FREE-WORLD LAW BEHIND BARS

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ABSTRACT. What law governs American prisons and jails, and what does it matter? This Article offers new answers to both questions.

To many scholars and advocates, "prison law" means the constitutional limits that the Eighth Amendment and Due Process Clauses impose on permissible punishment. Yet, as I show, "free-world" regulatory law also shapes incarceration, determining the safety of the food imprisoned people eat, the credentials of their health-care providers, the costs of communicating with their family members, and whether they are exposed to wildfire smoke or rising floodwaters.

Unfortunately, regulatory law's protections often recede at the prison gate. Sanitation inspectors visit correctional kitchens, find coolers smeared with blood and sinks without soap — and give passing grades. Medical licensure boards permit suspended doctors to practice — but only on incarcerated people. Constitutional law does not fill the gap, treating standards like a threshold for toxic particulates or the requirements of a fire code more as a safe harbor than a floor.

But were it robustly applied, I argue, free-world regulatory law would have a lot to offer those challenging carceral conditions that constitutional prison law lacks. Whether you think that criminal-justice policy's problem is its lack of empirical grounding or you want to shift power and resources from systems of punishment to systems of care, I contend that you should take a close look at free-world regulatory law behind bars, and work to strengthen it.

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INTRODUCTION

Prisons and jails are sites of confinement—they exist to deprive people of liberty. Whether the goal is punishment, deterrence, or incapacitation, the result is the same: incarcerated people are forcibly held apart from society. But like the free world, prisons and jails are also places where people eat and drink, give birth and die. Incarcerated people speak on the phone and use the internet, have bank accounts, and purchase goods. They are infected and inoculated; medications are dispensed and ambulances called. People housed in prisons and jails receive degrees, use wheelchairs and hearing aids, and participate in research studies. They are employed, licensed to work, and discriminated against. Some even cast votes. Prisons and jails are sited on land for which building permits are issued and designed by architects in compliance with building codes; they have plumbing and lighting and heating and cooling and ventilation systems. They can lose power, catch fire, flood, and grow mold. They are, as a matter of reality, if inconsistently as a matter of law, inextricably intertwined with the rest of society.

In the free world, it is the job of the regulatory state to ensure that people do not contract intestinal parasites at restaurants, to allocate health-care resources to communities that need them, and to protect users of phone and internet services from extortionate charges. But traditionally, scholars[1] and advocates have focused most of their attention and energy on the constitutional law of prison conditions—primarily the Eighth Amendment's prohibition on cruel and unusual punishment and the Fourteenth Amendment's Due Process Clause, as well as the First Amendment's free-speech and free-exercise guarantees.[2]

1. This Article's attention to the transsubstantive regulatory law of prisons and jails is novel, though important work has addressed certain discrete arenas like labor and health-care law. *See, e.g.*, Noah D. Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 VAND. L. REV. 857 (2008); Mira Edmonds, *The Reincorporation of Prisoners into the Body Politic: Eliminating the Medicaid Inmate Exclusion Policy*, 28 GEO. J. ON POVERTY L. & POL'Y 279 (2021); *cf.* Giovanna Shay, *Ad Law Incarcerated*, 14 BERKELEY J. CRIM. L. 329 (2009) (considering the narrower body of regulatory law promulgated by carceral officials themselves). It parallels, however, moves by scholars who have looked beyond the Fourth Amendment to argue that regulatory law—internal or external—does or should shape policing. *See, e.g.*, Maria Ponomarenko, *Rethinking Police Rulemaking*, 114 NW. U. L. REV. 1, 6-8 (2019); John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV. 1539, 1573-95 (2017); Stephen Rushin, *Police Union Contracts*, 66 DUKE L.J. 1191 (2017); Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 936-37, 952-60 (2014).

2. Pretrial detainees' conditions claims are brought under the Fourteenth—or, for federal detainees, Fifth—Amendment; as a result, the applicable deliberate-indifference standard does not (depending on the context and circuit) involve a subjective element, but the doctrine is otherwise imported from the Eighth Amendment. *See* Kingsley v. Hendrickson, 576 U.S. 389,

Despite its place in the spotlight, constitutional prison law offers exceedingly little protection to incarcerated eaters, patients, and callers.[3] Maggots in macaroni,[4] doctors who have been disciplined for sexual assault,[5] phone calls that cost more than a dollar per minute[6]—all of them pass constitutional muster. The doctrine's substantive standards situate prisons as sites and incarcerated people as objects of punishment or incapacitation, offering (at best) protection against extreme and obvious abuses. Although incarcerated people retain some other constitutional rights related to speech, religion, and due process, the strength of these rights and the ability to assert them are drastically limited in custody.[7] Regulatory violations do not necessarily offend the Constitution, which treats free-world standards—thresholds for toxic particulates, say—more as safe harbors than as floors. Eighth Amendment doctrine affords prison and jail officials tremendous deference, and the process of litigating these claims is littered with

400-02 (2015); Margo Schlanger, *The Constitutional Law of Incarceration, Reconfigured*, 103 CORNELL L. REV. 357, 410-17 (2018). Constitutional law may draw a sharp line in the sand, but the regulatory law of incarceration discussed in this Article does so only intermittently; instead, it primarily takes a functional approach when applying distinct rules to carceral places and incarcerated people. As for whether an objective-only standard leads to more rights-protective outcomes for pretrial detainees, some are more sanguine than others, *see, e.g.*, Schlanger, *supra*, at 415-16, but its recent application in COVID-related jail cases does not give cause for optimism, *see, e.g.*, Recent Case, Swain v. Junior, *961 F.3d 1276 (11th Cir. 2020)*, 134 HARV. L. REV. 2622, 2626 (2021) (suggesting that the objective standard's "reasonable response defense stretches quite far to protect prison and jail officials from liability").

3. *See infra* Part I.

4. *See, e.g.*, Islam v. Jackson, 782 F. Supp. 1111, 1113-15 (E.D. Va. 1992) (concluding that allegations that a prisoner was served food infested with maggots, developed stomach problems, and required medical treatment at an outside emergency room were not sufficiently serious to satisfy the objective element of an Eighth Amendment claim).

5. *See, e.g.*, Balla v. Idaho Bd. of Corr., No. 1:81-cv-01165-BLW, 2017 WL 11554335, at *12, *14-16 (D. Idaho Sept. 28, 2017) (concluding that there was no evidence of systemic Eighth Amendment violations related to a prison system's provision of medical care despite its contractor's employment of a physician whose license was restricted for five years to practicing medicine in a "men's only prison" following allegations that he had engaged in improper sexual conduct with female patients).

6. *See, e.g.*, Holloway v. Magness, 666 F.3d 1076, 1078-81 (8th Cir. 2012) (rejecting a prisoner's First Amendment challenge to a phone-service contract with high fees and commissions); Brief of Appellant at 4-5, Holloway v. Magness, 666 F.3d 1076 (8th Cir. 2012) (No. 11-1455) 2011 WL 1554810 ("[A] ten-minute interstate call costs . . . more than $1.00 per minute.").

7. *See* Turner v. Safley, 482 U.S. 78, 89 (1987). Incarcerated people do enjoy more substantial protection for religious liberty under federal statute. *See* Barrick Bollman, Note, *Deference and Prisoner Accommodations Post-*Holt*: Moving RLUIPA Toward "Strict in Theory, Strict in Fact,"* 112 NW. U. L. REV. 839, 858-62 (2018).

procedural obstacles purpose-built to stymy and cabin challenges to conditions of confinement.[8]

As this Article argues, "free-world" regulatory systems[9] in arenas as diverse as public health, public utilities, public finance, and public records should also be understood as part of the corpus of prison law because they can and do shape incarceration in profound ways.[10] For example, free-world regulatory processes impact whether prisoners' doctors and nurses are licensed, whether they get access to lifesaving medications, the extent to which their deaths are investigated, and whether the facilities that house them are built in places or constructed or maintained in ways that will endanger them. Regulatory processes determine how easily and in what ways prisoners can maintain contact with their loved ones, how much taxpayer money is spent on their care, how much taxpayer money is transferred directly to them, and how much they are paid for their labor. Regulatory processes also shape whether prisoners have access to higher education, whether those who are legally permitted to vote can exercise that right in practice, and how much information the public receives about the conditions of their confinement.

The story of free-world regulatory law behind bars is not presently an upbeat one.[11] Its protections often recede at the prison gate, for reasons entirely unrelated to security, leaving incarcerated people and carceral institutions in a deregulatory state of exception.[12] This can happen through wholesale exemption of

8. *See* Sharon Dolovich, *Forms of Deference in Prison Law*, 24 FED. SENT'G REP. 245, 249-52 (2012); Margo Schlanger, *Prisoners' Rights Lawyers' Strategies for Preserving the Role of the Courts*, 69 U. MIA. L. REV. 519, 520-22, 526-28 (2015).

9. This Article is concerned with the universe of regulatory law, statutory and administrative, that governs society and is, or might be, applied to prisons and jails. By contrast, it does not focus on the internal law of incarceration—that is, regulation exclusive to and generally articulated by prison and jail administrations themselves, as explored in Shay, *supra* note 1. When the transcontextual nature of regulatory law is particularly relevant to the arguments advanced in this Article, I emphasize that feature with the descriptive phrase "free-world." I have chosen this descriptor because it is the one that many of my incarcerated clients would use to describe outside people and institutions.

10. *See infra* Part II. Carceral institutions are not the only elements of the criminal-legal system that a broader, subconstitutional lens can illuminate. *See* Alex Kornya, Danica Rodarmel, Brian Highsmith, Mel Gonzalez & Ted Mermin, *Crimsumerism: Combating Consumer Abuses in the Criminal Legal System*, 54 HARV. C.R.-C.L. L. REV. 107, 113 (2019).

11. *See infra* Part III.

12. *See* ACHILLE MBEMBE, NECROPOLITICS (2019); GIORGIO AGAMBEN, STATE OF EXCEPTION (Kevin Attell trans., 2005); *see also* Shay, *supra* note 1, at 347 (explaining that prison and jail regulations are usually exempt from guardrails of administrative rulemaking like notice and comment). Adrian Vermeule has argued that our administrative law inevitably includes "grey holes" like this one. *See* Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L.

prisons and prisoners; for example, medical licensure boards often authorize suspended physicians to practice exclusively in prisons. It may happen through abstention—a deferential decision not to take enforcement steps or to fund adequate inspection staff. It can happen through correctional officials' resistance and obstructionism, such as when kitchen supervisors order incarcerated workers to hide evidence of food-safety violations. And it may happen through jurisdictional mismatch when regulatory authority is exercised at a lower level of government than carceral authority. The divergent treatment that results is often not only inhumane but bad policy.

Nevertheless, were it to be robustly applied to prisons and jails, free-world regulatory law would hold promise as a tool for ameliorating conditions. Substantively, procedurally, and normatively, it can avoid many of the shortcomings of the constitutional prison law that has long been asked to fill deregulatory voids.[13] Whether we are reformists who believe in incrementalism or abolitionists advocating for radical, noncarceral reimagination, we should herald a shift towards more aggressive free-world regulation of prisons. For hard-nosed pragmatists, free-world regulatory processes and actors are promising sites and agents of progress that has proven painfully hard to achieve through constitutional prisoners' rights litigation. For visionaries, understanding prisons and jails as the proper subjects of free-world regulation allows us to reconceptualize incarcerated people as members of the public—with the attendant entitlements—and to divert power from carceral institutions to the regulatory infrastructure of communal health and safety.[14]

Substantively,[15] free-world regulatory law is often more welfare enhancing because it develops in noncarceral contexts, whereas constitutional prison law's

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REV. 1095, 1132-36 (2009). But as even he acknowledges, "their scope will wax and wane." *Id.* at 1149.

13. The overarching move this Article makes is closely analogous to the reorientation in Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761 (2012). Harmon argues that the "conventional paradigm [of constitutional law] is necessarily inadequate to regulate the police" because it "establish[es] only deferential minimum standards for law enforcement, without addressing the aggregate or distributional costs and benefits of law enforcement or its effects on societal qualify of life," and because courts have limited institutional capacity to engage in empirical analysis. *Id.* at 763.

14. *See* Andrea Craig Armstrong, *The Missing Link: Jail and Prison Conditions in Criminal Justice Reform*, 80 LA. L. REV. 1, 1, 31, 35-36 (2019); Kornya et al., *supra* note 10, at 116. From a very different perspective, Ben Gifford argues that treating prisons as places where, and prisoners as people whose, victimization matters will work a fundamental shift in "who has standing in our cost-benefit analyses." Ben Gifford, *Prison Crime and the Economics of Incarceration*, 71 STAN. L. REV. 71, 107 (2019).

15. *See infra* Part IV.

development is stunted by the fact that it applies only to deeply disfavored people.[16] Free-world regulation's commitment to empiricism highlights a fundamental failing of our extreme form of judicial deference to prison and jail officials. Constitutional prison law excuses these officials from any expectation that they justify their policy choices, allowing them to get away with policies that are unsupported by evidence and indeed often appear to be counterproductive, such as those that impede contact with family members despite consistent findings that this contact reduces disciplinary infractions and recidivism.[17] Relatedly, constitutional prison law has little to say about officials' failures to take steps that are easy, obvious, and dramatically benefit prisoners but without which the conditions of confinement are nevertheless minimally adequate, such as providing hand soap during a pandemic.[18]

By contrast, free-world regulation is designed to promote efficient and effective improvements. Regulatory schemes can grapple seriously with, and make accommodations for, prisoners' incapacity to advocate for themselves, while the constitutional law of prisons has done the opposite, erecting daunting hurdles to litigation, particularly for pro se prisoners. Free-world regulatory law often reflects a more nuanced understanding of the ways that prisons impact and are impacted by our broader society, whereas constitutional prison law primarily treats the free world as a comparative reference point, against which conditions can be simplistically judged or excused. Unlike public-health officials, for instance, courts considering Eighth Amendment challenges do not squarely consider the ways that contagion behind bars can propagate illness into the surrounding community. One body of law recognizes the permeability of carceral institutions, and the other fails to do so.

Procedurally,[19] free-world regulatory processes can circumvent many of the obstacles to meaningful improvement of prison and jail conditions. Remedial measures can be precisely prescriptive and proactive. While both the Prison Litigation Reform Act (PLRA) and judicial doctrines of deference make it extraor-

16. Ordinarily, regulatory processes are multivalent and subject-specific, not unified and domain-specific. For instance, fire- and food-safety standards in elementary schools are set and assessed by fire- and food-safety departments, not by departments of education. Although free-world regulators lack the domain knowledge of corrections-specific oversight agencies, they also avoid the substantial risk of capture. For more on this point, see *infra* Section V.B.

17. This critique could fairly be made of regulatory versus constitutional law in other contexts. *See* Harmon, *supra* note 13, at 772-76 (explaining why courts are bad at consequentialist analysis).

18. *See* Swain v. Junior, 958 F.3d 1081, 1090 (11th Cir. 2020) (concluding that jail officials had shown irreparable injury absent a stay because they were ordered, "[u]nder pain of contempt," to "provide each Metro West inmate with an individual supply of soap").

