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The Failed Regulation and Oversight of American Prisons

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Abstract

When the state incarcerates, it assumes an affirmative, non-negotiable obligation to keep people in prison safe and to provide for their basic needs. In the United States, the three branches of government—legislative, executive, and judicial—are in theory collectively responsible for making certain that this obligation is fulfilled. In practice, the checks and balances built into the system have failed to ensure even minimally decent carceral conditions. This review maps this regulatory failure. It shows that, in all branches of government, rather than policing prison officials, the relevant institutional actors instead align themselves with the officials they are supposed to regulate, leaving people in custody unprotected and vulnerable to abuse by the very actors sworn to keep them safe. This pattern is no accident. It reflects a palpable normative hostility and contempt toward the incarcerated, an attitude with deep roots in the virulent race hatred endemic to the American carceral project from its earliest days.

INTRODUCTION

With the decision to incarcerate, the polity acquires a burden. Incarceration strips people of their ability to provide for their own health and safety and locks them into environments of deprivation and potential danger. Having taken this step, the state is "not free to let the state of nature take its course" (*Farmer v. Brennan* 1994, p. 833). Instead, it must keep the incarcerated safe from physical harm and provide for their basic needs. Fulfilling this obligation is the state's carceral burden (Dolovich 2009b). This burden requires state officials to ensure that people in custody have the means for physical safety and survival (food, shelter, medical care, protection from assault, etc.) as well as the freedom from fear requisite for basic human functioning. Anything less would subject people sentenced only to the deprivation of liberty to unnecessary physical pain and psychological suffering.

It is axiomatic that forcing people to endure gratuitous pain and suffering is beyond the scope of what, in a free and democratic society, the state may legitimately do to its citizens, even as punishment for crime. More than a moral imperative, the prohibition on such treatment is a basic constitutional principle, incorporated directly into the Eighth Amendment's interdiction on cruel and unusual punishment, which forbids the "unnecessary and wanton infliction of pain" (*Gregg v. Georgia* 1976, p. 173). This constitutional status converts the state's carceral burden into a legal obligation of the highest order, compelling prison officials to ensure that living conditions in their facilities meet standards of basic humanity. But constitutional principles are not self-executing. If they are to have practical meaning for the real world, state officials must willingly conform their conduct to constitutional requirements or else be made to do so.

Unfortunately, 150 years of civil rights enforcement have made plain that, left to their own devices, the state's agents cannot always be counted on to honor constitutional rights, especially when the rights holders in question are members of disfavored groups (*Chae Chan Ping v. U.S.* 1889; Ely 1996; *Korematsu v. U.S.* 1944; *Pugh v. Locke* 1976; *U.S. v. Carolene Products Co.* 1938, p. 152 n.4). And perhaps no disfavored group is more vulnerable to official abuse of power than the incarcerated, whose interactions with state actors take place behind high walls, away from public view, in fraught and adversarial environments where uniformed officers hold all the power. For those institutional actors responsible for ensuring that people sentenced to prison are not forced to endure an ongoing gauntlet of danger, deprivation, and harm, the challenge becomes how to regulate carceral conditions and enforce constitutional guarantees.

In the United States, the three branches of government—legislative, executive, and judicial—are in theory expected to work together to meet this challenge. In practice, when it comes to prisons, the checks and balances built into the system have almost entirely failed, with no branch proving able or willing to ensure even minimally decent carceral conditions. Instead, decades of empirical research, litigation records, and media reports (Deitch 2020)—all key sources for understanding what transpires in this hidden world—collectively map a profound regulatory failure.

This review examines the nature of this failure across the various institutions with regulatory authority over the prisons. As discussed below, each branch manifests this failure in its own signature way. Legislators actualize the tyranny of the majority. Executive agencies fail to police themselves. And the judiciary abdicates its assigned role as "guardians of the people's federal rights," thereby greatly limiting the scope of constitutional enforcement (*Patsy v. Board of Regents of State of Fla.* 1982, p. 503). In each case, the effect is the same: The governmental bodies charged with ensuring that prison officials fulfill the state's carceral burden instead align themselves with those same officials, a posture that leaves people in custody unprotected and vulnerable to abuse by the very actors sworn to keep them safe. This pattern is no accident, instead reflecting a

palpable hostility and contempt toward the incarcerated. This attitude has deep roots in the scorn and disgust long evinced in the national consciousness toward a perpetually demonized underclass (Isenberg 2016) and especially in the virulent race hatred that drove the American carceral project from the start. And, as shown below, it continues to manifest today across the various governmental institutions meant to oversee prisons and ensure their appropriate functioning.

This review first explains how the regulation and oversight of American prisons is intended to work and briefly describes the prevailing character of prison conditions. It then maps the regulatory failure in each branch of government. To make sense of this collective failure, it looks back to the historical antecedents of the American carceral system, which at its founding moment saw all branches of government united in a fierce determination to subjugate the people, disproportionately Black, who were subjected to carceral control. The callous indifference displayed by political actors to the fate of the imprisoned—many of whom had been first enslaved and then subjected to a form of re-enslavement (Blackmon 2009), with the survivors incarcerated in prisons that looked and ran very much like antebellum plantations—changed shape over the decades. But this pernicious disposition remains in evidence today across all branches of government, with the effect that the incarcerated are left with little recourse, whether to the law or otherwise, for abuses of official power or the pain and injury those abuses inflict.

I. HOW PRISON REGULATION IS MEANT TO WORK

The Executive Branch

In the United States, every state has its own prison system, as does the federal government.[1] In each jurisdiction, prisons are part of the executive branch. State prisons are operated by each state's Department of Corrections (DOC). State DOCs—and, in the case of the federal system, the US Bureau of Prisons (BOP)—are responsible for crafting and promulgating the policies to govern their facilities and for overseeing the implementation of those policies across facilities. Because conditions in individual prisons can vary considerably, agency-wide policies often require supplementation at each facility. The authority to set institution-specific policies falls to the leadership team in each institution (warden, deputy warden, etc.), which is also responsible for implementing those regulations imposed by the overseeing agency.

In keeping with the prison's institutional function of enforcing the deprivation of liberty, prevention of escapes is a key policy priority. But given the practical realities of the carceral enterprise, which keeps live humans in locked facilities over extended periods, the lion's share of a prison's operations, and thus of agency policy, is necessarily devoted to meeting prisoners' basic needs and to keeping them safe.

To fulfill this central imperative, agency officials and prison administrators must design and manage effective service delivery. And because things will always go awry in any complex system, executive agencies committed to fulfilling the state's carceral burden should create meaningful channels for hearing individual grievances as well as system-wide mechanisms for identifying and correcting institutional deficiencies and rapidly and unambiguously responding to official abuse or neglect. Such agencies should also cooperate with official monitors and nongovernmental

[1] Prisons are distinct from jails. Jails, which are administered by local governments, hold people awaiting trial or sentencing as well as those whose sentences are too short to require transfer to prison. Prisons house people who have been convicted of felonies (i.e., crimes carrying a sentence of more than 1–2 years). This review focuses only on state prisons run by state Departments of Corrections (DOCs) and on federal prisons run by the Bureau of Prisons (BOP).

oversight bodies to identify and resolve any problems arising from policy design and implementation (Deitch 2010, 2020).

The Legislature

In a well-functioning regulatory system, legislators provide a further layer of oversight. Like all executive branch agencies, DOCs are the product of legislatively delegated power. Their status and shape are determined initially by the state legislation authorizing their creation, and their ongoing operation is always subject to statutory directives and legislative oversight. At any time, those legislative committees with jurisdiction over the prisons may hold hearings to address particular issues, and, when deemed necessary, draft statutes directing prison administrators to take specific steps affecting facility-level conditions. Legislators' exclusive authority over appropriations also gives them the power of the purse, which can be used to compel agency action. These tools enable legislators committed to the state's carceral burden to remain abreast of what is happening on the ground. Additionally, in cases of institutional failure, lawmakers have the means to force change, whether through conditioning budget allocations on demonstrated improvements in performance or by legislating necessary reforms.

Still, legislative interventions can only be made in broad strokes. Certainly, macrolevel legislative directives can make a significant practical difference to the daily lives of people in custody, improving the quality of medical care, the physical plant, programming, etc., as well as increasing the overall safety of a facility. But in prison (as in life), individual needs must be met at the retail level, person by person, and legislators lack the capacity to regulate to this degree of granularity. Thus, even when legislative regulation and oversight work well system-wide, a mechanism for investigating and resolving allegations of harm by individual officers is still required.

The Courts

In a well-functioning system, the courts provide a backstop to legislative or executive failure, making sure that occasional instances of official abuse are condemned and remediated ex post. Ideally, the courts would play only a modest role in prison regulation. However, there is one scenario in which both the legislative and executive branches will predictably fail to effectively guard against abuses of state power: when the vulnerable population is a politically unpopular minority. In such cases, there is a risk that the political branches will inscribe popular prejudice into state policy, leaving the most politically disenfranchised citizens at the mercy of an indifferent and even hostile majority. At such points, as a matter of institutional design, the American constitutional scheme self-consciously shifts its center of gravity toward the courts. Federal judges, insulated from political pressures by lifetime appointments, are especially well-positioned to push back against the tyranny of the majority and to vindicate the constitutional rights of even society's most reviled members. In this way, the judiciary can compensate for the inability or unwillingness of the political branches to protect all citizens equally (Ely 1996; Scalia 1983, p. 894; *U.S. v. Carolene Products Co.* 1938, p. 152 n.4).

The above sections describe how, in theory, prison regulation is supposed to work. However, it is clear from conditions on the ground in prisons across the country that practice diverges greatly from theory.

II. THE STATE OF AMERICA'S PRISONS

The United States is home to more than 1,900 state and federal prisons, which as of early 2020 held more than 1.5 million people (with another roughly 700,000 people held in close to 3,200 local

jails) (Kang-Brown et al. 2020, Sawyer & Wagner 2020). Getting a clear picture of what goes on inside these institutions can be challenging. In the 1970s, the Supreme Court held that journalists have no First Amendment right of access to carceral institutions beyond that enjoyed by members of the general public (*Pell v. Procunier* 1974, *Saxbe v. Washington Post Co.* 1974). And because, also per Supreme Court precedent, public access to any given facility is wholly within the discretion of the warden (*Houchins v. KQED, Inc.* 1978), corrections administrators may deny access to any parts of their institutions they wish to keep hidden—even from members of the media, through whose work citizens "receive that free flow of information and ideas essential to intelligent self-government" (*Saxbe v. Washington Post Co.* 1974, p. 863). Lawyers must also fight for access, through processes that determine what records they may see, which individual residents they may interview, and which parts of a facility they may inspect. Once constitutional violations have been found and injunctive relief granted, plaintiffs' counsel may gain broad admittance to a given institution for purposes of monitoring compliance. But even then, they can only see so much. Prisons operate 24/7. They are often large and sprawling institutions, employing hundreds of officers and housing hundreds and even thousands of people. It is simply not possible for outsiders, however determined they may be, to see for themselves all that goes on behind the walls.

