to avoid any restrictions.[171] Similarly, the court rejected the damages cap as an unreasonable regulation of the plaintiff's constitutional right to be free from unnecessary rigor.

Significantly, the court eschewed an inquiry into the employee's

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[167] *See Bott*, 922 P.2d at 737; *see also* FRIESEN, *supra* note 12, § 13(1)(c)(i).

[168] The court concluded that the unnecessary rigor provision was self-executing because it "does more than state general principles; it prohibits specific evils that may be defined and remedied without implementing legislation." *Bott*, 922 P.2d at 737. A state constitutional provision "may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law." Jeffrey Omar Usman, *Good Enough for Government Work: The Interpretation of Positive Constitutional Rights in State Constitutions*, 73 ALB. L. REV. 1459, 1500 (2010) (quoting THOMAS COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION, IN CONSTITUTIONAL LIMITATIONS 121 (spec. ed. 1987).

[169] *Bott*, 922 P.2d at 739.

[170] The Utah Supreme Court decided that governmental immunity protected the state and individual defendants in the negligence claim, but could not block suit for the constitutional claim. *See Bott*, 922 P.2d at 736; *see also* FRIESEN, *supra* note 12.

[171] *Bott*, 922 P.2d at 736-37 (quoting Burdette v. State, 421 N.W.2d 185, 187 (Mich. Ct. App. 1988)).

intent in favor of the test set out in the constitutional provision itself: "the main consideration is 'whether a particular prison or police practice would be recognized as an abuse to the extent that it cannot be justified by necessity.'"[172]

Just over a decade after its seminal decision in *Bott*, the Utah Supreme Court reigned in constitutional tort based on unnecessary rigor considerably. First, it added the requirement of a risk of serious injury, at least in cases involving personal injury.[173] The court noted that "[w]hen the claim of unnecessary rigor arises from an injury, a constitutional violation is made out only when the act complained of presented a substantial risk of serious injury for which there was no reasonable justification at the time."[174] In addition, as discussed below in Part 4's discussion of procedural barriers, the court introduced a doctrine of qualified immunity.

c. Humane Treatment Rights as Support for the Proposition that the State Owes the Arrestee or Pretrial Detainee a Duty

State courts have also used state humane treatment constitutional provisions to bolster non-constitutional tort or even contract claims, particularly as support for the proposition that the police or the county owed the plaintiff a duty. The Indiana Court of Appeals has cited the state constitutional guarantee against unnecessary rigor in appeals relating to tort claims of false imprisonment and assault.[175] The unnecessary rigor provisions appear to be cited as authority for the proposition that police should not use excessive force.[176] Likewise, the

[172] *Bott*, 922 P.2d at 739 (quoting Sterling v. Cupp, 625 P.2d 123, 131 (Or. 1981)).

[173] Dexter v. Bosko, 184 P.3d 592, 597 (Utah 2008). Justice Nehring wrote a separate decision to "emphasize" that the majority's new physical injury requirement for unnecessary rigor constitutional tort claims was "limited to claims of a constitutional violation arising from personal injury sustained by an inmate . . . ." *Id*. at 598 (Utah 2008) (Nehring, J., concurring) ("Not all needlessly harsh, degrading, or dehumanizing treatment will result in serious injury. . . . It is not necessary in this case to formulate tests to apply to claims of unnecessary rigor where serious injury is not present. It is clear to me, however that the focus of such tests is properly on the nature of the acts to which the inmate was exposed and not on the foreseeability of injury, serious or otherwise.").

[174] *Id.* at 597.

[175] Matovina v. Hult, 123 N.E.2d 893 (Ind. Ct. App. 1955); Roberts v. State, 307 N.E.2d 501 (Ind. Ct. App. 1974); *see also supra* note 8.

[176] *Matovina*, 123 N.E.2d at 896-97 (citing without discussion Indiana's unnecessary rigor provision in upholding the civil liability of police officers for the false

Indiana Court of Appeals has cited the state's unnecessary rigor provision in support of the proposition that prison officials owed a "private duty to the prisoner to take reasonable precautions under the circumstances to preserve his life, health, and safety," which precluded the state and the officials' invoking government immunities.[177]

Likewise, a couple of Georgia Court of Appeals decisions have cited the Georgia abuse clause as evidence of a county's duty to provide an arrestee with medical care. The plaintiffs in the cases were not the injured arrestees, but rather the medical clinics and hospitals that had treated them.[178] In her concurrence in *Cherokee County*, Judge Dorothy Beasley, the author of a law review article on the Georgia Bill of Rights,[179] explained that any doubt about the county's liability for medical care, "vanishe[d] in the light of the constitutional prohibition against 'any person be[ing] abused in being arrested, while under arrest, or in prison.'"[180] Judge Beasley noted that the Georgia statutes discussed

imprisonment of a suspect in a hit and run driving incident after the suspect had been jailed for six days without any affidavit or warrant filed against him while the police investigated the case); *Roberts*, 307 N.E.2d at 564-65 ("'The law protects persons charged with crime from ill or unjust treatment at all times. Only reasonable and necessary force may be used in making an arrest; 'no person arrested, or confined in jail, shall be treated with unnecessary rigor;' and the restraint exercised over a prisoner in the courtroom can only be such as is necessary in the exercise of the court's sound and enlightened discretion, to prevent his escape or the harming of others; 'While the law protects the police officer in the proper discharge of his duties, it must at the same time just as effectively protect the individual from the abuse of the police.'") (internal citations omitted).

[177] Roberts v. State, 307 N.E.2d 501, 505 (Ind. Ct. App. 1974).

[178] *See* Cherokee Cnty. v. North Cobb Surgical Assocs., 221 Ga. App. 496, 496-97 (1996) ("Cherokee County appeals from the grant of summary judgment to North Cobb Surgical Associates, P.C., in North Cobb Surgical Associates' suit to recover for medical services provided Michael McFarland after McFarland was shot by a Cherokee County deputy sheriff while McFarland was being arrested."); *see also* Macon-Bibb Cnty. Hosp. Auth. v. Reece, 492 S.E.2d 292, 296 (Ga. Ct. App. 1997) (reversing a summary judgment order for the county in a lawsuit by a hospital seeking payment of medical bills and noting that the county's argument that it owed no duty to provide medical care to someone in its custody for injuries sustained before they were in their custody was unsupported by Georgia statutes and would violate Georgia's abuse clause).

[179] *See* Beasley, *supra* note 16.

[180] *North Cobb*, 221 Ga. App. at 497 (Beasley, J., concurring) (arguing that where the county had taken custody of the plaintiff, "not only to transport him to the hospital for emergency medical aid but also to charge him with aggravated assault . . . . [i]t could hardly be argued that it would not be an abuse to fail or refuse to obtain medical aid for McFarland after he was shot").

by the majority opinion "are an affirmative implementation of this constitutional prohibition."[181]

d. Humane Treatment Rights as the Support for Prosecution of State Officials

Indiana's unnecessary rigor clause has played a similar supporting role in a criminal prosecution of police officers for assault and battery. In a 1931 case, *Bonahoon v. State*, Indiana Supreme Court affirmed the convictions for assault and battery of two police officers for beating a man in their custody and giving him the "third degree."[182] Citing Indiana's unnecessary rigor provision, as well as state statutes and caselaw, the court stated that "[t]he law protects persons charged with crime from ill or unjust treatment at all times. . . . [o]nly reasonable and necessary force may be used in making an arrest."[183] The court concluded that the officers' acts "were indefensible and in violation of the Constitution" and noted that the officers' official position provided them no defense.[184]

e. Humane Treatment Rights as Support for Suppression of Evidence in the Criminal Case Against the Arrestee or Pretrial Detainee

State humane treatment constitutional provisions have appeared in appellate decisions relating to suppression of evidence in criminal cases, but have played a supporting role to other constitutional and statutory rights against coerced confessions. Indiana courts have cited the state's unnecessary rigor provision in support of decisions suppressing confessions obtained from arrestees on the heels of police intimidation or violence.[185] However, these decisions are neither recent nor based primarily on the unnecessary rigor provision.

In the 1939 case, *Kokenes v. State*, the Indiana Supreme Court cited unnecessary rigor, along with the Fifth Amendment to the United States Constitution and the Indiana constitution's guarantee against

[181] *Id.* at 497.
[182] Bonahoon v. State, 178 N.E. 570, 570 (Ind. 1931).
[183] *Id.* at 571.
[184] *Id.*
[185] *See* FRIESEN, *supra* note 12, at 13-73; *see also* Mack v. State, 180 N.E. 279, 284 (Ind. 1932); Suter v. State, 88 N.E.2d 386, 391-92 (Ind. 1949). Article I, § 15 of the Indiana Constitution provides: "No person arrested, or confined in jail, shall be treated with unnecessary rigor."

coerced confessions, in a decision overruling a trial court's failure to suppress the defendant's confession.[186] The defendant had confessed after repeated beatings, although he was not beaten at the time of confession.[187]

Likewise, in the 1949 case, *Suter v. State*, the Indiana Supreme Court found that the trial court had erred in admitting a confession obtained through threats and intimidation. The defendant had been arrested without a warrant, held for more than two days in a small cell, questioned constantly, deprived of food and denied repeated requests to consult with his lawyer and family.[188] The court based its decision in large part on an Indiana statute prohibiting the use of coerced confessions, but also noted Indiana's unnecessary rigor provision. In addition, the court situated the discussion in the broader principle of humane treatment: "It has long been the rule in Indiana that 'The law protects persons charged with crime from ill or unjust treatment, and cruel and brutal methods should never be tolerated.'"[189]

Other decisions in which criminal defendants have tried to use humane treatment provisions to suppress evidence in criminal cases have not gone the defendants' ways, because the courts found that the defendants had failed to show mistreatment. In a recent Indiana case, a criminal defendant cited the Indiana constitution's unnecessary rigor provision, along with prohibitions against coerced confessions, in support of his argument to suppress his statements to police and evidence from a search. The Court of Appeals found that he had not been treated with unnecessary rigor and suppressed only a statement that was taken in violation of the defendant's *Miranda* rights.[190] The Georgia Supreme Court affirmed a decision refusing to suppress a confession that the defendant claimed resulted from beatings and that violated, among other things, his state constitutional right not to be abused. The decision did not discuss the abuse provision. Rather, it noted evidence that the defendant had not been beaten and held that the trial court was "authorized" in deciding that the defendant's confession was freely and voluntarily given.[191]

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[186] Kokenes v. State, 213 Ind. 476, 491 (1938).
[187] *Id.* at 491.
[188] FRIESEN, *supra* note 12, at 13-73 (citing *Suter*, 88 N.E.2d at 391).
[189] *Suter*, 88 N.E.2d at 391 (quoting *Mack*, 180 N.E. at 284).
[190] State v. Keller, 845 N.E.2d 154, 165 (Ind. Ct. App. 2006).
[191] Callahan v. State, 194 S.E.2d 431, 434 (Ga. 1972).