19. *See infra* Part V.

dinarily difficult to obtain relief that will durably prevent future violations, regulation is well designed to take the long view in shifting societal practice and routinely includes meaningful and efficient monitoring mechanisms. Reforms can sweep broadly, affecting prisons and jails across a jurisdiction or even the country. Enforcement often does not require court involvement, and the formal protagonists need not be incarcerated people themselves; organized allies can spearhead efforts.

Normatively,[20] a turn toward free-world regulatory control of carceral institutions can help to advance not only reformist, but also abolitionist goals. By shifting institutional power to welfarist institutions, it can further the replacement of punishment-based responses with reparative public goods. Free-world regulatory law can help to redress incarceration's extraction of resources from poor communities of color, promoting redistribution while improving conditions. Applying the law that governs society writ large to prisoners and prisons can reframe our social and moral conceptions of these people and places, integrating them into, rather than excluding them from, that society. Finally, free-world regulatory law can account for—in ways that constitutional prison law does not—the broad range of serious harms that incarceration causes to incarcerated people, their families, and our communities. It can shift the locus of responsibility from malign correctional officers or even administrators to broader societal choices to prioritize certain aspects of public safety over others and to invest in punitive rather than welfarist responses.

This Article makes several contributions. By drawing together disparate strands of free-world regulation's operation behind bars, it demonstrates the impacts of an underappreciated body of law in the carceral context. This coalescence also creates rich opportunities for analysis. It reveals the consistent modes through which incarcerated people and carceral institutions are left in a deregulatory state of exception. And it allows for comparison of the existing framework of constitutional prison law with an envisioned alternative of vigorous regulation. Finally, this Article offers suggestions as to the roles that legislators, regulators, advocates, and academics can play in strengthening regulatory engagement with the carceral state.

I. WHAT CONSTITUTIONAL PRISON LAW COUNTENANCES

Before diving into the heart of this Article, which explores the roles that free-world regulatory law does and could play behind bars, some brief groundwork is warranted to illustrate why a robust complement to constitutional prison law

20. *See infra* Part VI.

is so sorely needed.[21] In comparing free-world regulatory law and constitutional prison law, Parts IV, V, and VI will parse many of the latter's important failings. The purpose of this preface is simply to establish a point of departure. From the prosaic to the exceptional, constitutional prison law fails to ameliorate many of the inhumane and dangerous conditions people experience in prisons and jails. Prison and jail officials can breach the regulatory state's safeguards with constitutional impunity.

Take prison food. The quality and quantity of food available to prisoners is consistently poor and often terrible, but it is routinely impervious to constitutional challenge. Courts consistently conclude that prison food "falling below food preparation standards" does not violate the Constitution; nor does prison food that is "moldy" or "rancid."[22] There are numerous cases rejecting constitutional challenges to prison "food 'occasionally contain[ing] foreign objects,'"[23]

21. It is vital not to ignore constitutional prison litigation's successes, at least in historical perspective. As Judith Resnik has powerfully chronicled, incarcerated people were not rights-holders of any sort prior to the 1960s, when jailhouse and free-world lawyers asserted, and courts began to recognize, that the constitutional prohibition on cruel and unusual punishment placed *some* bounds on their treatment, and that prison administrators did not have totally "unbridled power." Judith Resnik, *The Puzzles of Prisoners and Rights: An Essay in Honor of Frank Johnson*, 71 ALA. L. REV. 665, 687 (2020). It is important "[a]midst the tragic conditions in today's United States prisons" not to "miss what was accomplished" during this extraordinary period of legal reimagining. *Id.* But the story since then has been characterized by significant retrenchment in the role of courts as overseers. *See, e.g.*, Turner v. Safley, 482 U.S. 78, 89 (1987); Lewis v. Casey, 518 U.S. 343, 349 (1996); Valentine v. Collier, 140 S. Ct. 1598, 1598-99 (2020) (Sotomayor, J., statement respecting denial of application to vacate stay). Even David Shapiro's optimistic essay in 2016—written when there was a small and since-extinguished glimmer of hope in the Supreme Court's composition and recent jurisprudence—begins this way: "Prisoners' rights lawyers have long faced a dismal legal landscape." David M. Shapiro, *To Seek a Newer World: Prisoners' Rights at the Frontier*, 114 MICH. L. REV. FIRST IMPRESSIONS 124, 124 (2016). I share a fervent hope that the landscape of prison law can be brightened. As this Article argues, it can and should also be expanded. For a deeper discussion than this Article can offer of the failings of constitutional prison-conditions litigation, see Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 891 (2009), which argues that Eighth Amendment doctrine, as articulated in *Farmer v. Brennan*, 511 U.S. 825 (1994), fundamentally fails to account for "the state's carceral burden"—its duty of care to those it has "place[d] . . . in potentially dangerous conditions while depriving them of the capacity to provide for their own care and protection" (emphasis omitted). For consideration of the many logistical barriers that compound these doctrinal ones, see David M. Shapiro & Charles Hogle, *The Horror Chamber: Unqualified Impunity in Prison*, 93 NOTRE DAME L. REV. 2021, 2048-57 (2018).

22. Stallworth v. Wilkins, 802 F. App'x 435, 443-44 (11th Cir. 2020); *see also id.* (citing cases).

23. *Id.* at 443 (quoting Hamm v. DeKalb Cnty., 774 F.2d 1567, 1575 (11th Cir. 1985)).

including teeth, a rock, a worm, vermin, and maggots.[24] Such conditions in prisons do not offend the Eighth Amendment's prohibition against cruel and unusual punishment because a negligent failure to supervise a prison kitchen is not deliberately indifferent, and it is generally difficult to prove that such acts and omissions caused physical harm.[25]

The same dynamic occurs in a variety of other contexts. For example, fires in prisons and jails can be catastrophic, resulting in mass fatalities among those locked in and unable to escape.[26] Although courts have found a range of fire-safety issues to create substantial risks of serious harm,[27] it is necessary in each case to litigate what level of risk a practice poses, whether defendants are aware of the risk, and whether they have taken reasonable steps to abate it. As the Seventh Circuit once put it, in a decision reversing a district court's order to address problems including improperly maintained electrical wiring, inadequate fire exits, and paper and solvents stored near flames, "[t]he [E]ighth [A]mendment does not constitutionalize the Indiana Fire Code."[28] Violation of other health- and safety-related codes—like requiring incarcerated people to drink water contaminated with radium at almost twice the limit set by the U.S. Environmental Protection Agency (EPA)[29]—is likewise insufficient to run afoul of the Eighth Amendment.[30]

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24. *See* Price v. Milmar Food Grp., No. 17-13011, 2018 WL 4346688, at *3 (E.D. Mich. July 16, 2018).

25. *See, e.g.*, Bennett v. Misner, No. Civ.02-1662-HA, 2004 WL 2091473, at *11-13 (D. Or. Sept. 17, 2004) (rejecting Eighth Amendment claims regarding officers' failure to ensure that prisoners with viral illnesses and bleeding wounds were not involved in food preparation, in violation of state administrative regulations, for failure to show deliberate indifference and because the plaintiffs had not alleged that they "suffered significant injury or illness—such as specific, repeated instances of food poisoning or malnutrition").

26. In the worst prison fire in American history, 322 prisoners died at the Ohio State Penitentiary in Columbus. It is recounted in *To What Red Hell*, a short story published by Chester Himes—who survived it and went on to become the first Black crime novelist—in *Esquire*, with his prison number, 59623, as a byline. *See* Bret McCabe, *The Lonely Crusader*, JOHNS HOPKINS MAG. (Fall 2017), https://hub.jhu.edu/magazine/2017/fall/chester-himes-lonely-crusader-african-american-fiction-writer [https://perma.cc/2XGM-3U5U].

27. *See, e.g.*, White v. Cooper, 55 F. Supp. 2d 848, 858 (N.D. Ill. 1999).

28. French v. Owens, 777 F.2d 1250, 1257 (7th Cir. 1985); *see* Hadix v. Johnson, 367 F.3d 513, 529 (6th Cir. 2004) (quoting *French*, 777 F.2d at 1257); Shrader v. White, 761 F.2d 975, 986 (4th Cir. 1985) ("[S]afety codes do not establish the constitutional minima." (quoting Ruiz v. Estelle, 679 F.2d 1115, 1153 (5th Cir. 1982))).

29. *See, e.g.*, Carroll v. DeTella, 255 F.3d 470, 472 (7th Cir. 2001).

30. *See, e.g.*, *id.* at 473 ("If the prison authorities are violating federal antipollution laws, the plaintiff may have a remedy under those laws. His remedy is not under the Eighth Amendment." (citations omitted)).

Moreover, certain arenas subject to significant regulation in the free world are simply beyond the scope of constitutional prison-conditions law. For example, although prisoners do generally have a constitutional right to use telephones,[31] their ability to stay in touch with loved ones is seriously impeded by stratospheric charges.[32] When incarcerated people have challenged exorbitant rates of dollars per minute and kickbacks as high as 45%, courts have rejected an array of First Amendment, due-process, and equal-protection claims, concluding that these arrangements would violate the Constitution only if they foreclosed phone access entirely.[33]

Even when courts do consider free-world regulations in constitutional analyses, they generally make clear that regulatory standards are relevant but not determinative, and that no more than substantial compliance is necessary.[34] Recently, for example, courts excused prison and jail officials' (sometimes admitted) failures to comply with aspects of the Centers for Disease Control and Prevention's (CDC) guidance for managing the COVID pandemic in correctional institutions, concluding that because officials had taken some measures, they had not acted with deliberate indifference.[35] This lenity is all the more striking because the CDC guidelines were both "general" and "precatory" and "light-touch," while the toll of illness and death was grave: huge outbreaks led to the infection of over a fifth of all incarcerated people and age-adjusted mortality

31. *See* Washington v. Reno, 35 F.3d 1093, 1100 (6th Cir. 1994).

32. *See* Johnson v. California, 207 F.3d 650, 656 (9th Cir. 2000).

33. *See* Gilmore v. Cnty. of Douglas, 406 F.3d 935, 939-40 (8th Cir. 2005); Arsberry v. Illinois, 244 F.3d 558, 564-66 (7th Cir. 2001); *Johnson*, 207 F.3d at 656; *cf.* McGuire v. Ameritech Servs., Inc., 253 F. Supp. 2d 988, 1005-06 (S.D. Ohio 2003) (permitting a claim that high rates made communication impossible to proceed).

34. *See, e.g.*, Masonoff v. DuBois, 899 F. Supp. 782, 799 (D. Mass. 1995); Mawby v. Ambroyer, 568 F. Supp. 245, 251 (E.D. Mich. 1983); Capps v. Atiyeh, 559 F. Supp. 894, 913-14 (D. Or. 1982); Dawson v. Kendrick, 527 F. Supp. 1252, 1294-97 (S.D. W. Va. 1981).

35. *See* Swain v. Junior, 961 F.3d 1276, 1287-89 (11th Cir. 2020); Mays v. Dart, 974 F.3d 810, 819-20 (7th Cir. 2020); *see also* Sanchez v. Brown, No. 3:20-cv-00832-E, 2020 WL 2615931, at *18 (N.D. Tex. May 22, 2020) (holding that a jail did not violate public-health guidelines by failing to follow Centers for Disease Control and Prevention (CDC) recommendations regarding COVID).

rates multiple times higher than in the community.[36] At the same time, regulatory standards acted as a ceiling on constitutional liability, leaving carceral institutions that did comply "inoculated against coercive relief."[37]

Courts' approach to applying regulatory standards in the prison context is vividly illustrated by the series of decisions in *Ahlman v. Barnes*, a case concerning the pandemic response at the Orange County, California Jail. The district court initially ordered jail officials to comply with the CDC guidelines, finding—aberrantly—that they "represent[ed] the floor, not the ceiling, of an adequate response to COVID-19 at the Jail."[38] The sheriff sought a stay, arguing that the order imposed certain requirements beyond those set forth by the CDC.[39] A divided panel of the Ninth Circuit declined to stay the order, but both the majority and the dissent expressly rejected this conclusion by the district court.[40] Then, the Supreme Court stayed the order, sending a strong signal through its shadow docket.[41] Although the five Justice majority's basis for granting the stay is not articulated, the application and Justice Sotomayor's dissent both focused on the lower court's consideration of the CDC guidelines. The jail officials argued, and it appears that the majority likely agreed, that the Ninth Circuit "created a certworthy circuit split because . . . it endorsed a preliminary injunction that went beyond the CDC Guidelines."[42] The dissent rejected that argument, but on the facts rather than the law; Justice Sotomayor took pains to parse and contest,

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36. Brandon L. Garrett & Lee Kovarsky, *Viral Injustice*, 110 CALIF. L. REV. 117, 143, 169-70 (2022); *see* Sharon Dolovich, *Mass Incarceration, Meet COVID-19*, U. CHI. L. REV. ONLINE (2020); Brendan Saloner, Kalind Parish, Julie A. Ward, Grace DiLaura & Sharon Dolovich, *COVID-19 Cases and Deaths in Federal and State Prisons*, 324 JAMA 602 (2020); Neal M. Marquez, Aaron M. Littman, Victoria E. Rossi, Michael C. Everett, Erika Tyagi, Hope C. Johnson & Sharon L. Dolovich, *Life Expectancy and COVID-19 in Florida State Prisons*, AM. J. PREVENTIVE MED. (Jan. 27, 2022), https://www.ajpmonline.org/action/showPdf?pii=S0749-3797%2822%2900045-9 [https://perma.cc/G7LQ-AWE3].

37. Garrett & Kovarsky, *supra* note 36, at 154; *see, e.g.*, Valentine v. Collier, 956 F.3d 797, 802 (5th Cir. 2020); Roman v. Wolf, No. 20-55436, 2020 WL 2188048, at *1 (9th Cir. May 5, 2020). For an example in another context, see *Pack v. Artuz*, 348 F. Supp. 2d 63, 86-88 (S.D.N.Y. 2004). Regulators' nonenforcement can likewise doom a claim. *See, e.g.*, Carroll v. DeTella, 255 F.3d 470, 473 (7th Cir. 2001).

38. Ahlman v. Barnes, 445 F. Supp. 3d 671, 691, 693 (C.D. Cal. 2020).

39. Appellants' Opening Brief at 2, 22, 43, 49, Ahlman v. Barnes, 20 F.4th 489 (9th Cir. 2021) (No. 20-55668), 2020 WL 5412620,.

40. Ahlman v. Barnes, No. 20-55568, 2020 WL 3547960, at *7 (9th Cir. June 17, 2020) (Nelson, J., dissenting); *id.* at *4 n.8 (majority opinion).

41. *See* Ian Millhiser, *The Supreme Court's Enigmatic "Shadow Docket," Explained*, VOX (Aug. 11, 2020), https://www.vox.com/2020/8/11/21356913/supreme-court-shadow-docket-jail-asylum-covid-immigrants-sonia-sotomayor-barnes-ahlman [https://perma.cc/76SX-K2HV].