Despite these obstacles, decades of media reports, litigation on behalf of incarcerated plaintiffs, and data gathering by academics and other researchers have yielded a rich record of life in American prisons. This record, if not fully comprehensive, nonetheless makes clear that America's carceral institutions are systematically failing to provide even minimally safe and healthy conditions of confinement for many of the nation's more than two million prisoners. In many American carceral facilities, medical care is often so grossly inadequate that "suffering and preventable deaths behind bars" have been normalized (*Brown v. Plata* 2011; Fleury-Steiner 2008, p. 69). Facilities generally lack the capacity to treat serious mental health issues—an epidemic in American prisons and jails (Bronson & Berzofsky 2017)—despite the fact that innumerable features of the carceral environment intensify the symptoms of mental illness (Haney 2003, Kupers 2015). Physical plants are often aging, decrepit, and dirty, with poor ventilation and inadequate heating and cooling, which can leave people freezing in winter and enduring unbearable heat in summer (*Ball v. LeBlanc* 2015, *Yates v. Collier* 2017). At any given time, an estimated 80,000–100,000 people—disproportionately people of color—are being held in solitary confinement, many for years or even decades at a stretch (Resnik et al. 2015–2016, Schlanger 2013b). This experience strips people of human contact, sensory stimulation, and other requisites of psychological and emotional health and is well known to provoke or exacerbate mental illness and chronic health conditions (Haney 2003, 2006a; Hoke & Pendergrass 2018). In the worst facilities, instances of physical and sexual assault are common enough that fear of violence is pervasive (Haney 2011, Human Rights Watch 1996, Liptak 2004, Mariner 2001, Robertson 1995). This fear drives many people in custody to affiliate with gangs and engage in other self-destructive behaviors in a bid to ensure their own safety (Dolovich 2017b, Haney 2011). And although it is the job of correctional officers (COs) to protect prisoners, excessive force is "frequent and wide-ranging," and staff sexual abuse is "an ever-present danger" (Schlanger 2018; Shapiro & Hogle 2018, pp. 2025–26).

With more than 1,900 prisons in the United States, the quality of conditions inevitably varies across institutions. In every facility, there are officials doing their best to treat people humanely and with respect. But with the weight of the system pressing strongly in the opposite direction, these individual efforts will be of limited effect. As a structural matter, the biggest obstacle to humane conditions is crowding, which is endemic to some degree in virtually all American carceral facilities. When prisons are crowded, people live crammed together, sleeping and eating within feet or even inches of each other. There is insufficient capacity for vital services, which means that illness and disease go untreated, people face long waits for pretty much everything,

and levels of frustration, stress, irritation, and anger remain high. In the prison context, this is a recipe for disorder, volatility, and violence (Kupers 2008, p. 130). As noted prison psychologist Craig Haney has observed, prison crowding "heighten[s] the level of cognitive strain that prisoners experience . . . raises collective frustration levels inside prisons by generally decreasing the resources available to the prisoners confined in them," and makes "prison a more painful, harmful, and even more dangerous place" (Haney 2006b, pp. 272–73; see also Dolovich 2017b).

In short, right now, hundreds of thousands of people incarcerated in the United States are being denied the basic requisites for a minimally decent and trauma-free existence, not to mention meaningful opportunities for personal growth and development (Dolovich 2017b). Although institutions vary, for the most part, conditions in the nation's worst facilities differ from those in other prisons only in degree and not in kind (Haney 2011, 2006b).

III. LEGISLATIVE FAILURE IN A TOUGH-ON-CRIME ERA

In the mid-twentieth century, American penality seemed to have coalesced—at least rhetorically—around a commitment to the rehabilitative ideal (Dolovich 2012). Some criminologists were even predicting that punishment by incarceration would become progressively rarer (Rothman 1971). Instead, by the 1990s, most prisons in the country were overcrowded, and warehousing in demoralizing, dehumanizing, and dangerous conditions had become the standard penal strategy. Such a regime is plainly at odds with the state's carceral burden, indicating an across-the-board regulatory failure.

Consider first the legislative branch. As discussed, legislatures have several levers available for the exercise of authority over COs. However, beyond intermittent moments of engagement, legislators around the country have largely refrained from involvement in the prisons, instead leaving it to corrections administrators to run things as they see fit (Branham 2010). This hands-off attitude is to some extent inevitable in the modern administrative state, which is too complex, multifaceted, and reliant on expertise for legislators to be deeply involved in the details of any one area. But in the latter decades of the twentieth century, the political calculus that harsh punishment was a winning issue with voters (coded White and middle-class) left lawmakers unwilling to hold prison officials to account even for gross failures of care (Lehrer 2001).

Politicians' desire to seem "tough on crime" reached a peak in the 1980s and 1990s, with legislators around the country competing to ratchet up criminal penalties (Campbell & Schoenfeld 2013, Guetzkow & Western 2007). Elected prosecutors also increasingly pushed for more convictions and longer sentences (Pfaff 2017). The national prisoner population began to climb, going from approximately 740,000 in 1985 to 2.3 million in 2008 (Kaeble & Cowhig 2018).[2] This criminal punishment arms race undercut the ability of DOCs to ensure adequate conditions of confinement. Corrections administrators sought to expand prison capacity to meet the growing need for beds, but the rate of the increase quickly outpaced new construction. As the number of incarcerated people continued to climb, lawmakers did little or nothing to mitigate the negative effects of this growth. Their inaction may have shielded legislators politically, guarding against charges of being "soft on crime." But the resulting overcrowding helped generate some of the worst pathologies of present-day American prisons: gang control (Skarbek 2014), the overuse of solitary confinement (Schlanger 2013b), the culture of warehousing, the official tolerance of violence, decayed and decrepit physical plants, use of force as a first resort, and the normalization of

[2]There has been considerable debate over the main driver of this unprecedented growth (Bellin 2018, Gottschalk 2016, Kim 2016, Mauer 2001, Pfaff 2017, Reitz 2006), but there is no question that legislators affirmatively fueled the explosion in the prisoner population by passing laws that drove up available penalties for felony offenses.

substandard medical and mental health care (Dolovich 2009a, 2017b). As these problems proliferated, lawmakers largely remained silent, choosing to leave prison officials to their own devices. This inaction extended even to the legislative committees explicitly tasked with prison oversight (Fathi 2010, pp. 1460–61). Keramet Reiter's (2016) revealing work on the building of California's dedicated solitary confinement facility, Pelican Bay, describes a process through which hundreds of millions of taxpayer dollars were spent on a prison intended to subject more than 2,000 residents to extreme deprivation and hardship, yet which received virtually no scrutiny by the relevant legislative bodies that ought to have been monitoring such a project from start to finish.

That the people filling the nation's prisons were overwhelmingly poor and disproportionally (though not exclusively) people of color reflects the race and class politics that came to drive penal policy during this period (Alexander 2012, Beckett 1997, Forman 2017, Gottschalk 2016). The broad political disenfranchisement, both de jure and de facto, of the individuals and communities most negatively affected by these policies (Colgan 2019, Uggen et al. 2020) meant that lawmakers saw little political benefit to advocating for more humane conditions (Barkow & O'Neill 2006, Lehrer 2001). This assessment, coupled with the fear of mainstream political blowback should legislators try to improve prisoners' lives, did much to drive American crime policy in the late twentieth century (Enns 2016).

If political institutions are to take hold and endure, they generally require a compelling narrative anchor, a set of ideological conventions that can normalize potentially contentious practices, making them seem natural and reasonable (Douglas 1986). The harsh policies of the tough-on-crime era, reinforced by a commitment to what criminologist Francis Cullen (1995, p. 341) has labeled "penal harm," found such a narrative anchor in a vision that dehumanized and demonized people with criminal convictions, especially those who wound up in prison. On this framing, members of this group are viewed not as full citizens who, having acted wrongfully, should pay the prescribed price, but as "fundamentally different from normal people," "a breed apart" (Kauffman 1988, pp. 119, 178), and "a different species of threatening, violent individuals for whom we can have no sympathy and for whom there is no effective help" (Garland 2001, p. 136). Summarizing decades of research, social psychologist Albert Bandura (1999, p. 200) observed that once people have been effectively dehumanized, "they are no longer viewed as persons with feelings, hopes and concerns but as subhuman objects" who as such are "easier to brutalize." Consistent with this finding, the normative reframing of convicted offenders as congenitally dangerous, "a different breed" (Yochelson & Samenow 1977, p. 31), helped to remove from legislators' political equation the need to temper the impulse to inflict penal harm with an awareness of the human toll of increasingly harsh penal policies.

Consistent with this normative framework, the late-twentieth-century United States saw a national legislative embrace of highly punitive policies. During this period, legislatures across the country not only failed to take steps to ease crowding but in many cases passed laws designed to exacerbate the hardships of prison life. For example, in 1994, Congress excluded prisoners from eligibility for Pell Grants, until then a universally available benefit (Eisenberg 2020). This change forced the closure of college-level classes in prisons across the country, derailing a program known to dramatically reduce recidivism (Eisenberg 2020, Meiners 2009) and stripping 23,000 people of a meaningful way to do their time (Field 2018).[3]

In a similar vein, several states during this period passed so-called "no-frills prisons" statutes, which banned everything from weightlifting equipment to musical instruments and movie nights

[3]In December 2020, restoration of Pell Grants for people in prison was inserted into the omnibus COVID relief bill passed by Congress and signed into law by the president (Green 2020).

(Finn 1996, Zimmer 1995)—i.e., many of the pastimes and small pleasures that help people living under conditions of chronic deprivation make their days more bearable. Also during this period, Congress passed the Prison Litigation Reform Act (PLRA), which established onerous limits on constitutional challenges to prison conditions in the federal courts. Virtually every state subsequently passed its own PLRA, likewise limiting access to state courts for incarcerated plaintiffs (Brill 2008, Schlanger 2013a). In this way, state and federal legislators signaled not only their own unwillingness to make sure that prison officials meet the basic needs of people in custody but also their readiness to undermine the ability of the judicial branch to hold COs to account for unconstitutional failures of care.

The early twenty-first century seemed to signal a retreat from penal harm and hostility toward the incarcerated. In 2000, Congress passed the Religious Land Use and Institutionalized Persons Act (RLUIPA), which established heightened judicial protections for the free exercise of religion for people in state custody (42 USC § 2000cc). Three years later, a coalition of political progressives and evangelical Christians helped Congress pass the Prison Rape Elimination Act (PREA) (Nolan & Telford 2006, Weisberg & Mills 2003), which among other things directed the U.S. Attorney General to promulgate regulations "to prevent, detect, and respond" to the sexual assault of people held in American carceral facilities (§§ 34 U.S.C. 30301–30309). In the wake of the 2008 financial crash, state legislators scrambling to find ways to reduce expenditures began actively to seek ways to roll back the tough-on-crime policies that had brought about mass incarceration (Garland 2001, Schrantz et al. 2018). Around the same period, there emerged a growing political awakening to both the scale and the racialized character of the American penal system, a shift at once driven by and reflected in the runaway success of Michelle Alexander's (2012) groundbreaking book, *The New Jim Crow*, and the popularity of Ava DuVernay's (2016) Netflix documentary *13th*. The resulting combination of financial pressures and public demand for a reduction in the state's carceral footprint prompted something of a retreat from the tough-on-crime ethos of the 1990s and the emergence of a bipartisan consensus regarding the need for reform. This consensus, with a call by some conservatives for a new "smart-on-crime" approach, helped pass the First Step Act (FSA) of 2018, which provided welcome but modest benefits for federal prisoners. One provision in the FSA proved extremely consequential during COVID: expanding the role of the federal courts in reviewing compassionate release petitions brought by federal prisoners. This change ultimately facilitated the release of more than 1,700 people from BOP custody over the first ten months of the pandemic (Dolovich 2020b).