4. State Procedural Barriers to Judicial Review

To say that the relationship between state humane treatment rights and immunity doctrines in state court is complex is a gross understatement,[192] but it is fair to say that humane treatment rights sometimes have trumped and other times been trumped by immunity doctrines. In Utah, even in cases where unnecessary rigor has served as the basis for a constitutional tort, courts have restricted liability based on qualified immunity. By contrast, in Indiana, in cases where plaintiffs have sued under ordinary statutory or common law torts, courts have used unnecessary rigor provisions to preclude invocation of defenses rooted in common law or statutory immunities. As discussed below in Part III, judicial treatment of these immunity doctrines represents a critical opportunity for developing state constitutional protections for arrestees and pretrial detainees.

The only court to have permitted using an unnecessary rigor provision as a basis for a constitutional tort to date, the Utah Supreme Court, subsequently erected barriers to recovering damages, including a doctrine of qualified immunity. In *Dexter v. Bosko*,[193] the court held that to prevail in a private suit for damages based on a constitutional tort, a plaintiff must establish that "he or she suffered a 'flagrant' violation of his or her constitutional rights;" "existing remedies do not redress his or her injuries;" and "equitable relief, such as an injunction, was and is wholly inadequate to protect the plaintiff's rights or redress his or her

[192] *Cf.* Jennifer Friesen, *State Constitutions: The Right Ticket for Some Torts*, TRIAL, Dec. 1, 1997, at 38 (noting that "[o]ften state immunity laws, as well as their common law counterparts, are threaded with exceptions to liability for discretionary acts, intentional torts, law enforcement activities, and so forth, any of which could defeat recovery for a constitutional rights claim" and that "legislated damages caps may also apply" and arguing that "if statute-based immunity poses serious obstacles to adequate compensation, the court must be persuaded to make an outright exception to the law for constitutional injuries"). For a discussion and critique of the liability rules (or types of immunity) available for constitutional torts, see John Jeffries, *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207 (2013) (describing different types of immunity for constitutional torts and advocating a doctrine that "align[s] the damages remedy on one liability rule, a modified form of qualified immunity with limited deviations justified on functional grounds and constrained by the reach of those functional justifications").

[193] *Dexter v. Bosko* involved a constitutional tort claim based on prison officials' refusal to put a prisoner, Dexter, in a seatbelt during transport. During the transport, the van carrying the prisoners, who were handcuffed and shackled, flipped three times. The plaintiff, Dexter, was left paralyzed and died five years later due to complications from his injuries. Dexter v. Bosko, 184 P.3d 592, 594 (Utah 2008).

injuries."[194]

Absent statutes or rules explaining what unnecessary rigor means in a given context, officials are immunized for any conduct that falls short of recklessness. According to the court, "If an official knowingly and unjustifiably subjects an inmate to circumstances previously identified as being unnecessary rigorous, that is obviously a flagrant violation."[195] However, "where a clear prohibition has not been previously known to the official, more may be required to establish a flagrant violation."[196] According to *Dexter*, "a flagrant violation of the unnecessary rigor clause has occurred" if "the nature of the act presents an obvious and known serious risk of harm to the arrested or imprisoned person" and "knowing of that risk, the official acts without other reasonable justification."[197]

Even in states that have not addressed whether their humane treatment provisions can give rise to a constitutional tort, decisions involving other constitutional torts suggest that immunities may be a barrier to recovery. The one Georgia appellate court to discuss a state constitutional tort, albeit not one based on a violation of its abuse provision, refused to decide the merits of the claim on the basis of sovereign immunity.[198] In Georgia, sovereign and qualified immunity are a hybrid of constitutional and statutory law.[199] The Georgia

[194] *Id.* at 597-98 (citing Spackman v. Bd. of Educ., 16 P.3d 533, 538-39 (Utah 2000)).
[195] *Id.* at 598.
[196] *Id*.
[197] *Id*.
[198] The case involved a suit against the Department of Corrections, DOC officials and various county officials where state inmates out on work detail allegedly killed a woman in her home. Specifically, "plaintiffs' complaint alleged a constitutional tort in that the "procedure whereby convicted felons were provided with weapons and transported to residential communities to perform work projects constitutes a custom or policy adopted by the Defendants . . . which [allegedly] deprive[d] the citizens of Georgia and particularly the deceased of State Constitutional Rights." An amendment also alleged violations of 42 U.S.C. § 1983. Bontwell v. Dep't of Corr., 226 Ga. App. 524, 525-26 (1997). However, Judge Beasley notes: "It is unclear whether, in construing the constitution's 'abuse' provision in *pari materia* with its sovereign immunity provision, courts will construe the 'abuse' provision as a more important right which does not require statutory exception to sovereign immunity in order to subject the state to suit. There is apparently no case in which the two constitutional provisions have been matched against each other. A prisoner might claim the right to sue the state without the requirement of a statutory waiver of immunity since he is one of the sovereign people who insisted on the right of freedom from abuse when the constitution was adopted." Beasley, *supra* note 16, at 403-4.
[199] *See* Beasley, *supra* note 16, at 403-4.

constitution declares that sovereign immunity extends to the state and all of its departments and agencies, unless it is waived by the legislature in the Georgia Tort Claims Act.[200]

By contrast, as noted above, in an Indiana case involving an ordinary tort claim, the Indiana Court of Appeals relied in part on the state constitution's unnecessary rigor provision to override sovereign immunity. In *Roberts*, prison guards fired into a crowd of protesters at a prison. Roberts, a prisoner who was a bystander to the protest, was injured and claimed damages based on assault and negligence.[201] The Indiana Court of Appeals stated:

> Citizens of a state unavoidably exposed as they must be to dangers and abuses of power arising out of multi-functions of state and local government are entitled to relief from rigors of ancient judicial doctrine of sovereign immunity, at least to extent that government officials and employees, acting within scope of their employment, intentionally or negligently breach duty owed to private citizens individually.[202]

The *Roberts* court cited the state's unnecessary rigor provision as support for the notion that prison officials had a private duty to Roberts and therefore sovereign immunity did not bar suit against prison officials or the state of Indiana itself.[203]

The language, history, and caselaw of these provisions indicate that, in many contexts, these provisions offer protections different from and greater than those of the federal constitution. The litigation of humane treatment provisions, though sparse, suffices to illustrate some of the potential barriers to development of state constitutional protections for arrestees and pretrial detainees. It also reveals some opportunities for development of the rights.

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[200] GA. CONST. art. I, § 2, para. 9.

[201] Roberts v. State, 307 N.E.2d 501, 506-07 (Ind. Ct. App. 1974).

[202] *Id.* at 507.

[203] *Id.* at 505 ("[A] public official, charged with the custody and care of a prisoner, owes a private duty to the prisoner to take reasonable precautions under the circumstances to preserve his life, health, and safety—a duty which is in addition to the duty of safekeeping owed to the public generally. To the extent that Roberts' allegations relate to the failure to perform this duty, they are sufficient to withstand a claim of immunity. . . . . he was taken into custody and controlled, i.e., a special duty was created to him as a private individual.").

III. LEVERAGING HUMANE TREATMENT RIGHTS

Litigants, state courts and lawmakers alike should pay more attention to state constitutional provisions that bear on the rights of arrestees and pretrial detainees. Part A of this section argues that state humane treatment rights offer protections greater than those of the federal constitutional in many contexts, whether under the broader "dignity" construction of the right or the narrower construction protecting against "physical abuse." It contends that the very federalism arguments that the Supreme Court uses to avoid enforcing federal constitutional rights for arrestees and pretrial detainees support a more robust role for state courts in interpreting state constitutional rights. Part B evaluates strategies for fostering interpretation and implementation of these state constitutional rights, including through rulemaking, legislation, and litigation.

A. The Substance of Humane Treatment Rights

The broad interpretation of unnecessary rigor, act of severity, or abuse as a practice that constitutes a "cognizable indignity" not "justified by necessity" is the better one.[204] This interpretation comports with the ordinary meaning of the terms unnecessary rigor, abuse and "act of severity" and the historical evidence that the provisions stemmed from a concern for humane treatment of detainees.[205] Respecting the humanity of arrestees and pretrial detainees goes further than merely refraining from beating them.

Particularly under the "dignity" conception of humane treatment, there are many situations where state humane treatment guarantees better fit arrestees' and pretrial detainees' claims than federal constitutional guarantees. Sometimes, the root of the issue may not be the reasonableness of a search or seizure or the process due a detainee, but rather whether the state is treating a person humanely—as with, for example, "perp walks,"[206] inadequate medical treatment, lack of access to visitors, shackling of pregnant pretrial detainees, housing juveniles with adults, and housing transgender pretrial detainees in isolation.

However, even the narrower Indiana formulation, which requires physical or extreme abuse, potentially protects arrestees and pretrial

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[204] Sterling v. Cupp, 625 P.2d 123, 129 (Or. 1981).

[205] *See* discussion *supra* Part II.B.1.