42. Barnes v. Ahlman, 140 S. Ct. 2620, 2623 (2020) (Sotomayor, J., dissenting from grant of stay).

point by point, the assertion that the injunction's requirements exceeded the guidelines.[43]

As Margo Schlanger observed in 2015, when the Supreme Court appeared much more favorably disposed to prisoner claims than it currently does: "Litigation has receded as an oversight method in American corrections. It is vital that something take its place."[44] One as-yet-underexplored possibility for that "something": the same regulatory processes that protect the wellbeing of people who are not imprisoned.

II. REGULATORY LAW IN THE CARCERAL CONTEXT

A staggering array of regulatory standards and processes already shape—to varying degrees of effectiveness—life behind bars. They affect many of the things that matter most to incarcerated and nonincarcerated people alike, such as health care, food, work, and contact with loved ones.[45] Regulatory requirements—and their (non)enforcement—are especially salient on the inside, where the market competition from which free people benefit is entirely absent and the captive population has no opportunity to exit and little, if any, voice.[46] Often, regulatory

43. *Id.*

44. Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153, 171 (2015). State-law tort claims are generally not a viable alternative. Damage awards by juries to incarcerated plaintiffs tend to be very low except in cases of serious, permanent injury or death, leaving most would-be litigants unable to obtain contingent-fee representation. Moreover, many states have enacted special bars to claims by incarcerated people and have excluded them from waivers of sovereign immunity. *See, e.g.*, Phillips v. Monroe Cnty., 311 F.3d 369, 375 (5th Cir. 2002); Sealock v. Colorado, 218 F.3d 1205, 1212 (10th Cir. 2000); Webb v. Lawrence Cnty., 144 F.3d 1131, 1139-40 (8th Cir. 1998); Simmons v. City of Phila., 947 F.2d 1042, 1078 (3d Cir. 1991); *see also* Gallop v. Adult Corr. Insts., 182 A.3d 1137, 1141-42 (R.I. 2018) (barring a prisoner by civil-death statute from raising all state-law tort claims).

45. Federal surveys of incarcerated people no longer ask about conditions of confinement, but they once did so. *Compare* U.S. DEP'T OF JUST., BUREAU OF JUST. STATS., SURVEY OF INMATES OF LOCAL JAILS QUESTIONNAIRE, 1996, at 185-201 [ICPSR 6858] (containing extensive questions about jail conditions), https://bjs.ojp.gov/content/pub/pdf/siljq.pdf [https://perma.cc/7E8H-B2PM], *with* U.S. DEP'T OF JUST., BUREAU OF JUST. STATS., SURVEY OF INMATES OF LOCAL JAILS QUESTIONNAIRE, 2002 [ICPSR 4359] (containing no questions about jail conditions), https://bjs.ojp.gov/content/pub/pdf/quest_archive/siljq02.pdf [https://perma.cc/6DJQ-4UK5].

46. This is illustrated vividly by a recent puff piece describing a service called "Conspiraci" as "the 'Yelp' of prisons," and suggesting that it allows incarcerated people to "rate the prison system." *How Conspiraci, the 'Yelp' of Prisons, Helps Inmates Like Never Before*, LATESTLY (May 30, 2021, 11:10 AM IST), https://www.latestly.com/lifestyle/how-conspiraci-the-yelp-of-prisons-helps-inmates-like-never-before-2511358.html [https://perma.cc/B65K-77DP]. Incarcerated

law falls dramatically short; for reasons considered in depth in Part III, incarcerated people commonly end up outside its protective umbrella.

This Part offers a whistle-stop tour of just a handful of the many relevant regulatory arenas. It begins in an unlikely location: the restroom.

A. Architectural Design

Regulatory law shapes the built environment of a prison or jail even before it holds people captive. For example, federal energy-efficiency standards for urinals and toilets have a sole exemption: "fixtures designed for installations in prisons."[47] And state building codes set requirements for the number of fixtures, determining that while student dormitories must have at least one toilet per ten occupants, incarcerated people living in dormitory environments can make do with only one per fifteen.[48] It is because of state building codes that toilets in prisons and jails—unlike toilets in every other built structure—do not need to have privacy walls or partitions.[49]

Why does this matter? Because, as a leading correctional architect put it, in prisons and jails, "the throne is king."[50] The impacts of toilet design and placement are far-ranging. "Wet" cells, with toilets inside them, are used in higher security units; they limit time outside the cell and contact with staff, and toilets

people are not voluntary consumers; unlike those looking for restaurant or hotel recommendations, they cannot choose to avoid a low-rated prison facility with reports of food poisoning. *See, e.g.*, Anna Hansen, *Inmate Advocates Concerned Following DOC Switch from Three Vendors to One*, FOX47 (Aug. 11, 2021), https://fox47.com/news/local/inmate-advocates-concerned-following-doc-switch-from-three-vendors-to-one [https://perma.cc/D4KA-WQSC].

47. 10 C.F.R. § 430.2 (2021).

48. *See, e.g.*, OHIO ADMIN. CODE 4101:1-29-01 (2017) (effective Nov. 1, 2017).

49. *Id.* § 1209.3.1 (effective July 1, 2021).

50. Kerry Feeney, *The Throne Is King: Impact of the Prison Toilet*, AM. INST. ARCHITECTS, https://www.aia.org/articles/5326-the-throne-is-king-impact-of-the-prison-toile [https://perma.cc/F97W-VV3D]. For the first time in years, the Supreme Court in 2020 ruled in favor of an incarcerated person in an Eighth Amendment case, reversing a grant of qualified immunity in a case that involved the lack of a toilet. The defendants had placed the plaintiff in a cell "equipped with only a clogged drain in the floor to dispose of bodily wastes"; when, after holding his bladder for over twenty-four hours, "he eventually (and involuntarily) relieved himself, [it] caus[ed] the drain to overflow and raw sewage to spill across the floor" on which he was later forced to sleep. Taylor v. Riojas, 141 S. Ct. 52, 53 (2020). And still, the per curiam opinion took pains to point out that leaving Mr. Taylor lying in feces was not in itself sufficient to violate the Eighth Amendment, and would not do so if this horrific treatment was somehow "compelled by necessity or exigency"; it emphasized that an "officer-by-officer analysis will be necessary on remand," highlighting some of the defendants' taunts to show support in the record for a finding that "at least some officers involved in Taylor's ordeal were deliberately indifferent to the conditions of his cells." *Id.* at 54. The existence of debate over the clarity of the violation in a case this extreme vividly illustrates constitutional prison law's shortcomings.

are "the essential appendage a locked room requires to create isolation."[51] It is no exaggeration to say that a toilet is the key difference between a cell that can be locked down for days and one that cannot be.[52]

Incarcerated people's sense of normalcy is affected by the placement of toilets inside or outside cells. Wet cells are usually "hardened and austere," to protect surfaces and furnishings from moisture, whereas "dry" cells can more closely "resemble a bedroom."[53] Toilets can afford or deprive incarcerated people of the privacy that people in the free world enjoy when using the bathroom, and leave some — especially women and transgender people, but cisgender men as well — vulnerable to sexual harassment.[54] And when things malfunction, a toilet inside a cell can flood, leaving someone living in raw sewage.[55]

The placement and design of toilets also impact behavior in carceral environments in profound ways likely illegible to those in the free world. When toilets and showers are grouped together in common areas, they can facilitate assault and lead to conflict between incarcerated people and staff.[56] Toilets are also tools of "protest or punishment" and even self-harm, as they are "one of the last areas of control" for many incarcerated people.[57] Because a toilet may serve as "a garbage can, a drinks cooler, a laundry facility, or [] a means to dispose of contraband," and as a "method of flooding housing units to disrupt facility operations or register dissatisfaction," institutional toilets are often built with timed or manual lockout fixtures.[58] These devices in turn create opportunities for tension with a cellmate or retaliation by an officer.[59]

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51. Feeney, *supra* note 50.

52. *See id.*; Carol Brzozowski, *Water Sustainability in Prisons*, WATERWORLD (Jan. 7, 2016), https://www.waterworld.com/water-utility-management/article/14070022/water-sustainability-in-prisons [https://perma.cc/9AKS-FYYK]; Shawn Bush, *Pipe Down*, CORR. NEWS (Dec. 9, 2009), https://correctionalnews.com/2009/12/09/pipe-down [https://perma.cc/EGF6-DHMS].

53. Feeney, *supra* note 50.

54. *Id.*

55. Joseph Neff & Keri Blakinger, *First Came the Pandemic, Then Came the Raw Sewage*, MARSHALL PROJECT (May 30, 2020, 6:00 AM), https://www.themarshallproject.org/2020/05/30/first-came-the-pandemic-then-came-the-raw-sewage [https://perma.cc/668T-7E6F].

56. Feeney, *supra* note 50.

57. *Id.*

58. *Id.*

59. Kenneth E. Hartman, *Disgusting Effects of Prison Overcrowding: Sewage Backflow in My Cell*, TRUTHOUT (May 2, 2017), https://truthout.org/articles/disgusting-effects-of-prison-overcrowding-sewage-backflow-in-my-cell [https://perma.cc/98TE-RUVV].

B. Food Safety

To prisoners, food safety and quality is of great concern.[60] And not without reason: a recent CDC study revealed that incarcerated people suffer from foodborne illness at a rate more than six times higher than that of the free-world population.[61] Even when not unsafe, prison and jail food is often nutritionally inadequate and downright unappetizing.[62] A national survey of people formerly incarcerated in forty-one states revealed that nearly two-thirds rarely or never had access to fresh vegetables.[63] Meals are also often insubstantial; over 90% of survey respondents reported being unable to eat enough to feel full.[64]

The food-safety problems to which prisons and jails routinely subject incarcerated people would cause the closure of a free-world restaurant or the recall of contaminated food. In January 2021, for example, the U.S. Department of Agriculture issued a nationwide recall for over 750,000 pounds of frozen pepperoni

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60. *See* Alysia Santo & Lisa Iaboni, *What's in a Prison Meal?*, MARSHALL PROJECT (July 7, 2015, 7:15 AM), https://www.themarshallproject.org/2015/07/07/what-s-in-a-prison-meal [https://perma.cc/6XS3-MEGL]. Things became even more dire during the pandemic. *See* Keri Blakinger, *Ewwwww, What Is That?*, MARSHALL PROJECT (May 11, 2020, 6:00 AM), https://www.themarshallproject.org/2020/05/11/ewwwww-what-is-that [https://perma.cc/F3QD-N8X8]. The focus here is on food safety and nutrition, but eating—like excretion, see *supra* notes 56-59 and accompanying text—is a site of contested power in prison. *See generally* Rebecca Godderis, *Food for Thought: An Analysis of Power and Identity in Prison Food Narratives*, 50 BERKELEY J. SOCIO. 61 (2006) (describing how institutional actors use food to manage and control prisoners); *"I Refuse to Let Them Kill Me": Food, Violence, and the Maryland Correctional Food System*, MD. FOOD & PRISON ABOLITION PROJECT 129 (2021), https://static1.squarespace.com/static/5cfbd4669f33530001eeeb1e/t/6148a83a6b23a413c0dc7192/1632151613290/Food%2C+Violence%2C+and+the+Maryland+Correctional+Food+System+%E2%80%94+Part+5.pdf [https://perma.cc/BA9W-V4S7] (discussing the use of food in Maryland prisons as a "tool of violence, punishment, and dehumanization").

61. Mariel A. Marlow, Ruth E. Luna-Gierke, Patricia M. Griffin & Antonio R. Vieira, *Foodborne Disease Outbreaks in Correctional Institutions—United States, 1998-2014*, 107 AM. J. PUB. HEALTH 1150, 1153 (2017).

62. *See* Leslie Soble, Kathryn Stroud & Marika Weinstein, *Eating Behind Bars: Ending the Hidden Punishment of Food in Prison*, IMPACT JUST. 31 (2020), https://impactjustice.org/wp-content/uploads/IJ-Eating-Behind-Bars.pdf [https://perma.cc/466E-VNDR] (depicting a weekly menu from the Idaho Department of Corrections' state-wide menu). For nutritional analyses of prison meals, see Emma A. Cook, Yee Ming Lee, B. Douglas White & Sareen S. Gropper, *The Diet of Inmates: An Analysis of a 28-Day Cycle Menu Used in a Large County Jail in the State of Georgia*, 21 J. CORR. HEALTH CARE 390 (2015); and Shayda A. Collins & Sharon H. Thompson, *What Are We Feeding Our Inmates?*, 18 J. CORR. HEALTH CARE 210 (2012).

63. Soble et al., *supra* note 62, at 8.

64. *Id.* at 49.

pizza after four consumers reported that products they purchased were contaminated with pieces of glass or hard plastic.[65] Although only one reported a "minor oral injury," the recall was classified as Class I-High Risk, meaning that it was "a health hazard situation where there is a reasonable probability that the use of the product will cause serious, adverse health consequences or death."[66] As discussed in Part I, courts have concluded that such conditions in prisons do not offend the Eighth Amendment's prohibition against cruel and unusual punishment.[67] But they do violate food-safety codes.

Does free-world food-safety law offer an avenue for addressing these disgusting and unsafe conditions? Consider the case of Arizona's state prisons. An investigative journalist, Jimmy Jenkins, obtained and reported on thousands of pages of kitchen inspections across state prison facilities.[68] Inspectors found kitchens rife with dead cockroaches and mice droppings; handwashing sinks without hot water or soap; coolers, warmers, and dishwashers out of order or with broken thermometers; food pans being washed in mop sinks; and expired meat being served to prisoners. In one case, blood was found on the floor of a walk-in cooler.[69] All of these kitchens passed their inspections with satisfactory ratings, even when inspectors recognized the issues as ongoing.[70] The same detailed sanitation regulations apply to Arizona's prisons as to free-world institutions,[71] and inspectors can suspend and even revoke the licenses of other food

65. Food Safety & Inspection Serv., *Nestlé Prepared Foods Recalls Not-Ready-to-Eat Pepperoni Hot Pockets Product Due to Possible Foreign Matter Contamination*, U.S. DEP'T AGRIC. (Jan. 15, 2021), https://www.fsis.usda.gov/recalls-alerts/nestle-prepared-foods-recalls-not-ready-eat-pepperoni-hot-pockets-product-due [https://perma.cc/7T6K-V32T].

66. *Id.*

67. *See supra* notes 22-25 and accompanying text.

68. Jimmy Jenkins, *Blood, Cockroaches and 'Gigantic' Rats: Inspection Reports Reveal Filthy Conditions in Arizona Prison Kitchens*, KJZZ (May 17, 2021, 7:52 AM), https://kjzz.org/content/1683207/blood-cockroaches-and-gigantic-rats-inspection-reports-reveal-filthy-conditions [https://perma.cc/X557-6D8T]. For a similar investigation into kitchen conditions in a jail in Pennsylvania, see Brittany Hailer, *COVID-19, Rodents, Unpaid Labor: A Year in the Allegheny County Jail Kitchen*, PITTSBURGH CURRENT (May 2, 2021), https://www.pittsburghcurrent.com/covid-19-rodents-unpaid-labor-a-year-in-the-allegheny-county-jail-kitchen [https://perma.cc/W64D-T3LR].

