

Posted on www.prisonlegalnews.org on July 5, 2007 by permission of the author, who reserves the right to revoke such permission at his option.

Prison Food Law

Cyrus Naim

Food & Drug Law

Spring, 2005

Abstract:

This paper examines the history and current framework of prison food law. Whereas food law generally is the result of a complex maze of national, state, and local statutory and regulatory law, prison food is primarily regulated by the courts through adjudication of the Eighth Amendment prohibition of cruel and unusual punishment. This discrepancy is explained by the very different political realities faced by prison reform. At the same time, the result is both ineffective and counterproductive. The lack of serious legislation on the issue means that the law is written anyway, only it is done by courts that lack the requisite expertise and resources to do so competently.

Over two million individuals are incarcerated in our nation's prisons. These people do not eat or sleep without the leave of government agents. Given their isolated state and the importance of government action in their lives, food law would seem to be uniquely important to their well-being. Yet very little of what we would consider food law actually applies to them.

Food law in the United States is both extensive and detailed. The federal Food and Drug Administration and state departments of health have created a robust and complex regulatory system to ensure the safety of the food supply. Each link in the chain of food distribution is examined to ensure that the final product is both sanitary and of high quality. Inspectors visit the grain silos, then the mills, the bakeries, the warehouses, and finally the eating establishments. As one writer puts it, "This enormity of regulation at the federal, state, and local levels, with several federal agencies, many more than fifty state agencies, and hundreds of local agencies enforcing various laws is a generally accepted fact of life."^[1]

Yet this system, powerful as it is, does not make it past the prison door. It is available only to free citizens. Prison food law is an altogether different beast, primarily a product of prison law generally. Legislatures have essentially adopted a laissez-faire approach, leaving wardens to run their prisons as they see fit. It is prison administrators who decide what to serve inmates, how often, and whether they will choose to run their own inspections at all. The only accountability they face is in the courts, as a matter of Constitutional law, and even this is a relatively recent occurrence. Where food law is powerful and complex, prison law (and thereby, prison food law) is messy and weak.

It is the purpose of this paper to analyze and explore this divergence, and to help explain why it exists. Unfortunately, given the profound differences between the two types of law, there is no easy way to go about this. In first outlining what I wanted to say, I attempted to find a dichotomy by which to demonstrate the differences between these regimes. I found that to be impossible. The rules, sources of law, purpose, focus, means of enforcement, effectiveness, they're all *different* from the standard food law regime. Lining them up on one axis can only oversimplify the various, and often subtle, ways in which they differ.

Instead, I will be taking a scattershot approach, discussing each important difference in its own time. Hopefully, the result is, while not neat, still a better representation of the law as it is, and all the reasons that it has grown in this particular way. Here then, is an outline of the course this paper will take.

I will first discuss the histories of these two types of law, as far back as they go. Such histories will, of course, necessarily be brief. Entire books could easily be written on each history alone. The purpose here is not comprehensiveness, though I hope to at least mention nearly all of the most important aspects of each. Instead, these histories are intended to begin to draw out the different ways in which these bodies of law have been born, and to facilitate later comparison. Having done so, I will then briefly look at exactly what the law of prison food is today.

In the next section I will discuss the fact that prison law has much less political support than food law, and look at some of the possible reasons for this state of affairs. In doing so, I will discuss several theories for the current disinterest in prison reform, touching on race, psychology, voting patterns, and the purposes for which prisons exist in the first place. I conclude that, while there are good reasons to have less law on prison conditions than on food, there is very little (good) reason for this difference to apply to prison food in particular.

Third, I will discuss how enforcement mechanisms vary between food law and prison food law, and how much weaker enforcement is in the prison system. Some of these differences are necessary, a result of the fact that different solutions are required in an institutional setting than in an open marketplace. The current means of enforcement of prison law, however, is more a result of the political realities it faces. Using courts as a means of oversight results in a host of problems that could be avoided if other solutions were considered.

Finally, I will briefly discuss some of the ways prison food law differs in substance from food law generally. Issues unique to incarceration complicate the normal questions involved. The fact that prison is a form of punishment, for example, must be considered when devising the appropriate rules. This section is not meant to be comprehensive, but rather to highlight how the focus of prison food law, the "feel," does not match up with food law.

By going through each of these sections, I believe a fairly good understanding of the nature of prison food law can be achieved. Before I begin, however, I would like to make two small notes: First, while this paper is on the topic of prison food, I will often speak of prison law generally. I want to make clear that this is necessary because of the way in which prison food is inextricably intertwined with larger prison issues. Having discussed those, I will then return to prison food in particular. Second, throughout this paper, I will refer to the Rhode Island prison system as an

example of the way things are done, and problems with the current regime. I want to make it clear that this is emphatically *not* because I believe it to be an example of a bad prison. On the contrary, I believe the administrators there to be highly caring individuals who have established a very well run prison. Rather, this is simply because I have already done research on this prison for an earlier paper. I therefore have both specific knowledge of its inner workings that will be useful here, and contacts there that were gracious enough to speak with me again on the issues facing prison food. Having made these two points, I now move on to the first part of the paper, the histories of each system of law.

History of Food Law

Food law has a long and established history. Indeed, the first laws regulating the adulteration of food date back thousands of years. In the Roman Empire, a general law banning the fraudulent sale of merchandise included a prohibition on the sale of adulterated food. Termed *stellionatus*, the transgression was “comparable to a civil offense under present law...[Conviction] resulted in such punishment as condemnation to the mines or temporary exile.”^[2] There were no similar laws during the Dark Ages, but food law was reestablished by the Thirteenth Century, with the English Parliament enacting statutes prohibiting “the sale of any ‘corrupted wine’ or of any meat, fish, bread, or water that was not ‘wholesome for man’s body’ or that was kept so long ‘that it loseth its natural wholesomeness.’”^[3] At the same time, local laws were passed to add further protections, and a common law developed creating both civil and *criminal* penalties for adulteration of food.^[4]

In 1820, the first book introducing modern techniques to identify food adulteration was published. Written by Frederick Accum, *Treatise on Adulterations of Food and Culinary Poisons* was “an immediate and worldwide success.”^[5] The book detailed both the various methods sellers used to increase their profits through diluting or adding fillers to the foods they sold, and possible methods of discovering such adulteration. Interestingly, though it might seem to be written on a somewhat dry topic, it was covered by newspapers and was known to “the public everywhere.”^[6] His book, and the copycats that followed, were largely responsible for the enactment of the first examples of modern food regulation.^[7]

When the American colonies were established, they inherited what was already a somewhat robust food law. “Early colonial laws were, indeed, indistinguishable from those that prevailed in England at the time. American common law similarly developed on the basis of English precedent.”^[8] Through independence, these food laws persisted.^[9] Our food law, thus, has been with us since the first colonists came to America, and the *notion* of a food law has been around for *thousands* of years.

Food law took another step forward with the creation of local boards of health by the end of the nineteenth century.^[10] Congress became involved in this process in 1879. A yellow fever outbreak focused public awareness on the issue. Congress acted by establishing a National Board of Health to “assist local governments in addressing health and sanitation issues.”^[11] Today, these boards of health are instrumental in ensuring the nation’s food quality. The FDA is concerned primarily with foods that enter interstate commerce. Eating establishments, then, are out of their purview. Inspections of such establishments, including restaurants, hotels, schools,

etc., are done at the state or local level.^[12] Given the proliferation of restaurants in the past several decades, the role of these local boards has become increasingly important.^[13]

The next major advance in food law came in 1906. Upton Sinclair, a socialist writer, published his manifesto, *The Jungle*.^[14] Written primarily as an attack on capitalism, it included a detailed description of the plight of men working in the meat-packing industry. Unfortunately for Sinclair, the public largely ignored his central point. Instead, it focused on his discussion of the disgusting conditions in which their food was produced. This book, and the newspaper articles that followed, created a “firestorm of public indignation.”^[15] The public demanded regulation of the sanitation of those places where food was produced. This then was largely responsible for the first major national legislation on food law:^[16] The Pure Food and Drugs Act of 1906.^[17] Not only that, it also inspired passage of the first Meat Inspection Act.^[18] As Sinclair later said, “I aimed at the public's heart and by accident I hit it in the stomach.”^[19]

The Pure Food and Drugs Act was, for the time, wide-ranging in scope. It outlawed adding anything to food that was either unsafe, or was intended as a filler to cheapen the product.^[20] Likewise, *removing* anything of value from a product was declared illegal, as was selling food that had expired.^[21] In addition, it forbid the mislabeling of any food product (defined as including any statements intended to deceive or mislead the purchaser).^[22] The Bureau of Chemistry of the Department of Agriculture was authorized to test foods to ensure that they did not violate these strictures.^[23] When violations were found, the Bureau was ordered to notify the local U.S. Attorney for appropriate prosecution. Violations could be punished by as much as a year in prison, or a fine of up to \$500 (over \$10,000 in today’s currency).^[24] Although there was some debate in individual cases about whether a certain additive was dangerous or a filler, on the whole there was marked improvement in the food supply. The clearest violations were very quickly stopped.^[25]

By 1933, the FDA had been formed to take over enforcement of the Pure Food and Drugs Act.^[26] It found the Act’s provisions wanting in several respects: It did not give the administrators authority to set standard definitions of foods (and thereby create a simple and easily enforceable method of regulating mislabeling of foods), and it did not allow for the agency to affirmatively require specific labeling provisions.^[27] It lobbied for these changes without result for five years.^[28]

A new Food and Drug Act was only passed in 1938. Again, the main reason for congressional action was public outrage. The Massengill Company, a pharmaceutical manufacturer, sold a drug known as sulfanilamide to treat streptococcal infections.^[29] Used in pill or powder form, it was both safe and effective. When the corporation found out that there was demand for a liquid form of the drug, it dissolved the drug in the liquid diethylene glycol.^[30] Elixir Sulfanilamide, as it was called, was tested for flavor, fragrance, and appearance, and then immediately shipped for public consumption in 1937.^[31] It was not, however, tested for toxicity. Under the 1906 law Massengill had no obligation to do so.^[32] Had it tested for safety, it would have discovered that diethylene glycol, now used as antifreeze, is a deadly poison.^[33]

When the FDA got the first reports of deaths linked to the drug, a massive recall effort ensued, but it was already too late for many.^[34] All told, over 100 people died after consuming the

drug.[35] Yet, even afterward, there was not much the FDA could do to punish the corporation. Even to get the authority to *recall* the drug, it was forced to charge the company with “misbranding,” under the theory that the term “elixir” implied that the solution was an alcohol.[36] If it had been sold as merely “Solution Sulfanilamide,” the FDA would have had no authority to take action.[37] The Massengill Company’s only punishment was a fine of \$26,100 for misbranding.[38]

The tragedy, and the public fear that followed, finally encouraged Congress to act. In 1938 it enacted the Federal Food, Drug, and Cosmetic Act[39] primarily because of the sulfanilamide disaster.[40] The new law was far more elaborate than its predecessor, and was four times as long.[41] It addressed both previous concerns with the 1906 Pure Food and Drugs Act: “it authorized the FDA to establish mandatory food standards...[and] to require additional label information.”[42] But it went even further: It strengthened the strictures against adulteration and misbranding by increasing penalties.[43] It authorized courts to issue injunctions against illegal practices.[44] Finally, it mandated that labels include a list of ingredients (and certain other information).[45]

Since then, American food law has gone through several changes, though none so major as the 1938 act. Most notably, there was a fight in the 1960’s over whether, and to what extent, foods could be fortified with vitamins. The FDA considered over-fortification a possible danger, as ignorant consumers might overdose on some vitamins, or buy fortified foods under the mistaken notion that such fortification would automatically make them “healthy.”[46] As a result, it originally adopted a policy restricting such fortification.[47] Nevertheless, President Nixon got involved in 1969, assembling a “White House Conference on Food, Nutrition and Health.”[48] The Conference report’s final recommendations involved *encouraging* fortification.[49] Since then, the FDA’s policies moved from limiting fortification to merely requiring greater labeling, and ensuring that advertising is not misleading.[50]

Though there are many more laws that have been passed affecting food, there are only a few more that I wish to point out. These include: The Kefauver-Harris Amendments,[51] requiring proof of efficacy for all new drugs, that were precipitated by the thalidomide tragedy in 1962.[52] The Fair Packaging and Labeling Act,[53] passed in 1966, mandated that food labels conform to certain specific requirements. “Virtually every label on every food product in the United States had to be changed” as a result.[54] In 1977, Congress responded to complaints by the consumers and manufacturers of saccharin, and overruled an FDA regulation banning the additive.[55] Finally, Congress passed the Dietary Supplement Health and Education Act[56] in 1994, as a result of an amazing groundswell of opposition to FDA regulation of dietary supplements.[57]

There is certainly more to food law than I have stated here. Indeed, I have completely ignored those important events that took place within the FDA alone (i.e., without congressional input), and only lightly touched on the state laws affecting food that are every bit as important as the federal. The history presented here is focused primarily on demonstrating the societal and political framework in which our food law was built, and lightly delving into the content. Those wishing to learn more could begin by turning to those sources I have cited in this section. Having

discussed the long and vigorous history of food law, I now turn to the history of prisons, and prison law.

History of Prison Law

The history of prison law is markedly different from that of food law. Whereas food law dates back at least to Roman times, prisons as a form of punishment are primarily a modern invention,^[58] with the first major prison system built in Pennsylvania in the late eighteenth century.^[59] Indeed, the original purpose of Alexis de Toqueville's famous trip to the United States was to advise France on the American prison system.^[60] The *law* of prisons is even more recent, dating to the mid-twentieth century. Before then, there simply was no oversight. Wardens were the lords of their domain.