[206] *See* Palma Paciocco, *Pilloried in the Press: Rethinking the Constitutional Status of the American Perp Walk*, 16 NEW CRIM. L. REV. 50, 52 (2013) (noting that most perp walks have been found to be reasonable seizures under the Fourth Amendment).

detainees more than the federal constitution because it contemplates no inquiry into intent. As discussed in Part I above, the federal constitutional inquiry for cases of excessive force after arrest and for all constitutional claims once someone is a pretrial detainee hinges on state intent.[207] The only state humane treatment decision to include an inquiry into state intent in the unnecessary rigor context was *Dexter v. Bosko*, and there the intent inquiry stemmed only from qualified immunity inquiry and not from any limitation inherent in the right.[208] As is discussed in more detail below, other courts need not follow *Dexter's* qualified immunity analysis even for constitutional torts, but even if they do, the intent inquiry need not apply when plaintiffs seek other remedies, such as an injunction.[209]

The very federalism arguments that the Supreme Court uses to avoid enforcing the federal constitutional rights of state arrestees and pretrial detainees justify state legislatures, executives, and courts playing a more active role in protecting state constitutional rights for these groups. The "necessity" inquiry is perhaps the stickiest part of the "unnecessary" rigor or act of severity inquiry, and, as noted above, is arguably implicit in the abuse inquiry too.[210] Deciding the necessity for a given measure, such as double or triple bunking, restrictions on communications and the like, will often implicate issues related to local context, budgets and policies. Courts must assess whether a practice is necessary given the context of the state, the institution and the individual defendant. This understanding of local context is especially critical in the context of jails and prisons, which, as the Supreme Court has expressly noted, are very much creatures of state law and of particular concern to states.[211]

Fortunately, state court judges are better positioned than their federal counterparts to assess context, particularly the "political, financial and historical constraints under which state and local officials act."[212] Sensitivity to context may cut both ways for robust enforcement

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[207] *See supra* Part I.A.

[208] Dexter v. Bosko, 184 P.3d 592, 595-96 (Utah 2008).

[209] *Cf.* Christina Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 11 (1980) (arguing that courts should avoid equating uncertainty about damages with uncertainty about Section 1983 or the underlying constitutional right).

[210] With Georgia's "abuse" formulation of the humane treatment guarantee, some inquiry into the necessity for a practice is likely implicit, since abuse is defined as "excessive treatment."

[211] *See* discussion *supra* notes 47-51.

[212] *Id.*; *see also* Thomas H. Lee, *Countermajoritarian Federalism*, 74 FORDHAM L.

of the rights of arrestees and pretrial detainees. On the one hand, as Professor Whitman notes, "they may be too sensitive to these constraints, and insufficiently sympathetic to opposing claims based on individual rights," which, of course, "is one of the arguments for a federal damage action to vindicate constitutional rights." On the other, being closer to the ground, they are in a better position to craft solutions that work in the local context.[213]

Moreover, states are a good place for experimentation with reforms.[214] State courts decisions admit of more "flexibility, evaluation and experimentation than do those of federal courts."[215] Rules they make apply only to people within the state and "are not immediately institutionalized as national norms and national rules as are any constitutional principles that the United States Supreme Court enunciates."[216] Thus, states are good places to start with experiments on the feasibility of more humane practices. Discussions and reforms related to the treatment of arrestees and pretrial detainees in states with humane treatment provisions in turn may help to inform the national conversation on the appropriate treatment of arrestee and pretrial detainees.[217]

If a court, legislator, official, or litigant seeks guidance in applying humane treatment guarantees in a given arrest or jail context, it need neither follow unquestioningly federal caselaw interpreting distinct

REV. 2123, 2123 (2006) (explaining Justice Stevens brand of federalism in part based on Justice Stevens's "strong belief in the crucial role of state judges in dispensing customized and empathic retail justice to state citizens" and noting that "[s]tate judges protect people from the excesses and impersonality of distant majoritarian political processes at both the national and state levels by supervising the application of laws resulting from those processes to real-life cases").

[213] Whitman, *supra* note 209, at 38 ("[L]osing this understanding is a cost, and a decision by a federal court unfamiliar with local constraints may place a special burden on the administration of local government."). *See also* Lee, *supra* note 212, at 2126 ("[T]he normative point of federalism is to preserve a mosaic form of granular governance viewed as superior to one-size-fits-all national rules in responding to differences in how individuals define liberty.").

[214] Scott T. Johnson, *The Influence of International Human Rights Law on State Courts and State Constitutions*, 90 AM. SOC'Y INT'L L. PROC. 259, 261 (1996) (remarks of Utah Supreme Court Justice Christine Durham).

[215] *Id.*

[216] *Id*.

[217] Cf. Paul Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147 (1993) (arguing that independent state constitutional interpretation can advance the conversation on the meaning of membership in the national community).

federal constitutional rights hobbled by federalism concerns nor start from scratch. As the Oregon Supreme Court demonstrated in *Sterling*, there are ample sources to which courts can turn for guidance on best and minimum practices in the context of arrest and pretrial detention.[218]

Domestic benchmarks such as the ABA Standards on Treatment of Prisoners are one such source.[219] For example, with respect to visual searches of a person's private bodily areas, it provides: "a strip search should not be permitted without individualized reasonable suspicion when the prisoner is an arrestee charged with a minor offense not involving drugs or violence and the proposed strip search is upon the prisoner's admission to a correctional facility or before the prisoner's placement in a housing unit."[220] This standard is, of course, more protective than the federal constitution, at least under the Supreme Court's current understanding of it.[221] Although the United States Supreme Court is uncomfortable imposing this requirement for reasonable suspicion on all jails nationwide, state legislators, jail administrators, or courts may find this standard appropriate and practicable in the local context.

International law likewise offers useful guidance on humane practices in the arrest and pretrial detention contexts.[222] Whether or not

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[218] Determining what the right not to be treated with unnecessary rigor meant with respect to cross-gender searches of prisoners, for example, the Oregon Supreme Court in *Sterling* turned to ABA standards, as well as international legal documents regarding treatment of prisoners. *See* Sterling v. Cupp, 625 P.2d 123, 130-32 (Or. 1981); *see also* Kalb, *supra* note 133.

[219] The ABA Standards on Treatment of Prisoners address jails as well as prisons. *See* CRIMINAL JUSTICE STANDARDS ON TREATMENT OF PRISONERS 23-1.0 (2011), *available at* http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_treatmentprisoners.html#23-1.0.

[220] *Id*.

[221] *See* Florence v. Bd. of Chosen Freeholders, 132 S. Ct. 1510, 1513 (2012).

[222] *See, e.g.*, *Sterling*, 625 P.2d at 123. A number of scholars have argued, state constitutional interpretation offers a valuable opportunity for promoting human rights within the United States. *See, e.g.*, Cynthia Soohoo & Suzanne Stolz, *Bringing Theories of Human Rights Change Home*, 77 FORDHAM L. REV. 459 (2008); Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564, 1585-91 (2006); Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States*, 150 U. PA. L. REV. 245, 250 (2001); Martha F. Davis, *The Spirit of Our Times: State Constitutions and International Human Rights*, 30 N.Y.U. REV. L. & SOC. CHANGE 359, 271-75 (2006); Johanna Kalb, *Human Rights Treaties in State Courts: The International Prospects of State Constitutionalism After Medellín*, 115 PENN ST. L.

states or state courts are bound by international norms, a topic beyond the scope of this Article, international instruments offer helpful templates for humane practices in a particular arrest or jail situation.[223] There is a robust body of international law and guidelines aimed at the humane treatment of arrestees and pretrial detainees. For example, the United Nations has exhorted member nations to implement Rule 53(3) of the Standard Minimum Rules for the Treatment of Prisoners, which states that "[w]omen prisoners shall be attended and supervised only by women officers."[224] The United States has not done so, and many women in detention become the victims of sexual assault at the hand of male guards.[225] A female pretrial detainee who wishes to combat the policy of male guards guarding female detainees could cite Rule 53(3) as persuasive support for the proposition that the policy constitutes an unnecessary rigor.

State constitutional provisions protecting arrestees and pretrial detainees from unnecessary rigor, acts of severity, or abuse are potentially valuable tools with which to combat inhumane treatment of arrestees and pretrial detainees. The next section explores strategies for

REV. 1051 at 1053 (2011) ("[B]ecause state courts have been more receptive to arguments based on treaty instruments as non-binding, persuasive authority, even the broadest reading of Medellín will not end this type of human rights advocacy.").

[223] In addition to basic international human rights instruments, some key sources of guidance include: the United Nations Standard Minimum Rules for the Treatment of Prisoners; the Body of Principles for the Protection of All Persons under Any Form of Detention and Imprisonment; Basic Principles for the Treatment of Prisoners; United Nations Standard Minimum Rules for Non-Custodial Measures (Tokyo Rules); United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules); and Code of Conduct for Law Enforcement Officials.

See Criminal Justice Reform, UNITED NATIONS OFFICE OF DRUGS AND CRIME, http://www.unodc.org/unodc/en/justice-and-prison-reform/criminaljusticereform.html (last visited April 7, 2014). For further info, see *Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice*. UNITED NATIONS OFFICE OF DRUGS & CRIME, http://www.unodc.org/unodc/en/justice-and-prison-reform/compendium.html (last visited April 7, 2014); *see also* Kalb, *supra* note 133, at 1735-36 (offering strategies for litigants seeking to have state courts make international human rights norms a part of their decision-making in the context of "dignity rights").

[224] Aleshadye Getachew, *Correctional Facilities*, 14 GEO. J. GENDER & L. 339, 350 (2013).

[225] *See id.* (noting that "[t]he rate of sexual assault on female prisoners by corrections officers has been estimated to be as high as one in four in some facilities" and that Bureau of Justice Statistics on prison rape" indicate that in local jails women make up seventy percent of rape victims and male guards seventy-nine percent of perpetrators)

using them more effectively.