69. Jenkins, *supra* note 68.

70. *Id.*

71. ARIZ. ADMIN. CODE §§ R9-8-101, -108, -118 (2021) (excluding prisons from the definition of "food establishment" to which the regulations apply).

establishments for similar violations.[72] Yet there is no effective enforcement in the prison context.

C. *Medical Providers*

State and federal regulations also determine which providers practice medicine on incarcerated patients, who are entitled to health care but have no say at all in its provenance.[73] In many states, licensure laws permit doctors who lack full medical licenses — either because they never passed licensure exams or because their licenses have been suspended — to practice in prisons and jails under special, limited-scope institutional licenses. In Kansas, for example, nearly half of the physicians providing psychiatric care to state prisoners could not lawfully care for free-world patients.[74] In Louisiana, things are even worse. A recent investigation revealed that all but one of the eleven doctors employed by the Louisiana Department of Public Safety and Corrections have restricted licenses.[75] Seven of those are facility medical directors.[76]

This is troubling for numerous reasons. First, some of the doctors at issue were disciplined for misconduct involving direct harm or the risk thereof, like sexual assault or intoxication on duty.[77] Second, some prison providers' licenses were restricted because they diverted controlled substances; as a result, they are

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72. *See, e.g.*, Nikie Johnson, *Roaches, Rodents, No Permit: Restaurant Closures, Inspections in Riverside County, Aug. 6-12*, PRESS-ENTER. (Aug. 13, 2021, 3:46 PM), https://www.pe.com/2021/08/13/roaches-rodents-no-permit-restaurant-closures-inspections-in-riverside-county-aug-6-12 [https://perma.cc/AN23-GWGN].

73. For example, incarcerated patients may be forced to receive care from physicians who use livestock-deworming drugs to treat COVID. *See* Joe Hernandez, *Arkansas Inmates Are Suing After Being Given Ivermectin to Treat COVID-19*, NPR (Jan. 18, 2022, 2:48 PM ET), https://www.npr.org/2022/01/18/1073846967/arkansas-inmates-ivermectin-lawsuit-covid-19 [https://perma.cc/GQ9G-MZ7X].

74. *See Many State Hospital, Prison Doctors Without Medical Licenses*, AP NEWS (May 5, 2018), https://apnews.com/article/f5aa477428974da9a609c69f25777e75 [https://perma.cc/6TEB-Y9KJ] (stating that about twenty-one states offer limited licenses); *see also* Andy Marso & Kelsey Ryan, *Didn't Pass Your Medical Exams? You Can Still Work in Kansas State Hospitals*, KAN. CITY STAR (Apr. 30, 2018, 11:55 AM), https://www.kansascity.com/news/business/health-care/article208620099.html [https://perma.cc/4YBX-CSUU] (profiling a psychiatrist with a limited license who failed the licensure exam fourteen times).

75. Alexander Charles Adams, *Bad Medicine in Louisiana Prisons*, SCALAWAG MAG. (May 5, 2021), https://scalawagmagazine.org/2021/05/la-restricted-prison-health [https://perma.cc/V997-ULVP].

76. *Id.*

77. *See id.*

not permitted to prescribe certain medications, such as narcotics, for pain.[78] Accordingly, their patients may not receive necessary treatment. Third, and more generally, even doctors who were disciplined for mere malpractice are unlikely to provide better health care in challenging settings, like prisons and jails, than they did in the free world.[79]

Another concern, previously expressed by the National Commission on Correctional Health Care in a position statement, is that physicians with restricted licenses who cannot "easily find employment elsewhere" will be more "susceptible to pressures or excessive supervision placed on their medical autonomy" by correctional administrators trying to "save money or adhere to a security procedure that has not been adapted for medical care."[80] Physicians so beholden might "modify or avoid necessary patient treatment."[81] Plainly put, a doctor unable to work elsewhere if fired is unlikely to stand up for his or her patients and so risk being let go.

Correctional health systems tend to attract—and sometimes affirmatively seek out—physicians with limited-practice licenses because administrators cannot, or choose not to, spend enough on salaries to recruit fully licensed providers to these challenging positions.[82] Geography also plays a role; prisons are often sited in rural areas where there are medical shortages.[83] Here, federal regulation comes into play. The Department of Health and Human Services (HHS) certi-

78. *See id.*

79. *See, e.g.*, Rebecca McCray, *An Anti-Opioid Panic Left Prisoners in Needless, Agonizing Pain*, DAILY BEAST (Aug. 11, 2021, 5:20 AM ET), https://www.thedailybeast.com/an-anti-opioid-panic-left-new-york-state-prisoners-in-needless-agonizing-pain [https://perma.cc/239X-LKA5] (reporting on a physician who was permanently barred from the practice of emergency medicine and subsequently hired as a regional medical director for the state prison system, and in that role instituted a policy prohibiting narcotic pain treatment for severely ill incarcerated patients).

80. Nat'l Comm'n on Corr. Health Care & Soc'y of Corr. Physicians, *Joint Position Statement: Licensed Health Care Providers in Correctional Institutions*, 7 J. CORR. HEALTH CARE 157, 159 (2000).

81. *Id.*

82. *See* Keri Blakinger, *Disgraced Doctors, Unlicensed Officials: Prisons Face Criticism over Health Care*, NBC NEWS (July 1, 2021, 9:32 AM EDT), https://www.nbcnews.com/news/us-news/disgraced-doctors-unlicensed-officials-prisons-face-criticism-over-health-care-n1272743 [https://perma.cc/KCU6-45JZ] (reporting that some state prison systems employing doctors who had been disciplined "said that they couldn't find enough doctors otherwise, or that they couldn't compete with private practice salaries").

83. *See* C. Holly A. Andrilla, Davis G. Patterson, Lisa A. Garberson, Cynthia Coulthard & Eric H. Larson, *Geographic Variation in the Supply of Selected Behavioral Health Providers*, 54 AM. J. PREVENTIVE MED. S199, S204 (2018).

fies Health Professional Shortage Areas (HPSAs), which can be geographic areas, specific population groups, or facilities—including prisons and jails.[84] Designation as an HPSA carries with it significant recruitment benefits, including loan forgiveness for providers who participate in a National Health Service Corps placement and visa waivers for noncitizen physicians who have completed residency training in the United States.[85]

The regulatory criteria for designation of HPSAs reflect a variety of implicit judgments about the needs of incarcerated patients, and they offer an example of regulatory choices that are largely sensitive to the particular needs of prisoners. The basic population-to-physician ratio used in designating an area as having a shortage of primary-care providers is 3,500:1 for free-world populations, but only 1,000:1 for incarcerated populations.[86] This disparity (3.5 times) presumably reflects HHS regulators' appreciation both that incarcerated people have significantly higher rates of illness and that incarcerated people cannot seek care elsewhere when prison and jail doctors are stretched too thin.[87] The disparity is even more striking in the mental-health-care context. The HPSA regulations set a community threshold of 20,000:1 for psychiatrists. For incarcerated populations, they set a threshold for psychiatrists of 1,000:1, 20 times lower.[88] This, too, reflects the reality that rates of serious mental illness are many times higher in incarcerated populations.[89] The regulations even incorporate implicit assessments of the amount of care an average incarcerated person will need each year.[90] But, unfortunately, they entirely exclude small jails, offering no incentives to attract physicians to the facilities that need them the most.[91]

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84. 42 C.F.R. § 5.2 (2020).

85. Ordinarily, foreign physicians who train in the United States on J-1 visas must return to their home countries for at least two years before becoming eligible to return to the United States to practice medicine on a new visa; this requirement is waived for those willing to practice for two years in an HPSA. 45 C.F.R. § 50.5 (2020).

86. *Compare* 42 C.F.R. pt. 5 app. A.I.A.2(a) (2020) (free-world populations), *with id.* at pt. 5 app. A.III.A.1(b) (incarcerated populations). The ratio for dentists is similarly about 3.5 times lower for incarcerated versus free-world populations. *Compare id.* at app. B.I.A.2(a) (free-world populations), *with id.* at app. B.III.A.1(b) (incarcerated populations).

87. *Cf. id.* at pt. 5 app. A.I.A.6 (recognizing that in free-world communities, shortages of medical personnel may be mitigated by availability in contiguous areas).

88. *Compare id.* at pt. 5 app. C.I.A.2(a)(i) (free-world populations), *with id.* at app. C.III.A.1(b) (incarcerated populations).

89. Seth J. Prins, *Prevalence of Mental Illnesses in U.S. State Prisons: A Systematic Review*, 65 PSYCHIATRIC SERVS. 862, 862 (2014).

90. *See* 42 C.F.R. pt. 5 apps. A.III.A.1(b)(ii), C.III.A.1(b)(ii) (2020).

91. *See id.* at pt. 5 app. C.III.A.1(a); Katie Rose Quandt, *America's Rural-Jail-Death Problem*, ATLANTIC (Mar. 29, 2021), https://www.theatlantic.com/politics/archive/2021/03/americas-rural-jail-death-problem/618292 [https://perma.cc/2G3N-W4HQ].

D. Health-Care Coverage

Beyond the providers, federal regulatory processes alter whether prisons and jails are eligible to receive reimbursement for — and hence affect their willingness to provide — medical care. The baseline, as in other arenas of public-benefits law, is exclusion: incarcerated people are not eligible for coverage under Medicaid and Medicare.[92] Repeal of these exclusions would have a rapid and dramatic impact on the quality of health care received by incarcerated people across the country.[93] It would also create a strong fiscal incentive for Medicaid expansion in states that have thus far resisted it. As things stand, however, there are significant exceptions to the exclusions that define the boundaries of the carceral system in important ways.

One major exception exists with respect to inpatient, free-world care.[94] Offsite care costs are significant — Virginia and New York both spend around a quarter of their prison health-care budgets on free-world hospital care — and the costs appear to be growing as incarcerated populations age.[95] Unsurprisingly, these costs impact administrators' decisions about what care to authorize.[96] Moreover, concerns about reimbursement also impact providers' interest in providing care. Hospitals that treat many incarcerated patients do not enjoy some of the financial

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92. 42 U.S.C. § 1396d(a)(30)(A) (2018) (providing that Medicaid will not pay for "care or services for any individual who is an inmate of a public institution"); *id.* § 1395y(a)(2) (providing that Medicare will not pay for services for which a patient has no legal obligation to pay); *id.* § 1395y(a)(3) (providing that Medicare will not pay for services which are paid for by a governmental entity).

93. *See* Press Release, Kuster, Fitzpatrick, Booker Introduce Bipartisan Legislation to End Outdated Policy that Prevents Incarcerated Individuals from Accessing Medicaid (May 25, 2021), https://kuster.house.gov/news/documentsingle.aspx?DocumentID=3626 [https://perma.cc/EVP7-2JUM]; Kevin Fiscella, Leo Beletsky & Sarah E. Wakeman, *The Inmate Exception and Reform of Correctional Health Care*, 107 AM. J. PUB. HEALTH 384, 384-85 (2017). On the risk that such reforms could undermine decarceral fiscal pressure, see *infra* note 403 and accompanying text. Decreasing the cost to the state of health care for incarcerated people might in particular reduce the incentive to release elderly people through medical parole.

94. *State Prisons and the Delivery of Hospital Care*, PEW CHARITABLE TRS. 4-5 (July 2018), https://www.pewtrusts.org/-/media/assets/2018/07/prisons-and-hospital-care_report.pdf [https://perma.cc/4MUT-N8JG]; *see also* ARMANDO LARA-MILLÁN, REDISTRIBUTING THE POOR: JAILS, HOSPITALS, AND THE CRISIS OF LAW AND FISCAL AUSTERITY (2021) (arguing that governments circulate poor people between institutional spaces like jails and hospitals).

95. PEW CHARITABLE TRS., *supra* note 94, at 2-3.

96. *Id.* at 6-7.

protections that federal law otherwise provides to facilities serving large numbers of poor patients at lower reimbursement rates.[97]

In 1997, the Centers for Medicare and Medicaid Services (CMS), the federal agency that administers these programs, created a substantial exception to Medicaid's inmate exclusion.[98] Based on its own regulations, which say that the exclusion does not apply "during that part of the month in which the individual is not an inmate of a public institution,"[99] it issued guidance in the form of a letter to regional administrators, concluding that reimbursement would be available when an otherwise-eligible incarcerated person is "admitted as an inpatient in a hospital, nursing facility, juvenile psychiatric facility or intermediate care facility."[100] According to CMS, when such a person "becomes a patient in a medical institution" and is no longer "on premises" of a "penal setting," he or she is temporarily no longer an "inmate."[101] Initially, this had relatively limited effect because most incarcerated people—nondisabled adults without dependent children—were not otherwise eligible.[102] However, following passage of the Affordable Care Act, many states that opted to expand Medicaid coverage to poor adults have reaped significant savings in the cost of hospitalizing state prisoners: over $10 million annually in Ohio and Michigan, for example, and up to $70 million annually in California.[103]

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97. *See* 42 C.F.R. § 447.295 (2020) (stipulating that "inmates in a public institution or [who] are otherwise involuntarily in secure custody as a result of criminal charges are considered to have a source of third party coverage," so their care does not count towards hospitals' disproportionate share payments); U.S. Dep't of Health & Hum. Servs., Ctrs. For Medicaid & State Operations, Opinion Letter (Aug. 16, 2002).

98. U.S. Dep't of Health & Hum. Servs., Ctrs. For Medicaid & State Operations, Opinion Letter (Dec. 12, 1997).

99. 42 C.F.R. § 435.1009(b) (2020).

100. U.S. Dep't of Health & Hum. Servs., *supra* note 98.

101. *Id.*; *see also* DEP'T OF HEALTH & HUM. SERVS., OFF. OF INSPECTOR GEN., A-04-02-06002, FOUR-STATE REVIEW OF MEDICAID PAYMENTS FOR INCARCERATED BENEFICIARIES (2004), https://oig.hhs.gov/oas/reports/region4/40206002.pdf [https://perma.cc/U23Q-ADCN] (quoting CMS guidance from the December 12, 1997 letter).

102. *See How and When Medicaid Covers People Under Correctional Supervision*, PEW CHARITABLE TRS. 1-2 (Aug. 2016), https://www.pewtrusts.org/-/media/assets/2016/08/how_and_when_medicaid_covers_people_under_correctional_supervision.pdf [https://perma.cc/9YK8-E99L].