Methods of punishment changed over the centuries, but until recently, not by much. In ancient Athens, punishment came in primarily three forms: varying methods of violent execution,^[61] financial punishments such as fines or confiscation of property,^[62] or varying methods of shaming the individual.^[63] The punishments in ancient Rome were similar, involving fines, or, again, several imaginative methods of execution.^[64] Exile also existed as an alternative to execution, and later became a punishment in its own right.^[65] Forced labor was later added to the list.^[66]

Throughout this time, though there are hints of imprisonment being an option for punishment,^[67] criminals were placed in confinement primarily until they could face their actual penalty. Thus, people were held until they had paid off their fines (if they could not pay, they were eventually executed),^[68] or until execution.^[69] Indeed, the Roman jurist Ulpian stated the rule that prisons were for custody only, not punishment.^[70]

Early European punishments were very similar, with the addition of corporal punishment. Extravagant methods of execution remained available to judges, as did banishment, fines, and forced labor.^[71] Shaming was also used, including, for example, exposure on the pillory.^[72] Shaming was also often combined with corporal punishment, as people would be whipped, burned, branded, or (rarely) mutilated in public view.^[73] Later on, forced labor became a more popular (though still minor) sentence for criminals.^[74] This labor was often done in galleys, on public works projects, or, finally, prisons.^[75] Still, prisons were used primarily to hold accused criminals prior to trial, or until they could be punished. Ulpian's rule was restated by the English jurist Raleigh-Bratton in the thirteenth century as true for British law,^[76] and indeed continued to be cited by the late seventeenth and eighteenth centuries.^[77]

The pattern stayed constant in colonial America. The same types of punishment used through millennia were used here as well: fines, whippings, shaming, exile, and capital punishment.^[78] Again, local jails held either those awaiting trial or punishment, or those unable to pay their debts.^[79] Indeed, much of what we consider necessary to a jail was absent here. Inmates could come and go as they pleased, so long as they did not go too far from the vicinity of the jail, and returned at night to sleep.^[80]

At this point it will be useful to take a moment to note the condition of these historic prisons. They were largely unregulated. That is, there were no rules defining acceptable conditions, or any oversight by outside agencies. Rome's *Tullianum* prison was described by a historian from first century B.C.E. thusly:

The prison is a deep underground dungeon, no larger than a [dining-room that could hold nine people], dark and noisome...[T]he poor wretches were reduced to the appearance of brutes, and since their food and everything pertaining to their other needs was so foully commingled, a stench so terrible assailed anyone who drew near it that it could scarcely be endured.[81]

Later prisons were no better. One writer states that “[d]isorder and neglect were the dominant features of the eighteenth century prison.”[82] One colonial prison, established in 1773, was improvised out of copper mines. It was described thusly:

[It] was, by all accounts, a horrendous dungeon, a dark cave of “horrid gloom.” The “dripping water trickling like tears from its sides; the unearthly echoes, all conspired” to strike an observer “aghast with amazement and horror.” The prisoners were “heavily ironed and secured by fetters”; they ate “pickled pork” for dinner, while working at forges; “a piece for each was thrown on the floor and left to be washed and boiled in the water used for cooling the iron wrought on at the forges.”[83]

These awful conditions, and the lack of any law preventing them, may seem unsurprising given the harsh sentences already meted out to convicted criminals, but they are by no means a necessity. Indeed, one of the few exceptions is fourteenth century French royal prisons. These prisons were supposed to be regularly inspected, and had several (minimal) rules about basic obligations of the jailers (e.g. that it was the jailer's responsibility to provide some type of food, at least bread and water, to inmates).[84]

After America gained its independence, several simultaneous factors resulted in a shift to a new form of punishment. First, the population expanded. Pennsylvania's population quadrupled from less than 50,000 residents in 1730 to 430,000 by 1790.[85] As it did, shaming punishments lost their effectiveness. Shaming punishments work as a method of deterrence because community-members do not want to feel the scorn of their friends. But as communities expanded, they were no longer small enough so that everybody knew each other.[86] Similarly, banishment becomes much harder to enforce when residents cannot recognize an outsider on site. Older methods were no longer effective.

At the same time, execution, the backup punishment, began to fail too. Execution seems a very harsh sentence, especially for such minor crimes as petty theft, and yet was relatively common in the criminal codes.[87] The result was that juries often decided to nullify rather than send someone to death.[88] The conclusion many drew from this was that it was the *harshness* of the codes that led to crime.[89]

Finally, new Enlightenment thinking was gaining dominance, and its adherents attacked the harshness of criminal punishment. Montesquieu wrote his *Persian Letters* and the *Spirit of the Laws* in support of greater compassion in French sentencing.[90] Bentham argued that men were

rational beings, who did not need to be deterred by threat of death, but who would respond to a rational system of punishment.^[91] This thinking came to a head in 1793 in the article, *An Enquiry How Far the Punishment of Death is Necessary in Pennsylvania, with Notes and Illustrations*. Written by one William Bradford, it became very popular, and further established the Enlightenment view of punishment.^[92] Much like Accum's book on food adulteration led the way to modern food law, Bradford's article (and all the others) led the way to a new kind of criminal sentencing.

The first major reform came in 1790, when Pennsylvania substituted forced labor as the punishment for a variety of crimes, and rebuilt its old Walnut Street jail to accommodate the new inmates.^[93] New York quickly followed.^[94] These two prisons experienced some early successes (Newgate even earned a profit net of expenses), and other states moved to follow their example.^[95] Problems soon arose. Despite increasing population growth, neither state allocated any money to increasing prison capacity. The number of inmates in Pennsylvania's prison tripled from 72 in 1790 to 220 by 1815.^[96] The prisons began to face an increasing number of riots. Wardens began pardoning inmates as a method of keeping population under control.^[97] In New York the practice became so common that prisoners rioted if refused a pardon after serving half their term.^[98] Meanwhile, legislatures continued to press wardens to keep their prison costs under control.^[99] In a theme that would continue to repeat itself, prisons became overcrowded and underfunded.

Two new attempts at reform, again in New York and Pennsylvania, were established by 1820, each competing to be the model for the rest of the country. The notion was that much of crime was a result of societal ills. "[B]ad company, vice-rotten cities, temptations, weaknesses in the family were producing waves of crime."^[100] By removing people from these causes, and placing them in a "corruption-free environment," they could reform criminals and prevent them from committing future crimes.^[101] Both, then, involved the forced labor that was featured in earlier punishments, but with the addition that rehabilitation was a clear part of their goal. And, in order to produce the monastic conditions necessary for reform, both decided to ensure inmates remained isolated from each other.^[102] They differed, however, in their approach. The Pennsylvania prison system kept inmates in solitary cells during their incarceration, where they would work, eat, and sleep.^[103] The New York system (called the "Auburn system," because that's where the first prison was established) had each inmate sleep in his own cell, but had them work in a large communal room, during which time no inmates were allowed to talk to (or even look at) any others. ^[104] Though this difference might seem minor to some, it resulted in a vigorous debate.^[105] Eventually, most states adopted the Auburn system, primarily because it was cheaper than the Pennsylvania system.^[106] Just as important, with the decision to improve prisons came new funding from the legislature. The overcrowding problems were (temporarily) solved.^[107]

But history repeats itself, and by the 1860's prisons had again fallen into decay. After the initial reform push in the 1820's, not much else happened. Again, legislatures neglected the need for new prisons. The results, as one writer put them: "Prisons in the post-Civil War era became modern, that is, characterized by overcrowding, brutality, and disorder."^[108] As prisons were forced to adopt policies of double-celling inmates, they had to abandon their rules on isolation.^[109] Any notions of reform simply petered out. Corruption became common, as guards

would accept bribes in exchange for placing inmates in better work assignments.^[110] County jails were even worse: “The overcrowding was severe, the filth awful, the ventilation primitive, and the food scanty.”^[111]

Some reform movements arose in the 1870’s, especially after a scathing report commissioned by the New York Prison Association was released.^[112] Yet for all the proposals reformers made, few were actually adopted. The movement was largely ineffective, affecting only small minorities of prisoners.^[113] Yet another reform movement arose during the Progressive era. It, too, had mixed results at best.^[114] Some of their suggestions, involving, e.g., classification (to separate inmates by dangerousness) and education, were adopted piecemeal by different prison systems, but none across the board.^[115]

Throughout this period, there was no court oversight of prisons. Though there were some state prison boards, as a practical matter they rarely took action.^[116] Prison law was not a matter of what the courts decreed but rather of what wardens decided.^[117] Courts adopted a “hands off” policy, deferring to the expertise of prison administrators except in extreme circumstances.^[118] Yet in the 1960’s the courts reversed course, and began accepting such claims for review, under the theory that practices at prisons violated the Eighth Amendment prohibition of cruel and unusual punishment.^[119] The first such cases involved prison discipline, because they best fit the rubric of “punishment.”^[120] Yet by the 1970’s courts had expanded oversight to include general practices at a prison, including conditions that seem to have little to do with punishment at all.^[121] Once the doors were opened, a torrent of litigation ensued. “By 1984 (the first year for which data are accessible), 24% of the nation’s 903 state prisons (including at least one in each of forty-three states and the District of Columbia) reported to the federal Bureau of Justice Statistics that they were operating under a court order.”^[122] In some of the worst cases, judges took control of entire prison systems,^[123] sometimes for decades.^[124]

Exactly what changed to lead to this reversal by the courts is unclear. One thing that is certain is that the change was *not* a result of an increase in deterioration of prison conditions. To be sure, early cases often involved prisons in truly disgusting shape. One such case involved the Rhode Island prison system. Experts testified that Maximum Security was “the filthiest prison they had ever encountered.”^[125] The judge in the case found that the entire structure was “massively infested with cockroaches, rodents, mice, and rats.”^[126] The kitchen had mice droppings in open food containers, and dead pigeons lay by a waste disposal area, right outside an open door.^[127]

Yet, awful as this seems, it looks no worse than conditions present decades earlier. Kate O’Hare, incarcerated for her anti-World War I views, wrote a book about her experiences at the Missouri penitentiary from 1919-1920.

“Every crack and crevice of the cellhouse was full of vermin of every known sort, which no amount of scrubbing on the part of the women could permanently discharge.” Rats “overran the place in swarms, scampered over the dining tables, nibbled [at the food], played in [the] dishes, crept into bed, chewed up shoes and carried off everything not nailed down or hung far above their reach.” The dining room was equally filthy; the walls were “streaked with grime,” and the

ceiling was covered with fifteen years' accumulation of dead flies. The inmates were segregated and seated at long wooden tables infested with cockroaches.[\[128\]](#)

Surely this is no worse than conditions in Rhode Island fifty years later. Something else must have been responsible for the change.

One academic argues that the intervention by the courts was primarily a result of the larger expansion of civil rights and civil liberties going on at the time.[\[129\]](#) Another states that the courts could not get involved until other questions were resolved, including, e.g. which amendments in the Bill of Rights would even apply to the states.[\[130\]](#) Perhaps the courts only stepped in when it became apparent that the legislatures were simply unwilling to respond to the problems themselves. Whatever the reasons, court oversight has resulted, at the least, in elimination of the worst practices of prisons.[\[131\]](#)

Over the course of the past three decades, the precise standard judges would apply to prison conditions, and the amount of deference they would grant to prison administrators, has fluctuated.[\[132\]](#) In 1996, however, a new law was passed by Congress that substantially cut back court oversight (and in the process, established the requisite standards). Termed the Prison Litigation Reform Act (PLRA),[\[133\]](#) the law was passed in response to Congress' perceptions both that inmates were filing frivolous lawsuits regarding their incarceration in huge numbers, and that activist judges were overstepping their authority in ordering relief.[\[134\]](#)

The PLRA has essentially three types of rules. First, it limits the kinds of remedies available in prison litigation. Injunctions or consent decrees[\[135\]](#) can only be granted if they are "narrowly drawn, extend no further than necessary to correct the violation of the Federal right, and are the least intrusive means necessary to correct the violation of the Federal right."[\[136\]](#) This rule applies retroactively as well, allowing prisons to move for the termination of any court orders where the judge did not specifically make these findings.[\[137\]](#) Second, it limits the ability of indigent inmates to file suit, by requiring them to pay some filing fee even if they file *in forma pauperis*.[\[138\]](#) and limiting the attorney's fees inmates can claim if their suit succeeds.[\[139\]](#) Third, it adds limits on the types of cases that may be brought, by adding a requirement of "physical injury" before any suit may be brought,[\[140\]](#) and by requiring that inmates first exhaust all administrative remedies before bringing suit.[\[141\]](#) There is no doubt that the PLRA has succeeded in reducing the number of inmate lawsuits. The year after the PLRA went into effect, inmate suits dropped 40%.[\[142\]](#) The contention that the suits that have been eliminated are all frivolous, however, is sharply disputed.[\[143\]](#)

Finally, there are two recent trends worth mentioning. First is the increase in use of "Supermax" prisons, where inmates are kept to their cells 23 hours of every day.[\[144\]](#) Though sold to voters as a place to house the "worst of the worst," they are more commonly used to house those (often mentally ill) inmates who are the most disruptive in other institutions.[\[145\]](#) Such prisons are very expensive to maintain, costing nearly double in operating expenses to regular prisons.[\[146\]](#) Second is the growing use of private prisons. Their efficacy is a matter of fierce debate, with some arguing that such institutions will care more about profit than the health and safety of inmates,[\[147\]](#) and others claiming that it is exactly that profit motive that will ensure they act both appropriately and economically in order to get their contracts renewed.[\[148\]](#)

This concludes the history of prisons and prison law. As with the history of food law, I would stress that this discussion is by no means comprehensive. Entire books have been written on the subject of prison history.^[149] Rather, this history attempts to give an outline of the progress (or lack thereof) in prison management and oversight, to allow for comparisons to the food regime.

Prison Food Law Today

At this point it will be useful to discuss exactly where prison food law stands in the context of these two frameworks. The current law of prison food is primarily a product of prison law, rather than of food law. That is, while there is some self-regulation, *oversight* occurs primarily through inmate litigation alleging violations of Constitutional provisions, such as the Eighth Amendment ban on cruel and unusual punishment, or often First Amendment freedom of religion claims demanding prisons supply inmates with food following their specific religious requirements.^[150]

Under current standards, this means that sanitation or nutrition conditions cannot be held unlawful under the Eighth Amendment unless two tests are met. First, the conditions must be objectively cruel and unusual, defined as violating “contemporary standards of decency.”^[151] Second, a subjective test is applied, looking to the minds of the prison administrators. Since only cruel and unusual *punishment* is unconstitutional, the Court reasoned that only those conditions that are known by those responsible would be unlawful.^[152] The precise standard is that inmates must prove prison officials were “deliberately indifferent” to the specific problems in the case.^[153] Both tests must be met before any conditions will be found to violate the Eighth Amendment.^[154]

Nevertheless, there are some ways prison food law partakes of the greater power of food law generally. First, adequate food is one of the few minimum essentials currently held to be required by the Eighth Amendment. Practices will not be held to violate contemporary standards unless they deprive an inmate of “a single, identifiable human need such as food, warmth, or exercise.”^[155] In another case, the Court defined these basic human needs as including “e.g., food, clothing, shelter, medical care, and reasonable safety.”^[156] Thus, within the Eighth Amendment realm, food receives more protection than many other inmate provisions. Though, even here, sanitation issues must be severe before a judge will intervene, and “occasional lapses do not constitute cruel and unusual punishment.”^[157]

Second, prisons are occasionally regulated by general food laws that apply to any places where food is served. Thus, for example, Rhode Island has a general law applying to all places where food is processed or stored that requires that a manager be certified in food safety.^[158] This rule applies to the local prison system as well.^[159] Similarly, when the prison had a food illness outbreak two years ago, state inspectors came in to investigate as they would anywhere such an illness spread.^[160] Note, however, that general inspections that usually occur at, e.g., restaurants, do not occur in the prison.^[161] Such inspections, at least in Rhode Island, are conducted “in house.”^[162] This point is a relatively minor one, as can be seen by a perusal of any of the various treatises on inmate rights, which refer primarily to caselaw and secondarily to model prison standards published by various non-profits and prison associations.^[163]

Finally, there is a wealth of nutrition and sanitation information publicly available. The FDA alone publishes numerous guidelines on appropriate food handling practices.^[164] By giving prisons access to the appropriate standards, it allows them to self regulate more effectively.^[165] Also, such standards presumably make it easier, in case of litigation, for judges to determine if prisons have acted in an unsafe manner.