With this new reformist mindset came legislative attention to some of the worst conditions people face in custody, including the profligate use of extended solitary confinement (CRS 2019) and the practice of shackling pregnant women during childbirth (Ocen 2012). Yet this seeming groundswell has brought only modest legislative efforts to remedy the noxious conditions that continue to define the daily lives of hundreds of thousands of incarcerated people nationwide. The resounding silence with which legislators across the country greeted the disproportionate threat COVID posed to people locked inside crowded, poorly ventilated carceral facilities is wholly in keeping with this notable quiescence, with laws in New Jersey and Delaware expanding good-time credit for those in state prison during the pandemic representing rare exceptions (Dolovich 2020b).

IV. THE FAILURE OF EXECUTIVE SELF-REGULATION

Legislative inaction has given executive branch officials broad scope to run the prisons as they see fit. Despite considerable modernization of prison administration over the past five decades,

the executive branch continues to show itself persistently incapable of ensuring even minimally decent prison conditions.

As recently as the 1970s, prisons around the country existed as "a world apart," "one of the last bastions of the public [sector] to be exempt from standard civil service requirements [and] modern bureaucratic structure" (Feeley & Swearingen 2004, p. 443). "There were no written rules [or] regulations," and administrators "operated by intuition" (Jacobs 1980, p. 458). In the northern penitentiaries, wardens had virtually absolute control over life inside (Feeley & Rubin 1999). In the South, plantation prisons had long operated as "outmoded feudal-like institutions" and sites of "cruelty [and] torture" (Feeley & Swearingen 2004, pp. 437–38). Prisoners were largely at the mercy of staff who were free from outside scrutiny and sought to keep it that way (Mason 2008).

Eventually, spurred in part by the emergent willingness of some federal courts in the late 1960s and early 1970s to scrutinize prison conditions and issue orders mandating comprehensive reforms, this premodern agency structure finally began to give way (Feeley & Swearingen 2004, pp. 457–65). The American Correctional Association (ACA) became a national leader in the process of professionalization and bureaucratization, developing and widely promoting an "accrediting process based upon rigorous standards covering almost all aspects of prison management" (Jacobs 1980, p. 463).[4] Today, corrections agencies operate in "the mainstream of public administration" (Feeley & Swearingen 2004, p. 455), and prison officials tout their internal regulatory structure as evidence of well-run departments (Reynolds 2004).

These shifts generated significant improvement in prison conditions, moving prisons decisively from feudalism into modernity. But as the past few decades have conclusively shown, carefully crafted policies and regulations are not sufficient to ensure safe and well-run facilities. For one thing, prison policy manuals are the size of phone books. COs, being human, cannot possibly learn, much less preserve for instant recall, everything they contain. In practice, especially when they need to act fast, COs will be hard-pressed to remember official directives (Feeley & Swearingen 2004). And even if staff could fully implement established policy, they would in many cases remain reliant on their own judgment. Prisons are complex, messy, charged institutions housing people who—also being human—are subject to the full range of human reactions one might expect to see in those who are locked up, and thus are liable to act in unpredictable ways. Staff therefore require considerable on-the-job discretion.[5]

With such discretion comes outsized power, and this is especially so in prisons, where COs control virtually every aspect of prisoners' lives and where so much that happens will never come to light. If this power is not to be abused, at least one of two conditions must be met: Either COs must feel bound by an ethos of public service to exercise their authority consistent with the commitments and values of a constitutional democracy, or they must expect that any grievous failure of care will expose them to censure—whether externally (from courts, legislatures, or in the court of public opinion) or via intra-agency accountability measures. In practice, neither condition has had sufficient purchase to generate the desired effect. As to possible external censure, prisons are largely free from effective regulatory pressure from outside actors, whether legislators or courts.

[4]Although at the time of its emergence, the ACA accreditation process heralded substantial improvements in prison conditions compared to what came before, today there are many reasons to think this process of limited efficacy (Dolovich 2005).

[5]It is for this same reason that contract language laying out the responsibilities of private prison providers will necessarily be incomplete (Dolovich 2005, Hart et al. 1997).

Most prison regulations, whether issued by state DOCs or the BOP, are in practice largely exempt from the requirements of the applicable Administrative Procedure Act (APA), including the notice-and-comment rule-making procedures in place to ensure public input (Shay 2009). And prison administrators' legal authority to limit access to their facilities keeps journalists—and, by extension, the public at large—from getting the full picture as to what goes on inside, undercutting the power of the media to serve as an effective watchdog. (Although details leak out, the usual messengers—typically family members and loved ones of people in custody—tend to have little of the social or political capital necessary to elevate prisoners' suffering to public notice or concern.)

Much therefore rides on prison officers being independently motivated to ensure the safety and well-being of the residents they oversee. And although there is inevitably some variation across institutions, in general, the culture of American prisons is not conducive to promoting an ethos of service and solicitude on the part of staff toward those in custody. Instead, from their first days on the job, prison officials are primed to adopt an attitude of hostility and contempt toward the people in their facilities (Conover 2001). This normative disposition is of a piece with the animus that society in general feels toward those with criminal convictions. People sentenced to prison arrive already labeled as wrongdoers deserving of punishment. The visceral hatred driving decades of tough-on-crime policy does not dissipate once people bound for prison leave society behind but instead migrates into the prisons themselves, where the dominant narrative endorses and even intensifies the malevolence of the broader public. Several dynamics internal to the structure of prison life help drive this intensification. For one thing, COs tend to be greatly outnumbered, an experience that can reinforce "in-group favoritism and out-group hostility," especially "in small groups that possess a high degree of power" (Roithmayr 2016, p. 419). In addition, from the start, COs hear from their peers that prisoners cannot be trusted. The resulting suspicion, combined with the volatility of the prison environment, can leave officers in perpetual fear—not a state of mind likely to promote other-oriented concern and respect (Kauffmann 1988). Greatly compounding this effect is the marked overrepresentation in the prisoner population of people who are Black or Latinx. Implicit bias, sometimes supplemented by overt racism (Armstrong 2015, Assoc. Press 2009, Hawkins 2017), operates to reinforce the unwillingness or inability of COs to regard people in custody as fellow human beings whose safety and well-being matter and who must be protected.

The contempt and even loathing that COs can come to exhibit toward the people over whom they wield power are most obviously manifested in the labels some officers use to refer to people in custody: "bodies," "animals," "liars," "maggots," "lousy piece[s] of shit," and even "solid waste" (Calavita & Jenness 2015, pp. 104, 148; Crawley 2004, p. 99; Hartman 2009, p. 13; Irwin 2013, p. 76; Kauffmann 1988, pp. 162, 230). That COs would not hesitate to use such language—in some cases, in the presence of researchers—to describe the people they have been charged to protect indicates both the extent of prison residents' dehumanization in the eyes of staff, and the "unquestioned quality of th[e] institutional truism" (Calavita & Jenness 2015, p. 105) that prisoners are "the lowest of the low, the scum of the earth" (Conover 2001, p. 33).

The point here is not to blame the individuals who work as COs. The job is a hard one, and institutions can exercise a profound influence on both thoughts and actions. Prisons are especially powerful in this respect. And even people of goodwill may at times overstep and abuse their authority when placed in positions of power over vulnerable populations, especially when they themselves are afraid (Bandura 1999, Roithmayr 2016, Zimbardo 2007). There will, moreover, always be officers who try to avoid joining in any active mistreatment. But for the most part, any dissenters will be "swim[ming] against the tide" (Crawley 2004, pp. 90–91) and may even find themselves ostracized by fellow officers. This can be a dangerous position for COs. The hazing that sometimes follows perceived shows of disloyalty can be brutal (Pishko 2015). And with COs generally outnumbered by residents, each CO depends on fellow officers for protection if

they are ever in trouble. COs perceived as disloyal may find themselves with no backup when the need arises. Rather than run the risk, many understandably choose to conform (Crawley 2004, Kauffman 1988).

In this environment, the need for effective intra-agency accountability mechanisms is especially acute. At least on paper, the modern prison features many such mechanisms, designed to police the performance of staff and guard against operational failures. Supervisors are charged with overseeing the conduct of their subordinates and with intervening when circumstances warrant. Any untoward incidents—uses of force, medical and mental health issues, injuries, misconduct, etc.—must be documented and investigated. All facilities have internal procedures through which residents can file grievances. Prisons also typically have some system of internal auditing, whether within the facility, within the DOC more broadly, or via an independent arm of the executive branch such as an Inspector General (Dolovich 2005).

In practice, however, the effectiveness of all these safeguards is impeded by the same in-group loyalty and out-group hostility that make them necessary in the first place. Most supervisors come up through the ranks, socialized into the very us-versus-them narrative that pits uniformed officers of any rank against those in custody (Conover 2001, Kauffman 1988). In any dispute between COs and residents, supervisory officials are likely to side with staff—a partiality that undercuts the perceived legitimacy of disciplinary hearings and the handling of grievances (*Cleavinger v. Saxner* 1985). So strongly normative is this in-group fealty that supervisors often seem not even to recognize the way it potentially compromises their professional obligations. One study of the internal grievance process in the California prisons, conducted by Kitty Calavita & Valerie Jenness (2015), reported repeated instances of senior officials tasked with reviewing prisoner grievances (a quasi-adjudicative function calling for impartiality in judgment) freely admitting that loyalty to line staff virtually always leads them to side with the officers whatever the circumstances.

Similar dynamics can thwart even those intra-agency accountability mechanisms expressly designed to provide a neutral perspective. Those officials tapped as internal auditors tend largely, if not exclusively, to have prior experience in prison administration. They thus arrive already acculturated to the dominant narrative concerning those in custody and already prone to sympathy with COs. Among those auditors who prioritize good working relationships with facility administrators, these tendencies only deepen over time and thus leave observers—whose effectiveness rests on their ability to retain impartiality and independence of mind—prone to capture (Dolovich 2005, Van Zyl Smit 2010). Those who resist the pull of being welcomed as an insider and instead strive to retain critical distance from any us-versus-them thinking may find themselves running up against the "gray wall of silence," the CO analog to the "blue wall of silence" familiar from law enforcement more generally (Conover 2001, pp. 103–4). Some intra-agency monitors manage to walk this tightrope and successfully implement reforms. But in most such cases, the institutional changes thereby achieved, though laudable and necessary, are generally minimal.