103. *See* Steven Rosenberg, *Medicaid Coverage for Jail Inmate's Inpatient Hospitalizations*, SHERIFF 38, 39 (2015), https://www.cochs.org/files/medicaid/Rosenberg_Medicaid_Coverage_for_Jail_Inmates.pdf [https://perma.cc/FV46-5QM2]. For estimates of the percentages of those who would qualify for Medicaid coverage upon release from prison or jail, respectively, see Alison Evans Cuellar & Jehanzeb Cheema, *As Roughly 700,000 Prisoners Are Released Annually, About Half Will Gain Health Coverage and Care Under Federal Laws*, 31 HEALTH AFFS. 931, 931 (2012),

An array of other, narrower exceptions to Medicaid's inmate exclusion exists or could exist. Legislators have proposed amendments and states have sought demonstration waivers to cover certain services inside prisons and jails — notably, those that are directly linked to community health, like COVID testing and treatment, and behavioral health and other transition services in the thirty days prior to release.[104] And recent guidance extended Medicaid coverage for the first time to people in a particular subset of "supervised community residential facilities" like halfway houses.[105] In so doing, CMS offered a lengthy elaboration of the features that, in its view, warrant treatment of a beneficiary like a member of the community as opposed to an "inmate."[106] This lawmaking about the boundary between carceral confinement and liberty does not turn on the formalisms of the criminal-legal system — sentence status and correctional classification are irrelevant, as is whether the facility is operated by a governmental or private entity. Instead, the analysis is functional: does the facility "operate in such a way as to ensure that individuals living there have freedom of movement and association"?[107] Specifically, can residents "work[] outside the facility in employment available to individuals who are not under justice system supervision," "use community resources (libraries, grocery stores, recreation, education, etc.) at will," and "seek health care treatment in the broader community"?[108]

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which found that approximately a third of prisoners would qualify; and Marsha Regenstein & Sara Rosenbaum, *What the Affordable Care Act Means for People with Jails Stays*, 33 HEALTH AFFS. 448, 450 (2014), which found that 25-30% of jail detainees would qualify. Presumably, the percentages of those in custody who would qualify absent the inmate exclusion would be even higher, because few people who are incarcerated have incomes high enough to clear the eligibility threshold, though some would be excluded on other bases, such as immigration status.

104. *See* Natasha Camhi, Dan Mistak & Vikki Wachino, *Medicaid's Evolving Role in Advancing the Health of People Involved in the Justice System*, COMMONWEALTH FUND (Nov. 18, 2020), https://www.commonwealthfund.org/publications/issue-briefs/2020/nov/medicaid-role-health-people-involved-justice-system [https://perma.cc/L86B-PNVC]. Federal and state Medicaid regulations regarding enrollment also impact continuity of care for those who have been released from incarceration. *See* Sarah E. Wakeman, Margaret E. McKinney & Josiah D. Rich, *Filling the Gap: The Importance of Medicaid Continuity for Former Inmates*, 24 J. GEN. INTERNAL MED. 860 (2009). Avoiding interruptions in coverage is particularly important for the millions of Americans who experience relatively brief stints of detention in jails each year, and for dependents who rely on their insurance coverage in the free world. Some jurisdictions even take advantage of reentry to affirmatively facilitate enrollment. *See, e.g.*, A.B. 720, 2013 Leg., Reg. Sess. (Cal. 2013) (codified at CAL. PENAL CODE § 4011.11; CAL WELF. & INST. CODE § 14011.10 (West 2021)).

105. U.S. Dep't of Health & Hum. Servs., Ctrs. for Medicare & Medicaid Servs., Opinion Letter 4 (Apr. 28, 2016) (elaborating on the basis for the inmate exclusion).

106. *Id.* at 4-5.

107. *Id.*

108. *Id.*

Another exception to the baseline exclusions arises in the context of Medicare. Although most health care for incarcerated people is not subject to Medicare reimbursement because its cost is not the financial obligation of the patient, rulemaking has delineated a circumstance in which payment is appropriate: when state or local law requires incarcerated people to repay the cost of medical services they receive while in custody, and the government entity enforces this requirement by billing incarcerated people and pursuing collections with equal vigor regardless of coverage by Medicare.[109] This creates a variety of incentives — to charge incarcerated people, who are mostly indigent, for their medical care, but also to avoid capitated health-care contracts in which corporate providers receive a flat fee per patient and are responsible for the cost of all health care provided.[110]

E. Pharmaceutical Availability

The varied forms of public-health law's (dis)engagement with prisons and jails are too numerous to catalog. One additional example is worth highlighting here.

Hepatitis C, a chronic viral illness most frequently transmitted through needle-sharing, causes inflammatory damage to the liver, leading in serious cases to organ failure and death. It is multiple times more prevalent in incarcerated populations than in the free world; nearly one-third of all Americans with hepatitis C spend some time in a prison or jail in a given year.[111] As a result, carceral confinement contributes significantly to transmission and eventual community spread. On the flip side, treatment interventions in prisons and jails are extremely valuable.[112] Over the past decade, curative, life-saving pharmaceuticals

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109. *See* 42 C.F.R. § 411.4(b) (2020).

110. *See* DEP'T OF HEALTH & HUM. SERVS., OFF. OF INSPECTOR GEN., A-03-02-00004, REVIEW OF MEDICARE PAYMENTS FOR SERVICES PROVIDED TO INCARCERATED BENEFICIARIES 2 (2002), https://oig.hhs.gov/oas/reports/region3/30200004.pdf [https://perma.cc/8PBS-2B2U]; Micaela Gelman, Note, *Mismanaged Care: Exploring the Costs and Benefits of Private vs. Public Healthcare in Correctional Facilities*, 95 N.Y.U. L. REV. 1387, 1404-06 (2020).

111. *See* Anne C. Spaulding, Jagpreet Chhatwal, Madeline G. Adee, Robert T. Lawrence, Curt G. Beckwith & William von Oehsen, *Funding Hepatitis C Treatment in Correctional Facilities by Using a Nominal Pricing Mechanism*, 25 J. CORR. HEALTH CARE 15, 16 (2019); Adam L. Beckman, Alyssa Bilinski, Ryan Boyko, George M. Camp, A.T. Wall, Joseph K. Lim, Emily A. Wang, R. Douglas Bruce & Gregg S. Gonzalves, *New Hepatitis C Drugs Are Very Costly and Unavailable to Many State Prisoners*, 35 HEALTH AFFS. 1893, 1893 (2016).

112. *See* Jack Stone, Hannah Fraser, April M. Young, Jennifer R. Havens & Peter Vickerman, *Modeling the Role of Incarceration in HCV Transmission and Prevention Amongst People Who Inject Drugs in Rural Kentucky*, 88 INT'L J. DRUG POL'Y 102707, 102707 (2021).

have been introduced, but they are so costly that rationing occurs in almost all correctional systems.[113]

Complex federal pharmaceutical-pricing regulations, and state health regulators' responses to them, shape whether incarcerated people are cured of hepatitis C or not. There are circumscribed instances in which drug companies are permitted to offer discounted pricing without affecting the reimbursement rates they otherwise receive from large federal purchasing programs.[114] At present, many state prison systems and jails pay significantly higher prices than federal agencies for Hepatitis C and other expensive medications.[115]

But there are underutilized regulatory avenues by which prisons and jails can obtain large discounts. One, known as the 340B Drug Pricing Program, brings pricing in line with the best price available to federal entities like the U.S. Department of Veterans Affairs and federal programs like Medicaid. The 340B Program is available if incarcerated people are "patients" of an eligible free-world prescribing entity—often, a hospital at a state university.[116] Pursuing this approach in the prison context would thus have the added benefit of giving prisoners access to outside physicians.

Another avenue, which would permit even more drastic price reductions, would require the Secretary of HHS to designate correctional health systems themselves as "safety-net providers," allowing them to purchase drugs at "nominal" prices of less than 10% of the average manufacturer price.[117] Whether drug manufacturers voluntarily offer lower prices on drugs to be used in prisons and

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113. Although Eighth Amendment doctrine does not recognize a cost defense to medical-care claims, *see* Harris v. Thigpen, 941 F.2d 1495, 1509 (11th Cir. 1991); Jones v. Johnson, 781 F.2d 769, 771 (9th Cir. 1986), pricing impacts treatment protocols such as sobriety requirements, and prisoners who are denied medication based on an exercise of medical judgment are, some courts have held, out of luck, *see* Woodcock v. Correct Care Sols., 861 F. App'x 654, 659-61 (6th Cir. 2021); *see also id.* at 661 (Stranch, J., dissenting in relevant part) (characterizing prison policies as "rationing"). Even when plaintiffs seeking hepatitis C treatment have prevailed, the resulting orders are likely to lead officials to divert funds from other health-care expenditures that are not constitutionally mandated (or simply not subject to an injunction). *See* Robert Katz, *Hepatitis C Litigation: Healing Inmates as a Public Health Strategy*, 29 ANNALS HEALTH L. & LIFE SCIS. 127, 149-51 (2020).

114. *See* Beckman et al., *supra* note 111, at 1898-99.

115. *See* Anne C. Spaulding & Jagpreet Chhatwal, *'Nominal Pricing' Can Help Prisons and Jails Treat Hepatitis C Without Breaking the Bank*, STAT (Jan. 9, 2019), https://www.statnews.com/2019/01/09/nominal-pricing-prisons-jails-treat-hepatitis-c [https://perma.cc/VN9Y-Q8EE] ("Pfizer sells [syphilis medication] to correctional systems at a price 300 times higher than what it charges public health clinics.").

116. *See* Beckman et al., *supra* note 111, at 1899. Correctional health systems are not eligible prescribing entities under 340B.

117. 42 U.S.C. § 1396r-8(c)(1)(D)(i)(VI) (2018).

jails may turn on pressure exerted by state Medicaid regulators, who could require the discounts as a condition of placement on a state's Medicaid Preferred Drug List.[118] One recent analysis showed that for the same expenditure, one department of corrections currently paying market wholesale prices could double the number of people it treated under 340B pricing and increase it by seventeen times with nominal pricing, thereby covering most people with the virus in its custody.[119]

F. Benefits Payments

Regulatory processes also shape the ways that incarcerated people obtain and use money, which is no less vital behind bars than in the free world. Without it, indigent prisoners lack the basic dignity of deodorant and menstrual products;[120] with it, they can remain in close contact with loved ones who can offer support during a term of incarceration and upon release.[121] More broadly, prisoners' access to money reduces prison officials' power over their material and social conditions.

Incarcerated people are generally excluded by statute from eligibility for a range of public-benefits payments like Social Security Disability Insurance (SSDI). Such exclusions are typically based on the understanding, as articulated by the Third Circuit, that the expenses of an incarcerated person's "shelter, food, clothing, and medical care [are] . . . being provided for him free of charge by the prison authorities."[122] This justification is questionable as applied to SSDI (and

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118. *See How Correctional Facilities Could Lower Drug Prices*, PEW CHARITABLE TRS. 1-2 (Nov. 2018), https://www.pewtrusts.org/-/media/assets/2018/11/correctional-facilities-lower-drug-prices_factsheet_nov2018_final.pdf [https://perma.cc/E6BB-QNAW].

119. *See* Spaulding et al., *supra* note 111, at 19.

120. *See* Erin Polka, *The Monthly Shaming of Women in State Prisons*, PUB. HEALTH POST (Sept. 4, 2018), https://www.publichealthpost.org/news/sanitary-products-women-state-prisons [https://perma.cc/HPX6-E3UU].

121. *See, e.g.*, Morgan Godvin, *Money Changed Everything for Me in Prison*, MARSHALL PROJECT (Apr. 11, 2019, 10:00 PM), https://www.themarshallproject.org/2019/04/11/money-changed-everything-for-me-in-prison [https://perma.cc/RJE6-VUCH].

122. Washington v. Sec'y of Health & Hum. Servs., 718 F.2d 608, 611 (3d Cir. 1983); *see* 42 U.S.C. § 402(x) (2018); 20 C.F.R. § 404.468 (2021). The 1980 legislation to exclude prisoners from SSDI eligibility was motivated not only by concern that the system was "on the brink of financial disaster," but also by sensational reporting that notorious criminals like the Son of Sam killer were obtaining Social Security Disability Insurance (SSDI) payments for questionable disabilities. Jennifer D. Oliva, *Son of Sam, Service-Connected Entitlements, and Disabled Veteran Prisoners*, 25 GEO. MASON L. REV. 302, 325-26 (2018). The debate over the Prison Litigation Reform Act (PLRA) likewise focused on outlier cases in which prisoners raised pur-

the veteran-specific disability benefits from which incarcerated people are also excluded) because these are earned entitlements, not need-based programs.[123] Even the factual premise that a prisoner's "basic needs are being met" at government expense is a shaky one[124]: prisoners can be charged room and board,[125] must often purchase supplemental food to avoid going hungry,[126] and are commonly charged copays for health care.[127] In certain jurisdictions where providing detained people with undergarments is "not a minimum jail standard," they must buy their own underwear or go without.[128]

In the 2020 CARES Act and subsequent stimulus bills, things shifted. Whether by intention or hasty oversight, incarcerated people were not excluded from pandemic-related stimulus payments. A back-of-the-envelope calculation

portedly trivial concerns. *See* 141 CONG. REC. S14,418-19 (daily ed. Sept. 27, 1995). The allegations in these cases were in fact serious. In some instances, like a case involving denial of gender-affirming medical care, the gravity is clear from the face of the Congressional Record itself. In others, a review of the record reveals that the claims were badly misconstrued by proponents of the bill. *See* Jon O. Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 60 BROOK. L. REV. 519, 520-22 (1994).

123. Oliva, *supra* note 122, at 317-33 (discussing 38 U.S.C. § 5313 (2018)). Need-based programs are also generally suspended while a recipient is imprisoned — and sometimes, depending on state policy, forever thereafter. *See* Darrel Thompson & Ashley Burnside, *No More Double Punishments: Lifting the Ban on SNAP and TANF for People with Prior Felony Drug Convictions*, CTR. FOR L. & SOC. POL'Y (Aug. 2021), https://www.clasp.org/publications/report/brief/no-more-double-punishments [https://perma.cc/HP8K-UTF8]. In some states, recipients of cash payments and their families do not lose access to cash-assistance benefits due to "temporary absence" from home because of brief periods of pretrial detention. *See* Matthew P. Main, Comment, *Promoting Self-Sufficiency? How HRA's Exclusion of Incarceration from the Definition of "Temporary Absence" Contradicts Statutory Mandates and Hurts New York Families*, 14 CUNY L. REV. 105, 110-13 (2010).

124. Borchelt v. Apfel, 25 F. Supp. 2d 1017, 1020 (E.D. Mo. 1998).

125. Lauren-Brooke Eisen, *Charging Inmates Perpetuates Mass Incarceration*, BRENNAN CTR. FOR JUST. 3-4 (2015), https://www.brennancenter.org/sites/default/files/2019-08/Report_Charging_Inmates_Mass_Incarceration.pdf [https://perma.cc/6DU3-RGH4].

126. Soble et al., *supra* note 62, at 49.

127. Rachael Wiggins, Note, *A Pound of Flesh: How Medical Copayments in Prison Cost Inmates Their Health and Set Them Up for Reoffense*, 92 COLO. L. REV. 255, 258 (2021).