B. Strategies to Promote Humane Treatment

There is an abundance of scholarship on the importance of fostering the development of constitutional rights, particularly where opportunities for interpretation and application of the rights are scarce. As Professor John Jeffries argues, "we must 'avoid ossification and irrelevance' of the law by ensuring that the law has adequate opportunities to develop and change in response to changes in society."[226]

As the paucity of judicial decisions on state humane treatment guarantees demonstrates, the problem of ossification is especially acute with state constitutional humane treatment protections.[227] Unlike prohibitions against unreasonable searches and seizures or coerced confessions, humane treatment protections are not inherently tied to evidence-gathering and often do not implicate the exclusionary rule, which is a powerful, albeit controversial[228] and shrinking,[229] tool for getting state actors to heed constitutional rights.[230] The limited utility of

[226] John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 97 (1999) (arguing that a fault-based qualified immunity defense and merits-first qualified immunity adjudication facilitate constitutional innovation); *see also* Nancy Leong, *Making Rights*, 92 B.U. L. REV. 405, 420 (2012) (discussing scholarship on constitutional innovation in areas where opportunities to litigate the constitutional right are scarce).

[227] The lack of state constitutional decisions "retards the development of state constitutional law and discourse—the development of a language, after all, requires the opportunity to speak." Gardner, *supra* note 9, at 780-81 (positing that, although it is not clear from the data, "the dearth of state constitutional cases is [likely] due to the failure of litigants to raise such claims").

[228] *See* Sina Kian, *The Path of the Constitution: The Original System of Remedies, How It Changed, and How the Court Responded*, 87 N.Y.U. L. REV. 132, 163 n.137 (2012) ("There is hardly a constitutional debate more robust than that inspired by the Fourth Amendment exclusionary rule."); *see also* Yale Kamisar, *The Writings of John Barker Waite and Thomas Davies on the Search and Seizure Exclusionary Rule*, 100 MICH. L. REV. 1821, 1821 n.3 (2002) (citing scholarship debating the merits of the exclusionary rule).

[229] *See, e.g.*, Hudson v. Michigan, 547 U.S. 586, 591, 599 (2006) (holding that a violation of knock-and-announce rule did not require the suppression of all evidence found in the search and noting that the Supreme Court has admonished against "indiscriminate application" of the exclusionary rule and recognizing that "[w]e did not always speak so guardedly").

[230] *Cf.* Wayne R. LaFave, *Controlling Discretion by Administrative Regulations—The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication*, 89 MICH. L. REV. 442, 448 (1990) (arguing that police rulemaking is

the exclusionary rule in the context of state constitutional protections for arrestees and pretrial detainees illustrates a key limitation of the exclusionary rule itself: "excluding evidence cannot influence officers or departments uninterested in using illegally obtained evidence in a criminal prosecution, and it cannot discourage unconstitutional conduct that is unlikely to produce evidence."[231]

New strategies are needed to breathe life into state constitutional protections for arrestees and pretrial detainees. This section offers some ideas on legislation, rulemaking and litigation to encourage interpretation and enforcement of, and, ultimately, compliance with these norms.

1. Legislation and Rulemaking

In an ideal world, at least from the perspective of those looking to ensure the humane treatment of arrestees and pretrial detainees, state legislatures would pass legislation fleshing out the implications of state unnecessary rigor or abuse provisions for arrestees and pretrial detainees. After all, state constitutions are there to guide state officials, not just to castigate them.[232] State statutes implementing these humane treatment rights in a variety of contexts, including arrest, booking procedures, conditions of confinement, transportation, and the like could help guide state officials to ensure humane treatment of arrestees and

necessary even where the exclusionary rule applies, but that the need is most obvious where the exclusionary rule is not available, since the rule "assures a great deal of judicial attention"); Tony Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 360 (1974) (noting the exclusionary rule "provide[s] recurrent occasions for reconsideration of the rules by both the courts and the police themselves—necessary occasions . . . if constitutional deficiencies, administrative problems, and practices of evasion are to be flushed out and corrected"). The exclusionary rule deters misconduct by "reduc[ing] the expected value of misconduct by depriving officers and departments of the evidentiary value of illegal searches and seizures." Rachel Harmon, *Limited Leverage: Federal Remedies and Policing Reform*, 32 ST. LOUIS U. PUB. L. REV. 33 (2012).

[231] *See* Harmon, *supra* note 230.

[232] *See* Hans Linde, *E Pluribus–Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 197 (1984)

("[T]heorists treat constitutional law as the product of judicial decisions rather than as the premise for decisions. They do not demand that a purported constitutional rule make sense as a rule for governing before it can serve as a rule for deciding whether government has contravened the constitution. State courts are accustomed to seeing constitutions written and amended as directives to government quite apart from judicial review.").

pretrial detainees.[233] To the extent state statutes already address a particular practice, as was the case in the Indiana cases citing the state's unnecessary rigor constitutional provision in the context of coerced confessions,[234] legislators could review and, if necessary, revise state statutes to ensure that they comport with state constitutional norms.

Of course, legislation in the form of a state version of Section 1983 likewise would be enormously helpful to encourage development of humane treatment norms and to facilitate judicial enforcement of state rights to humane treatment, particularly if the legislation authorized attorney fee awards for successful plaintiffs. Legislation authorizing attorney fee awards would help to ensure that there are lawyers willing to take on inhumane treatment cases. Moreover, as noted above, few states have statutes explicitly authorizing state constitutional torts.[235] Legislation recognizing a cause of action with a damages remedy for constitutional violations generally or humane treatment violations specifically would spare courts having to decide, as the Utah Supreme Court did, whether a state constitutional protection can serve as a stand-alone basis for a constitutional tort. As discussed below, it is far from clear that other jurisdictions with humane treatment provisions will recognize a constitutional tort based on the violation of these provisions.

Legislation explicitly removing common law and statutory barriers to suit also could promote enforcement of state humane treatment rights. Legislation that waives state sovereign immunity would be helpful, if not essential, if states and sometimes even local governments and officials are going to be named as defendants.[236] Legislation carving out exceptions to qualified immunity or state

[233] Not surprisingly, some state statutes already exist, but do not get significantly more specific than the constitutional guarantee. As the *Sterling* Court noted, "The same commitment [to humanizing penal laws and the treatment of offenders] took the form of two interstate compacts adopted by Oregon and enacted as statutes, which provide that inmates of correctional institutions "shall be treated in a reasonable and humane manner." Sterling v. Cupp, 625 P.2d 123, 129 (Or. 1981) (citing OR. REV. STAT. § 421.245, art. IV(5); OR. REV. STAT. § 421.284, art. IV(e)).

[234] *See supra* Part II.B.3(e).

[235] *See* FRIESEN, *supra* note 12, § 7.08.

[236] *See* FRIESEN, *supra* note 12, at 7-49, § 7.07(2)(f) ("In Georgia, the obstacle of constitutionally based sovereign immunity prevents the judiciary from fashioning a 'Bivens' remedy under state law that would allow the remedy of damages against a state department or agency."). *See also* Gilbert v. Richardson, 452 S.E.2d 476 (Ga. 1994) (holding that sovereign immunity applied to the county and the sheriff since the Georgia Tort Claims Act's waiver of sovereign immunity of the state for the torts of its officers and employees expressly excludes counties from its waiver).

damages caps for constitutional violations would increase the likelihood of success and the amount of damages, which would help to incentivize lawyers to take cases on a contingency fee basis. Still, as with Indiana courts' treatment of sovereign immunity and Utah courts' treatment of damages caps, courts sometimes may remove these barriers themselves.[237]

However, arrestees and pretrial detainees have little or no political clout, and legislatures are unlikely to act without courts forcing them to do so.[238] Thus, broad state legislative moves making states and state officials more susceptible to lawsuits from arrestees and pretrial detainees may be rather pie in the sky. It seems more likely that arrestees and pretrial detainees be the serendipitous beneficiaries of changes in the law that make states and state officials more susceptible to suit generally. Otherwise, legislation may come in response to a particular bad practice that comes to light and gains public attention.

Since legislators may be wary of opening the courthouse doors to arrestees and detainees, legislation creating a state monitoring body for jails and prisons may be a more politically palatable option. The monitoring body could make assessing jails' compliance with humane treatment norms part of its charge.[239] Advocates for arrestees and pretrial detainees should also consider working with outside certification bodies to make sure that humane treatment is incorporated into any

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[237] *See* discussion *supra* Parts II.B.3(b) and II.B.4.

[238] As Professor Dripps has argued "[t]he unhappy truth about legislatures and the criminal process is that the legislature will not impose limits on the police or the prosecutor unless ["law enforcement methods offend some powerful interest group"] . . . or "courts have declared that certain law enforcement techniques may be constitutional if and only if these techniques are subjected to legislative regulations. In these situations, what appears to be statutory protections for the accused are in reality motivated by the desire to punish as much crime as possible." Donald Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; or, Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079, 1082, 1092 (1993) (citing the example of the federal wiretapping statutes, where "the legislative concern behind Title III was not to protect the rights of suspects, but to provide a law enforcement tool that would otherwise be disallowed by the courts"); *see also* David Sklansky, *Quasi-Affirmative Rights in Constitutional Criminal Procedure*, 88 VA. L. REV. 1229, 1243 (2002) (arguing that the political powerlessness of defendants may justify greater judicial scrutiny).

[239] *See* Michele Deitch, *The Need for Independent Prison Monitoring in a Post-PLRA World*, 24 FED. SENT'G REP. 236 (2012) (advocating jail and prison monitoring and arguing that "[c]ounty-operated jail facilities should also receive oversight from a state-level authority").

accreditation process to which a jail may be subject.[240]

Rulemaking likewise may prove a more politically feasible and appropriate context for implementing state constitutional guarantees of humane treatment.[241] Advocates for arrestees and pretrial detainees should encourage state departments of justice, departments of corrections or sheriff's offices to issue guidelines or rules defining humane treatment in contexts where the risk of abusive practices can be identified prospectively. Since the rights of arrestees and pretrial detainees may also be low on the executive's list of priorities, advocates for these groups should seek to get the development of protections for arrestees on the plate of law reform groups, such as law commissions, criminal justice commissions or access to justice commissions.[242]

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[240] *But see id*. at 242 (arguing that accreditation, though useful, is an inadequate substitute for independent monitoring to curb abuses in jails and prisons).