There are, in addition, external oversight bodies of various forms—commissions, citizens' advisory boards, ombudspersons, advisory groups with varying levels of formal access, etc.—many of which work hard to push corrections agencies to make tangible change (Deitch 2010, 2020). But without meaningful governmental commitment to the humanizing project, these actors remain limited in what they can achieve.

A new generation of state corrections commissioners has come to recognize and even to welcome the need for reform (Deitch 2012, Kelso 2014). Yet much like progressive prosecutors and reform-minded chiefs of police, those prison administrators seeking to humanize their facilities will often confront a rank and file strongly resistant to change. This effect is paradoxical because line officers can pay a high personal price for the toxic adversarialism of the prison environment. COs are frequent targets of violence (Ferdik & Smith 2017, Konda et al. 2012). They have among

the highest levels of depression, anxiety, substance abuse, and suicide of any profession (Brower 2013), and their families suffer an elevated risk of violence in the home (Valentine et al. 2012). It is a tragic irony that COs' unions, which in many states enjoy considerable political power (Page 2011), often take positions staunchly opposed to meaningful reform, even in cases where change could considerably improve the working conditions of their members and thus their quality of life (Brower 2013, Valentine et al. 2012). This dynamic largely prevailed even during COVID, although COs, like the incarcerated themselves, spend their days in crowded, poorly ventilated facilities that invite rapid viral spread (Dolovich 2020b) and despite the fact that, over the first eight months of the pandemic, staff were 3.2 times more likely to test positive for COVID than members of the general public (Ward et al. 2021).

V. JUDICIAL DEFERENCE AND THE RETREAT FROM CONSTITUTIONAL ENFORCEMENT

Numerous provisions of the Bill of Rights apply to people in prison. Of these, it is the Eighth Amendment prohibition on cruel and unusual punishment—which in the prison context covers medical neglect, excessive force, the deprivation of basic needs, and the failure to protect the incarcerated from physical or sexual assault—that bears most consequentially on the health and safety of people inside. But incarcerated plaintiffs who wish to bring Eighth Amendment claims face substantial hurdles to getting into court and to prevailing on the merits once there—hurdles in many cases deliberately imposed by a Supreme Court that has systematically sought to limit judicial intervention on behalf of prisoners. In consequence, for the most part, court-ordered relief is elusive in all but the most egregious cases.

The willingness of federal courts to hear prisoners' constitutional claims at all is a relatively recent development. After the Civil War and through much of the twentieth century, the federal judiciary took a hands-off posture toward constitutional claims brought by people living inside carceral institutions. However brutal prison conditions were during this period—and they were brutal indeed (Mason 2008, Myers 1987, Perkinson 2010, *Pugh v. Locke* 1976)[6]—the federal courts almost uniformly subscribed to the view that "it is not the function of the courts to superintend the treatment and discipline of prisoners" (*U.S. ex rel. Atterbury v. Ragen* 1956, p. 955). This posture left the incarcerated with no forum in which to seek recourse for constitutional violations.

This situation began to change in the late 1960s, when several federal judges, primarily in the South, began to look behind the walls. For a brief but consequential period, these judges subjected to scrutiny virtually every aspect of prison operations, uniformly condemned the facilities they found to be sites of unspeakable horror, and ordered comprehensive institutional changes

[6]In his concurrence in *Rhodes v. Chapman* (1981, p. 355), Justice Brennan summarized as follows conditions in the Alabama prisons before the federal courts finally got involved:

> The institutions were "horrendously overcrowded," to the point where some inmates were forced to sleep on mattresses spread on floors in hallways and next to urinals. The physical facilities were "dilapidat[ed]" and "filthy," the cells infested with roaches, flies, mosquitoes, and other vermin. Sanitation facilities were limited and in ill repair, emitting an "overpowering odor"; in one instance, over 200 men were forced to share one toilet. Inmates were not provided with toothpaste, toothbrush, shampoo, shaving cream, razors, combs, or other such necessities. Food was "unappetizing and unwholesome," poorly prepared, and often infested with insects, and served without reasonable utensils. There were no meaningful vocational, educational, recreational, or work programs. . . . [There was also] "rampant violence" within the prison. Weaker inmates were "repeatedly victimized" by the stronger; robbery, rape, extortion, theft, and assault were "everyday occurrences among the general inmate population."

Nor was Alabama an outlier. As Justice Brennan noted, "[s]imilar tales of horror are recounted in dozens of other cases" (*Rhodes v. Chapman* 1981, p. 356).

(Feeley & Rubin 1999, pp. 30–42). The ensuing raft of litigation—in Alabama, Arkansas, Georgia, Louisiana, Mississippi, Texas, and elsewhere—spurred the bureaucratization of prison administration and the professionalization of staff (Feeley & Swearingen 2004, pp. 442–50, Jacobs 1980, pp. 458, 462–63). This judicial involvement ushered American corrections into the modern era.

The process also left entire prison systems, largely but not exclusively in the South, under comprehensive court orders to transform every aspect of their operations (Feeley & Rubin 1999, Dolovich 2020a). In several cases, state DOCs remained under federal court supervision for decades (Feeley & Rubin 1999, pp. 51–95; Perkinson 2010). Through the 1970s and 1980s, federal courts established and enforced minimum constitutional standards for a host of conditions, including sanitation, ventilation, heating and cooling, nutrition, access to exercise, personal safety and security, visitation, sleeping accommodations, lighting, clean water, excessive noise, accident prevention, and fire safety as well as medical care, mental health care, and dental care (Boston & Manville 2010, Columbia Hum. Rights Law Rev. 2017). In many facilities, overall conditions were so grossly inadequate and so plainly a function of crowding that judges saw no prospect of remediation absent a population reduction. In those cases, courts readily imposed population caps. At the close of the 1980s, thirty-seven states were under some form of court order related to crowding (Marquart et al. 1994), with fourteen operating under a court-ordered population cap (Keating 1992).

In this transitional period, the Supreme Court followed the lead of the first-mover federal district courts. In 1976, the Court heard its first Eighth Amendment prison conditions claim, holding that "deliberate indifference to serious medical needs of prisoners" constitutes the "cruel and unusual punishment" the Eighth Amendment prohibits (*Estelle v. Gamble* 1976, p. 104). A year later, the Court upheld an order out of Arkansas limiting how long a person could be placed in "punitive isolation" (*Hutto v. Finney* 1978). In Arkansas at the time, this meant being crammed into 8×10 foot cells with as many as 10 other people, no furniture, a single toilet, filthy mattresses, and a daily diet of "grue," a "substance created by mashing meat, potatoes, oleo, syrup, vegetables, eggs, and seasoning into a paste and baking the mixture in a pan" (*Hutto v. Finney* 1978, pp. 682–83).

The mid-1970s also saw incarcerated plaintiffs prevailing in the Supreme Court on claims of First Amendment expression (*Procunier v. Martinez* 1974), Fourteenth Amendment procedural due process (*Wolff v. McDonnell* 1974), and Fourteenth Amendment due process right of access to the courts (*Johnson v. Avery* 1969, *Procunier v. Martinez* 1974, *Bounds v. Smith* 1977). But this period of expanding constitutional protections, known today as the "reform era," was short-lived. Even while the Court was announcing the end of "hands off," it was qualifying and constricting the scope of judicial enforcement, increasing the doctrinal burden on incarcerated plaintiffs, and repeatedly emphasizing the deference courts owed prison officials (*Bell v. Wolfish* 1979, *Block v. Rutherford* 1984, *Jones v. N.C. Prisoners' Labor Union, Inc.* 1977, *Pell v. Procunier* 1974). Over the ensuing decades, the Court systematically deployed the imperative of judicial deference as a blanket justification for siding against the incarcerated, crafting hard-to-satisfy constitutional standards and modifying standard procedural rules for the prison context to make them more defendant-friendly (Dolovich 2012). As the lower federal courts reoriented to the new regime, they came independently to implement its priorities, identifying new ways to rule for defendant prison officials even when there were pathways to find for the plaintiffs (*Jones v. Bock* 2007). In this way, judicial deference in prison cases came to extend beyond the rules themselves, emerging as a "culture or ethos to which many lower courts aim to conform their conduct" (Weidman 2004, p. 1523).

The Court's retreat from the reform-era promise of meaningful constitutional protections accelerated most markedly during the years 1986–1996. During this period, in its prison law cases, the Court repeatedly had before it defensible doctrinal approaches that would have strengthened prisoners' constitutional rights and instead opted for less protective rules. For example, in *Whitley*

v. Albers (1986), the Court established the standard for Eighth Amendment excessive force claims. Rejecting the "deliberate indifference" standard it had previously applied to Eighth Amendment medical neglect claims, the Court held that force against prisoners is unconstitutionally excessive only when used "maliciously and sadistically for the very purpose of causing harm" (*Whitley v. Albers* 1986, pp. 320–21). After Whitley, no amount of force, however extreme, may be found unconstitutionally excessive so long as defendants can show they believed their actions warranted under the circumstances. In *Turner v. Safley* (1987), the Court set the standard of review for policies or practices that impede the exercise of prisoners' First or Fourteenth Amendment rights. Not content with the standard rational basis test, on which courts may still independently assess the validity of the state's justifications, *Turner* held that plaintiffs bear the burden of showing that "the logical connection between the regulation and the asserted goal"—typically some variant of institutional security—"is so remote as to render the policy arbitrary or irrational" (*Turner v. Safley* 1987, pp. 89–90). *Turner*'s extreme permissiveness has empowered prison administrators to "saddle prisoners' expressive rights with a host of arbitrary restrictions" without fear of judicial censure (Shapiro 2016, p. 972). And in *Lewis v. Casey* (1996), although acknowledging that prior cases established a due process right of "meaningful" access to the courts, Justice Scalia dismissed the idea that people in prison have a constitutional right to "litigate effectively" (*Lewis v. Casey* 1996, p. 354). Instead, the Court held that prisoners are entitled to "adequate law libraries or adequate assistance from persons trained in the law" only to the extent necessary to "bring to court a grievance that the [plaintiff] wished to present" (*Lewis v. Casey* 1996, pp. 354–56). Following this decision, which also held that plaintiffs must show that "shortcomings in the library or legal assistance program" cost them "an identifiable legal claim," many prisons simply stopped maintaining their law libraries (Seamone 2006) and right-of-access claims disappeared almost entirely from the federal court docket.

Prison administrators have not been the only beneficiaries of the judiciary's regulatory reticence. At the height of the tough-on-crime era, the Court also showed itself unwilling to exercise its constitutional authority to check legislators in their persistent ratcheting up of prison sentences. In *Harmelin v. Michigan* (1991), emphasizing that "reviewing courts should grant substantial deference" to legislative authority to "determin[e] the types and limits of punishments for crimes," the Court upheld as constitutional a sentence of life in prison without the possibility of parole for a first offender convicted of possessing 672 grams of cocaine (*Harmelin v. Michigan* 1991, p. 999). After *Harmelin*, successful Eighth Amendment claims of gross disproportionality in noncapital sentencing became vanishingly rare, and the federal courts were effectively removed from regulating the constitutionality of increasingly extreme carceral penalties (Dolovich 2017a, Taylor 2012, DeClue 2012).