128. Earl Rinehart, *Smuggling in Undies Prompts Change at Franklin County Jail*, COLUMBUS DISPATCH (Apr. 15, 2015, 9:32 AM), https://www.dispatch.com/article/20150415/news/304159728 [https://perma.cc/L54C-6MGX] (describing a Franklin County jail policy that required detainees to either "buy their tighty whities" at the commissary or "go commando").

reveals that this infusion of money into carceral institutions was potentially staggering in magnitude—around $6.5 billion.[129] By comparison, incarcerated people and their families spend about $1.6 billion on commissary purchases and $1.2 billion on telecommunications annually.[130] The sum total of all wages paid to incarcerated prisoners over the course of a year is no greater than $500 million.[131] The filing fees for all prisoner civil-rights litigation amount to a paltry $9 million each year.[132]

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129. There are roughly 2.15 million people incarcerated in prisons and jails in the United States at a given time; roughly 2.05 million of them are U.S. citizens or documented immigrants. See Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL'Y INITIATIVE (Mar. 24, 2020), https://www.prisonpolicy.org/reports/pie2020.html [https://perma.cc/HS47-XFRC]; Michelangelo Landgrave & Alex Nowrasteh, *Illegal Immigrant Incarceration Rates, 2010-2018: Demographics and Policy Implications*, CATO INST. (Apr. 21, 2020), https://www.cato.org/publications/policy-analysis/illegal-immigrant-incarceration-rates-2010-2018-demographics-policy#incarcerations [https://perma.cc/N2ZM-AZ77]. Very few of these people were ineligible for stimulus payments due to income, and very few were ineligible because they were claimed as others' dependents. See Haywood v. Comm'r, 84 T.C.M. (CCH) 442 (T.C. 2002) (disallowing the petitioner from claiming her 21-year-old incarcerated son as a dependent because "the support provided to [him] by the State prison system where he was incarcerated far exceeded the monetary amounts provided by petitioner"). If 2.05 million people received stimulus payments totaling $3,200 each, the total influx of funds would be approximately $6.5 billion. See Mitchell Caminer, Comment, *Enjoined and Incarcerated: Complications for Incarcerated People Seeking Economic Relief Under the CARES Act*, 2021 U. CHI. LEGAL F. 297, 298 (2021).

130. Stephen Raher, *Paging Anti-Trust Lawyers: Prison Commissary Giants Prepare to Merge*, PRISON POL'Y INITIATIVE (July 5, 2016), https://www.prisonpolicy.org/blog/2016/07/05/commissary-merger [https://perma.cc/PCS3-R8KV]; Michael Sainato, *'They're Profiting Off Pain': The Push to Rein in the $1.2bn Prison Phone Industry*, GUARDIAN (Nov. 26, 2019, 5:02 AM), https://www.theguardian.com/us-news/2019/nov/26/theyre-profiting-off-pain-the-push-to-rein-in-the-12bn-prison-phone-industry [https://perma.cc/JZ9L-XQXZ].

131. This figure is undoubtedly an overestimate. About 870,000 prisoners are employed, earning an average of 31 cents per hour in federal prisons and less (20 cents) in state prisons. Josh Halladay, Note, *The Thirteenth Amendment, Prison Labor Wages, and Interrupting the Intergenerational Cycle of Subjugation*, 42 SEATTLE U. L. REV. 937, 938 (2019). This calculation assumes all of these prisoners are employed full-time, year-round, at the higher rate of pay. For a fifty-state survey of prison wages, see Wendy Sawyer, *How Much Do Incarcerated People Earn in Each State?*, PRISON POL'Y INITIATIVE (Apr. 10, 2017), https://www.prisonpolicy.org/blog/2017/04/10/wages [https://perma.cc/W8HS-YGVC].

132. At present, roughly 26,000 prisoner civil-rights cases are filed in federal court each year. *See* Andrea Fenster & Margo Schlanger, *Slamming the Courthouse Door: 25 Years of Evidence for Repealing the Prison Litigation Reform Act*, PRISON POL'Y INITIATIVE tbl.A (Apr. 26, 2021), https://incarcerationlaw.com/resources/data-update/#TableA [https://perma.cc/2BJR-8U6J]. At the current filing fee of $350, *see* 28 U.S.C. § 1914 (2018), which incarcerated plaintiffs must pay even if granted *in forma pauperis* status, *see id.* § 1915(b), this amounts to approximately $9 million per year.

Initially, a first round of payments went out—about 85,000 prisoners received around $100 million.[133] After a report by the Inspector General of the Treasury flagged these payments and concluded, without any statutory analysis, that incarcerated people were not eligible, the Internal Revenue Service (IRS) demanded that recipients return their payments.[134] Prison systems confiscated funds from inmate accounts or threatened incarcerated people who did not voluntarily return the money they had received with criminal prosecution or adverse classification. Some prisoners in New York were told that, if released on supervision, "a treatment goal [may be] for you to display prosocial behavior by returning the stimulus check to the federal government."[135] The IRS justified its decision by citation to the just-mentioned exclusion provision in the Social Security statute, but a judge in the Northern District of California certified a nationwide class and concluded that the agency's actions violated the Administrative Procedure Act, ordering it to process claims by incarcerated people.[136]

Administrative decisions by the IRS, abetted by prison officials' obstructionism, nonetheless deprived many incarcerated people of the funds to which they were entitled.[137] Initially, the IRS refused to allow family members in the free world to e-file stimulus claims on behalf of incarcerated people (though it later processed claims that were filed this way).[138] After the litigation extended the deadline for filing a simplified paper Form 1040, heroic efforts by advocates and organizers—and some state departments of corrections—to distribute the forms

133. *Interim Results of the 2020 Filing Season: Effect of COVID-19 Shutdown on Tax Processing and Customer Service Operations and Assessment of Effort to Implement Legislative Provisions*, TREASURY INSPECTOR GEN. FOR TAX ADMIN. 4-6 (June 30, 2020), https://www.treasury.gov/tigta/auditreports/2020reports/202046041fr.pdf [https://perma.cc/8WK3-CDY8].

134. *Id.*

135. Jordan Michael Smith, *Prisoners Face 'Undue Punishment' as the IRS Claws Back Their Stimulus Checks*, APPEAL (July 8, 2020), https://theappeal.org/prisoners-stimulus-checks [https://perma.cc/ZL3X-GBJB].

136. Scholl v. Mnuchin, 489 F. Supp. 3d 1008 (N.D. Cal. 2020) (order granting preliminary injunction); Scholl v. Mnuchin, 494 F. Supp. 3d 661 (N.D. Cal.) (order granting summary judgment in part), *appeal dismissed*, 2020 WL 9073361 (9th Cir. 2020).

137. Keri Blakinger & Joseph Neff, *Prisoners Won the Right to Stimulus Checks. Some Prisons Are Standing in the Way*, NBC NEWS (Oct. 21, 2020, 6:58 PM EDT), https://www.nbcnews.com/news/us-news/prisoners-won-right-stimulus-checks-some-prisons-are-standing-way-n1244173 [https://perma.cc/58ZX-Y69L].

138. *See Frequently Asked Questions About CARES Act Relief for Incarcerated People*, CARES ACT PRISON CASE.ORG, https://caresactprisoncase.org/faq [https://perma.cc/DBS9-DS6C] ("7. My loved one is incarcerated and has authorized me to file a claim—is that ok?"). The Internal Revenue Service (IRS) also declined to include information about incarcerated people's paper claims in the online payment status tool, making it impossible for loved ones in the free world to check whether claims had been processed. *See id.* ("19. Will I hear from the IRS about the status of my claim?").

and instructions for completing them led to tens of thousands of filings, mailed to dedicated addresses for processing of prisoners' claims.[139] The IRS then simply decided that it would decline to process many timely filed claims by incarcerated people. Instead, it required incarcerated claimants to file another request for the stimulus payment by completing 2020 tax returns, this time without the garnishment protections that attached to the first round of stimulus payments.[140] When the second round of stimulus payments was issued, the IRS sent them not by check, as before, but by debit card.[141] Some departments of corrections, unable to process them, returned them to the IRS.[142]

G. Financial Transactions

Just as in the free world, people living in prisons and jails need to safeguard what money they have—almost all of which comes from deposits by family and friends[143]—by depositing it. Indeed, because cash is contraband, hiding money under a mattress is not just foolish but criminal, and depositing funds is the only lawful option.[144] Although prisons and jails have long handled money in trust

139. Daniel Moritz-Rabson, *How Prisons Are Blocking Incarcerated People's Stimulus Checks*, FILTER (Nov. 18, 2020), https://filtermag.org/prisons-preventing-prisoners-from-receiving-stimulus-checks [https://perma.cc/3HHB-AAPA].

140. Asher Stockler & Daniel Moritz-Rabson, *Prisons Are Skimming Big Chunks of CARES Act Stimulus Checks*, INTERCEPT (Feb. 17, 2021, 11:57 AM), https://theintercept.com/2021/02/17/stimulus-checks-cares-prisons-skimming-irs [https://perma.cc/8MDT-4KEA]; Daniel Moritz-Rabson, *A Year into COVID, Prisoners Still in the Dark About Stimulus Checks*, FILTER (Apr. 13, 2021), https://filtermag.org/irs-prisoners-stimulus-checks [https://perma.cc/KR6W-8EY9]. In some states, prison officials garnished even those checks subject to the statutory protections. *See, e.g.*, *Woodson v. ODRC*, ACLU OHIO, https://www.acluohio.org/en/cases/woodson-v-odrc [https://perma.cc/XES8-3PKA].

141. Jimmy Jenkins, *Stimulus Debit Cards Unusable for Prison Inmates in at Least Four States*, NPR (Feb. 6, 2021, 8:01 AM ET), https://www.npr.org/2021/02/06/964469718/stimulus-debit-cards-unusable-for-prison-inmates-in-at-least-four-states [https://perma.cc/98EQ-J6KK].

142. *Id.*

143. Some prison systems will only deem an incarcerated person to be "indigent," and therefore entitled to things like free legal photocopying, if he or she is *both* indigent in the ordinary sense—without and unable to earn any money—and also "has been verified as having no outside source from which to obtain funds." *See, e.g.*, N.J. ADMIN. CODE §§ 10A:1-2.2, 6-2.6 (2021). When community resources are factored into the indigency determination in this way, an incarcerated person who receives some money from a poor relative may wind up utterly dependent on that person.

144. *See, e.g.*, 18 U.S.C. § 1791(d)(1)(E) (2018).

accounts for those they incarcerate,[145] carceral financial services have experienced explosive growth in the roughly two decades since the industry came into being.[146] The market leader, JPay, allows transfers through its website and mobile apps, call center, and visitation lobby kiosks. It also allows transfers to be initiated at MoneyGram agents and has taken over check processing for departments of corrections and sheriffs' offices. But JPay's fees can be extortionate, consuming as much as 45% of a transfer in some jurisdictions.[147] Prison systems and jails receive "commissions"—i.e., budgetary infusions—through these contracts, and are therefore incentivized to enter into the contract with the highest kickback rate rather than the lowest service rate.[148]

At release, many prisons and jails give people remaining funds from their accounts on prepaid debit cards with intricate and exorbitant fee schedules. As the Ninth Circuit recognized in reinstating claims under the federal Electronic Fund Transfers Act, one fee schedule charged for account maintenance (starting five days after the card was issued), ATM withdrawals (on top of fees charged by the ATMs themselves), balance inquiries, declined transactions (due to either insufficient funds or incorrect PINs), contacting the automated customer service too many times, and obtaining the balance by check.[149] The named plaintiff was charged fees equal to 22% of the card's original value.[150]

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145. Historically, family members and friends used cashier's checks and money orders to send money to their incarcerated loved ones. Though fees are involved in issuance of these instruments, they are minimal and subject to competitive pressure and there is a public option (the U.S. Postal Service). *See* Stephen Raher, *The Company Store and the Literally Captive Market: Consumer Law in Prisons and Jails*, 17 HASTINGS RACE & POVERTY L.J. 3, 19 (2020).

146. These companies are privately held, making it difficult to scrutinize their finances. However, publicly reported information about Securus—which purchased JPay in 2015—reveals that it has seen dramatic earnings growth. *See* Ben Walsh, *Prisoners Pay Millions to Call Loved Ones Every Year. Now This Company Wants Even More.*, HUFFINGTON POST (Dec. 6, 2017), https://www.huffpost.com/entry/prison-phone-profits_n_7552464 [https://perma.cc/EN3B-BAE3] (reporting earnings before interest, taxes, depreciation, and amortization (EBITDA) for Securus of roughly $37 million in 2004 and $115 million in 2014); David Straughan, *How Cashing in on COVID-19 May Have Saved Securus, Owners of JPay*, INTERROGATING JUST. (Aug. 9, 2021), https://interrogatingjustice.org/prisons/securus-covid-19-profits [https://perma.cc/5BD2-ZS7U] (reporting EBITDA for Securus of $209 million in 2020).

147. Daniel Wagner, *Prison Bankers Cash in on Captive Customers*, CTR. FOR PUB. INTEGRITY (Nov. 11, 2014, 10:07 AM ET), https://publicintegrity.org/inequality-poverty-opportunity/prison-bankers-cash-in-on-captive-customers [https://perma.cc/EDH2-UG5H].

148. *See* Katie Rose Quandt, *Lawsuit Reveals How Tech Companies Profit Off the Prison-Industrial Complex*, THINKPROGRESS (Feb. 9, 2018, 8:00 AM), https://archive.thinkprogress.org/prison-technology-companies-inmates-9d4242805363 [https://perma.cc/WB8C-FUEG].

149. Brown v. Stored Value Cards, Inc., 953 F.3d 567, 570 (2020) (also reinstating claims under the Fifth Amendment Takings Clause and state law).

150. *Id.* at 571.

As Stephen Raher has argued, these abuses and others could be curtailed by federal rulemaking and enforcement actions available to state public-utilities commissions under unfair-and-deceptive-trade-practices and money-transmitter laws.[151] The federal Consumer Financial Protection Bureau could step in; indeed, it has recently begun to do so.[152] A public-option banking system could also facilitate free transfers of funds into and out of inmate trust accounts.[153]

H. Telecommunications

Perhaps the best known application of free-world regulatory law behind bars is the now two-decades-long story of efforts to impel the Federal Communications Commission (FCC) to regulate prison phone rates and then to defend the regulations it issued.[154] In 2000, a coalition of incarcerated people, their family members, and their criminal defense lawyers sued a private-prison operator, Corrections Corporation of America (CCA), challenging its decision to enter into exclusive phone-service contracts that forced the plaintiffs to pay rates far in excess of those charged to free-world customers, while affording CCA generous commissions. They alleged that these contracts violated federal antitrust and communications law in addition to their First, Fifth, and Fourteenth Amendment rights.[155] The first named plaintiff, Martha Wright, struggled to pay for calls with her incarcerated grandson, and spent her final years devoted to the

151. Raher, *supra* note 145, at 61-64, 80-81, 83-84.

152. *Id.* at 64; *CFPB Penalizes JPay for Siphoning Taxpayer-Funded Benefits Intended to Help People Reenter Society After Incarceration*, CONSUMER FIN. PROT. BUREAU (Oct. 19, 2021), https://www.consumerfinance.gov/about-us/newsroom/cfpb-penalizes-jpay-for-siphoning-taxpayer-funded-benefits-intended-to-help-people-re-enter-society-after-incarceration [https://perma.cc/X4QV-T6KZ].