There are several areas of primary importance in prison food law.^[166] Mentioning them here will facilitate later discussion. First are sanitation issues. These include anything from simple cleanliness problems and rodent infestations,^[167] to problems endemic to prisons (e.g., outbreaks of infectious disease, given close proximity of such a large group, and food poisoning as food gets cold while being served to a large number of inmates).^[168] Note that these cases are often linked to other issues, most notably overcrowding. As more people are placed into a prison, sanitation becomes more of a problem.^[169]

Another issue is the use of food, or the withdrawal of food, as a form of punishment. Thus, in some cases a prison might withhold food from inmates that do not conform to the rules.^[170] In other cases, disruptive inmates are served what is called “nutra-loaf,” or “food loaf,” a substance made essentially by taking normal meals and grinding/mashing them into an unappetizing loaf.^[171] Lastly, there is the issue of special diets. Often inmates have special dietary needs, either for health (e.g. diabetics)^[172] or religious reasons (e.g. Jews requiring Kosher foods).^[173]

This brief overview of prison food law is enough to begin to draw out the differences it has from food law generally. Of course there is always more. Indeed, in this particular case, much more, some of which will be discussed below. We may now move onward (*finally!*) to the meat of the paper.

The Political Nature of the Two Systems

The first thing to notice about the two legal frameworks of prison and food law is the extraordinarily different realities in which they operate. Food law over the course of the past two centuries has seemed to follow a simple lockstep pattern: The public is made aware of problems in the food and drug supply, either through the publication of information on the subject or through the existence of a public tragedy, and the legislature responds with some new laws to repair the problems exposed.

Thus Accum’s book on food adulteration captures public attention and results in the first modern food regulation regimes. An outbreak of yellow fever results in the establishment of local boards of health. Upton Sinclair publishes his manifesto and an outraged populace spurs Congress to pass both the Meat Inspection Act and the Pure Food and Drugs Act. Further expansion of the law is delayed until the Elixir Sulfanilamide disaster speeds passage of a new Food and Drugs Act in 1937.

More recent changes in the law follow this same pattern. The Kefauver-Harris Amendments were passed after the thalidomide disaster. This case is most notable because the problems *did not even occur inside the United States*, yet changes to the law were still made. Lobbying by

consumers and producers of saccharin resulted in additional legislation to ensure its availability. The Dietary Supplement Health and Education Act was also passed as a direct result of intensive lobbying by consumers.

This unbroken trend demonstrates a populace that is both highly aware of its food and food law, and capable of pressing its interests in the legislatures. Each major expansion and contraction of the law was a result of consumer intervention. The end result is not only a robust legal framework, but one which changes over time to better fit the interests of the public. This same robust framework of law may be found locally. Every state has its own food and drug act.[\[174\]](#) Each of these, too, exhibits the same kind of powerful and dynamic regulation as at the federal level.[\[175\]](#)

The history of prisons, however, shows a far different pattern. For millennia, the basic rules of punishment went unquestioned. To the extent confinement was used it was completely unregulated. Yet by the late eighteenth century, some of the same factors at work in food law seemed to come to the fore. Writings of the time, this time by Bentham, Montesquieu, and Bradford, captured the public's imagination, and resulted in wide-ranging reform. Much like the publication of *The Jungle*, or Accum's book on food adulteration, they resulted in concrete legislative changes.

Unfortunately, the comparison seems to end there. Rather than continuing to follow a pattern of constant improvement and growth of the law, it instead followed a consistent downward slope. First it moved into a rut where occasionally there was talk of reform, but no real changes ever manifested. Indeed, one student writer has compared prison law to New Year's resolutions. "Yet soon the luster of the resolutions dims, the determination of the resolver wanes, and a return to more convenient ways seems inevitable."[\[176\]](#)

Thus the first prison reform movement arose in the 1820's, but after initial activity the movement faltered. By the 1860's prisons had already relapsed into poor conditions. In the 1870's a report commissioned by the New York Prison Association again resulted in a new push for reform. But here even the first push was ineffective, with legislatures adopting few reforms.

And again, in the 1920's, Progressives pushed for changes in prisons. They, too, failed to enact much meaningful reform. This particular movement is most interesting for the contrast that it shows with food law. *The Jungle* was published in 1906 and resulted in a furor of change. Three decades later the Elixir Sulfanilamide disaster too caused a wealth of growth in food law. Yet during the middle of this period, Kathleen O'Hare wrote her account of her experiences in prison[\[177\]](#) with little result. Since that time, there has been no shortage of accounts of prisons in popular culture, nearly all negative.[\[178\]](#) Yet none have angered the public, or led to any lobbying.

After that, the next major reform came not from politics, but from the court. This one, however, was somewhat successful, improving some of the worst prison practices and beginning to apply minimum standards of care. Yet what happened at this point is very interesting: The next major push in the legislatures was not to improve prison conditions, but actually to *cut back oversight*. The Prison Litigation Reform Act was passed where a multitude of earlier reform attempts had

failed. This was not merely a minor procedural change: It substantially cut back on inmate litigation and resulted in the termination of many court orders. Whereas food law has seen a continuing increase in complexity and strength, prison law (and prison *food* law along with it) has gone from intense interest, in America's early history, to apathy, and finally to an actual backlash against any kind of oversight at all.

The primary question this section seeks to address is: *Why?* Why, given a relatively equal amount of information, a relatively equal amount of tragedy, has food law flourished while prison law has lain stagnant? What is responsible for the continual decrease in interest in prison law, when interest in food seems as strong as ever? Unfortunately, I don't have a clear answer. Indeed, I don't believe that any one answer *could* adequately explain this difference in public concern. At the least, however, there are some promising areas of inquiry to begin answering this question. Each, to some extent, helps explain the reality in which prison food law must work.

Perhaps the most obvious answer to this question lies in the nature of prisons. That is, they are a form of punishment. As such, they are *meant* to be unpleasant, and enacting law to limit this unpleasantness goes directly against their very purpose. Poll data seem to support this reasoning. Somewhat more than 80% of individuals think courts are too lenient on criminals.^[179] Less than 5% feel they are too harsh.^[180] Some of the reasoning in cases limiting court oversight also seems to assert this justification. For example, in one case Justice Rehnquist stated, "the Constitution does not mandate comfortable prisons, and prisons of SOCF's type [maximum security], which house persons convicted of serious crimes, cannot be free of discomfort. Thus, these considerations properly are weighed by the legislature and prison administration rather than a court."^[181]

To some extent, this sentiment is certainly correct. Standard legal jurisprudence states that prison sentences are meant to serve the four functions of punishment, deterrence, rehabilitation, and incapacitation.^[182] For them to serve the first two of these functions there must certainly be some amount of unpleasantness or hardship in going to prison. Punishment does not punish if it does not cause some distress. No one shall be deterred from committing a crime if the consequences of getting caught and prosecuted are not unwanted. Indeed, far more than a minimal amount of discomfort is required for a working justice system.^[183]

This answer has another advantage as well: Not only does it explain why interest in prison reform is low, it explains the *decrease* in interest over the centuries. When prisons were first instituted, they were intended to be a more human alternative to the existing regime, and public awareness and concern were remarkably high. The focus in the 1820's was on rehabilitation. It was only over time that the legislatures stopped listening (or that the public stopped speaking). At the same time, rehabilitative ideals have fallen out of fashion. While the United States was the first major power to abolish the death penalty for most crimes, ^[184] it is among the last to refuse to eliminate it completely. The goals of imprisonment today focus more on the other three purposes of imprisonment.^[185] This fits into line with the theory: lack of oversight is an intentional method of ensuring prison fulfills its current goals of punishment and deterrence. Earlier periods had more of a push for reform because prisons had a different goal.

But this answer does not go far enough, for surely there must be some stopping point to the notion of punishment. Taking this reasoning to its logical extreme results in condoning, among other things, torture and dismemberment, which our society has explicitly decided are beyond the pale of civilized punishment.[\[186\]](#) Clearly not *every* occurrence at a prison is part of its basic purpose of punishment. Murder by another inmate, for example, does not seem to be the punishment legislatures intended to enact.

So a line must be drawn between acceptable methods of punishment, and unacceptable ones. Deciding where exactly to place that line between torture and inaction is difficult. Unfortunately, it is a decision that the public as a whole, and the legislatures it has elected, have both completely abdicated.

If that line were to be drawn, basic issues of sanitation and nutrition would surely fall on the side of protection. After all, the goal of food law in every other field is not to prevent punishment, but to ensure the basic health of our citizens.[\[187\]](#) Similarly, regulating the cleanliness of prison kitchens wouldn't seem to affect the "punishment level" of the prison, but merely ensure that inmates don't get food poisoning.

Ensuring that meals are nutritious also does not seem to be "going easy" on prisoners. Indeed, the healthiest foods could often be considered the least appetizing. After all, spinach and broccoli are not known for their flavor. Serving a salad with meals hardly seems to be pampering. Punishment is simply not the point here. Rather, the issues are more about preventing vitamin deficiency or large weight gain.[\[188\]](#) When we consider the basic punishment prisons are meant to inflict, obesity does not seem to be on the list.

This is especially true when we begin to look at some of the special diets inmates need. In one case inmates were not given the diets they were medically required to have. "Of the three, one is now blind due to his inability to control his diabetes; one spent an extended period of time in the hospital due to a relapse of Crohn's Disease; and the third suffered a diabetic seizure due to his drinking of a saccharin sweetened juice."[\[189\]](#) Surely blindness is not the punishment envisioned when sending a criminal to prison. Yet prior to the court's involvement, there was no statute, no regulation, mandating that inmates receive such meals. Indeed, there was not even a full time doctor working at the facility.[\[190\]](#)

So the notion that the lack of regulation is intended, because society wants to ensure punishment, does not explain why there is no regulation of prison food, or any of those areas of incarceration that are not really "punishment." Something else must be at work here. A better explanation might be simple interest group politics. When legislatures are deciding how to best spend their time, investing in issues that affect a larger proportion of the community might make very good sense. After all, in the United States there are approximately 2 million Americans incarcerated at any one given time.[\[191\]](#) While this may seem a large number, it is less than one percent of the 293 million currently living in the U.S.[\[192\]](#)

This theory makes even more sense when two other factors are taken into consideration. First, in most states inmates cannot vote. A full 48 out of 50 states (the exceptions are Maine and Vermont) do not allow prisoners to vote.[\[193\]](#) 35 of those extend the prohibition to those on

parole.^[194] In 14 states, the ban survives the completion of an inmate's sentence in at least some circumstances, and often requires them to affirmatively apply for a restoration of voting rights.^[195] Working under the assumption that legislators are representatives of their constituents, the numbers lead to an obvious conclusion: The gaping absence of inmates, those most interested in the law of prisons, and those most likely to support improvements (rather than increasing harshness), results in a lack of political will for reform.

Of course, this is not the whole story. Those who care about inmates (e.g. relatives of convicts) would also be interested in improved prison conditions. The second point to consider is that they, too, do not vote. It is a simple fact that those who commit crimes are among the poorest.^[196] Assuming that their friends and family come from the same background, they, too, are poor. Unfortunately, it is the poorest classes that are least likely to vote. In 2002, twenty-five percent of eligible voters with a family income of less than \$10,000 per year voted.^[197] When looking to those with a family income over \$75,000, however, one finds that fifty-nine percent voted, over double the rate of the poorest.^[198] Not only do inmates not have a voice in government, but the constituency most likely to care about their welfare is the least likely to vote. The combination leads to the conclusion that measures intended to improve prison conditions do not have a strong base of support.

Compare this to food law. Food is one of the few issues by which *everyone* is affected. (Or at least, everyone who eats.) Upper class, lower class, and (most important) middle class, none want to eat unsafe food. Any bill passed by a legislature can be expected to have broad popular support. The difference can be seen, again, by turning to the events surrounding the publication of *The Jungle*. While Sinclair intended to stir protest against the entire capitalist system, he instead managed only to focus America's attention on food law. The difference is very important: One had a broad base of support, while the other did not. As one author wrote, "But it was not an accident. Middle-class people learned from the scandal what they wanted to learn; they took what had meaning for *their* lives. And that meaning was in the food they ate, not in the miserable lives of the workmen whose body and blood had contaminated their middle-class food."^[199]

But this kind of broad support doesn't seem possible when it comes to prisons. While some, especially in the lower classes, might care about the interests of inmates, many others would not. To the middle class, the most important issues are likely to be deterrence and punishment, on the one hand, and costs, on the other. Both of these push in the direction of less law requiring basic minimums in prisons. Deterrence because the lack of such basics is certainly unpleasant, and costs because both the basics supplied, and the bureaucracy that would presumably be required to ensure their distribution, would come with a price tag. Indeed, one of the few times the public has agreed to an increase in prison spending, it has been to build supermax prisons, meant to be a severe punishment to house the "worst of the worst" criminals.

This interest in efficiency can be seen to have played a part in several cases in prison history. Once America established its first prisons, it did not build any more until the buildup of prisoners led to a crisis in the 1820's. Then, when the country had to choose between two prison models for reform, the Auburn system or the Pennsylvania system, they chose the cheaper one. Since

then, underfunding has been a chronic problem with prisons. Indeed, one attorney has noted that, “Nearly every prison system in the United States is overcrowded and underfunded.”[\[200\]](#)

When combined with the issues of punishment, money spent on virtually any other public agency would likely have better support. One newspaper article written in 2003 discussed the (then) recent trend of legislatures pressuring prisons to cut back on prison food.[\[201\]](#) It noted that, “For many state lawmakers, complaints about prison food do not elicit much sympathy when they are considering cuts that could leave people without health insurance or mean fewer police and firefighters.”[\[202\]](#) Marty Seifert, a Minnesota State Representative, perfectly captured this sentiment. “We have to make sure the rapists and murderers sacrifice like everyone else.”[\[203\]](#)

But while this explanation serves very well to help understand why prison reform has little support *today*, it does little to explain the bursts of interest in earlier years. Presumably, the prisoners of the past were every bit as poor as they are today. Indeed, older laws often punished the poor simply for *being* poor through loitering and vagrancy laws.[\[204\]](#) And the number of inmates in our nation’s prisons has only risen over time.[\[205\]](#) Both of these lead to the conclusion that, while interest in prison reform should have always been low, it nevertheless should have risen over time. And yet the opposite is true.

So what changed? Why was there so much early concern in prison regulation, and so little today? Perhaps part of the answer is the change in focus from rehabilitation to punishment, but that just begs the question. It is clear that prisoners are hated today,[\[206\]](#) and there is some evidence that the populace was more willing to give inmates the benefit of the doubt earlier in our nation’s history.[\[207\]](#) But this doesn’t tell us anything. Even assuming that theory is correct, what caused the focus of prisons to change?

A final theory explains these changes in terms of race. As those being convicted were the poor, eventually there was a shift to a greater number of immigrants (and later, African Americans) being imprisoned. In 1850, 32% of New York inmates were immigrants (primarily Irish).[\[208\]](#) By the Civil War that number went up to 44%, with native New Yorkers composing only 41% of convicts.[\[209\]](#) Some writers have theorized that it is this change that has resulted in less interest in prison conditions,[\[210\]](#) and indeed this increase does coincide with the failure of reform by the 1860’s, and of other reform movements of the 1870’s.