A host of other cases from 1974 onward followed a similar path—*Pell v. Procunier* (1974), *Jones v. North Carolina Prisoners' Union* (1977), *Meachum v. Fano* (1976), *Houchins v. KQED* (1978), *Wilson v. Seiter* (1991), *Hudson v. McMillian* (1992), *Farmer v. Brennan* (1994), *Ewing v. California* (2003), *Beard v. Banks* (2006), and *Woodford v. Ngo* (2006), among others. The collective effect was to dramatically undercut the potential for meaningful judicial regulation and oversight of prisons and prison conditions. The deferential posture uniting these cases appeared to reflect the view that, given the dangers of prison life, prison officials needed a free hand in the daily running of their facilities and in crafting institutional policy. As the doctrine became progressively more defendant-friendly, federal courts at all levels learned to approach defendants' arguments with sympathy and plaintiffs' arguments with skepticism and even hostility. Federal judges formally retain the power to scrutinize and critically assess prison officials' claims, and many do so. In such cases, plaintiffs sometimes win—especially when the facts are extreme and when plaintiffs are represented by experienced counsel who can navigate a complex and trap-laden doctrinal field (*Canadian Coalition*

Against the Death Penalty v. Ryan 2003, *Clement v. California Department of Corrections* 2004, *Gray v. Hardy* 2016, *Prison Legal News v. Cook* 2001). But courts contemplating finding for plaintiffs must push against the weight of the case law, which exerts a gravitational pull against rigorous protection of people in custody. This effect can be clearly seen in the cases challenging extended solitary confinement. People held in solitary confinement are locked in small concrete cells for twenty-one to twenty-four hours a day, with little or no human contact and minimal sensory stimulation, leaving their cells only when cuffed, tethered, and under escort and then only for "brief shower[s] or solitary exercise" (Rhodes 2004, p. 23). Many individuals have been subjected to these conditions for years or even decades (*Ashker v. Newsom* 2019, *Peoples v. Fischer* 2012, Woodfox 2019). The few federal courts to have entertained Eighth Amendment challenges to solitary confinement "express shock" at what they saw, "open criticism" of the practice, and sympathy for those subjected to it (Weidman 2004, pp. 1533–34; *Wilkinson v. Austin* 2005, pp. 214–15). Yet to date, no federal court has found even long-term solitary confinement per se unconstitutional. Instead, as Mikel-Meredith Weidman (2004) has shown, courts have strained to find a way to grant some limited relief while avoiding ruling on the ultimate constitutional question.

In the mid-1990s, with passage of the PLRA, Congress put its weight behind the Rehnquist Court's efforts to reduce judicial oversight. The PLRA placed "draconian restrictions" on federal court jurisdiction over prison conditions claims (Schlanger 2015, p. 520). Among other things, it imposed a broad exhaustion requirement, restricted attorneys' fees, burdened the ability of people in custody to proceed in forma pauperis, and limited the scope of recovery for "mental or emotional injury" (18 USC § 1915, 42 USC § 1997e). It also considerably constrained the judicial power to order prospective remedies, including population caps (18 USC § 3626 (a)). (This last provision was Congress's response to the proliferation of court-imposed population reduction orders in the 1970s and 1980s, a trend that had drawn much conservative ire.)

The PLRA did not foreclose prisoner suits altogether. As Margo Schlanger (2006; 2015, p. 521) has shown, federal district court judges "continue to enter and enforce remedies against unconstitutional conditions"—largely thanks to the tenacity and ingenuity of the prisoners' rights bar. The legislation did, however, greatly reduce the scope of injunctive relief in successful cases. It also generated a significant drop in the number of plaintiffs managing to get into federal court, an effect in large part traceable to the unnecessarily narrow reading the Court gave to the PLRA's exhaustion requirement. In *Woodford v. Ngo* (2006), the Court read this provision to require "proper exhaustion" (*Woodford v. Ngo* 2006, p. 88); as a result, those who fail to perfectly satisfy every procedural requirement, however onerous or complex, of their facility's grievance process forfeit the right to file suit in federal court. After this decision, several state DOCs increased the procedural complexity of their internal grievance processes (Borchardt 2012), taking the opportunity *Woodford* offered to reduce COs' potential legal exposure (Schlanger & Shay 2008).

Woodford notwithstanding, after 2000, the Court seemed to ease up somewhat on its singular focus on limiting prison officials' constitutional liability (*Brown v. Plata* 2011, *Johnson v. California* 2005, *Kingsley v. Hendrickson* 2015, *Ross v. Blake* 2016), a shift driven in part by Justice Kennedy's apparent awakening to the troubling situation in American prisons (Kennedy 2003). Here, *Brown v. Plata* (2011) was particularly consequential. In a 2011 5–4 decision penned by Justice Kennedy, the Court upheld a three-judge panel order effectively requiring California prisons to rehouse or release roughly 46,000 people.

Still, over the past four decades, the overwhelming force of the Supreme Court's prison law cases has been directed to minimizing judicial involvement in the prisons. These cases represent a retreat from (and indeed, scarcely acknowledge) the judiciary's assigned role in protecting unpopular minorities from the depredations of majority prejudice. If anything, the opinions of several Justices bear traces of the same normative hostility and contempt toward people in custody that

have prompted regulatory inaction by the political branches [*Brown v. Plata* 2011, pp. 564–66 (Alito); *Brown v. Plata* 2011, pp. 1952–53 (Scalia); *Bucklew v. Precythe* 2019 (Gorsuch); *Overton v. Bazzetta* 2003, pp. 2173–74 (Thomas); *Whitley v. Albers* 1986, pp. 320–22 (O'Connor); *Woodford v. Ngo* 2006, p. 97 (Alito); Dolovich 2011; Mayeux 2018; N.Y. Times Ed. 1992]. Rather than standing "between the States and the people, as guardians of the people's federal rights [against] unconstitutional action" (*Patsy v. Board of Regents of State of Fla.* 1982, p. 503), the Supreme Court—and by extension, the federal judiciary as a whole—has instead shown greater solicitude for the needs and interests of prison officials, although it is the conduct of these very actors that the federal courts are charged to scrutinize (Dolovich 2017a, p. 112). The almost uniform refusal of the federal judiciary to respond to urgent appeals for broad constitutional relief during the pandemic despite the demonstrable elevated risk posed to the incarcerated by COVID (Saloner et al. 2020) powerfully illustrates just how little meaningful constitutional protection for people in custody the federal courts are prepared to provide (Dolovich 2020b, *Money v. Pritzker* 2020, *Swain v. Junior* 2020, *Valentine v. Collier* 2020, *Wilson v. Williams* 2020).

VI. THE NORMATIVE FOUNDATION OF REGULATORY FAILURE

The state's carceral burden is the price society pays for imprisonment. The option of removing people from the shared public space and holding them in locked facilities remains constitutionally available only on condition that the state assumes ongoing responsibility for their basic needs (Dolovich 2009b). The stakes of this arrangement—society's "carceral bargain" (Dolovich 2009b, p. 892)—are highest for the incarcerated: When the state fails to fulfill its duty of care, people in custody suffer severe physical and psychological harm and may even die premature and preventable deaths (*Estelle v. Gamble* 1976, *Farmer v. Brennan* 1994). Yet across all branches of government, when regulatory authority is exercised, it is constituencies other than the prisoners themselves—whether voters, society at large, or the prison officials to whom the state's constitutional duty of care has been delegated—whose interests are prioritized.

Any adequate explanations for this state of affairs must involve reckoning with the moral value—or, more aptly, the moral disvalue—American society collectively ascribes to the lives and well-being of people in prison. Arguments grounded in the moral underpinnings of policy failure can never be categorically proven true. Still, enough can be said with sufficient certainty to indicate a foundational connection between the callous indifference government institutions systematically display toward the incarcerated and the regulatory failure across all branches of government that has largely left people in custody without the state's protection in any meaningful form.

Space does not permit a full excavation of the origins of this callous indifference, fueled—as this review has noted at multiple points—by a normative hostility and even contempt for those who wind up in prison. But it seems clear that to be a prisoner in the United States today is to occupy a morally degraded state (Dolovich 2011, Haney 2010, Lynch 2008, Madriz 1997), as someone "it is socially and politically acceptable to hate and deride" (Steiker 1999, p. 1797). The politics of the tough-on-crime era were enabled by a sense that people with criminal convictions, especially prisoners, are "a breed apart" (Kauffman 1988, p. 119). In the prisons themselves, innumerable dynamics reinforce the dehumanization and demonization of people in custody, which in turn shape the way prison officials treat the incarcerated. In the federal judiciary, decades of judicial deference to prison officials have left courts prone to regard defendants' claims with sympathy and plaintiffs' claims with skepticism and even hostility. There is, in short, no institution of democratic government in which people in custody are regarded or treated as full citizens and fellow human beings entitled to respect and to protection from needless harm.

As is by now well understood, there is a strong racial dimension to the readiness of American political institutions to regard people in custody as "subhuman objects" (Bandura 1999, p. 200). The overrepresentation of people of color in the American prison population, Black people in particular, is well documented (Alexander 2012, Mauer 2006, Tonry 1995). Of course, prisons also hold many White people: Marie Gottschalk (2016, pp. 120–21) points out that the incarceration rate for White Americans, although considerably lower than that for Black Americans, is still "high when compared with the overall incarceration rates of other industrialized democracies," and "some predominantly white states operate some of the most dehumanizing and dangerous prisons in the country." And as Nancy Isenberg (2016) documents in *White Trash*: *The 400-Year Untold History of Class in America*, the nation's poorest whites have throughout American history been perpetually regarded with contempt and even disgust by those with higher social standing, a pattern suggesting that the national impulse to dehumanize the incarcerated may not be exclusively racial. But as Khalil Gibran Muhammad has shown in his canonical work, *The Condemnation of Blackness*, the association of Blackness with criminality in the American political consciousness is especially deep and long-standing (Muhammad 2010, Welch 2007). This association, fueled by stereotyping in the media and other cultural vectors, "is so pervasive throughout society that 'criminal predator' is used as a euphemism for 'young Black male'" (Welch 2007, p. 276). Research into implicit racial bias demonstrates that these associations are present no matter the race of the subjects and even in the minds of people consciously committed to race equality (Eberhardt 2019, Richardson 2012). In one study, conducted by Esther Madriz (1997, pp. 342–46), women asked about their perception of criminals described them "as animalistic, as savages or monsters [, as] insane or unbalanced." These images were "strongly racialized, with Black and Latino men being uppermost in the fears of most women. . .regardless [of subjects'] race and socioeconomic background" (Madriz 1997, pp. 342–46; Richardson & Goff 2014).