153. *Cf.* Mehrsa Baradaran, *It's Time for Postal Banking*, 127 HARV. L. REV. F. 165, 166-67 (2014) (focusing primarily on extension of credit but observing that postal banking could help to protect poor people from predatory practices by financial-services companies); John Crawford, Lev Menand & Morgan Ricks, *FedAccounts: Digital Dollars*, 89 GEO. WASH. L. REV. 113, 137-40 (2021) (proposing a Federal Reserve bank-account option that would not charge interchange fees). Relatedly, people released from custody often have trouble opening bank accounts, which may impede their successful reentry. David Benoit, *Ex-Inmates Struggle in a Banking System Not Made for Them*, WALL ST. J. (Oct. 31, 2020, 5:35 PM ET), https://www.wsj.com/articles/ex-inmates-struggle-in-a-banking-system-not-made-for-them-11604149200 [https://perma.cc/EP4M-RNTD] (citing a Pennsylvania Department of Corrections study that found a strong relationship between being unbanked and recidivism).

154. For a summary of the critical junctures in this process from the Prison Policy Initiative, see Peter Wagner & Alexi Jones, *Timeline: The 18-Year Battle for Prison Phone Justice*, PRISON POL'Y INITIATIVE (Dec. 17, 2018), https://www.prisonpolicy.org/blog/2018/12/17/phone_justice_timeline [https://perma.cc/NFG8-738M].

155. Complaint at 5, Wright v. Corr. Corp. of Am., No. 1:00-cv-00293-GK (D.D.C. Feb. 16, 2000).

campaign that ensued.[156] The court granted defense motions to refer the matter to the FCC,[157] and the plaintiffs filed petitions for rulemaking, first seeking industry restructuring to introduce competition in 2003, and then seeking rate caps in 2007.[158]

The FCC took no action for years. Then, in 2012, it issued a notice of proposed rulemaking, and a year later, it adopted rate caps for interstate prison phone calls.[159] In 2015, the FCC engaged in further rulemaking, imposing caps on intrastate call rates — that is, the rates applicable to the vast majority of calls.[160] It also limited ancillary fees for things like opening an account and adding credit, and took steps to regulate video calls and other nontraditional telecommunications services.[161] A number of companies and state and local governments petitioned the D.C. Circuit for review of the 2015 regulations. Due to a change in the composition of the FCC, it abandoned its defense of the intrastate rate caps; instead, the original Wright petitioners and a coalition of other organizations intervened to defend them.[162] The court vacated the intrastate rate caps and video-call provisions, finding that they exceeded the FCC's statutory authority.[163] It

156. Justin Moyer, *After Almost a Decade, FCC Has Yet to Rule on High Cost of Prison Phone Calls*, WASH. POST (Dec. 2, 2012), https://www.washingtonpost.com/opinions/after-almost-a-decade-fcc-has-yet-to-rule-on-high-cost-of-prison-phone-calls/2012/12/02/b11ea164-2daf-11e2-9ac2-1c61452669c3_story.html [https://perma.cc/DLC9-W7ZF].

157. Wright v. Corr. Corp. of Am., No. 1:00-cv-00293-GK, at 1 (D.D.C. Aug. 22, 2001), https://www.clearinghouse.net/chDocs/public/PC-DC-0019-0002.pdf [https://perma.cc/7KNT-T35V] (order granting motion to dismiss) (directing the parties to "file the appropriate pleadings with the FCC").

158. Petition for Rulemaking by Martha Wright, et al., to Marlene H. Dortch, Sec'y, Fed. Commc'ns Comm'n (Nov. 3, 2003), https://www.clearinghouse.net/chDocs/public/PC-DC-0027-0001.pdf [https://perma.cc/5QD3-8G22]; Alternative Rulemaking Proposal by Martha Wright, et al., to Marlene H. Dortch, Sec'y, Fed. Commc'ns Comm'n (Mar. 1, 2007), https://www.clearinghouse.net/chDocs/public/PC-DC-0027-0005.pdf [https://perma.cc/SA8N-8AEJ].

159. Rates for Interstate Inmate Calling Services, 78 Fed. Reg. 67956 (Nov. 13, 2013) (codified at 47 C.F.R. pt. 64 (2020)).

160. Rates for Interstate Inmate Calling Services, 80 Fed. Reg. 79136 (Dec. 18, 2015) (codified at 47 C.F.R. pt. 64 (2020)).

161. *Id.*

162. Peter Wagner, *Court Hears Industry Lawsuit Against FCC Regulation of Prison and Jail Telephone Industry*, PRISON POL'Y INITIATIVE (Feb. 8, 2017), https://www.prisonpolicy.org/blog/2017/02/08/fcc_update [https://perma.cc/A747-7XPG].

163. Glob. Tel*Link v. Fed. Commc'ns Comm'n, 866 F.3d 397, 402 (D.C. Cir. 2017); *id.* at 415 (concluding that the Federal Communications Commission (FCC) had failed to justify its assertion of jurisdiction regarding video calls rather than that it lacked such jurisdiction).

remanded the ancillary fee caps to the FCC to determine whether fees for interstate calls could be segregated from those for intrastate calls.[164] In proposing to reimpose caps that apply to virtually all ancillary fees, a reengaged FCC has subsequently concluded that they generally cannot be segregated.[165]

Some state public-utilities commissions have also acted to curb exorbitant rates, filling the regulatory gap left by the D.C. Circuit's decision, though most have not.[166] Things have nonetheless improved markedly in many state prisons, thanks to successful organizing for legislative reform and contract renegotiation, but rates remain very high in most jails.[167] In addition to rates and fees, there are other important targets of regulation in this arena, such as disabled prisoners' access to relay services.[168] Privacy has also been a serious concern since a hacker obtained and released records — including recordings — of seventy million prison and jail phone calls, including thousands with attorneys.[169] As first-class mail

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164. *Id.*

165. FED. COMMC'NS COMM'N, THIRD REPORT AND ORDER, ORDER ON RECONSIDERATION, AND FIFTH FURTHER NOTICE OF PROPOSED RULEMAKING, FCC 21-60, at 9-10 (2021), https://docs.fcc.gov/public/attachments/FCC-21-60A1.pdf [https://perma.cc/Z9MR-RLJE].

166. *See, e.g.*, *Inmate Phone Service Providers Info & Materials*, ALA. PUB. SERV. COMM'N (2021), http://psc.alabama.gov/telecom/Engineering/documents/inmate.htm [https://perma.cc/YMT3-4RQK]. Some such regulatory activity occurred even before the *Wright* rulemaking. *See, e.g.*, Daleure v. Kentucky, 119 F. Supp. 2d 683, 686 n.5 (W.D. Ky. 2000), *appeal dismissed*, 269 F.3d 540 (6th Cir. 2001). Additionally, a handful of localities and one state legislature have acted to eliminate call fees entirely. *See, e.g.*, N.Y.C., N.Y., ADMIN. CODE § 9-154 (2021) (effective May 3, 2019); *Connecticut Becomes First State to Make All Prison Phone Calls Free*, USA TODAY (June 22, 2021, 8:35 AM ET), https://www.usatoday.com/story/news/nation/2021/06/22/connecticut-first-state-make-prison-phone-calls-free/5302390001 [https://perma.cc/9X85-XV5R].

167. *See* Peter Wagner & Alexi Jones, *State of Phone Justice: Local Jails, State Prisons and Private Phone Providers*, PRISON POL'Y INITIATIVE (Feb. 2019), https://www.prisonpolicy.org/phones/state_of_phone_justice.html [https://perma.cc/UJ9U-5D5X] (reporting that the average cost of a fifteen-minute call from a jail in New York in 2018 was $7.79, as compared to 65 cents from a prison in the state).

168. The FCC's 2013 rulemaking prohibited price discrimination against incarcerated people requiring assistive devices. Rates for Interstate Inmate Calling Services, 78 Fed. Reg. 67956, 67968 (Nov. 13, 2013) (amending 47 C.F.R. § 64.6040). But more work remains. FED. COMMC'NS COMM'N, REPORT AND ORDER ON REMAND AND FOURTH FURTHER NOTICE OF PROPOSED RULEMAKING: RATES FOR INTERSTATE INMATE CALLING SERVICES, No. 12-375, at 50 (Aug. 7, 2020), https://docs.fcc.gov/public/attachments/FCC-20-111A1.pdf [https://perma.cc/T8C2-LUDQ].

169. *See* Jordan Smith & Micah Lee, *Not So Securus: Massive Hack of 70 Million Prisoner Phone Calls Indicates Violations of Attorney-Client Privilege*, INTERCEPT (Nov. 11, 2015, 12:43 PM), https://theintercept.com/2015/11/11/securus-hack-prison-phone-company-exposes-thousands-of-calls-lawyers-and-clients [https://perma.cc/FW2R-FH6Y]; *see also Comments on Proposed Rulemaking on Rates for Interstate Inmate Calling Services*, ELEC. FRONTIER FOUND. 4-5 (Jan. 19,

slows and prisons move to digitize it, postal regulators may be called on to act as well.[170] Just as nonprofit leaders are piloting free videoconferencing in women's prisons in Iowa and Colorado,[171] the companies whose profits are being curtailed are identifying new opportunities. One major market player, Global Tel*Link, has patented a virtual-reality system to allow an incarcerated person on a call with a loved one to, "for a brief time, imagine himself outside or away from the controlled environment."[172]

I. Corporate Governance

The increasing involvement of corporations in providing detention-related services, and sometimes in running carceral facilities themselves, means that

2016), https://www.eff.org/files/2016/01/19/eff_prison_video_comments_final_01.19.16.pdf [https://perma.cc/WCF6-5LKL] (discussing regulatory limits on retention and disclosure of call records). Increasingly, prisons and jails have begun to subject incarcerated people's calls to AI-driven analysis. *See* David Sherfinski & Avi Asher-Schapiro, *U.S. Prisons Mull AI to Analyze Inmate Phone Calls*, THOMSON REUTERS FOUND. NEWS (Aug. 10, 2021, 7:53 PM GMT), https://news.trust.org/item/20210809090018-c8r11 [https://perma.cc/3CLB-648Q]. Regulatory measures also impact incarcerated people's ability to use contraband cellphones, which provide an inexpensive and private alternative but can also create security concerns. *See* Meg Kinnard, *FCC Gives State Prisons Tech Options to Quash Cellphones*, AP NEWS (July 13, 2021), https://apnews.com/article/business-technology-government-and-politics-prisons-7721888535596fda4830231f55cde5024 [https://perma.cc/4L4Q-V543]; *see also* Hannah Riley, *Just Let People Have Cellphones in Prison*, SLATE (Feb. 15, 2021, 9:00 AM), https://slate.com/news-and-politics/2021/02/cellphones-in-prisons.html [https://perma.cc/3K6K-N3VM] (arguing that bans on cellphones are ineffective and unduly punitive).

170. *See Comments on Proposed First-Class Mail and Periodicals Service Standard Changes*, PRISON POL'Y INITIATIVE 2-3, 5 (June 16, 2021), https://www.prc.gov/docs/118/118887/PPI%20Stmt%20of%20Position.pdf [https://perma.cc/4YVJ-55DP]; *id.* at 4 (noting that incarcerated people were unable to participate in surveys the Postal Service used to assess customer satisfaction); Marcia Brown & David Dayen, *Physical Mail Could Be Eliminated at Federal Prisons*, AM. PROSPECT (Feb. 24, 2021), https://prospect.org/justice/physical-mail-could-be-eliminated-at-federal-prisons [https://perma.cc/WW73-SPGP]; Aaron Gordon, *Prison Mail Surveillance Company Keeps Tabs on Those on the Outside, Too*, VICE (Mar. 24, 2021, 9:39 AM), https://www.vice.com/en/article/wx8ven/prison-mail-surveillance-company-keeps-tabs-on-those-on-the-outside-too [https://perma.cc/47MR-G4RA].

171. *See* Jennifer Zabasajja, *Can a Nonprofit Disrupt the Pricey Prison Phone Industry?*, BLOOMBERG CITYLAB (Sept. 8, 2021, 10:17 AM EDT), https://www.bloomberg.com/news/articles/2021-09-08/nonprofit-aims-to-disrupt-pricey-prison-telecom-industry [https://perma.cc/A6UQ-Z366].

172. Joseph Cox, *Prison Phone Company Patents VR to Give Inmates Brief Taste of Freedom*, VICE (Sept. 9, 2021, 9:00 AM), https://www.vice.com/en/article/3aqm4k/prison-virtual-reality-vr-global-tel-link [https://perma.cc/LU7X-P2PM].

strains of corporate law offer potential, if thus far underutilized, guardrails. Significant regulatory concerns are raised—and creative avenues opened—by anticompetitive and fraudulent behavior by carceral contractors.[173]

This is plainest in the context of services like telecommunications, for which incarcerated people and their families pay directly as consumers. For example, a lawsuit recently filed by a raft of leading plaintiff-side firms and civil-rights nonprofits alleged that the two largest providers of prison and jail phone calls engaged in price fixing, charging exorbitant rates (as high as $15) to accept one-time collect calls from incarcerated people in violation of federal antitrust and antiracketeering laws.[174] Similar concerns arise in the context of prison commissaries.[175] And antimonopoly law could likewise support claims against healthcare contractors and other providers of services for which departments of corrections and sheriffs' offices pay directly but which benefit incarcerated people.[176]

Carceral contractors are also increasingly integrating both horizontally and vertically. Federal Trade Commission (FTC) Chair Lina Khan has advanced arguments in favor of structural separations of online commerce and communications behemoths.[177] These arguments could not apply with greater force to two companies—GTL and Securus—one or the other of which has become for most incarcerated people the exclusive consolidated provider of financial,[178] telecommunications, media, and entertainment services.[179] These two companies manage access to digitized "law libraries," educational materials, and even medical

173. Third-party beneficiary contract-law claims may also have a role to play. *See* Rochelle Bobroff & Harper Jean Tobin, *Third-Party Beneficiary Claims: Recent Cases Against Private Parties and Local Agencies*, 42 CLEARINGHOUSE REV. J. POVERTY L. & POL'Y 99, 103-05 (2008).

174. Albert v. Global Tel*Link Corp., No. 8:20-cv-01936-LKG, 2021 WL 4478696, at *1-2 (D. Md. Sept. 30, 2021).

175. *See* Stephen Raher, *The Company Store: A Deeper Look at Prison Commissaries*, PRISON POL'Y INITIATIVE (May 2018), https://www.prisonpolicy.org/reports/commissary.html [https://perma.cc/8C7R-QNRR].