If anything, the disparities have only increased. Today, the racial differences in incarceration rates are staggering. An estimated 43% of America’s two million inmates are African American.[\[211\]](#) Another 19% are Hispanic.[\[212\]](#) Yet African Americans comprise only 12% of the population.[\[213\]](#) Hispanics are only 12.5% of the population.[\[214\]](#) To put these numbers in perspective, 12.6% of all African American males between the ages of 25 and 29 (more than one in eight) are incarcerated.[\[215\]](#) The same is true of only 1.7% of whites.[\[216\]](#) African American males have a 32% chance of going to prison at some point in their lives.[\[217\]](#)

Indeed, the situation is so polarized that some observers have written that simple racism is at least partly responsible for the current state of America’s prisons. Randall Kennedy writes, “One major impediment [to the enforcement of decent law and order] is the conviction of many people

that the law enforcement system is overwhelmingly racist. Although the precise dimensions of this attitude are unclear, within African-American communities it is certainly appreciable.”[\[218\]](#) Indeed, at least one law professor has concluded that the best course of action for the black community is to simply use their right to jury nullification. They should simply refuse to convict black defendants of nonviolent crimes.[\[219\]](#)

So is this theory correct? Is it racism that has resulted in an unwillingness to improve prison conditions? Do people believe (at least subconsciously) that they are entitled to a strong food law when blacks (or at least black criminals) are not? The data, unfortunately, is mixed. There is an established psychological phenomenon, known as the *similarity-attraction effect*, that explicitly backs up this conclusion.[\[220\]](#) It shows that, as a person feels more similar to another, their liking for that person also increases.[\[221\]](#) This effect is present even for relatively trivial similarities, such as sharing a first name,[\[222\]](#) or a liking for a particular artist.[\[223\]](#) On its face, then, the theory seems relatively powerful. The popular understanding of white Americans that they are “different” from the majority of inmates, because they are of a different race, may very well mean that they are less willing to support improvements in prison conditions.

Unfortunately, the analysis doesn’t end there. A corollary to the *similarity-attraction effect* is the *black-sheep effect*.[\[224\]](#) Surprisingly, whereas members of a group are more likely to like other members of the group, the exception is in the case of stigmatized group members. When a group member has a “negative feature,” other members of the group dislike that person even more than an outsider with the same feature.[\[225\]](#) So, for example, one study showed that people were inclined to reject someone who was a former mental patient more strongly when that person was more similar to them in other respects.[\[226\]](#)

It seems highly likely that imprisonment, something which only happens to convicted criminals, would be such a negative feature. As mentioned earlier, prisoners are, as a whole, hated by the public.[\[227\]](#) Indeed, the one study I could find addressing this issue did find incarceration to be stigmatizing in this way (though in that case the group divisions were by party affiliation, not by race).[\[228\]](#) As of right now, the data is not really there to say with certainty whether race plays a dominant part of the reform mix.

Finally, I’d like to make a small point in reference to food law. Throughout this section, I have focused on the lack of prison law, and prison food law in particular, as an anomaly, while treating the prevailing food law regime as the standard. With regards to prison law, I believe that to be undoubtedly true. Given the problems faced in America’s prisons, and compared to virtually any other subject of public interest, the absence of congressional action is exclusive to this field.

Yet the opposite could easily be said of food. People seem uniquely interested in the subject, in a way that is not true in other areas. The recent (now discredited) story of a woman finding a finger in her bowl of Wendy’s chili[\[229\]](#) has resulted in a media frenzy. A simple westlaw search of the allnews database reveals 810 articles written on the topic.[\[230\]](#) Wendy’s lost an estimated 2% in sales as a result of the incident.[\[231\]](#) Similar excitement brewed around a 1993 claim (also a hoax) of finding a syringe in a can of Pepsi that spawned a host of copycats.[\[232\]](#)

This same interest can be found to have affected the law of food. As mentioned above, the Dietary Supplement Health and Education Act was passed after an amazing groundswell of consumer interest. So many people lobbied on the issue that some congressmen bought new answering systems especially to handle the load.^[233] Specific laws have been passed on such seemingly limited issues as filled milk,^[234] margarine,^[235] and saccharine.^[236] Whereas prisons are notable for the lack of governing statutory law, food law is notable for the opposite: a stunning array of statutes controlling even somewhat obscure issues.

So where does that leave us? I have spent a lot of time touching upon a wide range of topics, involving politics, race, punishment theory, and psychology. It was necessary, however, in order to demonstrate the very different worlds in which food law and prison law operate. Food law enjoys broad public support across race and class. There really are few downsides for legislatures in enacting such laws. (And when they do overstep their bounds, the public quickly makes its voice heard and they reverse course.)

But if food law is the first-born child on the honor roll, beloved by all and supremely confident, prison law is the poor step-child, without love and without much hope. Any enactment of prison reform is hampered by a host of problems: Those most invested in change either can't or don't vote. Those who do vote seem more invested in a view of punishment and deterrence that leaves little room for improving prison conditions. This is true even when, as in prison food, the improvements don't really seem to affect punishment. Whether they hold this view out of a strong belief in deterrence or else simple racism, or whether they are merely ignorant of what can and does go wrong in prisons is not completely clear. Undoubtedly that depends on the individual, and these factors may hold to varying extents. What is clear, however, is that for legislatures there is very little benefit (and a large downside) to attempting to enact such reforms. The result, simply, is that they don't happen.

This concludes the section discussing the political realities of prison food law. The next section begins to tackle the practical consequences of the current state of affairs by looking to the most important aspect of any set of laws: enforcement.

Enforcement

In the food law realm, the FDA and other state agencies have a multitude of options when confronted with a non-complying food establishment. From statutorily granted measures such as fines^[237] or seizures,^[238] to agency created enforcement methods such as the "warning letter" and use of publicity,^[239] they have the ability to respond to issues forcefully or with a light touch, as required.

Yet there is no analogue in prisons. Since the legislatures have been unwilling to legislate minimum standards, those standards come instead either from within, through self regulation, or through the courts, which outline the limits on prisoner treatment mandated by various constitutional amendments. The result is a two sizes fit all approach. In the first case, there is no real enforcement, just goodwill. In the second, enforcement is both haphazard and often unwieldy.

It is the purpose of this section to do two things. First, I will look at some of the reasons other enforcement methods, standard for the FDA or state agencies, are either inappropriate or unavailable to prison food. Second, I will discuss how the current prison law enforcement mechanisms are inappropriate both generally, and specifically with respect to prison food.

The FDA has a large array of enforcement methods, both official and unofficial. One journal goes through them in a simple laundry list: “inspectional observation, warning letter, meeting with company management, recall, referral to state or other agencies, publicity, import detention and refusal, seizure, injunction, civil money penalty, prosecution, license suspension, license revocation, emergency suspension, withdrawal of product approvals...notification of health professionals, users...”[\[240\]](#) In addition, it goes on to mention standards and regulation setting, and consumer education.[\[241\]](#)

That’s quite a list. Let’s unpack that. These enforcement methods can be divided into several categories. In the first are those that involve removing harmful products from the marketplace. The second group is composed of punishment of private actors. Third are those that involve educating consumers about risks. Fourth are those that involve monitoring to ensure compliance with the rules. Finally, the agency can simply mandate new rules in line with its mission as it sees fit. Each of these groups will be discussed in turn.

The first category clearly could not apply in the prison setting. Seizing harmful food is only possible when there is something to seize. Import detention, for example, obviously only implies to imports of food. Similarly, recalls assume there are specific food items out on the market that can be removed. Recalling a prison simply doesn’t make sense.

The second group, involving punishment, does not apply because it assumes a private actor. Civil penalties levied on a prison would simply take money from one government agency and give it to another. The normal profit motive this deterrent relies on simply does not exist. Further, many of the problems that are found in prison are the *result* of a lack of funding by the legislature.[\[242\]](#) Imposing fines in these cases would merely exacerbate the problem, rather than solve it.

Similarly, there can be no revocation of licenses because state funded prisons obviously are not *given* licenses. They cannot be. When a restaurant fails inspection, and its license is revoked, it may simply be closed down. There are plenty of other restaurants consumers may go to, and, with the exception of the restaurant owner and staff, no one who will be seriously harmed. The same is not true of a prison kitchen. Inmates have to eat, whether the kitchen that provides their food is sanitary or not. It cannot be shut down because there is no other source from which inmates can get their food. In speaking with the Director of Food Services at one prison, I raised this problem. His response was that, if a kitchen were so unsanitary that it needed to be shut down, they might possibly rent equipment to prepare food as a temporary measure.[\[243\]](#) But, given the low funding prisons already get, and the high volume of meals they must serve, such a solution could not last for long.[\[244\]](#)

An interesting question is the extent to which such measures could be applied to private prisons. They *are* driven by profit, and the threat of fines could foreseeably have an impact. Indeed, one

reason some have raised for increasing the use of private prisons is the very fact that they *can* be subject to such methods of enforcement.^[245] Given that a strong reason states hire them is their claimed cost savings,^[246] however, it is not clear that there would be much room for such fines before they would exit the market. And, of course, it is likely that they would not quietly accept such a burden. Indeed, much has been written about how their very profit motive has resulted in *worse* care, as they cut food and security for the sake of profit.^[247]

Revoking their right to run a prison (i.e., revoking their license) could certainly work. Indeed, in at least one case a private firm did resign after various problems at a Texas prison.^[248] The actual *prison*, however, would still be there. Thus this might be a good solution in order to ensure inmates receive adequate nutrition, since food is continually consumed, and whoever took over the prison could begin serving their own. Sanitation issues, however, to the extent they are related to problems like rodent infestation which cannot be fixed without closing the prison kitchen down, would be just as problematic as in the case of publicly run prisons. In any case, as of now private prisons are a small minority, and for purposes of this paper, it is enough to say that none of these remedies *are* applied to private prisons.

The third avenue of enforcement the FDA uses involves consumer education. This solves many problems simply by having consumers make better choices. Yet inmates do not have the same options. They take what they are given. Without the ability to choose, there are no benefits to greater information. Education will not solve any of their problems.

On a related note, the use of publicity is just as, though less obviously, ineffective. The FDA uses publicity as an informal tool to effect change, sometimes when other enforcement methods fail. Thus, in one case, when the FDA could not get a producer to hold some avocado pulp that may have contained listeria, it simply issued a press release warning about its use.^[249] On its face, publicity might work to encourage change of shady prison practices. An angry public might demand changes in the same way they do in the food realm. As the previous section has shown, however, such publicity is simply not effective when it comes to prison conditions. People don't exhibit the same level of concern as they do when it comes to food. More will be written about the consumerist nature of food law in a later section.

The fourth group of enforcement options available to the FDA, involving monitoring, might theoretically apply to prison. There is no reason, other than deference to prison administrators, that such monitoring could not occur. As mentioned above, the Rhode Island prison *was* inspected after an outbreak of disease several years ago.^[250] Indeed, if there is any one improvement to the current situation that would be both relatively effective and easily implemented, this would be it. At least with respect to prison food, the infrastructure is already in place. The FDA already inspects approximately 20,000 establishments per year.^[251] Each state has its own agencies doing similar inspections. There is no reason to believe that what inspectors look for in restaurant kitchens would be any different from what occurs in prison kitchens. Perhaps there may be impediments to expanding such a program to other areas of prison life. For one thing, there is no federal or state agency equipped to *make* such inspections. At least with respect to prison food, however, no possible complications seem readily apparent. The issue is more that there is no political will to enact such change, and possibly the increased funding necessary to pay for such inspections.

The final enforcement power of the FDA is its ability to create rules as it sees fit in order to further its directive. Obviously, given the fact that there is no comparable prison oversight agency, there is no one to institute such rules. In one sense, however, something along the same lines could be said to be happening in the courts. The courts are the only government body that exercises any real oversight over prison conditions. In this way, they are analogous to the FDA. Whereas the FDA might base its rules on its statutory mandate, the courts, by deciding issues on a case by case basis, begin to create similar rules based on their constitutional mandate. More about this will be discussed below.

At this point it is clear that, for the most part, none of the FDA enforcement options are available in prison law. All require, at the least, either some statutory basis or some investment from the public as a whole. How then, is prison law enforced? There are two primary sources of prison law, each of which is related to some extent with the other. They both will be discussed here.

In the absence of outside oversight, much of prison regulation is done from within. That is, prisons themselves will often voluntarily attempt to set and comply with standards they or others create. Thus, there are several nonprofit organizations that publish standards regarding prison conditions. The American Public Health Association, for example, publishes a book of standards for prison health services, requiring, e.g., an onsite dietician to supervise menu planning, or psychiatric screening before an inmate may be placed in punitive segregation.[\[252\]](#) The American Correctional Association publishes a similar volume on health care with the Commission on Accreditation for Corrections.[\[253\]](#) Others are on topics running the gamut from juvenile boot camp[\[254\]](#) to correctional industries (i.e., inmate work programs)[\[255\]](#)

These outside resources can provide concrete, detailed information about how to best go about running specific areas of a prison. Interested administrators may use such information as a method of ensuring that they are doing everything they can to run the prison both safely and effectively. Thus, the Director of Food Services in the Rhode Island prison system makes sure inmate meals comply with guidelines from the American Dietetic Association and American Correctional Association to the extent possible. This includes, e.g., offering two servings of fruit per day.[\[256\]](#)

In addition, prisons may often decide to run their own inspections to ensure that, e.g., sanitation is up to their own standards. Thus, in the Rhode Island prison, inspections are conducted monthly in-house to check for problems in areas such as sanitation, pest control, and air quality.[\[257\]](#) Letter grades are assigned to denote levels of severity, and times by which problems need to be fixed.[\[258\]](#)

Finally, prisons can voluntarily seek accreditation from nonprofit organizations like the American Correctional Association. This process, at least in the case of the American Correctional Association, involves a three year application period during which a prison must follow all published guidelines.[\[259\]](#) Audits may be made (with several weeks notice) to ensure compliance.[\[260\]](#) If problems are found, prison administrators are notified.[\[261\]](#) If they fail to repair such problems they will not be accredited by the agency.[\[262\]](#) Such a system begins to have some aspects of the inspections available to food law enforcement agencies. This

accreditation process has been relatively successful, with approximately 80% of state departments of corrections now involved.[\[263\]](#)

This process of self-regulation is great so far as it goes. Under this regime, interested prisons can make very real improvements in their systems. But there are two things to note: First, this system is nevertheless tied to some extent to the regime of court oversight. Thus, the first version of the standards written by the American Public Health Association were published in 1976. As the book's introduction states, "Not coincidentally, in 1976 the United States Supreme Court ruled that 'deliberate indifference to the serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain...proscribed by the Eighth Amendment...'"[\[264\]](#) Similarly, the American Correctional Association advertises one of the benefits of accreditation as, "a defense against lawsuits through documentation and the demonstration of a 'good faith' effort to improve conditions of confinement."[\[265\]](#)

Second, beneficial as this system might be, it is not really law. As long as such systems are voluntary, they only help the good prisons, but do nothing for the bad. While some prisons certainly have administrations that honestly care to ensure the well being of inmates, it is easy to imagine institutions where they do not. The analogue in the food realm would be to merely publish sanitation standards and hope restaurants comply. Surely, some would out of simple decency. But just as surely others would not. This can easily be seen by the number of restaurants that already *are* shut down for failure to comply with regulations.[\[266\]](#) Perhaps a nonprofit accreditation organization could be established, but this would actually be quite different from accreditation in prisons, because, given consumer choice, individual restaurants might very well be punished for not being accredited. There is no similar ability of prisoners to demand incarceration at only accredited prisons.[\[267\]](#)

Just as important, even interested administrators cannot always comply with regulations. Given limited funds and circumstances occasionally beyond their control, prison administrators can only do their best, which in some cases may not be enough. Thus, for example, when Rhode Island's prison runs the inspections discussed above, they are to be supervised by one of two health coordinators. Yet both left in December of 2004, and, as of March 2005, no replacements had been found.[\[268\]](#) Similarly, the Director of the Department of Corrections put in a proposal over four years ago for an expansion of the prison in order to accommodate growing numbers of inmates, but so far, it has continually been ignored.[\[269\]](#) Without some law mandating certain procedures in the case of overcrowding, the prison does not have much choice but to accept inmates as they arrive, and attempt to make the best of it. Even a well meaning prison administrator cannot follow all the guidelines unless there is some hard rule forcing, not only him, but the legislature as well to comply.