[241] *See* Amsterdam, *supra* note 230, at 417, 429 (predicting that "the more flexible and professional technique of rulemaking," not legislation, would be the more likely result of his proposal that courts find unconstitutional any practice not supported by a written policy and therefore describing the "essential purpose and the probable effect of [his] constitutional doctrine as employing police rulemaking to control police discretion in the exercise of the search and seizure power"). *See also* Linde, *supra* note 242, at 473-74 (suggesting the Oregon Law Commission assist in drafting model rules or guidelines to flesh out constitutional provisions with few opportunities for judicial interpretation, such as Oregon's unnecessary rigor provision).

[242] *See* Hans Linde, *Law Reform in Oregon: Notes for a New Generation*, 44 WILLAMETTE L. REV. 463, 473-74 (2007) (noting the Oregon Law Commission could propose model rules or standards to guide law enforcement officials in how to comply with "constitutional issues upon which judicial elucidation is rare," including Oregon's unnecessary rigor provision, "a section with everyday operational importance but few occasions for judicial application"). The Oregon legislature created the Oregon Law Commission to "conduct a continuous substantive law revision program." (OR. REV. STAT. §§ 173.315-173.357). Oregon also has a Criminal Justice Commission, which seeks to:

> [I]mprove the efficiency and effectiveness of state and local criminal justice systems by providing a centralized and impartial forum for statewide policy development and planning[, including] . . . making recommendations on the capacity and use of state prisons and local jails. . .

OR. CRIM. JUST. COMMISSION, http://www.oregon.gov/CJC/Pages/about_us.aspx (last visited Aug. 14, 2013). Several states also have "Access to Justice Commissions." Tennessee's, for example, "was created by the Supreme Court to develop a strategic plan for improving access to justice in Tennessee that shall include education of the public, identification of priorities to meet the need of improved access to justice, and recommendations to the Supreme Court of projects and programs the Commission determines to be necessary and appropriate for enhancing access to justice in Tennessee." *See Tennessee Access to Justice Commission*, TENN. ST. CTS., http://www.tncourts.gov/programs/access-justice/access-justice-commission-0 (last

Rules spelling out the constitutionally humane procedures to be taken by state officials in specific contexts also could help not only in guiding officials, but also in the judicial enforcement of state constitutional rights. Clear rules obviate some of the problems of the doctrine of qualified immunity in blocking judicial review of official actions. As discussed above, at least as framed by the Utah Supreme Court,[243] if state officials get immunity unless there is a clear rule prohibiting their conduct, clear rules narrow the immunized territory.

As with legislation, there may be strategic opportunities to persuade executives to take on these projects such as in the aftermath of a public scandal or in the face of a lawsuit.[244] New York City's experience with stop-and-frisk offers a good example of rulemaking prompted by public outcry and litigation.[245] As part of the settlement to the class action lawsuit in *Daniels v. City of New York*, the city agreed to create a written policy on stop-and-frisk and to reform officer training on conducting *Terry* stops.[246] It also agreed to require police officers to fill out a form every time they stopped and frisked someone.[247] Requiring police to fill out a stop-and-frisk form likely helped to foster police awareness of constitutional rights and to deter abuses.[248] Moreover, the forms created a record, which in turn proved useful in future litigation.[249] Similarly, the city of Portland, Oregon is undertaking

visited Aug. 15, 2013).

[243] *See infra* Part II.B.4 (discussing Dexter v. Bosko, 184 P.3d 592, 597 (Utah 2008)).

[244] Examples of public outcries over abuses include the LA Rampart scandal, the torture of Abner Louima in a New York police station, and the recent outcry over police shootings and use of force against mentally ill people in Portland, Oregon. *See generally Rampart Scandal Timeline*, PUB. BROADCASTING SERVICE http://www.pbs.org/wgbh/pages/frontline/shows/lapd/scandal/cron.html (last visited May 14, 2014); *Abner Louima*, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/people/l/abner_louima/index.html (last visited May 14, 2014); *Portland Police, Justice Department, Agree on Excessive Force Reform*, CNN (Dec. 17, 2012, 7:55 PM), http://www.cnn.com/2012/12/17/justice/portland-police-justice-department.

[245] *See* Jeffrey Toobin, *Rights and Wrongs—A Judge Takes on Stop and Frisk*, NEW YORKER, May 27, 2013.

[246] *See id.*

[247] *See id.*

[248] *Cf.* Amsterdam, *supra* note 230, at 421 (noting "it is a grave mistake . . . to assume that things policemen do in a state of rulelessness would continue to be done under a regime of rules" . . . and quoting Professor Davis for the following proposition: "[E]ven the police themselves need to be educated in the realities of what they are doing; many of them would refuse to participate if they were more sharply aware of the realities.").

[249] Toobin, *supra* note 245, at 39 ("During the next decade, the police filled out more

police rulemaking as part of the settlement of a federal lawsuit over the Portland police bureau's mistreatment of mentally ill people.[250] Although these examples arise in the federal court context, and concededly show that federal constitutional rights remain important tools for protecting people from police misconduct, at least prior to arrest, they nevertheless illustrate the opportunities for rulemaking that arise in the shadow of especially egregious incidents of government abuse and the specter of litigation.

Failing the intervention of a law reform group or the cooperation of state legislatures or executives, however, development of these state constitutional protections falls to the courts. Even where legislatures and state executives engage in proactive lawmaking, it is unlikely that they will anticipate every problematic practice, so judicial interpretation and enforcement of state constitutional guarantees of humane treatment remains essential.

2. Judicial Strategies

Judges will likely need to play a role in breathing life into state humane treatment norms. Since arrestees and pretrial detainees "have no alternative access to the levers of power in the system," the case for deference to majoritarian processes to implement humane treatment protections is weaker than in other contexts.[251] This section considers a few strategies for judicial enforcement of these constitutional norms, including through limiting qualified immunity and promoting constitutional torts, injunctions, and doctrines tying litigation of humane treatment norms to the criminal case against an arrestee or pretrial detainee, where one exists.

a. Constitutional Torts

If statutes or courts permit state constitutional tort suits for

than four million of these forms, which served as indispensible evidence for the Center for Constitutional Rights and others in lawsuits against the city.").

[250] *Portland Police Enacting DOJ Probe Reforms*, KGW, (June 11, 2013, 12:30 PM), http://www.kgw.com/news/Portland-police-enacting-DOJ-probe-reforms-211058621.html (noting that "Portland police are moving forward on changes recommended after a U.S. Dept. of Justice probe found "a pattern or practice of excessive use of force" within the bureau, specifically when dealing with the mentally ill"); *see also Directives Feedback*, CITY OF PORTLAND, http://www.portlandoregon.gov/police/59757 (last visited Aug. 14, 2013).

[251] Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1315 (1976). *See also* discussion *supra* note 238.

violation of humane treatment rights, they may be a useful tool for developing and enforcing these rights. A merits-first approach to deciding state constitutional tort claims would help to guarantee opportunities for judicial interpretation of these rights. Cabining inquiries into intent and fault could help to remedy wrongs and to deter abuse, but risks doing so at the cost of stifling constitutional innovation in this area.

Litigating state humane treatment rights through state constitutional tort offers some benefits. Since a constitutional tort case may yield damages and potential plaintiffs may hire a lawyer on a contingency fee basis, constitutional tort litigation broadens the pool of potential attorneys beyond the small world of lawyers engaged in public interest litigation. If courts recognize a constitutional tort for violation of a humane treatment provision, and if plaintiffs properly brief the humane treatment issue, plaintiffs suing on a constitutional tort theory in state court may in fact have a greater chance of prevailing on a state constitutional tort theory than in federal court. The federalism concerns that constrain federal courts in applying federal constitutional rights to state and local police and jails are not present, and states are therefore freer to interpret state constitutional rights more broadly. Unlike under Section 1983, under state law, supervisors also may still be held accountable under *respondeat superior* theories, which, as noted above, is an area of recent federal retrenchment.[252]

State courts may even be better suited to the task of deciding constitutional torts than their federal counterparts in *Bivens* and Section 1983 suits. As one commentator has noted, state courts, like state legislators, may be better at "defining norms of official conduct than federal decisionmakers."[253] State judges have experience in "setting standards of behavior in tort actions between private individuals." They also are more familiar with inquiries like causation and fault, "which raise the most difficult problems of individual culpability."[254]

To deter state officials from treating arrestees and pretrial

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[252] *See* FRIESEN, *supra* note 12, at 8-7 (stating "[p]erhaps the most positive aspect of state tort claims acts, from a plaintiff's point of view, is that they quite often provide for respondeat superior liability against government for covered acts" and that "genuine respondeat superior liability is never available to plaintiffs suing for federal constitutional violations under 42 U.S.C. § 1983"). *See also* discussion *supra* notes 65-68 (discussing decisions curtailing supervisor liability under § 1983).

[253] Whitman, *supra* note 209, at 37.

[254] *Id.*

detainees inhumanely and to compensate victims of inhumane treatment more effectively, courts should consider eschewing any inquiry into state intent in assessing unnecessary rigor. As Professor Dolovich has argued forcefully in the context of the Eighth Amendment, the state should be liable for serious physical and psychological harm, whether or not a state official acted recklessly. Professor Dolovich contends that, since the state puts people in prison and thus "places them in potentially dangerous conditions while depriving them of the capacity to provide for their own care and protection," "the state has an affirmative obligation to protect prisoners from serious physical and psychological harm."[255] A recklessness standard, she argues, runs the risk of encouraging state officials to turn a blind eye to risks to prisoners.[256] The same argument applies to jails.[257]

However, lowering the qualified immunity bar risks encouraging stagnation in an already rather stagnant constitutional realm. Courts may be reluctant to adopt broad interpretations of unnecessary rigor, acts of severity or abuse when it means a substantial pay out to an arrestee or pretrial detainee.[258] It seems no coincidence that the Oregon Supreme Court's decision in *Sterling*, recognizing the dignity conception of unnecessary rigor, arose in the context of an injunction and not a constitutional tort.[259]

Judges should consider adopting a "merits-first" approach to qualified immunity. Under a "merits-first" framework, courts assess whether a constitutional violation occurred prior to assessing whether the right was clearly established. For a time, the United States Supreme Court required that federal courts adopt a merits-first approach to Section 1983 claims, but the merits-first order is no longer mandatory in federal court.[260] Even in the case making optional the "merits-first"

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[255] Dolovich, *supra* note 21, at 891-92.