The responses reported by Madriz reflect the deeply racialized nature of the normative vision that drives the American carceral project (Dolovich 2011). This racialization began before the Civil War, as various forms of carceral control were deployed to protect the interests of enslavers and further the project of racial domination. Across the South, jails served as "slave markets," "marketplaces for slave discipline," and "clearinghouses for fugitive slave claims" (Henderson 2016, pp. 182–206). In Louisiana, Mississippi, and Tennessee, "insubordinate" people who resisted the terms of their enslavement were sent to prison for "correction," a process involving systematic abuse and physical torture "designed to humiliate and debase prisoners" and turn them "into submissive servants" (J.K. Bardes, unpublished results).[7]

After Emancipation, the forces of white supremacy deployed the criminal law to convert newly freed people into convicted offenders and place them under state control (Blackmon 2009, Natapoff 2012, Oshinsky 1997). These machinations emerged simultaneously with "convict leasing," a practice that lasted from the late 1860s until, in some states, well into the twentieth century (Blackmon 2009, Natapoff 2012, Oshinsky 1997). Across the South, many Black Americans were effectively re-enslaved. Convicted on trumped-up petty charges, they were leased out to planters and industrialists and put to work, often under conditions of unspeakable brutality. Workers were

[7]Slave-era statutes also permitted enslavers to punish the enslaved people under their control to "correct their behavior," prohibiting only "'cruel' or 'unusual' punishment (or both)" (Reinert 2016, pp. 834–40); Alex Reinert's important work excavating this striking parallel between slave-era limits on the use of force by enslavers and present-day Eighth Amendment protections for prisoners makes clear the depth of the connections between race, slavery, and the law regulating contemporary punishment.

starved, beaten, tortured, and forced "to live as the wild beasts," with "whipping the punishment of choice" (Oshinsky 1997, pp. 59, 61). Whereas most White prisoners lived behind prison walls in relative safety, in some states, Black prisoners worked by lessees had mortality rates as high as 45% (Shichor 1995).

Convict leasing entailed a collaboration between all branches of government. Legislators authorized the practice and passed laws facilitating the capture of people to be used to fulfill the state's side of the contracts. State officials administered the leases, delivered newly (re)enslaved individuals to employers, and, in the case of local officials, actively worked with local planters and industrialists to supply workers when needed, often in exchange for direct payment (Blackmon 2009). And although there is little record of judicial interest in this arrangement, one notorious 1871 opinion from the Virginia Court of Appeals declared Virginia's Bill of Rights "a declaration of principles to govern a society of freemen," not "convicted felons and men civilly dead," and unapologetically labeled prisoners "slaves of the state," subject only to the "regulations of the institution of which they are inmates, and the laws of the state to whom their service is due in expiation of their crimes" (*Ruffin v. Commonwealth* 1871, p. 796).

As convict leasing came to an end, the Southern states needed a place to house their prisoners. The Southern plantation prison was born from this need.[8] Many of these prisons still operate today—among them, Louisiana's Angola prison, Arkansas's Cummins Unit, and Mississippi's Parchman Farm, where the incarcerated are still forced to pick cotton in the fields (Armstrong 2012). From their earliest days, these facilities looked and operated just like slave plantations. People were "quartered. . .in squalid barracks," "denied. . .basic services and amenities," and forced to work in the fields from sunup to sundown under the watchful gaze of guards armed with whips and guns and authorized to use lethal force (Feeley & Swearingen 2004, p. 437; Oshinsky 1997, p. 148; Perkinson 2010, pp. 246–50; *Rhodes v. Chapman* 1981). Violence was rampant and rape was common (Feeley & Rubin 1999, *Holt v. Sarver* 1970, *Pugh v. Locke* 1976). Anyone caught trying to reach the courts with complaints about conditions would be punished with isolation or violence or both (Mason 2008).

Incarceration in America today is not chattel slavery. But the imprisoned continue to be treated at every level of government as existing firmly outside society's moral circle, with any harm suffered by them viewed with callous indifference if it is noticed at all. Conditions of confinement in American prisons are unlikely to change until this normative posture gives way to a broad acknowledgment that those people consigned by the criminal legal system to loss of liberty remain human beings who are entitled to be treated as such.

CONCLUSION

This review has mapped what regulatory failure looks like in the American carceral context. Although charged to ensure the fulfillment of the state's carceral burden and thus the humane treatment of people in custody, institutional actors in all three branches of government instead orient themselves in both spirit and practice alongside prison administrators and COs. Legislators defer to prison administrators, leaving them to run the prisons unimpeded by legislative oversight.

[8]The plantation prison was not the only penal model in the United States during this period. In the Northeast, the early American penitentiaries were intended by their Quaker founders as places of penitence and reform. But this model—with its enforced silence and isolation—was cruel in its own way (Hallinan 2001, pp. 62–63) and eventually gave way to a network of reformatories where staff ruled with a free hand and corporal punishment and other forms of official abuse were commonplace. Here too, the incarcerated population tended to be disproportionately Black (Muhammad 2010, Vesely-Flad 2017).

Courts defer to prison officials at all levels, leaving them free from meaningful constitutional constraint. And as one official attested in an interview with Calavita & Jenness (2015, p. 118), prison administrators side with "staff over [prisoners]. Always. Always. Always." The effect is to reproduce across all regulatory institutions the callous indifference to the incarcerated that has been a hallmark of American prisons from the start.

The plantation prison faced searching regulatory scrutiny only in the 1960s and 1970s, when some federal district courts started entertaining broad constitutional challenges and ordering comprehensive change. This assertion of judicial authority had an overtly normative cast. In opinion after opinion, federal courts for the first time affirmed people in custody as fully equal constitutional subjects, whose treatment must be judged in light of "broad and idealistic concepts of dignity and civilized standards, humanity, and decency" (*Jackson v. Bishop* 1968, p. 579; *Pugh v. Locke* 1976, p. 329). And having once acknowledged the humanity of the people being held under conditions uncomfortably reminiscent of chattel slavery, many judges found themselves compelled to condemn virtually all aspects of the institutional operations they confronted in the prisons as inhumane and thus unconstitutional.

The Supreme Court first identified dignity and decency as the preeminent normative limits on constitutional punishment in 1958 (Simon 2014, *Trop v. Dulles* 1958). Except for Justice Brennan's sole-authored concurrence in *Furman v. Georgia* (1972), it was another five decades before the Court again, per Justice Kennedy, even acknowledged the dignity and humanity of people in prison (*Brown v. Plata* 2011, p. 509; Simon 2014). This extended judicial silence as to the constitutional imperative of humane prison conditions coincided with the "buildup of mass incarceration in the 1980s and 1990s" (Simon 2014, p. 139). It was sustained alongside 50 years of legislative complicity and the self-evident failure of the executive branch to police itself. And Justice Kennedy's fleeting efforts aside, the judicial failure to acknowledge the state's obligation to ensure humane conditions for those in custody has continued into the 2020s, which opened with COVID spreading rapidly through crowded prisons filled with hundreds of thousands of people facing an outsized risk of death (Saloner et al 2020), and federal courts across the country looking for—and largely finding—legal justifications to do little or nothing about it (Dolovich 2020b, Harv. Law Rev. 2021, *Money v. Pritzker* 2020, *Swain v. Junior* 2020, *Valentine v. Collier* 2020, *Wilson v. Williams* 2020).

DISCLOSURE STATEMENT

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LITERATURE CITED

Alexander M. 2012. *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*. New York: New Press

Armstrong A. 2012. Slavery revisited in penal plantation labor. *Seattle Univ. Law Rev.* 35:869–910

Armstrong A. 2015. Race, prison discipline and law. *UC Irvine Law Rev.* 5:759–82

Ashker v. Newsom, WL 330461 (2019)

Assoc. Press. 2009. Florida detention officer fired for joining the KKK. *Mercury News*, Dec. 31. **https://www.mercurynews.com/2009/12/31/florida-detention-officer-fired-for-joining-the-kkk/**

Ball v. LeBlanc, 792 F.3d 584 (2015)

Bandura A. 1999. Moral disengagement in the perpetration of inhumanities. *Personal. Soc. Psychol. Rev.* 3(3):193–209

Barkow RE, O'Neill KM. 2006. Delegating punitive power: the political economy of sentencing commission and guideline formation. *Texas Law Rev*. 84:1973–2022

Beard v. Banks, 548 U.S. 521 (2006)

Beckett K. 1997. *Making Crime Pay: Law and Order in Contemporary American Politics*. New York: Oxford Univ. Press

Bell v. Wolfish, 441 U.S. 520 (1979)

Bellin J. 2018. Reassessing prosecutorial power through the lens of mass incarceration. *Mich. Law Rev.* 116(6):835–57

Blackmon DA. 2009. *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II*. New York: Anchor Books

Block v. Rutherford, 468 U.S. 576 (1984)

Borchardt D. 2012. The iron curtain redrawn between prisoners and the Constitution. *Columbia Hum. Rights Law Rev*. 43(2):469–520

Boston J, Manville DE. 2010. *Prisoners' Self-Help Litigation Manual*. New York: Oceana

Bounds v. Smith, 430 U.S. 817 (1977)

Branham LS. 2010. Accrediting the accreditors: a new paradigm for correctional oversight. *Pace Law Rev*. 30:1636–71

Brill A. 2008. Rights without remedy: the myth of state court accessibility after the Prison Litigation Reform Act. *Cardozo Law Rev*. 30(2):645–82

Bronson J, Berzofsky M. 2017. *Indicators of mental health problems reported by prisoners and jail inmates, 2011–12*. Bur. Justice Stat. Rep. NCJ 250612, US Dep. Justice, Washington, DC. **https://www.bjs.gov/content/pub/pdf/imhprpji1112.pdf**

Brower J. 2013. *Correctional officer wellness and safety literature review*. Off. Justice Progr. Rep. 028104, US Dep. Justice, Washington, DC. **https://s3.amazonaws.com/static.nicic.gov/Public/244831.pdf**

Brown v. Plata, 563 U.S. 493 (2011)

Bucklew v. Precythe, 139 S.Ct. 1112 (2019)

Calavita K, Jenness V. 2015. *Appealing to Justice: Prisoner Grievances, Rights, and Carceral Logic*. Oakland, CA: Univ. Calif. Press

Campbell MC, Schoenfeld H. 2013. The transformation of America's penal order: a historicized political sociology of punishment. *Am. J. Sociol.* 118(5):1375–423

Canadian Coalition Against the Death Penalty v. Ryan, 269 F. Supp. 2d 1199 (2003)

Chae Chan Ping v. U.S., 130 U.S. 581 (1889)

Cleavinger v. Saxner, 474 U.S. 193 (1985)

Clement v. California Department of Corrections, 364 F.3d 1148 (2004)

Colgan BA. 2019. Wealth-based penal disenfranchisement. *Vanderbilt Law Rev*. 72:55–149

Columbia Hum. Rights Law Rev. 2017. *A Jailhouse Lawyer's Manual*. New York: Columbia Law School. **http://jlm.law.columbia.edu/**

Congres. Res. Serv. 2019. *The First Step Act of 2018: an overview*. Rep. R45558, Congres. Res. Serv., Washington, DC. **https://crsreports.congress.gov/product/pdf/R/R45558**