Similarly, food services does not comply with all applicable standards. For example, the amount of time between dinner and breakfast is supposed to be 13 hours, but given the constraints of the prison schedule, this much time is not always given.[\[270\]](#) I do not mean to suggest that the decision to disregard this rule was a bad one. Indeed, it may have been (and sounds to be) quite reasonable. The point is, without some outside agency deciding when such rules may or may not be ignored, the framework is not one of law but of discretion. To the extent discretion results in good choices, all the better. While I have been discussing the Rhode Island prison to some

extent, I'd like to make clear that I believe it to be a very well run prison, making good decisions, and facing the same problems as any other.[\[271\]](#) As can be seen from discussions above, however, the history of prisons is rife with poor choices. There must be some second kind of enforcement that is, well, enforceable, for the law to do any good.

This gap is filled by the courts. By allowing inmates to challenge prison conditions, they allow for some *enforceable* minimum standards with which prisons and legislatures must comply. Unfortunately, litigation in the courts is a relatively poor method of enforcing such rules, for a variety of reasons. This section explores the most important issues.

The first point it is important to notice is that court enforcement only occurs after an inmate files suit, and wins. In order for an inmate to succeed, he usually requires a good lawyer to adequately present the issues. Unfortunately, most prisoners are indigent. They can rarely afford to hire lawyers to bring claims, and must instead either represent themselves, or rely on help from non-profit human rights organizations. One study found that, in the Southern District of New York, approximately 95% of inmates who brought suit regarding prison conditions did so *in forma pauperis*.[\[272\]](#) That is, they claimed that they were too poor even to pay the filing fee, let alone an attorney. Indeed, some have estimated that 60% of *all* pro se cases are filed by inmates.[\[273\]](#) Unsurprisingly, given the complexity of necessary reforms, those cases that are most successful are not handled by the inmates themselves, but instead by some nonprofit organization or another. Thus for example, successful litigation against the Rhode Island prison system required decades of work by the National Prisons Project, a branch of the American Civil Liberties Union.[\[274\]](#) To the extent, then, that these nonprofits are limited in their ability to not only take, but *find* cases with merit, prison oversight suffers. An adversarial form of oversight necessarily requires an adversary. In most cases there is not one that can adequately present all the issues. As a result, prison oversight is not comprehensive, but rather ad hoc.

That is not to say most cases brought by inmates have merit. Indeed, most don't.[\[275\]](#) There is a torrent of inmate litigation, and finding those cases with merit is difficult indeed. The number of lawsuits by prisoners contesting some aspect of their incarceration total in the tens of thousands in federal court alone.[\[276\]](#) One circuit court wrote (prior to the enactment of the PLRA), "About one appeal in every six which came to our docket (17.3%) the last four months was a state prisoner's pro se civil rights case. A high percentage of these are meritless, and many are transparently frivolous...Such figures suggest that pro se civil rights litigation has become a recreational activity for state prisoners in our Circuit."[\[277\]](#)

Some, including many state attorney generals, have responded to this flood by claiming that *all* such suits are frivolous,[\[278\]](#) but that is simply not the case. Indeed, in the push to pass the Prison Litigation Reform Act, the National Association of Attorneys General and several state attorney generals distributed several "top ten" lists of frivolous inmate litigation.[\[279\]](#) Ironically, at least one of the cases mentioned was anything but frivolous, involving, e.g., claims of "overcrowding, forced confinement of prisoners with contagious diseases, lack of proper ventilation, lack of sufficient food, and food contaminated by rodents."[\[280\]](#)

But in the face of these numbers, judges may have a hard time maintaining their objectivity. One law professor outlines the problem:

Whether a prisoner's claim proceeds beyond the complaint stage depends largely on the attitude with which the magistrate or district judge views the complaint. Claims that are not frivolous on their faces--and many are not-- usually can be construed to allege facts that warrant at least appointing counsel to develop the case. But upon investigation so many prisoner claims prove weak that it is easy to lose objectivity in assessing the merits of their allegations. The conscientious judge who allows cases to proceed beyond the pleading stage may find the claims fabricated or distorted. He then becomes less eager to allow future cases to proceed, and his decisions dismissing cases rarely receive substantive appellate review. Perhaps for these reasons, federal magistrates and judges in Los Angeles appear to have become less than fully sensitive to prisoner claims. Their inclination to resolve ambiguities in pleadings against pro se litigants is the clearest outward manifestation of this attitude.[281]

There are thus two general problems with relying on inmate litigation for enforcement: the fact that most inmates must file their cases without a lawyer, and the large number of meritless cases that serve to hide the ones with merit. The end result is that inmate litigation is at the bottom of the list when it comes to success rates. Estimates of the percentage of successful inmate suits vary from 6% [282] to 13%. [283] This is far below even other types of cases known for low success rates. Employment discrimination cases succeed at trial in an average of 22.2% of cases, and civil rights cases average 34.7%. [284] As one judge put it,

The prisoner who actually suffers a meaningful deprivation of his constitutional rights, but has no money to afford a trained lawyer, must act pro se, and labor through a confusing maze of rules, pleadings, motions, decisions, and law in order to vindicate his guaranteed rights. He must hope that in that sea of frivolous prisoner complaints, his lone, legitimate cry for relief will be heard by a clerk, magistrate or judge grown weary of battling the waves of frivolity. [285]

But while these are general problems with using litigation as a means for enforcement of prison standards, there is very good reason to believe that litigation seems uniquely ill-suited to enforcing food law in particular. In addition to the problems noted above, prisoners often lack the knowledge required to bring a suit on these issues. While it is likely that most inmates can effectively understand when they have been beaten without cause, it seems much less likely that they will be able to ensure, e.g., that the water temperature in dishwashers is at least 180 degrees Fahrenheit, [286] or that the meals they are being served have the requisite daily value of vitamins and minerals. Whereas an inmate might be depended upon to bring suit if he is denied food altogether, in most cases he may not even know that there is a problem (at least, not until too late). These are subtleties that would best be looked for by experts, not inmates.

Similarly, *judges* lack the requisite expertise to craft injunctions ensuring inmate health and safety. [287] No judge knows the pages and pages of requirements to keep a facility sanitary, or to serve nutritionally adequate food. Things only get more complicated when the special needs diets of inmates are considered, some of which are prescribed by *doctors*. [288] To some extent, this problem is often solved by referring to the requirements of the model standards alluded to earlier. [289] This is relatively controversial, however, and such standards have been declared by the Supreme Court to be relevant, but not controlling. [290] The Court's reasoning makes sense. Such model standards clearly cannot be written into the Constitution. But the question remains,

how can judges know when to deviate from them, and when not to? Without a real agency inquiry into the topic, there is no clear answer.

A third issue to consider is the nature of the Constitutional right in question. That is, the right protects inmates from “cruel and unusual punishment.” As a result, the Court has found that a prison cannot be held liable for its actions unless it acted with “deliberate indifference.”^[291] Yet, as discussed above, the issues inherent in prison food do not seem to be much about punishment.^[292] When legislatures send inmates to jail, the punishment envisioned does not include the possibility that they might go blind because they drink sweetened juice.^[293] Indeed, much of the benefit to oversight is that it may help correct issues that prisons did not even know existed. As such, the Constitutional rules in this area are not a good match for the harm they seek to address. Yet when there is no other alternative, the courts have no choice but to get involved (that is, if Eighth Amendment rights are to mean anything).

Court ordered changes can be of two types:^[294] simple orders targeting one specific incident or practice,^[295] or complex injunctions that may often involve highly technical, detailed rulings covering large portions of prison administration.^[296] Cases involving prison food are often of the latter type, because unsanitary or unhealthy food (that reaches the level of an Eighth Amendment violation) is often the result of either a massive sanitation problem, or a lack of the requisite infrastructure to respond to such issues, rather than a single incorrect food handling technique.^[297] As a result, judges must often get involved in day-to-day prison management to an extent far greater than they are equipped to handle, and to an extent that many believe to be an unseemly overstepping of judicial authority.

So, for example, in 1978, New York agreed to a 52-page consent decree governing its pre-trial detention centers. One disapproving student writes: “Even something as simple as modifying the method of food preparation turned into an arduous process by which the city had to agree to the number of forks, knives, spoons and ‘spoodles’ that every institutional kitchen would stock.”^[298] The fact that this kind of invasiveness is sometimes necessary is unsurprising. In the face of an uncooperative prison administration, one which allowed the harms to materialize in the first place, a judge may often have to give unequivocal orders to ensure that they are followed. The question remains, however: should it really be the courts that are saddled with this burden, rather than an expert agency?

Finally, if this were not enough, the Prison Litigation Reform Act has further limited inmate ability to litigate on these issues. Its effects harm food litigation in several respects. First, as mentioned above, court orders and consent decrees in prison suits must now be “narrowly tailored” to address the Constitutional harm. Yet most prison food suits are necessarily of the complex type, requiring detailed rulings to repair systemic problems. Presumably, many such decisions may no longer be upheld, and judges will have to tailor their rulings in such a way as to make them less effective.^[299] Second, the requirement of “actual injury” seems completely inappropriate when considering issues of food law. After all, much of the point of sanitation and good nutrition is to *avoid* such harms. Forbidding inmates from bringing suit in these cases essentially requires any oversight to wait until the problem is a large one. Third, its limits on filing *in forma pauperis* make it that much harder for inmates to bring suits on all issues, including those of food law. On its face it may seem that this limitation *helps* inmates with valid

claims, since it prevents more frivolous lawsuits from being brought. Nevertheless, the only really comprehensive empirical research done on the subject has found that the PLRA has resulted in a drop, not in frivolous lawsuits, but rather all inmate lawsuits.[\[300\]](#)

All of this is to say that the current system of enforcement of prison food law is woefully inadequate. Whereas the FDA and state agencies have real authority to effect change, the closest analogue in the prison setting is an amalgamation of voluntary institutions and the courts. The end result is a poor cousin to its general law counterpart.

Having discussed how the law of prison food is different both in the political realm in which it operates, and the effectiveness of its enforcement, I turn now, briefly, to some of the ways it differs in its substantive *focus*.

Nature of Prison Food Law

There are several overlapping ways in which the law of prison food is very different from general food law. All have been touched on in the previous sections, but I believe it will be useful if I briefly discuss them here, to give a better sense of the law as it is.

The first important difference resides in the fact that inmates have their lives controlled while in prison, while regular citizens have numerous choices they can make at any time. While this may seem an obvious point, it results in a very different approach in the two fields. Thus, much of food law is very consumerist in its approach, especially with regards to nutrition. The FDA has consistently followed an approach where it simply notifies consumers of issues through labeling, and allows them to decide which course of action to take. The original 1906 Pure Food and Drugs Act prohibited misleading consumers about the foods they were buying. With the second Act, the FDA had the right to specifically require that additional information be labeled.

Since then, the U.S. approach to nutrition has continually focused on giving the consumer options. The decision in the 1960's and 1970's to back off strict limits on fortification of food is a prime example. In their place, the FDA merely required additional labeling, and made sure producers did not mislead consumers about the benefits of fortification. Congressional legislation mirrors this trend. The Dietary Supplement Health and Education Act, mentioned above, allows for the sale of dietary supplements so long as they notify consumers that their claims have not been tested by the FDA. The notion seems to be that consumers should have a right to choose whether they would like to try them, even if they may be ineffective. Congress passed a similar law with respect to Saccharin, allowing it to be sold with a warning about possible cancerous effects observed in mice. Even some laws ensuring adequate sanitation follow the consumerist approach. Thus, in some states, cleanliness grades are posted on the internet, or prominently posted in the windows of restaurants that have already passed inspection.[\[301\]](#) Consumer choice here is used as a method of improving conditions through the marketplace.

Yet none of this is possible when it comes to prisons. Whether an inmate is misled about the contents of his food or not, he must eat it. Having an inmate discover that he is not getting enough vitamins does little good if he has no access to healthier foods. Instead, prison food law

necessarily has a prescriptive approach. The law mandates certain minimum requirements that must be met by prisons, and that's all. Inmates are not given choices. They have no right to order from a menu.^[302] Instead, inmates "must be" served nutritionally adequate meals.^[303] Prisons "must serve" at least three meals a day.^[304] Indeed, the prescriptivist nature of the law can manifest itself in the fact that there has been litigation on aspects of meals that most people take for granted. Thus caselaw has been written, for example, on the amount of time a prison must give inmates to complete their meals.^[305] This difference in focus can especially be seen by the fact that issues regarding special diets, either as a result of health or religion, compose such a large part of prison law. Without the ability to make their own choices regarding what they eat, inmates have no choice but to sue.

A second difference between prison food law and food law generally is the constitutional nature of prison food law. That is, since there are no governing statutes, the relevant standards are pulled out of the Constitution. This has two interesting effects. The first is that the Constitutional provisions interpreted by the courts are necessarily vaguer than the statutes and regulations involved in food law.^[306] At the same time, in order for the courts to accomplish the goals of the Constitutional rights in question, they have been forced to read into them this necessary complexity. The end result is that the courts act, in many respects, as a regulatory agency with a very vague mandate. I have discussed this point before, and won't belabor it, but it is important to see that the result is both undemocratic and inefficient, since judges must act with no guidance in an area in which they have no expertise. Another important difference is that prison law now mirrors Constitutional law in its focus. That is, the courts' mandate comes from the Bill of Rights. Consequently, important law revolves around, not only cruel and unusual punishment, but also, e.g., the first amendment right to free speech,^[307] the right to an attorney,^[308] due process rights of access to the courts,^[309] and freedom of religion claims.^[310]

This manifests itself in the food realm by the comparatively strong rights of inmates to religious diets. The Rhode Island prison's Director of Food Services described these claims as "the 300 lb. gorilla in the room."^[311] Indeed, these claims are interesting because of the way religion seems to trump the prescriptive nature of prison food law generally. Such suits are essentially an inmate's demand for the right to *choose* the kinds of food he eats, so long as that decision is based on religious belief. To see this, one need only look to some of the effects of the doctrine. When a prison begins to offer a kosher alternative meal, often a large number of inmates will begin to claim that they are Jewish, also requiring the other meal.^[312] Similarly, inmates will often try to push the bounds of such doctrines. The Utah Director of Correction wrote of one example: "In the case of the Church of the New Song their religion required a special diet of Porterhouse steak and Bristol Cream Sherry."^[313] Of course, such claims are likely to fail, but they demonstrate the fact that improvements in prison food come from the Constitution as a whole, not just the Eighth Amendment prohibition of cruel and unusual punishment.