[256] *See id.* at 895-96 (advocating either a strict liability standard modified to avoid unfairness to certain defendants or a shifting negligence standard, which varies depending on whether "macro-level" or "micro-level" failures of care are at issue).

[257] *See* discussion *supra* note 39 (discussing Justice Brennan's and Justice Marshall's critique of the Bell v. Wolfish focus on punitive intent).

[258] *Cf.* Jeffries, *supra* note 226 (arguing that a fault-based qualified immunity doctrine promotes constitutional development).

[259] *See supra* Part II.B.2.

[260] *See* Leong, *supra* note 226, at 412-13 (discussing the mandatory sequence in which lower courts were to address the qualified immunity under *Saucier*: the "initial inquiry" must be whether "the officer's conduct violated a constitutional right" and only then should the court ask "whether the law clearly established that the officer's conduct was

approach in federal court, however, the United States Supreme Court sang the praises of the approach:

> [T]he two-step procedure promotes the development of constitutional precedent and is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable.[261]

Thus, the merits-first approach seems especially apt for developing state constitutional rights to humane treatment where few other opportunities exist to litigate them.[262]

Ruling on the merits of the constitutional issue not only helps to clarify the humane treatment norm and to guide officials, but, like rulemaking, also helps to promote enforcement in future lawsuits. By reaching the merits, courts narrow the immunized territory in the future by putting police or jail officials on notice that a particular practice is unconstitutional.[263] Once a court establishes that a particular act or practice violates state humane treatment rights, an official will no longer be protected by qualified immunity for violation of the state constitutional right in a state constitutional tort suit or a federal Section 1983 suit in which a state constitutional claim is joined, since the right is now "clearly established."

Merits-first makes particular sense in state courts, because state constitutions typically lack analogs to the federal constitution's Article III case and controversy requirement, and state courts are therefore free to issue advisory opinions.[264] State power, unlike federal, power is

unlawful in the circumstances of the case" and noting that the problem with this merits-first approach is that it creates dicta).

[261] Pearson v. Callahan, 555 U.S. 223 (2009).

[262] *Cf.* Leong, *supra* note 226, at 412-13 ("*Pearson* thus affirms the idea that rights-making is important and that qualified immunity provides a valuable vehicle for such rights-making. Rights-making is so important that in many circumstances it trumps other reservations we may have about various disadvantages associated with merits-first qualified immunity adjudication."); Sam Kamin, *An Article III Defense of Merits-First Decisionmaking in Civil Rights Litigation: The Continued Viability of* Saucier v. Katz, 16 GEO. MASON L. REV. 53, 62-64 (2008) (making the case for merits-first decisionmaking in civil rights cases).

[263] *See* John M.M. Greabe, *Mirabile Dictum!: The Case for "Unnecessary" Constitutional Rulings in Civil Rights Damages Actions*, 74 NOTRE DAME L. REV. 403, 407 (1999) (describing "important notice-giving" function of the merits-first approach to deciding novel constitutional issues).

[264] Brianne Gorod, *The Collateral Consequences of Ex Post Judicial Review*, 88 WASH.

"plenary and inherent."[265] Moreover, unlike federal common law, "state common law lawmaking has been from the beginning an accepted feature of state and local governance."[266]

However, a merits-first approach to state constitutional torts may not go far enough to develop humane treatment rights or to promote humane treatment. For one, it is far from clear that state courts will recognize constitutional torts in the first place, let alone decide the merits of the constitutional claim first. Thus far, no state with an unnecessary rigor, severity or abuse provision, other than Utah, has recognized a constitutional tort for violation of its humane treatment provision. Some state supreme courts have indicated their disapproval of a constitutional tort theory with respect to other state constitutional provisions, and federal district courts in Indiana and Oregon, correctly or not, have taken this disapproval to extend to the state's humane treatment provision.[267] Rhode Island, however, has recognized a

L. REV. 903 (2013) (advocating ex ante judicial review and noting that "numerous state courts, unburdened by the supposed constraints of Article III's "case or controversy" requirement, allow for advisory opinions and have found ways to make an advisory opinion practice work").

[265] Helen Hershkoff, *State Courts and the "Passive Virtues:" Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1887 (2001).

[266] *Id.* at 1888; *see also* Lee, *supra* note 212, at 2128 ("[U]nlike federal judges cabined by the constitutional separation-of-powers principle, a large part of a state judge's job is to "make" law by deciding common-law suits.").

[267] The Indiana Supreme Court has not decided whether the state's unnecessary rigor provision gives rise to a private right of action under a constitutional tort theory. *See generally* Rosalie Berger Levinson, *Recognizing a Damages Remedy to Enforce Indiana's Bill of Rights*, 40 VAL. U. L. REV. 1 (2005). However, relying on an Indiana Supreme Court decision in the context of free speech and the allegedly wrongful termination of a public employee, in an unpublished decision, Indiana federal district courts have dismissed plaintiffs' state unnecessary rigor constitutional claims on the basis that state law provided no private cause of action for violations of the Indiana Constitution. *See, e.g.*, Wilson v. Majors, No. 1:12–cv–638–TWP–DML, 2012 WL 5929983 (S.D.Ind. Nov. 27, 2012) (citing Cantrell v. Morris, 849 N.E.2d 488, 499 (Ind. 2006). *Cantrell* indeed indicated resistance to the need for a doctrine of constitutional tort for violation of the Indiana Constitution, but ultimately "decline[d] th[e] request to expound more generally on the availability of a civil damage remedy." *Id*. at 500. In Oregon, the Oregon Supreme Court has rejected a constitutional tort based on the state constitution's free speech provision, Hunter v. City of Eugene, 787 P.2d 881, 883 (Or. 1990) ("If an implied private right of action for damages for governmental violations of Article I, section 8, and other nonself-executing state constitutional provisions is to exist, it is appropriate that it come from the legislature, not by action of this court."), and two federal courts have read the decision to extend even to violations of the unnecessary rigor provision. *See* Standish v. Woods, No. CV 03-933-AS, 2004 WL

constitutional tort for violation of the due process clause of the Rhode Island Constitution.[268] In some jurisdictions, sovereign immunity also may be a barrier to constitutional tort.[269]

Moreover, the deterrent value of any constitutional tort action may be diminished if the court reaches the merits but does not actually award damages or awards only minimal damages, whether because of qualified immunity or the jury's biases. As Professor Caleb Foote noted years ago in his seminal article, *Tort Remedies for Police Violations of Individual Rights*, "for most potential tort plaintiffs the 'moral aspects of the case' are not very favorable."[270] Whereas the threat of a civil suit may help to deter police abuse when dealing with an "apparently respectable citizen," it likely will do little to deter misconduct when "the potential subject of police illegality is a skid row 'bum' or a gambler or a prostitute or has a record of prior arrests," because the "defendant officers can prove the plaintiff's bad reputation in mitigation of the damages."[271] Professor Foote also suggests that juries may not award adequate tort damages because of racist attitudes.[272] Although one hopes that this concern has diminished in the decades after Foote's article, there is reason to believe that that racism in tort awards, as in policing, remains a problem.[273]

1379466 (D. Or. May 10, 2004); *see also* Haliburton v. City of Albany Police Dep't, No. 04-6062-KI, 2005 WL 2655416 (D. Or. Oct. 18, 2005) (citing *Hunter*, 787 P.2d at 883). These federal court decisions may be wrongly decided. Arguably, *Hunter* is distinguishable from cases based on Oregon's unnecessary rigor provision, because it expressly dealt with a non-self-executing constitutional provision. As noted above, the Utah Supreme Court at least found the state's unnecessary rigor provision to be self-executing. *See supra* Part II.B.3(b). Constitutional tort also is on shaky footing in Tennessee. *See* FRIESEN, *supra* note 12, at 7-62, § 7.07(2)(v) ("Although the Tennessee Supreme Court has never decided that an individual cannot sue for damages directly under the Tennessee Constitution, federal courts in Tennessee follow the lead of the Tennessee Court of Appeals, which continues not to recognize such an action.").

[268] FRIESEN, *supra* note 12, at 7-37, 7-61, § 7.07(1)(s), § 7.07(2)(u) (discussing Rhode Island cases that recognize constitutional torts in the context of the state's due process clause but not in the context of the victims' rights amendment).

[269] *See* discussion *supra* note 236.

[270] Caleb Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493, 497, 500 (1954) (explaining the significance of "immeasurables" in damages awards for false imprisonment and arguing that "the theory of damages in false imprisonment is successful as an inducement to sue only for the respectable plaintiff who can come into court with relatively clean hands").

[271] *See id.*

[272] *See id.*

[273] *See* Martha Chamallas, *Civil Rights in Ordinary Tort Cases: Race, Gender and the*

Even without Section 1983-style statutes or judicial decisions recognizing constitutional torts based directly on state constitutional rights, arrestees and pretrial detainees may be able to litigate unnecessary rigor violations through state tort claims acts.[274] In fact, the Oregon Court of Appeals has suggested that wronged arrestees may raise violations of Oregon's unnecessary rigor constitutional provision through the Oregon Tort Claims Act.[275] As with merits-first analysis in the context of constitutional torts, courts should embrace opportunities to elaborate on the meaning of humane treatment rights and their implications for the treatment of arrestees and pretrial detainees when deciding suits brought under state tort claims acts.

Of course, these tort suits based on violations of state constitutional rights foster interpretation of the right only if someone brings the case in the first place. Absent the potential for attorney fee awards, would-be plaintiffs still will have trouble finding a lawyer to take their case if it looks as though immunity doctrines bar recovery. To encourage development of these rights, courts should consider exercising their equitable powers to award attorney fees. Although "the familiar 'American rule' is that American courts will not award attorney fees to prevailing parties unless authorized by a contract or statute, some state courts have awarded attorney fees in "extraordinary cases" pursuant to their equitable powers, particularly where the plaintiff is acting in a representative capacity and in protection the rights of

Calculation of Economic Loss, 38 LOY. L.A. L. REV. 1435, 1437-38 (2005) (discussing hidden race and gender bias in tort awards); *cf*. John Tyler Clemons, *The Supreme Court, Implicit Racial Bias, and the Racial Disparity in the Criminal Justice System*, 51 AM. CRIM. L. REV. 689, 692 (2014) (noting that "research suggests that one of the primary sources of the disparity is internal, residing within each key actor in the criminal justice system from police officers and prosecutors to judges and juries").