Conover T. 2001. *Newjack: Guarding Sing Sing*. New York: Random House

Crawley E. 2004. *Doing Prison Work: The Public and Private Lives of Prison Officers*. Portland, OR: Willan

Cullen FT. 1995. Assessing the penal harm movement. *J. Res. Crime Delinquency* 32(3):338–58

DeClue CJ. 2012. Sugarcoating the Eighth Amendment: The grossly disproportionate test is simply the Fourteenth Amendment rational basis test in disguise. *Southwest. Law Rev.* 41(2):533–80

Deitch M. 2010. Independent correctional oversight mechanisms across the United States: a 50-state inventory. *Pace Law Rev*. 30:1754–930

Deitch M. 2012. The need for independent prison oversight in a post-PLRA world. *Fed. Sentencing Rep.* 24(4):236–44

Deitch M. 2020. But who oversees the overseers?: the status of prison and jail oversight in the United States. *Am. Crim. Law Rev.* 47: 207–73

Dolovich S. 2005. State punishment and private prisons. *Duke Law J.* 55:437–546
Dolovich S. 2009a. Foreword: Incarceration American Style. *Harv. Law Policy Rev.* 3:237–59
Dolovich S. 2009b. Cruelty, prison conditions, and the Eighth Amendment. *N.Y. Univ. Law Rev.* 84:881–979
Dolovich S. 2011. Exclusion and control in the carceral state. *Berkeley J. Crim. Law* 16(2):259–339
Dolovich S. 2012. Creating the permanent prisoner. In *Life Without Parole: America's New Death Penalty?*, ed. C Ogletree, A Sarat, pp. 96–107. New York: NYU Press
Dolovich S. 2017a. Canons of evasion in constitutional criminal law. In *The New Criminal Justice Thinking*, ed. S Dolovich, A Natapoff, pp. 111–54. New York: NYU Press
Dolovich S. 2017b. Prison conditions. In *Reforming Criminal Justice: Punishment, Incarceration, and Release*, Vol. 4, ed. E Luna, pp. 261–93. Phoenix, AZ: Justice Acad.
Dolovich S. 2020a. Evading the Eighth Amendment. In *The Eighth Amendment and its Future in a New Age of Punishment*, ed. M Ryan, W Berry, pp. 133–60. Cambridge, UK: Camb. Univ. Press
Dolovich S. 2020b. Mass incarceration, meet COVID-19. *Univ. Chic. Law Rev. Online*. **https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3766415**
Douglas M. 1986. *How Institutions Think*. Syracuse, NY: Syracuse Univ. Press
DuVernay A. 2016. *13th*. Los Gatos, CA: Netflix
Eberhardt JL. 2019. *Biased: Uncovering the Hidden Prejudice that Shapes What We See, Think, and Do*. New York: Viking
Eisenberg AK. 2020. The prisoner and the polity. *N.Y. Univ. Law Rev.* 95(1):1–74
Ely JH. 1996. *On Constitutional Grounds*. Princeton, NJ: Princet. Univ. Press
Enns P. 2016. *Incarceration Nation: How the United States Became the Most Punitive Democracy in the World*. New York: Camb. Univ. Press
Estelle v. Gamble, 429 U.S. 97 (1976)
Ewing v. California, 538 U.S. 11 (2003)
Farmer v. Brennan, 511 U.S. 825 (1994)
Fathi DC. 2010. The challenge of prison oversight. *Am. Crim. Law Rev.* 47(4):1453–62
Feeley MM, Rubin EL. 1999. *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons*. Cambridge, UK: Camb. Univ. Press
Feeley MM, Swearingen V. 2004. The prison condition cases and the bureaucratization of American corrections: influences, impacts and implications. *Pace Law Rev.* 24:433–75
Ferdik FV, Smith HP. 2017. *Correctional officer safety and wellness literature synthesis*. Natl. Inst. Justice Rep. NCJ 250484, US Dep. Justice, Washington, DC. **https://www.ojp.gov/pdffiles1/nij/250484.pdf**
Field K. 2018. Can a college education solve the nation's prison crisis? *Chron. High. Educ.* 64(17):19
Finn P. 1996. No-frills prisons and jails: a movement in flux. *Fed. Probat.* 60(3):35–44
Fleury-Steiner B. 2008. *Dying Inside: The HIV/AIDS Ward at Limestone Prison*. Ann Arbor, MI: Univ. Mich. Press
Forman JJ. 2017. *Locking Up Our Own: Crime and Punishment in Black America*. New York: Farrar, Straus & Giroux
Furman v. Georgia, 408 U.S. 238 (1972)
Garland D. 2001. *The Culture of Control: Crime and Social Order in Contemporary Society*. New York: Oxford Univ. Press
Gottschalk M. 2016. *Caught: The Prison State and the Lockdown of American Politics*. Princeton, NJ: Princet. Univ. Press
Gray v. Hardy, 826 F.3d 1000 (2016)
Green E. 2020. Financial aid is restored for prisoners as part of the stimulus bill. New York Times, Dec. 21. **https://www.nytimes.com/2020/12/21/us/politics/stimulus-law-education.html**
Gregg v. Georgia, 428 U.S. 153 (1976)
Guetzkow J, Western B. 2007. The political consequences of mass imprisonment. In *Remaking America: Democracy and Public Policy in an Age of Inequality*, ed. J Soss, J Hacker, S Mettler, pp. 228–42. New York: Sage
Hallinan JT. 2001. *Going Up the River: Travels in a Prison Nation*. New York: Random House
Haney C. 2003. Mental health issues in long-term solitary and 'supermax' confinement. *Crime Delinquency* 49:124–56

Haney C. 2006a. *Reforming Punishment: Psychological Limits to the Pains of Imprisonment*. Washington, DC: Am. Psych. Assoc.

Haney C. 2006b. The wages of prison overcrowding: harmful psychological consequences and dysfunctional correctional reactions. *Wash. Univ. J. Law Policy* 22:265–94

Haney C. 2010. Demonizing the enemy: the role of science in declaring the war on prisoners. *Conn. Public Interest Law J.* 9(2):185–242

Haney C. 2011. The perversions of prison: on the origins of hypermasculinity and sexual violence in confinement. *Am. Crim. Law Rev.* 48:121–41

Harmelin v. Michigan, 501 U.S. 957 (1991)

Hart O, Shleifer A, Vishny RW. 1997. The proper scope of government: theory and an application to prisons. *Q. J. Econ.* 112(4):1127–61

Hartman KE. 2009. *Mother California: A Story of Redemption Behind Bars*. New York: Atlas & Co

Harv. Law Rev. 2021. Conditions of confinement, COVID-19, and the CDC. *Harv. Law Rev.* 134:2233–56

Hawkins D. 2017. Ex-prison guards in Ku Klux Klan plotted to kill a black inmate. An FBI informant caught them. *Washington Post*, Aug. 16. **https://www.washingtonpost.com/news/morning-mix/wp/2017/08/16/ex-prison-guards-in-ku-klux-klan-plotted-to-kill-a-black-inmate-an-fbi-informant-caught-them/?noredirect=on**

Henderson TY. 2016. Property, penality, and (racial) profiling. *Stanf. J. Civ. Rights Civ. Lib.* 12:177–212

Hoke M, Pendergrass T, eds. 2018. *Six by Ten: Stories from Solitary*. Chicago, IL: Haymarket Books

Holt v. Sarver, 309 F. Supp. 362 (1970)

Houchins v. KQED, Inc., 438 U.S. 1 (1978)

Hudson v. McMillian, 503 U.S. 1 (1992)

Hum. Rights Watch. 1996. *All too familiar: sexual abuse of women in U.S. state prisons*. Rep, Hum. Rights Watch, New York

Hutto v. Finney, 437 U.S. 678 (1978)

Irwin J. 2013. *The Jail: Managing the Underclass in America's Society*. Berkeley, CA: Univ. Calif. Press

Isenberg N. 2016. *White Trash: The 400-Year Untold History of Class in America*. New York: Penguin

Jackson v. Bishop, 404 F.2d 571 (1968)

Jacobs JB. 1980. The prisoner's rights movement and its impacts, 1960–80. *Crime Justice* 2:429–70

Johnson v. Avery, 393 U.S. 483 (1969)

Johnson v. California, 543 U.S. 499 (2005)

Jones v. Bock, 549 U.S. 199 (2007)

Jones v. N.C. Prisoners' Labor Union, Inc., 433 U.S. 119 (1977)

Kaeble D, Cowhig M. 2018. *Correctional populations in the United States, 2016*. Bur. Justice Stat. Rep. NCJ 251211, US Dep. Justice, Washington, DC. **https://www.bjs.gov/content/pub/pdf/cpus16.pdf**

Kang-Brown J, Montagnet C, Schattner-Elmaleh E, Hinds O. 2020. *People in prison in 2019*. Rep., Vera Inst. Justice, Brooklyn, NY. **https://www.vera.org/publications/people-in-prison-in-2019**

Kauffman K. 1988. *Prison Officers and their World*. Cambridge, MA: Harv. Univ. Press

Keating GC. 1992. Settling through consent decree in prison reform litigation: exploring the effects of *Rufo v. Inmates of Suffolk County Jail*. *Boston Coll. Law Rev.* 34:163–201

Kelso JC. 2014. Corrections and sentencing reform: the obstacle posed by dehumanization. *McGeorge Law Rev*. 46(4):897–906

Kennedy A. 2003. Speech at the American Bar Association annual meeting. *U.S. S. Ct*. **https://www.supremecourt.gov/publicinfo/speeches/sp_08-09-03.html**

Kim D. 2016. Psychiatric deinstitutionalization and prison population growth: critical literature review and its implications. *Crim. Justice Policy Rev.* 27(1):3–21

Kingsley v. Hendrickson, 135 S.Ct. 1039 (2015)

Konda S, Reichard AA, Tiesman HM. 2012. Occupational injuries among U.S. correctional officers, 1999–2008. *J. Saf. Res.* 43(3):181–86

Korematsu v. U.S., 323 U.S. 214 (1944) TA. 2008. . ,

Kupers TA. 2008. Prison and the decimation of pro-social life skills. In *The Trauma of Psychological Tortur*, ed. A Ojeda, pp. 127–38. Westport, CT: Praeger

Kupers TA. 2015. A community mental health model in corrections. *Stanf. Law Policy Rev*. 26:119–58

Lehrer E. 2001. Hell behind bars: the crime that dare not speak its name. *Heritage Foundation*. **https://www.heritage.org/crime-and-justice/commentary/ed020501-hell-behind-bars-the-crime-dare-not-speak-its-name**

Lewis v. Casey, 518 U.S. 343 (1996)

Liptak A. 2004. Ex-inmate's suit offers view into sexual slavery in prisons. *New York Times*, Oct. 16, p. A1. **https://www.nytimes.com/2004/10/16/us/exinmates-suit-offers-view-into-sexual-slavery-in-prisons.html**

Lynch M. 2008. The contemporary penal subject(s). In *After the War on Crime: Race, Democracy, and a New Reconstruction*, ed. J Simon, IH López, ML Frampton, pp. 89–105. New York: NYU Press

Madriz EI. 1997. Images of criminals and victims: a study on women's fear and social control. *Gend. Soc.* 11(3):342–56

Mariner J. 2001. *No escape: male rape in U.S. prisons*. Rep., Hum. Rights Watch, New York

Marquart JW, Cuvelier SJ, Burton VS, Adams K, Gerber J, et al. 1994. A limited capacity to treat: examining the effects of prison population control strategies on prison education programs. *Crime Delinquency* 40(4):516–31

Mason S. 2008. *Writ Writer*. San Diego, CA: Passage Prod.