A final difference is the importance of punishment issues in prison food. This is *prison*, after all. Thus, food, like so much else in prisons, has been used to punish unruly inmates, and caselaw has developed about the limits to which prisons can go. These cases revolve either around the withholding of food, or the offering of food intentionally made less appetizing. In the first case, the rules prohibiting such actions are surprisingly robust. Indeed, this is one of the few areas in which there is statutory law. "Many states 'by statute or regulation forbid the use of food as

punishment or require that segregated inmates receive the same meals as other prisoners.””[\[314\]](#) Similarly, where a prison had a rule requiring inmates to be dressed before they were fully fed, it could not enforce the rule against an inmate for twelve consecutive days.[\[315\]](#)

Other cases involve deliberately unappetizing food served to misbehaving inmates. In an inventive zeal that could only be found in prisons, some created “food loaf,” by taking ordinary meals and blending them into a loaf shaped mush.[\[316\]](#) Courts have allowed such meals so long as they were adequately nutritious, and the behavior resulting in the deprivation was related to food (e.g. throwing food).[\[317\]](#) The point is, such cases simply could not exist outside the prison.

This concludes the section on the nature of prison food. The purpose has been, not to give a detailed analysis of prison food doctrine, but to show, through examples, the ways in which prison food tackles problems from a completely different perspective than general food law. I now move on to the conclusion of the paper.

Conclusion

This paper has attempted to describe prison food law and demonstrate its extraordinary differences and weaknesses, as compared to the rest of the food law regime. It lacks the political support of food law, and as a result does not have the same enforcement mechanisms. Interestingly, it has Constitutional implications that food law usually does not. Finally, the issues of punishment that are the very reason for a prison’s existence complicate and alter the analysis that must be conducted on specific policy questions.

To some extent these disparate strands do not tie themselves into one neat package. If anything is true of prison food law, it is that it is *messy*. Rules are muddy and enforcement is haphazard. Different states, cities, different individual *prisons* have their own policies, rules, and procedures that can vary widely. Even the history of prisons demonstrates a meandering, back and forth pattern, as does the level of court oversight.

But they do begin to demonstrate how and why prison food law has wallowed in the general mess of prison law. More importantly, they question whether these reasons are *good* ones. The role of punishment must certainly be taken into account in creating a prison food law, but that does not mean that one should not be legislatively created. Nor does it mean that it cannot mirror, at least in some respects, other aspects of food law. Sanitation seems like it should be a basic norm, one that crosses the divide between incarceration and freedom. Punishment does not manifest itself (or, at least, should not) as a desire to cause food poisoning. Even assuming deference to prison administrators, their role would not be unduly impinged by occasional inspections of kitchens, at least if they were scheduled so as not to interfere.

Prison food law is weak, and in large part that is because the public seems to want it that way. But this bad policy, not just as a matter of ideals, but as a matter of simple practicality. For in the absence of statutory law, the courts have been forced to step in. As a result, the law is being written anyway, but this time by a government body not well equipped to handle the load. The proponents of the PLRA looked on the mass of inmate litigation and decided the problem was frivolous inmate lawsuits. They missed the point. These lawsuits were not the cause of the

problem, but a symptom. If the courts were not forced to take this kind of litigation to protect the Constitutional rights of inmates, if there were some body attempting to handle the bulk of the load in a more efficient, less adversarial system, there would not be such a large number of inmate suits. Exactly what form this oversight might take I don't know. But the question hasn't even been asked, a solution has not been searched for. Given the current state of the law, it cannot hurt to start.

[1] George M. Burditt, *The History of Food Law*, 50 FOOD & DRUG L.J. 197, 201 (1995).

[2] Peter Barton Hutt, *Government Regulation of the Integrity of the Food Supply*, 4 ANN. REV. OF NUTRITION 1, 3 (1984).

[3] *Id.* at 4.

[4] *Id.*

[5] *Id.* at 5.

[6] *Id.*

[7] *Id.* For examples of such laws, see 23 & 24 Vict., ch. 84 (1860); 35 & 36 Vict., ch. 74 (1872). 38 & 39 Vict., ch. 63 (1875). Richard L. Waters, *The FDA: It's Not Just About Tobacco*, 52 J. MO. B. 231, n. 14 (1996).

[8] Hutt, *supra* note 2, at 5-6.

[9] *Id.* at 6.

[10] *Id.*

[11] Wendy C. Perdue, Lawrence O. Gostin, and Lesley A. Stone, *Public Health and the Built Environment: Historical, Empirical, and Theoretical Foundations for an Expanded Role*, 31 J.L. MED. & ETHICS 557, 558 (2003).

[12] *See, e.g.*, Sandra B. Eskin, *Putting All Your Eggs in One Basket: Egg Safety and the Case for a Single Food-Safety Agency*, 59 FOOD & DRUG L.J. 441, 444 (2004) ("State agriculture or health department officials carry out the actual inspections of supermarkets, restaurants, institutions, and other retail food establishments.") *See also* Florida Department of Health, *Public Health Services*, at http://www.doh.state.fl.us/planning_eval/phealth/services.htm ("FOOD INSPECTION -- Programs ensure that certain food service establishments operate in a safe and sanitary manner to minimize the occurrence of foodborne illnesses. This includes inspection of facilities where food is processed, prepared or served.").

[13] Adjusted for inflation, \$48.2 billion was spent on restaurant sales in 1970. That number has ballooned to a projected \$475.8 billion for 2005. National Restaurant Association, *Restaurant Industry Fact Sheet* (2005), available at <http://www.restaurant.org/pdfs/research/2005factsheet.pdf>.

[14] UPTON SINCLAIR, *THE JUNGLE* (1906)

[15] LAWRENCE M. FRIEDMAN, *AMERICAN LAW IN THE 20TH CENTURY* 60 (2002).

[16] Burditt, *supra* note 1, at 198.

[17] Pub. L. No. 59-384, 34 Stat. 768 (1906).

[18] Burditt, *supra* note 1, at 201. Pub. L. No. 59-242, 34 Stat. 1260 (1907).

[19] Mary Whisner, *Story Time in the Law Library*, 96 *LAW LIBR. J.* 371, n.20 (2004).

[20] *See* Pure Food and Drugs Act, Pub. L. No. 59-384, 34 Stat. 768, 770 § 7 (1906).

[21] *See id.*

[22] *See id.* at 770 § 8.

[23] *See id.* at 769 § 4.

[24] *See id.* at 768 § 1. Current dollar value found using *The Inflation Calculator*, at <http://www.westegg.com/inflation/>.

[25] Hutt, *supra* note 2, at 6.

[26] *Id.* at 7.

[27] *Id.*

[28] *Id.*

[29] Carol Ballentine, *Taste of Raspberries, Taste of Death, The 1937 Elixir Sulfanilamide Incident*, *FDA CONSUMER MAGAZINE* Vol. 15 (June 1981), available at <http://www.fda.gov/oc/history/elixir.html>.

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] John Scott Batterman, Note: *Brother Can You Spare a Drug: Should the Experimental Drug Distribution Standards Be Modified in Response to the Needs of Persons with Aids?*, 19 HOFSTRA L. REV. 191, n. 40 (1990).

[39] Pub. L. No. 75-717, 52 Stat. 1040 (1938).

[40] While there may be some question about whether Congress may have acted *at a later time* to revise the 1906 regulatory regime, there is no doubt that it was the sulfanilamide disaster that finally pushed a stalling Congress into immediate action. *See, e.g.*, Batterman, *supra* note 38, at 197; Burditt, *supra* note 1, at 200; Ballentine, *supra* note 29.

[41] The 1906 law was 5 pages long. The 1938 revision clocked in at 20. *Compare* Pub. L. No. 59-384, 34 Stat. 768 (1906), *with* Pub. L. No. 75-717, 52 Stat. 1040 (1938).

[42] Hutt, *supra* note 2, at 7.

[43] Burditt, *supra* note 1, at 198.

[44] *See* 52 Stat. at 1043, § 302.

[45] Hutt, *supra* note 2, at 7.

[46] *See* 21 C.F.R. § 104.20. (“[R]andom fortification of foods could result in over- or underfortification in consumer diets and create nutrient imbalances in the food supply. It could also result in deceptive or misleading claims for certain foods.”)

[47] Hutt, *supra* note 2, at 10.

[48] *Id.* at 11.

[49] *Id.*

[50] *Id.* *See, e.g.*, In the Matter of ITT Continental Baking Company, Inc., et al., 83 F.T.C. 865 (1971) (Finding makers of “Hostess” snack cakes and “Wonder Bread” liable for statements implying their products would “help your child grow bigger and stronger.”)

[51] Drug Amendments of 1962, Pub. L. No. 87-781, 76 Stat. 780 (1962).

[52] Audrey A. Hale, Note, *The FDA's Mail Import Policy: A Questionable Response to the Aids Epidemic*, 16 RUTGERS COMPUTER & TECH. L.J. 169, 173 (1990). Though never released in the United States, in Europe thalidomide was prescribed to pregnant women to combat morning sickness. Unfortunately, its use led to birth defects and a scandal so large that it crossed to the United States as well.

[53] Pub. L. No. 89-755, 80 Stat. 1296 (1966).

[54] Burditt, *supra* note 1, at 200.

[55] Peter Hoover, *The Old-New Division in Risk Regulation*, 69 VA. L. REV. 1025, 1048 (1983). Instead, the new law required labeling of all products containing saccharin. Saccharin Study and Labeling Act, Pub. L. No. 95-203, 91 Stat. 1451 (1977).

[56] Pub. L. No. 103-417, 108 Stat. 4325 (1994).

[57] Indeed, one commentator wrote, "I believe the DSHE Act was solely responsible for the purchase of many telephone answering machines by Congressional committee staff offices and Members of Congress...Many Members of Congress admit that they were lobbied as heavy on this legislation as any in their memories." William J. Skinner, *Allowable Advertising Claims for Dietary Supplements*, 5 J. PHARMACY & LAW 309 (1995).

[58] LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 48 (1993) ("The penitentiary system was basically a nineteenth century invention.").

[59] See David J. Rothman, *Perfecting the Prison*, *THE OXFORD HISTORY OF THE PRISON* 111, 114 (1995). As will be seen below, there was some amount of imprisonment prior to this, but this was the rare exception, not the rule.

[60] *Id.* at 111.

[61] See Edward M. Peters, *Prison Before the Prison*, *THE OXFORD HISTORY OF THE PRISON* 3, 5 (1995) ("stoning to death (lapidation); throwing the offender from a cliff (precipitation); binding him to a stake so that he suffered a slow death and public abuse while dying (*apotypanismos*, an early form of crucifixion)...")

[62] See *id.* at 6.

[63] See *id.* (including, e.g., imposing the status of "shamefulness," and public denunciation).

[64] See *id.* at 6, 17. The strangest of these methods of execution was the *culleus*, wherein the offender was placed in a sack with a dog, an ape, and a serpent, and the sack then tossed into the sea.

[65] *Id.*

[66] *See id.* at 17.

[67] *See, e.g., id.* at 6 (discussing Socrates' trial, in which he makes reference to spending his "days in prison," as a "slave of the magistrates") Note that even here, Socrates' statements imply forced labor, not merely confinement.

[68] *See id.* at 15. *See also id.* at 17-19.

[69] *E.g., id.* at 18.

[70] *Id.* at 34.

[71] Pieter Spierburg, *The Body and the State*, OXFORD HISTORY OF THE PRISON 49, 51 (1995).

[72] *Id.*

[73] *Id.* at 52-53.

[74] *Id.* at 64.

[75] *Id.* at 66.

[76] Peters, *supra* note 61, at 34.

[77] *Id.* at 40.

[78] *See* Rothman, *supra* note 59, at 112.

[79] FRIEDMAN, *supra* note 58, at 49.

[80] *Id.*

[81] *Id.* at 19 (quoting Diodorus Siculus).

[82] Randall McGowen, *The Well-Ordered Prison*, OXFORD HISTORY OF THE PRISON 79 (1995).

[83] FRIEDMAN, *supra* note 58, at 78.

[84] Peters, *supra* note 61, at 39-40.

[85] Matthew W. Meskell, Note: *The History of Prisons in the United States from 1777 to 1877*, 51 STAN. L. REV. 839, 841-842 (1999).

[86] FRIEDMAN, *supra* note 58, at 77.

[87] *See* Rothman, *supra* note 59, at 114.

[88] *See* DAVID J. ROTHMAN, *THE DISCOVERY OF THE ASYLUM* 60 (1971)

[89] *See id.* at 59-60 (quoting Cesare Beccaria, an enlightenment scholar, stating, “The severity of the punishment of itself emboldens men to commit the very wrongs it is supposed to prevent... The certainty of punishment, even if it be moderate, will always make a stronger impression than the fear of another which is more terrible but combined with the hope of impunity.”)

[90] Meskell, *supra* note 85, at 843.

[91] *See id.*

[92] *Id.*

[93] *Id.* at 847.

[94] *Id.* at 848.

[95] *Id.* at 849.

[96] *Id.* at 850.

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] FRIEDMAN, *supra* note 58, at 77.

[101] *Id.*

[102] Note that conditions were in any case not so monastic: disobeying rules often resulted in a whipping. In 1840, when reform movements moved to ban whippings, they were merely replaced with other punishments (e.g., being raised by their thumbs) that seemed, if anything crueler. *See* Meskell, *supra* note 85, at 858-859.

[103] Rothman, *supra* note 59, at 117.

[104] *Id.*

[105] *Id.*

[106] *Id.* at 119.

[107] *Id.* at 121.

[108] *Id.* at 125.

[109] *Id.*

[110] *Id.*

[111] Edgardo Rotman, *The Failure of Reform*, OXFORD HISTORY OF THE PRISON 169, 171 (1995).

[112] *See id.* at 173.

[113] *Id.* at 175.

[114] *Id.* at 183.

[115] *Id.*

[116] *Id.* at 184.

[117] *See* James E. Robertson, *The Majority Opinion as the Social Construction of Reality: The Supreme Court and Prison Rules*, 53 OKLA. L. REV. 161, 165 (2000) (“Well into the twentieth century, state governments delegated extensive authority to prison wardens and asked for little accountability in return.”).