[274] For example, the Oregon Tort Claims Act provides: "[s]ubject to the limitations of [the Act], every public body is subject to civil action for its torts and those of its officers, employees and agents acting within the scope of their employment or duties, whether arising out of a governmental or proprietary function or while operating a motor vehicle in a ridesharing arrangement." OR. REV. STAT. § 30.265 (2007).

[275] *See, e.g*., Brungardt v. Barton, 685 P.2d 1021, 1022-23 (Or. Ct. App. 1984) (dismissing based on the plaintiff's failure to give notice within the time period specified by statute an action in which an arrestee alleged assault and battery and a violation of his right not to be treated with unnecessary rigor after an officer allegedly arrested the plaintiff and beat him with his baton, but recognizing that the plaintiff would have had a cause of action under the Oregon Tort Claims Act (OTCA) had he given timely notice because the officer was acting within the scope of his employment). The decision does not distinguish between the plaintiff's assault and battery claims and his claim based on the unnecessary rigor violation.

others.[276] In some circumstances, particularly when the state humane treatment right is reasonably well-defined, the state has made clear the availability of a remedy, and there is also a substantial federal claim, it may make sense for plaintiffs to raise state humane treatment claims along with federal claims in a Section 1983 suit in order to be able to seek attorney fees under 42 U.S.C. § 1988.[277]

b. Injunctions

Injunctions are a valuable and underused tool for promoting the recognition and enforcement of humane treatment rights. Remarkably, despite the success of the *Sterling* plaintiffs in achieving institutional reform, *Sterling* is the only case the author has found in which a court has granted an injunction based on a violation of an unnecessary rigor, act of severity, or abuse provision.

Ignoring the power of injunctions is a missed opportunity. Courts that are reluctant to recognize the availability of damages based on a constitutional tort theory may be more receptive to arguments for an injunction.[278] Despite Oregon's resistance to constitutional torts, at least with respect to some constitutional provisions,[279] in *Sterling* the Oregon Supreme Court explicitly recognized that an injunction is an appropriate remedy for a violation of the right to be free from unnecessary rigor. Even in a jurisdiction like Utah, which recognizes a

[276] FRIESEN, *supra* note 12, at 10-5; *see also* Deras v. Myers, 535 P.2d 541 (Or. 1975) (noting that although the "as a general rule American courts will not award attorney's fees to the prevailing party absent authorization of statute or contract, . . . courts of equity have the inherent power to award attorney's fees," particularly when a plaintiff brings a suit in a representative capacity and protects the rights of others and remanding for determination of attorney fees); Koon v. City of Gresham, 860 P.2d 848, 850 (Or. Ct. App. 1993) (declining to rule that the *Deras* attorney fee analysis applied only in the context of constitutional claims and stating that "the logic of the attorney fee analysis in *Deras* and later cases applies only when the issue is one of some magnitude and when the plaintiff obtains some cognizable public benefit").

[277] *See* FRIESEN, *supra* note 12, at 10-7-31, §10.04-10.06[4] (discussing the rule that "permits prevailing [Section 1983] plaintiffs to collect attorney fees from the defendant when they succeed on state law claims that are 'pendant' to their 'substantial' section 1983 claims for federal constitutional violation").

[278] *Cf.* Whitman, *supra* note 209, at 11 (arguing in the context of Section 1983 that "if a judge's discomfort centers on the propriety of damage relief, the request for damages may be denied while an action for injunctive relief may remain available" and advocating equitable remedies over damages in Section 1983 litigation because they are better at deterring and affirming a plaintiff's rights and are less disruptive to local government).

[279] *See supra* note 167.

potential damages remedy, courts have voiced a strong preference for injunctive relief. As noted above, Utah's post-*Bott* caselaw made clear that in order for a court to grant damages, it must first consider the whether equitable relief, such as an injunction, is an adequate remedy.[280]

Injunctions may be an even more powerful tool for law reform than suits for damages. They deter, not indirectly by making violations of a constitutional right expensive, but directly by telling the state to do or not to do something.[281] The injunction in Oregon's *Sterling* case, for example, in essence created a rule requiring that pat downs be conducted by an officer of the same sex as the inmate unless "immediate circumstances" necessitated cross-gender pat downs.[282] This approach put the onus on the state to articulate the necessity for a more dignity-impairing approach.

Although injunctions obviate many of the problems of qualified immunity, which center around suits for damages, they present problems of their own. First, there are problems of standing and mootness. Arrestees and pretrial detainees are arrestees and pretrial detainees for only so long. As some point, they are either released or become convicted prisoners or both. Judges should consider employing or creating doctrines akin to merits-first in the injunctive context, such as public interest exceptions to these questions.[283]

That state courts can and should encourage reform through injunctions does not mean they will be given the chance to do so. Even more so than with suits for damages, where contingency fee arrangements are a possibility, whether or not these cases are litigated will largely depend on the availability of attorney fees or the willingness of a public interest organization like the ACLU to take up the cases. However, the argument for courts awarding attorney fees pursuant to their equitable powers is especially strong in the injunctive context.[284] Quite often, when a plaintiff seeks an injunction of a particular police or jail practice, the plaintiff is acting in a representative capacity and

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[280] *See* discussion *supra* note 194.

[281] *See* Whitman, *supra* note 209, at 11, 48 (arguing that equitable relief is often appropriate to deter future violations and may in fact deter better than damages).

[282] *Cf.* Chayes, *supra* note 251, at 1297 (explaining that in public law litigation, a judicial decree regarding an ongoing measure is a legislative act).

[283] Angilau v. Winder, 248 P.3d 975, 979-80 (Utah 2011) (refusing to hear a juvenile's unnecessary rigor claims due to mootness and declining to rely on the public interest exception to mootness since the claim was inadequately briefed).

[284] *See supra* note 276.

seeking a broader public benefit.

Therefore, those seeking to promote humane treatment of arrestees and pretrial detainees through litigation would be well advised to make a claim for injunctive relief on the basis of state humane treatment rights a part of their strategy. They should seek, and courts should consider granting, attorney fees awarded based on courts' equitable powers.

c. Tying Humane Treatment to the Criminal Case

Even with merits-first analysis, the greater use of injunctions, and equitable awards of attorney fees, affirmative law suits against states or state and local officials may only go so far. Since lawsuits against police and jails for mistreatment may remain few and far between, judicial doctrines tying humane treatment to the litigation of the criminal case may be warranted to ensure repeated opportunities for judicial review.[285]

A judicial doctrine linking the litigation of the criminal case and humane treatment makes some practical sense because many arrestees and most pretrial detainees will be charged with criminal offenses.[286] For pretrial detainees, the judge in the criminal case is the very official who ordered the person detained and thus should have an interest in ensuring humane treatment.

Litigation about humane treatment, whether it relates to excessive force or to conditions of confinement, arguably is already part of providing legal representation to criminal defendants. Conditions of confinement litigation can be critical to providing high quality representation to criminal defendants. In federal court, for example, defense attorneys and federal public defender offices have achieved significant reforms related to treatment of federal arrestees in the context of litigating the criminal case.[287] Likewise, in capital litigation,

[285] Amsterdam, *supra* note 230, at 429 ("I have no doubt that courts should entertain affirmative lawsuits against the police both to require the promulgation of rules and to review police rulemaking procedures and the contents of promulgated rules under the fourth amendment and administrative law standards. But I do not believe that these sorts of lawsuits would suffice to provide the constant judicial scrutiny necessary to keep police-made rules faithful to the constitution, or police faithful to the rules.").

[286] The use of the words "accused person" in Rhode Island's humane treatment constitutional provision may restrict Rhode Island's provision to arrestees or pretrial detainees who have been charged with a crime.

[287] *See, e.g.*, Brandau v. United States, 578 F.3d 1064 (9th Cir. 2009) (discussing

conditions of confinement litigation is viewed as part and parcel of representation.[288]

Judicial doctrines tying humane treatment remedies to the criminal case against an arrestee or pretrial detainee may provide much-needed incentives for defense attorneys to litigate humane treatment. Particularly in the area of indigent defense, where resources are limited and attorneys are already stretched thin, defense attorneys are more likely to litigate humane treatment, and indeed are ethically obligated to do so, if it impacts the bottom line of guilt or innocence or the defendant's sentence. Of course, where an abuse leads to evidence, lawyers should seek to suppress the evidence, and judges should consider suppression as a potential remedy. [289]

However, since abuses often are unrelated to evidence-gathering, remedies other than the suppression of evidence are needed. In egregious cases of abuse, courts should consider whether violations of the constitutional rights to humane treatment warrant dismissal of the criminal charges against a defendant.[290] Dismissal could serve not only a

litigation related to the Eastern District of California's policy of shackling pretrial detainees, which federal public defenders had challenged on due process grounds after bringing motions at arraignment and appealing their denial, and remanding the case to determine whether shackling was still happening and mootness); *cf.* Aamer v. Obama, 742 F.3d 1023 (D.C. Cir. 2014) (recognizing jurisdiction over Guantanamo detainees' habeas corpus actions challenging the practice of force feeding detainees in response to a hunger strike).

[288] In capital cases, litigation may relate not only to current conditions of confinement, but also to conditions of confinement in past institutions as part of explaining or mitigating the defendant's actions. *See* GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES cmt. at 84(2003) ("If the client [is] incarcerated, institutionalized or placed outside of the home, as either a juvenile or an adult, the defense team should investigate the possible effect of the facility's conditions on the client's contemporaneous and later conduct.") (citing TERRY A. KUPERS, PRISON MADNESS: THE MENTAL HEALTH CRISIS BEHIND BARS AND WHAT WE MUST DO ABOUT IT 33-34 (1999)); David M. Halbfinger, *Care of Juvenile Offenders in Mississippi is Faulted*, N.Y. TIMES, Sept. 1, 2003, at A13.