Mauer M. 2001. The causes and consequences of prison growth in the United States. *Punishm. Soc.* 3(1):9–20

Mauer M. 2006. *Race to Incarcerate*. New York: New Press

Mayeux S. 2018. Youth and punishment at the Roberts court. *Univ. Pa. J. Const. Law* 21(2):543–612

Meachum v. Fano, 427 U.S. 215 (1976)

Meiners ER. 2009. Resisting civil death: organizing for access to education in our prison nation. *DePaul J. Soc. Justice* 3(1):79–96

Money v. Pritzker, 453 F. Supp.3d 1103 (2020)

Muhammad KG. 2010. *The Condemnation of Blackness: Race, Crime, and the Making of Modern Urban America*. Cambridge, MA: Harv. Univ. Press

Myers ML. 1987. The Alabama case: 12 years after James v. Wallace. In *The Law and Policy of Sentencing and Correction*, ed. LS Branham, p. 472. St. Paul, MN: West Acad. Publ.

Natapoff A. 2012. Misdemeanors. *South. Calif. Law Rev*. 85:1313–75

Nolan P, Telford M. 2006. Indifferent no more: People of faith mobilize to end prison rape. *J. Legis.* 32(2):129–41

N.Y. Times Ed. 1992. The youngest, cruelest justice. *New York Times*, Febr. 27, p. A24. **https://www.nytimes.com/1992/02/27/opinion/the-youngest-cruelest-justice.html**

Ocen PA. 2012. Punishing pregnancy: race, incarceration, and the shackling of pregnant prisoners. *Calif. Law Rev.* 100:1239–311

Oshinsky DM. 1997. *Worse than Slavery: Parchman Farm and the Ordeal of Jim Crow Justice*. New York: Free Press

Overton v. Bazzetta, 123 S.Ct. 2162 (2003)

Page J. 2011. *The Toughest Beat: Politics, Punishment, and the Prison Officers Union in California*. New York: Oxford Univ. Press

Patsy v. Board of Regents of State of Florida, 457 U.S. 496 (1982)

Pell v. Procunier, 417 U.S. 817 (1974)

Peoples v. Fischer, 898 F. Supp. 2d 618 (2012)

Perkinson R. 2010. *Texas Tough: The Rise of America's Prison Empire*. New York: Picador

Pfaff JF. 2017. *Locked In: The True Causes of Mass Incarceration and How to Achieve Real Reform*. New York: Basic Books

Pishko J. 2015. High desert suicide: Was a prison guard hazed to death? *Rolling Stone*. **https://www.rollingstone.com/politics/politics-news/high-desert-suicide-was-a-prison-guard-hazed-to-death-42087/**

Prison Legal News v. Cook, 238 F.3d 1145 (2001)

Procunier v. Martinez, 416 U.S. 396 (1974)

Pugh v. Locke, 405 F. Supp. 318 (1976)

Reinert AA. 2016. Reconceptualizing the Eighth Amendment: slaves, prisoners, and "cruel and unusual" punishment. *N.C. Law Rev*. 94:817–60

Reiter K. 2016. *23/7: Pelican Bay Prison and the Rise of Long-Term Solitary Confinement*. New Haven, CT: Yale Univ. Press

Reitz KR. 2006. Don't blame determinacy: U.S. incarceration growth has been driven by other forces. *Texas Law Rev*. 84(7):1787–802

Resnik J, Baumgartel S, Kalb J. 2015–2016. Time-in-cell: isolation and incarceration. *Yale Law J. Forum* 125:212–21

Reynolds C. 2004. Effective self-monitoring of correctional conditions. *Pace Law Rev*. 24:769–92

Rhodes LA. 2004. *Total Confinement: Madness and Reason in the Maximum Security Prison*. Berkeley, CA: Univ. Calif. Press

Rhodes v. Chapman, 452 U.S. 337 (1981)

Richardson LS. 2012. Police efficiency and the Fourth Amendment. *Indiana Law J*. 87:1143–82

Richardson LS, Goff PA. 2014. Interrogating racial violence. *Ohio State J. Crim. Law* 12:115–52

Robertson JE. 1995. "Fight or F. . ." and constitutional liberty: an inmate's right to self-defense when targeted by aggressors. *Indiana Law Rev*. 29(2):339–64

Roithmayr D. 2016. The dynamics of excessive force. *Univ. Chic. Legal Forum* 10:407–36

Rothman DJ. 1971. *The Discovery of the Asylum: Social Order and Disorder in the New Republic*. Abingdon, UK: Routledge

Ross v. Blake, 136 S.Ct. 1850 (2016)

Ruffin v. Commonwealth, 21 Gratt. 790 (1871)

Saloner B, Parish K, Ward J, DiLaura G, Dolovich S. 2020. COVID-19 cases and deaths in federal and state prisons. *JAMA* 324(6):602–3

Sawyer W, Wagner P. 2020. Mass incarceration: the whole pie 2020. *Prison Policy Initiative*. **https://www.prisonpolicy.org/reports/pie2020.html**

Saxbe v. Washington Post Co., 417 U.S. 843 (1974)

Scalia A. 1983. The doctrine of standing as an essential element of the separation of powers. *Suffolk Univ. Law Rev.* 17(4):881–900

Schlanger M. 2006. Civil rights injunctions over time: case study of jail and prison court orders. *N.Y. Univ. Law Rev.* 81(2):550–630

Schlanger M. 2013a. *Plata v. Brown* and realignment: jails, prisons, courts, and politics. *Harv. Civ. Rights Civ. Lib. Law Rev.* 48(1):165–215

Schlanger M. 2013b. Prison segregation: symposium introduction and preliminary data on racial disparities. *Mich. J. Race Law* 18:241–50

Schlanger M. 2015. Prisoners' rights lawyers' strategies for preserving the role of the courts. *Univ. Miami Law Rev.* 69(2):519–58

Schlanger M. 2018. The constitutional law of incarceration, reconfigured. *Cornell Law Rev*. 103(2):357–436

Schlanger M, Shay G. 2008. Preserving the rule of law in America's jails and prisons: the case for amending the Prison Litigation Reform Act. *Univ. Pa. J. Const. Law* 11(1):139–54

Schrantz D, DeBot ST, Maur M. 2018. Decarceration strategies: how 5 states achieved substantial prison population reductions. *The Sentencing Project*. **https://www.sentencingproject.org/wp-content/uploads/2018/09/Decarceration-Strategies.pdf**

Seamone E. 2006. Fahrenheit 451 on cell block D: a bar examination to safeguard America's jailhouse lawyers from the post-Lewis blaze consuming their law libraries. *Yale Law Policy Rev*. 24:91–147

Shapiro DM. 2016. Lenient in theory, dumb in fact: prison, speech, and scrutiny. *George Wash. Law Rev*. 84:972–1028

Shapiro DM, Hogle C. 2018. The horror chamber: unqualified impunity in prison. *Notre Dame Law Rev*. 93(5):2021–64

Shay G. 2009. Ad law incarcerated. *Berkeley J. Crim. Law* 14:329–76

Shichor D. 1995. *Punishment for Profit: Private Prisons/Public Concerns*. Thousand Oaks, CA: SAGE

Simon J. 2014. *Mass Incarceration on Trial: A Remarkable Court Decision and the Future of Prisons in America*. New York: New Press

Skarbek D. 2014. *The Social Order of the Underworld: How Prison Gangs Govern the American Penal System*. New York: Oxford Univ. Press

Steiker C. 1999. Death, taxes and—punishment? A response to Braithwaite and Tonry. *UCLA Law Rev*. 46:1793–800

Swain v. Junior, 961 F.3d 1276 (2020)

Taylor S. 2012. Unlocking the gates of desolation row. *UCLA Law Rev*. 59:1810–68

Tonry M. 1995. *Malign Neglect: Race, Crime, and Punishment in America*. New York: Oxford Univ. Press

Trop v. Dulles, 356 U.S. 87 (1958)

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

Uggen C, Larson R, Shannon S, Pulido-Nava A. 2020. Locked out 2020: estimates of people denied voting rights due to a felony conviction. *The Sentencing Project*. **https://www.sentencingproject.org/publications/locked-out-2020-estimates-of-people-denied-voting-rights-due-to-a-felony-conviction/**

U.S. ex rel. Atterbury v. Ragen, 237 F.2d 953 (1956)

U.S. v. Carolene Products Co., 304 U.S. 114 (1938)

Valentine v. Collier, 956 F.3d 797 (2020)

Valentine CL, Oehme K, Martin A. 2012. Correctional officers and domestic violence: experiences and attitudes. *J. Fam. Violence* 27:531–45

Van Zyl Smit D. 2010. Regulation of prison conditions. *Crime Justice* 39(1):503–63

Vesely-Flad R. 2017. Constructions of character and criminality in nineteenth-century US penal systems. In *Racial Purity and Dangerous Bodies: Moral Pollution, Black Lives, and the Struggle for Justice*, pp. 31–72. Minneapolis, MN: Fortress Press

Ward J, Parish K, Dolovich S, DiLaura G, Saloner B. 2021. COVID-19 cases among employees of U.S. federal and state prisons. *Am. J. Prev. Med.* 60(6):840–44

Weidman MM. 2004. The culture of judicial deference and the problem of supermax prisons. *UCLA Law Rev*. 51:1505–53

Weisberg R, Mills D. 2003. Violence silence: why no one really cares about prison rape. *Slate*. **https://slate.com/news-and-politics/2003/10/why-no-one-really-cares-about-prison-violence.html**

Welch K. 2007. Black criminal stereotypes and racial profiling. *J. Contemp. Crim. Justice* 23(3):276–88

Whitley v. Albers, 475 U.S. 312 (1986)

Wilkinson v. Austin, 545 U.S. 209 (2005)

Wilson v. Seiter, 501 U.S. 294 (1991)

Wilson v. Williams, U.S. App. LEXIS 14291 (2020)

Wolff v. McDonnell, 418 U.S. 539 (1974)

Woodford v. Ngo, 548 U.S. 81 (2006)

Woodfox A. 2019. *Solitary: A Biography*. New York: Grove Press

Yates v. Collier, 868 F.3d 354 (2017)

Yochelson S, Samenow S. 1977. *The Criminal Personality: The Change Process*. New York: Jason Aronson

Zimbardo P. 2007. *The Lucifer Effect: Understanding How Good People Turn Evil*. New York: Random House

Zimmer D. 1995. Prison is no place for 'extras.' *Christ. Sci. Monitor* 87(64):20