[118] *Id.* at 171-172. For a list of several such opinions, see *id.* at n.69.

[119] *See* [Margo Schlanger, Beyond the Hero Judge: Institutional Reform Litigation as Litigation](#), 97 Mich. L. Rev. 1994, 2003 (1999).

[120] *Id.*

[121] *Id.* *See, e.g.*, *Heitman v. Gabriel*, 524 F.Supp. 622 (W.D.Mo. 1981) (court order finding various conditions at jail unconstitutional, including, e.g., fire hazards, lack of adequate legal and recreational reading materials, basic sanitation issues, and lack of adequate bedding).

[122] Schlanger, *supra* note 119, at 2004.

[123] Robertson, *supra* note 117, at 175.

[124] *See, e.g.*, *Palmigiano v. Garrahy*, Nos. 74-172 and 75-032 (D.R.I.) (court oversight of Rhode Island prison system from 1977 until settlement agreement reached in 1994).

[125] *Palmigiano v. Garrahy*, 443 F. Supp. 956, 961 (D.R.I. 1977).

[126] *Id.*

[127] *Id.* at 962-963.

[128] Rotman, *supra* note 111, at 177 (citing KATE RICHARDS O’HARE, IN PRISON 63-65 (1923)).

[129] *See id.* at 192.

[130] *See* Schlanger, *supra* note 119, at 2001.

[131] *See id.* at 1997-1998.

[132] *Compare* *Wolff v. McDonnell*, 418 U.S. 539, 555-556 (1974) (“[T]here is no iron curtain drawn between the Constitution and the prisons of the country”) *with* *Block v. Rutherford*, 468 U.S. 576, 589 (1984) (“When the District Court found that many factors counseled against contact visits, its inquiry should have ended. The court’s further ‘balancing’ resulted in an impermissible substitution of its view on the proper administration of Central Jail for that of the experienced administrators of that facility.”).

[133] Pub. L. No. 104-134, §§ 801-10, 110 Stat. 1321-66-1321-77 (1996) (codified at 11 U.S.C. § 523; 18 U.S.C. §§ 3624, 3626; 28 U.S.C. §§ 1346, 1915, 1915A; 42 U.S.C. §§ 1997-1997h).

[134] Elizabeth Alexander, *Prison Litigation Reform Act Raises The Bar*, 16-WTR CRIM. JUST. 10, 11 (2002).

[135] A consent decree is a special kind of settlement whereby the court may enforce the terms of the agreement.

[136] 18 U.S.C. § 3626 (a)(1)(A).

[137] *See* 18 U.S.C. § 3626 (b).

[138] *See* 28 U.S.C. § 1915.

[139] *See* 42 U.S.C. § 1997e(d).

[140] *See* 42 U.S.C. § 1997e(e).

[141] *See* 42 U.S.C. § 1997e(a).

[142] Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1558 (2003)

[143] *See generally id.*

[144] See generally Alan Elsner, *Supermax Prisons: A Growing Human Rights Issue*, 28-AUG CHAMPION 36 (2004).

[145] *Id.* at 37-38.

[146] *Id.* at 38.

[147] E.g., David E. Pozen, *Managing a Correctional Marketplace: Prison Privatization in the United States and the United Kingdom*, 19 J.L. & POL. 253, 256 (2003).

[148] See, e.g., *Developments in the Law: The Law of Prisons*, 115 HARV.L.REV. 1838, 1870 (2002).

[149] See, e.g., THE OXFORD HISTORY OF THE PRISON (Norval Morris & David J. Rothman eds., 1995); HARRY E. BARNES, THE EVOLUTION OF PENOLOGY IN PENNSYLVANIA (1927); ROTHMAN, *supra* note 88.

[150] See generally MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS §§ 2:10, 3:13, 6:10 (3d ed. 2002)

[151] *Hudson v. McMillian*, 503 U.S. 1, 8 (1992). See also MUSHLIN, *supra* note 150 at § 2:2.

[152] See *Wilson v. Seiter*, 501 U.S. 294, 297 (1991).

[153] *Id.*

[154] Note that other tests will be applied in other cases. Thus, in guard brutality cases, the subjective test applies a standard of maliciousness. MUSHLIN, *supra* note 150 at § 2:2. In cases involving other Constitutional rights, e.g. First Amendment freedom of religion cases (some of which involve dietary restrictions and will be discussed later in this paper), the proper test is outlined in *Turner v. Safley*, 482 U.S. 78 (1987). That test looks to four factors: (1) whether there is a “‘valid, rational connection’ between the regulation and legitimate governmental objectives,” (2) “‘whether there are ‘alternative means of exercising the right at issue,’” (3) “‘the effect that the claimed right of the prisoner would have on the institution including other inmates and corrections officers and government resources,’” and (4) “‘whether there are obvious, easy alternatives available to prison officials to meet their legitimate interests without impinging on prisoner rights.’” MUSHLIN, *supra* note 150 at § 1:9.

[155] *Wilson v. Seiter*, 501 U.S. 294, 304 (1991).

[156] *Deshaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189, 200 (1989).

[157] MUSHLIN, *supra* note 150, at § 2:10.

[158] See R.I. GEN. LAWS §§ 21-27-1 – 27-21-11.13

[159] Telephone Interview with John Rogers, Associate Director of Food Services, Rhode Island Department of Corrections (Mar. 25, 2005).

[160] *Id.*

[161] Mr. Rogers noted that a health inspector came in on the one year anniversary from when they reopened a kitchen in the Rhode Island prison, but characterized it as “a mistake,” and said he should not have been allowed inside the building. *Id.*

[162] *Id.*

[163] *See generally* MUSHLIN, *supra* note 150, at §§ 2:10, 3:13, 6:10.

[164] *See, e.g., Food and Cosmetic Guidance Documents, at* <http://vm.cfsan.fda.gov/~dms/guidance.html>.

[165] Telephone Interview with John Rogers, Associate Director of Food Services, Rhode Island Department of Corrections (Mar. 25, 2005).

[166] Categories given are as described by Margo Schlanger, an expert in inmate litigation. Telephone Interview with Margo Schlanger, Professor of Law, Washington University (Jan. 2005).

[167] *See, e.g.,* Heitman v. Gabriel, 524 F. Supp. 622 (D. Mo. 1981).

[168] *See, e.g.,* Grubbs v. Bradley, 552 F. Supp. 1052, 1069 (D. Tenn. 1982).

[169] Thus, for example, in the Rhode Island prison, the kitchens make approximately 11,000 meals per day. Telephone Interview with Albert Bucci, Assistant to the Director, Rhode Island Department of Corrections (May 7, 2003). In order to accommodate these large numbers, meals are served in three shifts, for a total of nine meals per day, with only short intervals in between. As a result, when something breaks down, a temporary (and inadequate) solution is often necessary in order to keep inmates fed. Interview with Albert Bucci, in Cranston, R.I. (Apr. 11, 2003).

[170] *See, e.g.,* Cooper v. Sheriff, Lubbock County, Tex., 929 F.2d 1078 (5th Cir. 1991) (rule withholding food from inmates who are not fully clothed at mealtime unconstitutional as applied to inmate who did not eat for 12 consecutive days).

[171] *See, e.g.,* Cunningham v. Jones, 567 F.2d 653 (6th Cir. 1977).

[172] *See, e.g.,* Balla v. Idaho State Bd. of Corrections, 595 F. Supp. 1558, 1574-1575 (D. Idaho 1984).

[173] *See, e.g.,* Kahane v. Carlson, 527 F.2d 492 (2d Cir. 1975).

[174] Burditt, *supra* note 1, at 201.

[175] Requiring, e.g., mandatory inspection of all eating establishments, and updating the rules for such inspections. *See, e.g.*, Hotel, Food Service Establishment and Public Swimming Pool Inspection Act, Tenn. Code Ann. §68-14-301 et seq. (2002) (increasing restaurant permit fees and giving increased funds to local inspectors).

[176] Meskell, *supra* note 85, at 864.

[177] *See* note 128, *supra*, and accompanying text.

[178] *See, e.g.*, *Oz* (HBO 1997-2003) (television series about prison life depicting brutal violence as a common occurrence; THE SHAWSHANK REDEMPTION (Columbia Pictures 1994) (depicting, *inter alia*, a corrupt warden and gang rape). *The Shawshank Redemption* also has a scene in which Andy Dufraine, the protagonist, sits down with his meal only to find a worm crawling inside of it.

[179] *See* Mark Warr, *Poll Trends: Public Opinion on Crime and Punishment*, THE PUBLIC OPINION QUARTERLY Vol. 59, No.2, p. 296, 307 (Summer 1995).

[180] *See id.*

[181] *See* Rhodes v. Chapman, 452 U.S. 337, 349 (1981)

[182] *See, e.g.*, United States Sentencing Comm'n, *Sentencing Guidelines for United States Courts*, 52 Fed. Reg. 18,046, (1987) (“The Comprehensive Crime Control Act of 1984 foresees guidelines that will further the basic purposes of criminal punishment by deterring crime, incapacitating the offender, providing just punishment, and rehabilitating the offender.”).

[183] *See* Jeffrey D. Bukowski, Comment, *The Eighth Amendment And Original Intent: Applying The Prohibition Against Cruel And Unusual Punishments To Prison Deprivation Cases Is Not Beyond The Bounds Of History And Precedent*, 99 DICK. L. REV. 419, 434-435 (Winter, 1995) (“Prison conditions are allowed to be restrictive and even harsh, as they are part of the penalty that criminal offenders pay for their offenses against society.”)

[184] *See* Rothman, *supra* note 59 at 114.

[185] *See* Norval Morris, *The Contemporary Prison*, THE OXFORD HISTORY OF THE PRISON 227, 247 (1995).

[186] *See* *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (“the primary concern of the drafters [of the Eighth Amendment] was to proscribe ‘tortures’ and other ‘barbarous’ methods of punishment”).

[187] See *United States v. Dotterweich*, 320 U.S. 277, 280 (1943) (“The purposes of this legislation thus touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection”).

[188] See, e.g., *Sanders v. Illinois*, 198 F.3d 626, 628 (7th Cir., 1999) (reinstating inmate’s claim where he claimed “receiving meals containing ‘insufficient vitamins to prevent degeneration mentally or physically’”).

[189] *Balla v. Idaho State Bd. of Corrections*, 595 F. Supp. 1558, 1574-1575 (D. Idaho 1984)

[190] *Id.* at 1575.

[191] Paige M. Harrison and Allen J. Beck, *Prison and Jail Inmates at Midyear 2004*, NCJ-208801 p. 2 (Bureau of Justice Statistics Apr., 2005).

[192] See *Annual Estimates of the Population for the United States and States, and for Puerto Rico: April 1, 2000 to July 1, 2004*, NST-EST2004-01 (U.S. Census Bureau Dec. 22, 2004).

[193] The Sentencing Project, *Felony Disenfranchisement Laws in the United States* (Apr. 2005), at <http://www.sentencingproject.org/pdfs/1046.pdf>.

[194] *Id.*

[195] *Id.*

[196] See James E. Robertson, *Cruel and Unusual Punishment in United States Prisons: Sexual Harassment Among Male Inmates*, 36 AM. CRIM. L. REV. 1 n.61 (Winter 1999).

[197] Voting and Registration in the Election of November 2002, P20-552, p.6 (U.S. Census Bureau July, 2004).

[198] *Id.*

[199] FRIEDMAN, *supra* note 15, at 61.

[200] Daniel J. Sharfstein, *European Courts, American Rights: Extradition and Prison Conditions*, 67 Brooklyn L. Rev. 719, 764 (Spring, 2002). Sharfstein cited Bureau of Justice Statistics that showed, “by year end 1998, state prisons were operating at between thirteen and twenty-two percent over-capacity, while federal prisons were twenty-seven percent above capacity.” *Id.*, n.154 (citing Bureau of Justice Statistics, U.S. Dep’t of Justice, Prison Statistics, at <http://www.ojp.us-doj.gov/bjs/prisons.htm> (revised Apr. 20, 2000); U.S. Dep’t of State, *Initial Report of the United States of America to the U.N. Committee Against Torture* (Oct. 15, 1999), at http://www.state.gov/www/global/human_rights/-torture_articles.html).

[201] Patrick Howe, *Cash-Hungry States Cutting Prison Fare*, SEATTLE TIMES, May 14, 2003, at A6, available at 2003 WLNR 2401627.

[202] *Id.*

[203] *Id.*

[204] See generally Harry Simon, *Towns Without Pity: A Constitutional and Historical Analysis of Official Efforts to Drive Homeless Persons from American Cities*, 66 TUL. L. REV. 631, 635-641 (Mar. 1992).

[205] Allen Beck and Paige Harrison, *Number of persons in custody of State correctional authorities by most serious offense, 1980-2001*, at <http://www.ojp.usdoj.gov/bjs/glance/tables/corrtyptab.htm> (Bureau of Justice Statistics 2003).

[206] See Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291, n. 311 (“After all, criminals continue to be, today, a class of people that many feel entitled to hate and exclude.”) (citing KATHLYN TAYLOR GAUBATZ, *CRIME IN THE PUBLIC MIND* (1995) (empirical data regarding public opinion about criminal justice)).

[207] See Rothman, *supra* note 59, at 125 (“The Jacksonian reformers had presumed that inmates would not be hardened criminals but ‘good boys gone bad’...”).

[208] ROTHMAN, *supra* note 88, at 254-255.

[209] *Id.*

[210] See *id.*

[211] Harrison and Beck, *supra* note 191, at 11.

[212] *Id.*

[213] *Population by Race and Hispanic or Latino Origin for the United States: 1990 and 2000*, Census 2000 PHC-T-1 (U.S. Census Bureau 2001).

[214] *Id.*

[215] Harrison and Beck, *supra* note 191, at 11.

[216] *Id.*

[217] The Sentencing Project, *Facts About Prison and Prisoners* (Nov. 2004), at <http://www.sentencingproject.org/pdfs/1035.pdf>.

[218] RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 4 (1997).

[219] See Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 715 (Dec. 1995).

[220] See Paul J. Silvia, Joshua S. Graham, and Chasidy N. Hawley, *Changing Attitudes Toward Prison Reform: Effects of Similarity to Prisoners on Attraction and Rejection*, 35 J. OF APPLIED SOC. PSYCHOLOGY 248, 249 (2005).

[221] *Id.*

[222] *Id.*

[223] See Henri Tajfel, *Experiments in Intergroup Discrimination*, 223 Scientific American 96 (1970).

[224] See Silvia, Graham, and Hawley, *supra* note 220, at 250.

[225] *Id.*

[226] *Id.* (citing D.W. Novak and M.J. Lerner, *Rejection as a consequence of perceived similarity*, 9 J. OF PERSONALITY AND SOC. PSYCHOLOGY 147 (1968)).

[227] See note 202, *supra*.

[228] See Silvia, Graham, and Hawley, *supra* note 220.