[289] Again, of course, where inhumane treatment is tied to evidence gathering, the exclusionary rule is a tried and true remedy designed to deter. *See supra* note 231; *see also* discussion *supra* notes 185-191 (discussing Indiana cases suppressing evidence based on constitutional and statutory rights prohibiting coerced confessions and citing Indiana's unnecessary rigor provision).

[290] Federal courts, for example, can dismiss criminal cases based on "outrageous government conduct." *Cf.* United States v. Simpson, 927 F.2d 1088, 1090 (9th Cir. 1991) (overturning a district court's decision dismissing charges because it found that the government's conduct did not amount to neither "fairly attributable to the prosecutor nor sufficiently flagrant"). The United States Supreme Court has recognized,

remedial role for the particular arrestee or pretrial detainee,[291] but also help to deter future abuses.

Dismissal, of course, is not for the faint of heart, particularly when the criminal case involves serious charges.[292] Litigating humane treatment with such high stakes—picture a court deciding whether to dismiss charges against an alleged murderer who complains about conditions at the local jail—runs the risk of encouraging narrow interpretations of the humane treatment right.[293] It is also tricky in that

for example, that federal courts have power to create remedies for violation of rights. United States v. Hasting, 461 U.S. 499, 505 (1983) ("Guided by considerations of justice and in the exercise of supervisory powers, federal courts may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress. The purposes underlying use of the supervisory powers are threefold: to implement a remedy for violation of recognized rights; to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury; and finally, as a remedy designed to deter illegal conduct.") (internal citation omitted). State courts likewise may craft remedies pursuant to their inherent supervisory powers. *See, e.g.*, Gary E. O'Connor, *Rule(make)r and Judge: Minnesota Courts and the Supervisory Power*, 23 WM. MITCHELL L. REV. 605, 615 (1997) (discussing the Minnesota Supreme Court's use of its supervisory power to order a new trial, to allow a criminal defendant to have a trial by requiring the trial court to withdraw a guilty plea and to adopt rules); State v. Peart, 621 So. 2d 780 (La. 1993) (invoking its supervisory powers to craft the remedy of a rebuttable presumption that indigent defendants in a particular Section of the Orleans Parish Criminal District Court were receiving ineffective assistance of counsel).

[291] In her article on the Georgia Bill of Rights, Judge Dorothy Beasley laments that in her time as a state court judge, "not once did counsel invoke the constitutional prohibition of abuse while the defendant was being arrested or under arrest." She suggests that the defense may be appropriate in misdemeanor cases, "where the frequent charge is criminal trespass, or abusive and opprobrious words, or obstructing a police officer, or assault or battery on a police officer." In those cases, "the defense often is that the police had instigated the attack or used unnecessary force in effecting an arrest." Beasley, *supra* note 16, at 391.

[292] Hudson v. Michigan, 547 U.S. 586, 591 (2006) ("The exclusionary rule generates 'substantial social costs,' . . . which sometimes include setting the guilty free and the dangerous at large. We have therefore been 'cautio[us] against expanding' it, . . . and 'have repeatedly emphasized that the rule's 'costly toll' upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application.'") (internal citations omitted).

[293] Many commentators have suggested in the context of the exclusionary rule that the severity of the remedy—suppression of evidence that may lead to the acquittal of guilty people—has led courts to under-enforce the underlying rights. For a discussion of the literature on the relationship between constitutional rights and remedies, see Nancy Leong, *supra* note 226, at 412-13 (noting that recent scholarship on rights-making focuses on the need for opportunities to develop rights but fails to acknowledge the importance of the context in which rights are litigated). *See also* Eugene Kontorovich,

the abuse at stake—say, a practice of shackling pregnant inmates during labor—may have nothing to do with the underlying criminal charges—say, identify theft.

Other remedies, however, may prove more palatable to judges. Sentencing reductions for violation of humane treatment rights are a potentially promising intermediate remedy that diminishes the risk of narrow interpretation of the substantive rights.[294] Canadian judges, for example, routinely give defendants double credit for time served in pretrial detention in recognition of the subpar conditions in which defendants are detained.[295] When an arrestee or pretrial detainee has been treated inhumanely, his or her criminal defense lawyer should consider advocating for a sentence reduction. Defense attorneys may be reluctant to raise inhumane treatment claims out of fear of scuttling plea negotiations, but where the potential carrot of dismissal or sentencing reductions exists, raising humane treatment claims may in fact give defense attorneys much needed leverage to negotiate more favorable deals. Violations of state humane treatment rights in pretrial detention also could be used in support of revisiting denials of pretrial release, whether in a bail hearing or through a petition for writ of habeas corpus, which, as noted above, at least Oregon courts have recognized can serve as vehicle for litigating unnecessary rigor violations.[296] Here, state constitutional rights to bail, which have no federal analog, make the case for bail even stronger.[297]

In sum, state courts should create remedies and remedial doctrines that foster opportunities for interpreting state constitutional protections for arrestees and pretrial detainees. Strategies to encourage development of humane treatment rights include recognizing a constitutional tort based on violations of these rights, eliminating or

Liability Rules for Constitutional Rights: The Case of Mass Detentions, 56 STAN. L. REV. 755 (2004); Sonja Starr, *Sentence Reduction as a Remedy for Prosecutorial Misconduct*, 97 GEO. L.J. 1509, 1511 (2009).

[294] *Cf*. Sonja Starr, *supra* note 293, at 1511.

[295] *See* R. v. Hall, [2002] 3 S.C.R. 309, para. 118 (Can.) ("an accused placed on remand is often subjected to the worst aspects of our correctional system by being detained in dilapidated overcrowded cells without access to recreational or educational programs. The seriousness of this deprivation is recognized by sentencing judges who frequently grant double credit for pre-trial custody") (citing G. T. Trotter, THE LAW OF BAIL IN CANADA (2nd ed. 1999) at pp. 36-39 and R. v. Rezaie [1996], 112 C.C.C. (3d) 97 (Can. Ont. C.A.)).

[296] *See* discussion *supra* note 159.

[297] *See supra* note 78.

cabining qualified immunity or, failing that, adopting a merits-first approach to qualified immunity, granting attorney fees pursuant to courts' equitable powers, and creating doctrines tying humane treatment to would-be defendants' criminal cases.

Although these judicial strategies do not demand political will on the front end to the same extent as legislation or rulemaking, they are not without political consequences. State judges who are perceived to go too far in protecting politically unpopular groups may be elected out of office,[298] and state constitutions are easier to amend than the federal constitution.[299] This greater political accountability may increase the perceived legitimacy of courts' engaging in judicial rulemaking,[300] but also means that courts may be less willing to make unpopular decisions and, even if they are, their decisions are not carved in stone. These judicial strategies, like legislation and rulemaking, are not a panacea. Rather, they are likely to be most effective when they are accompanied

[298] Independent state constitutional analysis has not always ended well for state judges, who are often elected. For example, Californians voted Chief Justice Rose Bird and two other justices of the California Supreme Court out of office based on the common perception that they were imposing liberal politics under the guise of independent state constitutional analysis. *See* EDWARD ERLER, THE CALIFORNIA SUPREME COURT IN THE CULTURE WARS: A CASE STUDY IN JUDICIAL FAILURE, COURTS AND THE CULTURE WARS 139 (Bradley Watson ed., 2002); *see also* KERMIT HALL, OF FLOORS AND CEILINGS: THE NEW FEDERALISM AND STATES BILLS OF RIGHTS, THE BILL OF RIGHTS IN MODERN AMERICA AFTER 200 YEARS 204 (David J. Bodenhamer & James W. Ely, Jr. eds., 1993) (expressing pessimism over independent state constitutional interpretation on the rights of criminal defendants and citing the example of the 1986 recall of California Supreme Court Chief Justice Rose Bird and two other justices because they were "widely perceived as being soft on crime").

[299] Inga Nelson, *Recognition of Civil Unions and Domestic Partnerships as Marriages in Same-Sex Marriage States*, 98 MINN. L. REV. 1171, 1201 (2014) ("Although it is significantly easier to amend most state constitutions than it is to amend the federal Constitution, many states require more than a simple majority of voters or legislators to approve a change to the state constitution.").

[300] Hershkoff, *supra* note 265, at 1887 (arguing that state court judges, who "are perceived to be part of the political process," can help to set the agenda in a way that "produces greater democratic discourse and encourages the participatory values associated with federalism"). Professor Usman argues that greater judicial activism is appropriate in the state court context because state courts judges are also more accountable to the electorate than federal judges, because they are often elected. Usman, *supra* note 168, at 1524. *But see* Linde, *supra* note 232, at 198 (questioning the argument that the appointment or election of judges has any bearing on whether their decisions are "representative or legitimate" and asking "[s]hould an elected supreme court, like yours in Georgia or ours in Oregon, decide cases with an eye to popular wishes more than our appointed colleagues in, say, Massachusetts or New Jersey?").

by other measures to promote humane treatment of arrestees and pretrial detainees.

IV. CONCLUSION

As the "intellectual godfather" of judicial federalism,[301] Justice Hans Linde, has put it, "[s]tate constitutions allow the people of each state to choose their own theory of government and of law, within what the nation requires, to take responsibility for their own liberties, not only in courts but in the daily practice of government."[302] State humane treatment guarantees represent an important piece of this picture. Legislation and rulemaking could help to bring these guarantees to life. Still, a judicial push often will be necessary. In adjudicating cases involving the rights of arrestees and pretrial detainees, judges should consider adjudicatory and remedial strategies to foster opportunities for interpretation and implementation of these state constitutional rights. This Article offers a few.

[301] Collins, *supra* note 15, at 5 (quoting Toobin, *supra* note 9, at 10, 11).

[302] Linde, *supra* note 232, at 199; *see also* Long, *supra* note 9 (arguing that state courts' decisions to rely on state constitutional provisions can help to foster a sense of community—in this instance, a more humane community—in the state).