[229] See, e.g., Maria Alicia Gaura and Dave Murphy, *Wendy's Diner Finds Human Finger in Her Chili*, SAN FRANCISCO CHRONICLE, Mar. 24, 2005, at A1, available at 2005 WLNR 4614071. Note that her story has since been called into question, and she has been arrested and accused of concocting the story in an attempt to get money from the franchise. See, e.g., Matt Richtel and Alexei Barrionuevo, *Finger in Chili Is Called Hoax; Las Vegas Woman Is Charged*, NEW YORK TIMES, Apr. 23, 2005, at A9, available at 2005 WLNR 6340771.

[230] Search conducted on May 2, 2005, using the search string: Wendy's & Finger & Chili.

[231] Matt Leingang, *Wendy's Reports Earnings Decline Fast-Food Chain Hurt By Claim of Finger in Chili, Bad Weather*, AKRON BEACON J., April 29, 2005, at D1, available at 2005 WLNR 6700595.

[232] See, e.g., Mary F. Pols and Dave Birkland, *Mukilteo Teen Admits Pepsi Hoax*, SEATTLE TIMES, June 17, 1993, at A1, available at 1993 WLNR 1130466.

[233] See note 57, *supra*.

[234] The Filled Milk Act, made famous by the *Carolene Products* case and its footnote 4, forbids adding any kind of fat to milk but milk-fat. 21 U.S.C. §§ 61-64 (1923).

[235] See Oleomargarine Act, Pub. L. No. 81-459, 64 Stat. 20 (1950)

[236] See Saccharin Study and Labeling Act, Pub. L. No. 95-203, 91 Stat. 1451 (1977). I also mentioned this statute at n.54, *supra*.

[237] See Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 333.

[238] See *id.* at § 334.

[239] See Mindy H. Chapman, Comment, *Rx: Just What the Doctor Ordered: International Standards for Medical Devices*, 14 NW. J. INT'L L. & BUS. 566, n.41 (1994).

[240] Alan L. Hoeting, *The FDA's Enforcement Program*, 47 FOOD & DRUG L.J. 405, 407 (1992).

[241] See *id.* at 405, 408.

[242] See note 169, *supra*, discussing effects of overcrowding on sanitation. Overcrowding is necessarily linked to underfunding, as it only occurs when there is no money allocated to the building or maintenance of new prisons.

[243] Telephone Interview with John Rogers, Associate Director of Food Services, Rhode Island Department of Corrections (Mar. 25, 2005).

[244] Note that there are accreditation organizations (discussed below), but these are not government run, and so don't grant licenses. They cannot be, for the reasons discussed.

[245] See *Developments in the Law: The Law of Prisons*, *supra* note 148, at 1870.

[246] See *id.*

[247] Pozen, *supra* note 147, at 256.

[248] See Amie Streater, *Commissioners Accept Aramark's Resignation*, FORT WORTH STAR TELEGRAM, Mar. 10, 2004, at B2, available at 2004 WLNR 1811717 (Detailing resignation of food services firm after poor food, spoiled food, and food shortages nearly led to riots).

[249] Kelly Blevins, *FDA's Use of Negative Publicity as an Enforcement Mechanism*, FOOD AND DRUG LAW: AN ELECTRONIC BOOK OF STUDENT PAPERS, at http://www.law.harvard.edu/faculty/hutt/table_of_contents_2002.html.

[250] See note 160, *supra*, and accompanying text.

[251] Hoeting, *supra* note 240, at 407.

[252] See AMERICAN PUBLIC HEALTH ASSOCIATION TASK FORCE ON CORRECTIONAL HEALTH CARE STANDARDS, STANDARDS FOR HEALTH SERVICES IN CORRECTIONAL INSTITUTIONS 53, 96 (2003).

[253] See AMERICAN CORRECTIONAL ASSOCIATION AND COMMISSION ON ACCREDITATION FOR CORRECTIONS, PERFORMANCE-BASED STANDARDS FOR CORRECTIONAL HEALTH CARE IN ADULT CORRECTIONAL INSTITUTIONS (2002). Other relevant organizations producing model standards include the National Advisory Commission on Criminal Justice Standards and Goals, the American Law Institute, the United Nations, and the American Bar Association. MUSHLIN, *supra* note 150 at § 2:2.

[254] See AMERICAN CORRECTIONAL ASSOCIATION AND COMMISSION ON ACCREDITATION FOR CORRECTIONS, STANDARDS FOR JUVENILE CORRECTIONAL BOOT CAMP PROGRAMS (1995).

[255] See AMERICAN CORRECTIONAL ASSOCIATION, STANDARDS FOR CORRECTIONAL INDUSTRIES (1981).

[256] Telephone Interview with John Rogers, Associate Director of Food Services, Rhode Island Department of Corrections (Mar. 25, 2005).

[257] *Id.*

[258] Interview with Albert Bucci, Assistant to the Director, Rhode Island Department of Corrections, in Cranston, R.I. (Apr. 11, 2003). Health inspections will give “fix-it” orders of severity A, B, C, or D. “A” orders note the need for a minor repair. “B” orders are slightly more urgent, but are still relatively minor. “C” orders require repairs to be made before a specified deadline. “D” orders are for serious health hazards, requiring immediate repair.

[259] See *generally* AMERICAN CORRECTIONAL ASSOCIATION AND COMMISSION ON ACCREDITATION FOR CORRECTIONS, *supra* note 253, at xiv-xix.

[260] See *id.* at xvii, xviii.

[261] See *id.* at xvii.

[262] See *id.* at xix.

[263] *Id.* at xiv.

[264] AMERICAN PUBLIC HEALTH ASSOCIATION TASK FORCE ON CORRECTIONAL HEALTH CARE STANDARDS, *supra* note 252, at xvii.

[265] AMERICAN CORRECTIONAL ASSOCIATION AND COMMISSION ON ACCREDITATION FOR CORRECTIONS, *supra* note 253, at xiv.

[266] For a large list of closures in the Los Angeles area alone, see Los Angeles Department of Health Services, *Food Facility Closure List*, at <http://www.lapublichealth.org/phcommon/public/eh/closure/restall1.cfm> (listing

331 closures for the period from 1/22/2005 through 4/22/2005).

[267] Note that accreditation *does* offer benefits in litigation, but this requires the court oversight we have in place. Accreditation on its own does not have similar benefits. More on this will be discussed below.

[268] Telephone Interview with John Rogers, Associate Director of Food Services, Rhode Island Department of Corrections (Mar. 25, 2005).

[269] Interview with A.T. Wall, Director, Rhode Island Department of Corrections, in Cranston, R.I. (Apr. 11, 2003).

[270] Telephone Interview with John Rogers, Associate Director of Food Services, Rhode Island Department of Corrections (Mar. 25, 2005).

[271] To see research I have done on this prison system in particular (composed largely of interviews with staff, some of which have been used here), see Cyrus Naim, *After Palmigiano* (2003) (Unpublished manuscript, available on request).

[272] Jonathan D. Rosenbloom, *Exploring Methods To Improve Management And Fairness In Pro Se Cases: A Study Of The Pro Se Docket In The Southern District Of New York*, 30 FORDHAM URB. L.J. 305, 326 (2002).

[273] *Id.* at 310 (citing both his own study, at n.40, and Lois Bloom & Helen Hershkoff, *Federal Courts, Magistrate Judges, and the Pro Se Plaintiff*, 16 NOTRE DAME J. L. ETHICS & PUB. POL'Y 475, 479 (2002)).

[274] *See generally* LEO CARROLL, *LAWFUL ORDER* (1998) (detailing history of *Palmigiano v. Garrahy*, Nos. 74-172 and 75-032 (D.R.I.)).

[275] *See* Hon. Jon O. Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 BROOK. L. REV. 519 (1996) (“Prisoner lawsuits challenging prison conditions share two characteristics. Nearly all of these lawsuits are filed pro se, and the vast majority are dismissed as frivolous.”); Eugene J. Kuzinski, Note, *The End of the Prison Law Firm?: Frivolous Inmate Litigation, Judicial Oversight, and the Prison Litigation Reform Act of 1995*, 29 RUTGERS L.J. 361, 364 (1998).

[276] *See* Schlanger, *supra* note 142, at 1558 (“In 1995, inmates filed nearly 40,000 new federal civil lawsuits—nineteen percent of the federal civil docket. About fifteen percent of the federal civil trials held that year were in inmate civil rights cases.”) Schlanger goes on to note that this number has dropped by 40% since the passage of the Prison Litigation Reform Act, discussed

later in this paper. *Id.* A reduction to over 20,000 federal lawsuits, however, leaves a very large number still.

[277] Gabel v. Lynaugh, 835 F.2d 124, n.1 (5th Cir. 1988).

[278] Newman, *supra* note 275, at 520 (“Laboring under the burdens of having to respond to thousands of lawsuits, most of which are frivolous, the attorneys general of the states adopted the tactic of condemning all prisoner litigation as frivolous.”)

[279] Adam Slutsky, Note, *Totally Exhausted: Why a Strict Interpretation of 42 U.S.C. § 1997e(A) Unduly Burdens Courts and Prisoners*, 73 Fordham L. Rev. 2289, 2295-2296 (2005).

[280] Newman, *supra* note 275, at 521. Newman goes on to discuss two other cases where, though the claim was not for a life and death matter, it was nevertheless a legitimate complaint.

[281] Theodore Eisenberg, Section 1983: Doctrinal Foundations and an Empirical Study, 67 Cornell L. Rev. 482, 544-545 (1982).

[282] See Kuzinski, *supra* note 275, at 364.

[283] See Theodore Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 GEO. L.J. 1567, 1587 (1989).

[284] See *id.*

[285] Cotner v. Campbell, 618 F. Supp. 1091, 1095 (1985).

[286] See AMERICAN CORRECTIONAL ASSOCIATION AND COMMISSION ON ACCREDITATION FOR CORRECTIONS, *supra* note 253, at 49. See also William J. Rich, Prison Conditions and Criminal Sentencing in Kansas: A Public Policy Dialogue, [11 Kan. J.L. & Pub. Pol’y 693, 706 \(2002\)](#) (“Without experts, lawyers and inmates will not be able to determine whether leftover food has been stored at temperatures that meet minimum health and safety standards, let alone evaluate the adequacy of medical and mental health care.”).

[287] See Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 Duke L.J. 1265, 1287 (1983) (“[I]nstitutional financing and administration are subjects with which few judges have more than a passing familiarity. Yet, when litigation exposes constitutional violations in public institutions a court of equity must take steps to eliminate them.”).

[288] See notes 189 and 190, *supra*, and accompanying text.

[289] MUSHLIN, *supra* note 150 at § 2:2 (citing *Rhem v. Malcolm*, 371 F. Supp. 594, 627 (S.D.N.Y. 1974)).

[290] *Id.* (citing *Bell v. Wolfish*, 441 U.S. 520, 543-44 n.27 (1979)).

[291] See notes 150-157, *supra*, and accompanying text.

[292] See notes 187-190, *supra*, and accompanying text.

[293] See notes 189 and 190, *supra*, and accompanying text.

[294] See also Note, *Complex Enforcement: Unconstitutional Prison Conditions*, 94 HARV. L. REV. 626 (1981) (making same distinction between “discrete adjudication” and “complex enforcement”).

[295] See, e.g., *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968) (banning use of strap to punish inmates).

[296] See, e.g., *Johnson v. Lark*, 365 F. Supp 289 (D.C. Mo. 1979) (court order requiring, e.g., provision of soap and cleaning equipment to inmates, limiting number of inmates per cell to two, creating proper disciplinary procedure, etc.)

[297] See, e.g., *Palmigiano v. Garrahy*, 443 F. Supp. 956, 961 (D.R.I. 1977). *C.f.* *Complex Enforcement: Unconstitutional Prison Conditions*, *supra* note 294, at 630 (finding same tendency toward complex enforcement in cases involving inmate health and safety).

[298] *Kuzinski*, *supra* note 275, at 371.

[299] *But see* William C. Collins, *Bumps in the Road to the Courthouse: The Supreme Court and the Prison Litigation Reform Act*, 24 Pace L. Rev. 651, 673 (2004) (“The PLRA attempts to limit the scope of both court orders and consent decrees but it is not clear to me what practical effects these provisions have on relief orders. I am aware of at least one settlement in which the parties and the judge both appeared to simply ignore the relief-power limitations of the Act.”).

[300] See generally *Schlanger*, *supra* note 142.

[301] See, e.g., Los Angeles Environmental Health, *Establishment Rating List*, at <http://www.lapublichealth.org/rating/> for an example of internet posting of ratings. Los Angeles also requires the posting of ratings in the restaurant’s front window. See *Santa Clara County; County to Finalize Grading System For Restaurants*, S.F. CHRON., Nov. 10, 1999, at A19.

[302] Surprisingly, there is caselaw on this topic. See *MUSHLIN*, *supra* note 150, at § 2:10 (citing *Bijeol v. Nelson*, 579 F.2d 423 (7th Cir. 1978)).

[303] *Id.*

[304] *Id.*

[305] See *id.* (citing *Robbins v. South*, 595 F. Supp. 785 (D. Mont. 1984); *Rutherford v. Pitchess*, 457 F. Supp. 104 (C.D. Cal. 1978)).

[306] See also Michel Rosenfeld, *Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts*, 2 INT'L J. CONST. L. 633, 648 (2004) (“To be sure, constitutional provisions are, for the most part, more general and vaguer than statutory provisions.”).

[307] See, e.g., *Travis v. Lockhart*, 607 F. Supp. 1083 (E.D. Ark. 1985) (Handling of mail from media).

[308] See, e.g., *Moore v. Janing*, 427 F. Supp. 567 (D. Neb. 1976)(private facilities for attorney conferences).

[309] See, e.g., *Martin v. Ellandson*, 122 F. Supp. 2d 1017 (S.D. Iowa 2000).

[310] See, e.g., *Teterud v. Gillman*, 385 F. Supp. 153 (S.D. Iowa 1974) (hair length restrictions infringing on religion).

[311] Telephone Interview with John Rogers, Associate Director of Food Services, Rhode Island Department of Corrections (Mar. 25, 2005).

[312] For a short time, the Rhode Island prison system offered such prepackaged kosher meals, because it housed very few Jews. It had to reverse course however, given the relative expense of such meals (approx. \$4), when a large number of inmates began requesting them. *Id.*

[313] Jonathan M. Wilan, *Regulation of Prison Food*, n.58, FOOD AND DRUG LAW: AN ELECTRONIC BOOK OF STUDENT PAPERS, at http://www.law.harvard.edu/faculty/hutt/table_of_contents_2002.html.

[314] MUSHLIN, *supra* note 150 at § 2:10 (citing JOHN BOSTON AND DANIELLE E. MANVILLE, PRISONER’S SELF HELP LITIGATION MANUAL 34 (1995)).

[315] *Id.* (citing *Cooper v. Sheriff, Lubbock Cty., Tex.*, 929 F.2d 1078 (5th Cir. 1991)). Note that in another case, where a rule was applied so that an inmate missed 50 meals over a five month period, this was not found to implicate the Eighth Amendment, because the deprivation was not severe. *Id.* (citing *Talib v. Gilley*, 138 F.3d 211 (5th Cir. 1998)).

[316] *Id.* (citing *Cunningham v. Jones*, 567 F.2d 653 (6th Cir. 1977)).

[317] *Id.*