176. *See* Marsha McLeod, *The Private Option*, ATLANTIC (Sept. 12, 2019), https://www.theatlantic.com/politics/archive/2019/09/private-equitys-grip-on-jail-health-care/597871 [https://perma.cc/6LD5-Y4XZ] (noting that the acquisition by a private-equity firm of a correctional health-care contractor to merge with another it owned involved "head-to-head competition between the merging firms, a limited number of other competitors, and high barriers for entering the market").

177. Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973, 980 (2019).

178. Letter from Bianca Tylek, Exec. Dir., Worth Rises, to the H. Comm. on Fin. Servs., at 2-4 (Nov. 18, 2019), https://ourfinancialsecurity.org/wp-content/uploads/2019/12/Worth-Rises-Testimony-HFSC-Hearing-11.19.19.pdf [https://perma.cc/BVY6-W9SX].

179. *See Corporate Consolidation: How GTL and Securus Came to Dominate the Prison and Jail Telecom Industry*, PRISON POL'Y INITIATIVE (Apr. 3, 2019), https://www.prisonpolicy.org/graphs/phone_consolidation_updated_Apr_03_2019.html [https://perma.cc/4HS6-VGH8].

requests and grievance forms; in the latest "innovation," they will now digitize all mail received by incarcerated people in some systems, mediating all contact with the free world other than visits and court appearances.[180]

These services are valuable—incarcerated peoples' lives are meaningfully improved by tablet access to email, Khan Academy videos, and music. But when the price of an email, free to anyone not incarcerated, is 35 cents (up to 47 cents around Mother's Day), and people incarcerated in Florida lose access to $11.3 million worth of music downloads, regulators should intervene.[181]

Other strands of regulatory law also have a role to play in curbing abusive behavior by prison and jail contractors. Campaign-finance laws can be used to challenge inappropriate pay-to-play contributions.[182] When breaches are not disclosed by contractors, federal and state false-claims acts could provide a basis for liability, including in qui tam actions brought by private relators—whistleblowers working in a facility or formerly incarcerated people.[183] To the extent

180. *See* Tonya Riley, *"Free" Tablets Are Costing Prison Inmates a Fortune*, MOTHER JONES (Oct. 5, 2018), https://www.motherjones.com/politics/2018/10/tablets-prisons-inmates-jpay-securus-global-tel-link [https://perma.cc/S6US-NRL9]; sources cited *supra* note 170. Notably, Securus touts to investors not only its growth into new markets, but also its "[p]rogression to [a] [h]igher [p]ercentage of [d]eregulated [b]usiness." Securus Techs., Public Lender Presentation, *in* Stephen Raher, *You've Got Mail: The Promise of Cyber Communication in Prisons and Need for Regulation* exhibit 3, at 26 (Apr. 15, 2015), https://static.prisonpolicy.org/messaging/Exhibit3.pdf [https://perma.cc/SD63-WRD5].

181. Michael Waters, *The Outrageous Scam of "Free" Tablets for the Incarcerated*, OUTLINE (Aug. 10, 2018, 9:49 AM EST), https://theoutline.com/post/5760/free-tablets-in-prison-nightmare [https://perma.cc/4KDV-VH2X] (citing Victoria Law, *Captive Audience: How Companies Make Millions Charging Prisoners to Send an Email*, WIRED (Aug. 3, 2018, 7:00 AM), https://www.wired.com/story/jpay-securus-prison-email-charging-millions [https://perma.cc/JT2N-UEUV]); Ben Conarck, *Florida Inmates Spent $11.3 Million on MP3s. Now Prisons Are Taking the Players.*, FLA. TIMES-UNION (Aug. 18, 2018, 5:14 PM), https://www.jacksonville.com/news/20180808/florida-inmates-spent-113-million-on-mp3s-now-prisons-are-taking-players [https://perma.cc/UN3E-ASA9].

182. *See Lawsuit: Unlawful Delay by FEC to Resolve CLC Complaint Against Private Prison Company Threatens Integrity of Government Contracting Process*, CAMPAIGN LEGAL CTR. (Jan. 10, 2018), https://campaignlegal.org/press-releases/lawsuit-unlawful-delay-fec-resolve-clc-complaint-against-private-prison-company [https://perma.cc/2E8E-B69Y]; *cf.* Aleks Kajstura, *Jail Phone Companies Flood Money into Sheriff Races*, PRISON POL'Y INITIATIVE (Oct. 12, 2017), https://www.prisonpolicy.org/blog/2017/10/12/phone-elections [https://perma.cc/49C6-Y6AT] (examining how a prison and jail phone company was permitted to contribute to local sheriff elections).

183. Arielle M. Stephenson, Note, *Private Prison Management Needs Reform: Shift Private Prisons to a True Public-Private Partnership*, 49 PUB. CONT. L.J. 477, 497 (2020), https://www.tennessean.com/story/opinion/contributors/2016/11/02/reforming-private-prisons-inside/93121972 [https://perma.cc/3UKU-3KJM] (quoting Anne H. Hartman & Sarah P. Alexander, *Reforming Private Prisons from the Inside*, TENNESSEAN (Nov. 2, 2016)); *see, e.g.*, Dennis

that contracting companies are publicly traded, there are powerful securities law tools, including the U.S. Securities and Exchange Commission (SEC) whistleblower statute and shareholder class actions, available to challenge fraud and misrepresentations such as the undisclosed failure to meet staffing obligations in health-care contracts.[184]

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These examples are just an illustrative sample, drawn from two overarching arenas—health and finance. But free-world regulatory law shapes incarcerated peoples' lives in a range of other ways, determining everything from whether pretrial detainees who are legally eligible to vote can do so in practice,[185] to whether prisoners are exposed to cancer-causing environmental toxins like radon,[186] to whether carceral officials report complete and accurate data regarding

Romboy, *Feds Accuse Utah of Misusing Millions of Dollars in DOJ Grants, Stimulus Money*, DESERET NEWS (Apr. 13, 2020, 12:10 PM MDT), https://www.deseret.com/utah/2020/4/13/21219091/federal-stimulus-utah-department-of-justice-lawsuit-whistleblower [https://perma.cc/V4NV-LYD5]; Complaint in Intervention, United States *ex rel*. Williams v. Williams, No. 2:15-cv-00054 (D. Utah Apr. 10, 2020), http://kslnewsradio.com/wp-content/uploads/2020/04/Federal-V-Utah-Complaint.pdf [https://perma.cc/G7YH-ZBD4]; *see also Settlement Agreement Between the United States and NaphCare, Inc.*, U.S. DEP'T JUST. (June 17, 2021), https://www.justice.gov/opa/press-release/file/1406281/download [https://perma.cc/4A8G-NAZU] (reflecting a finding that a prison medical contractor overbilled the Bureau of Prisons and an agreement to pay restitution). Whistleblowing by prison and jail staff is not common, but it does occur, and might happen more if legal representation were more readily accessible. *See* Letter from Project South, Ga. Det. Watch, Ga. Latino All. for Hum. Rts. & S. Ga. Immigrant Support Network, to Joseph V. Cuffari, Inspector Gen., Dep't of Homeland Sec., at 1-2 & n.1 (Sept. 14, 2020), https://projectsouth.org/wp-content/uploads/2020/09/OIG-ICDC-Complaint-1.pdf [https://perma.cc/4PEV-DNHV] (describing whistleblower reports of involuntary hysterectomies performed on U.S. Immigration and Customs Enforcement detainees and the failure to take basic measures to prevent the spread of COVID).

184. *See, e.g.*, Class Action Complaint, Hartel v. Geo Grp., Inc., No. 9:20-cv-81063, at 2-3 (S.D. Fla. July 7, 2020), https://www.dandodiary.com/wp-content/uploads/sites/893/2020/07/GEO-Group-Complaint.pdf [https://perma.cc/C722-ZGA2] (alleging that a private-prison company made materially false and misleading statements about the adequacy of its COVID-response procedures).

185. *See* Nicole D. Porter, *Voting in Jails*, SENT'G PROJECT (May 7, 2020), https://www.sentencingproject.org/publications/voting-in-jails [https://perma.cc/4S7R-3WDZ] (summarizing examples); Matt Vasilogambros, *Many in Jail Can Vote, but Exercising That Right Isn't Easy*, PEW STATELINE (July 16, 2021), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/07/16/many-in-jail-can-vote-but-exercising-that-right-isnt-easy [https://perma.cc/H7UE-TJLS].

186. *See* Anthony Moffa, *Environmental Indifference*, 45 HARV. ENV'T L. REV. 333, 342-46 (2021).

people who die in their custody.[187] Still more examples are mentioned at other points throughout this Article.

III. THE DEREGULATORY STATE OF EXCEPTION

Regulatory law is certainly no panacea in the free world, and it offers less protection to racially, economically, and politically marginalized people than to the powerful.[188] But it commonly falls short in prisons and jails in ways substantially more extreme than occur outside their walls. In some cases, this is a difference not just of degree but of kind: incarcerated people and carceral places are formally excluded. In orders, regulatory disengagement is de facto rather than de jure, but just as profound. The preceding Part illustrated a number of the ways that prisons and jails exist—fully or partially—in deregulatory states of exception, leaving incarcerated people without the basic protections that others enjoy in the free world. This Part offers a taxonomy.

One prefatory point deserves some discussion. While this Article takes the view that much more robust regulation of prisons and jails—that is, much more in line with free-world treatment—would help to improve conditions within them, it is obviously not the case that regulatory standards and processes should always be the same behind bars. In some situations, there may be genuine and unavoidable security rationales for somewhat differential treatment. For example, even if incarcerated people were enrolled in Medicaid, it would likely not be logistically feasible to afford them entirely free choice of willing providers, to which other beneficiaries are entitled in the free world, given limits on transportation out of a prison or jail.[189] On the other hand, sometimes, because market mechanisms are absent[190] or because incarcerated people are more vulnerable—

187. *See* OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF JUST., REVIEW OF THE DEPARTMENT OF JUSTICE'S IMPLEMENTATION OF THE DEATH IN CUSTODY REPORTING ACT OF 2013 (Dec. 2018), https://oig.justice.gov/reports/2018/e1901.pdf [https://perma.cc/89JQ-D8Z7].

188. *See, e.g.*, Joe Guillen, *City Inspections of Detroit Schools Find Rodents, Mold*, DETROIT FREE PRESS (Jan. 25, 2016), https://www.freep.com/story/news/2016/01/25/city-inspections-detroit-schools-find-rodents-mold/79311004 [https://perma.cc/KGH7-8NU4] (reporting that widespread violations of a health and safety code in a heavily indebted school district were identified during inspections prompted by "teacher sick-outs," and quoting the mayor as saying that the city would "take prompt legal action to enforce compliance" if repairs were not made).

189. *See* 42 C.F.R. § 431.51 (2020) (codifying free-choice-of-provider regulations).

190. For example, the market-based incentive for restaurants to comply with food-safety regulations—namely, the risk that customers will spend their money elsewhere, due either to a bad food grade or to a bout of food poisoning—does not apply to kitchens that serve people confined against their will. *But see* Daniel E. Ho, *Fudging the Nudge: Information Disclosure and*

prisoners cannot switch to a different phone service provider and are more likely than people outside to require psychiatric care — more aggressive regulatory control is needed in the carceral context than in the free world to achieve the same level of protection. There is room for legitimate debate in certain cases. But serious consideration of the causes of regulatory exceptionalism for prisons and jails and its impacts on people in them and the rest of society will, this Article posits, prompt many to support substantially increased engagement.

There are four broad categories of regulatory exceptionalism. First, incarcerated people and carceral institutions are sometimes formally exempted from a statute or rule's coverage or from external enforcement, even when doing so is inconsistent with and even undermines the purpose of the legislation or regulation. Second, those tasked with enforcing statutes and rules that do apply to incarcerated people and carceral institutions sometimes abstain from doing so — or from doing so effectively. This is perhaps because they face no political pressure to enforce the law behind bars or political pressure not to do so. Third, regulators sometimes try to act in carceral contexts, only to encounter resistance — either covert or overt — from correctional officials. Fourth and finally, regulatory efforts are sometimes impeded by jurisdictional mismatch, when the regulatory agency is not empowered to govern the carceral one.

A. Exemption

The regulatory exemption of prisons and jails has both substantive and procedural facets. In some instances, incarcerated people and carceral institutions are carved out from and left uncovered by free-world standards. In others, the same rules ostensibly apply, but free-world regulators do not engage in any external oversight, leaving compliance to prison and jail officials' discretion.

Labor regulation is an important instance of substantive exclusion. Although the Constitution permits governments to compel convicted prisoners to work for little or no money, rendering them "slaves of the [s]tate,"[191] it does not require them to do so. Nor does it require that pretrial detainees who work be paid a meager wage, which is the result of a further carve-out from modern labor law.[192] Given the evidence of a strong correlation between poverty and recidivism, such policies may avoid expenditures by incarcerating jurisdictions at the

Restaurant Grading, 122 YALE L.J. 574 (2012) (calling into serious question whether restaurant-sanitation grading actually has this effect). In fact, because prisons and jails spend money on food service *and* make money in kickbacks from the alternative — commissary purchases — there is a double incentive to serve worse food.

191. Ruffin v. Commonwealth, 62 Va. (21 Gratt) 790, 796 (1871).

192. *See, e.g.*, VA. CODE ANN. § 40.1-28.9(A)(6) (West 2021).

front end, but they impose significant underappreciated downstream costs on public safety and future carceral budgets.[193]

As this example shows, substantive exclusions often serve to entrench some of incarceration's most perverse dynamics by perpetuating economic subjugation. And decisions to cut incarcerated people out of the regulatory state are often based on the inaccurate supposition that incarcerated people are fully provided for and protected by their custodians.[194] These exclusions fail to consider both the realities of incarceration—for example, the fact that prisoners' access to health care is substantially impacted by the availability of reimbursement—and the broad ramifications of prison and jail mismanagement.

In cases of procedural exclusion, the same standards apply inside as out, but free-world enforcers cede control. In some jurisdictions, for example, prisons are statutorily exempt from external food-safety inspections by external agencies;[195] in certain states, prison officials have been assigned inspection functions ordinarily within the ambit of a health department.[196] Without independent oversight, they or their contractors "do [their] own inspections."[197] As expected, this leads to serious shortcomings, such as food-safety inspections by the Kansas Department of Corrections that, unlike those conducted by the Kansas Department

193. *See* Cody Tuttle, *Snapping Back: Food Stamp Bans and Criminal Recidivism*, 11 AM. ECON. J.: ECON. POL'Y 301 (2019) (showing that a food-stamp ban increased recidivism among drug traffickers, driven by financially motivated crimes); Kristy Holtfreter, Michael D. Reisig & Merry Morash, *Poverty, State Capital, and Recidivism Among Women Offenders*, 3 CRIMINOLOGY & PUB. POL'Y 185 (2004) (showing that an annual household income below the poverty threshold increased the odds of rearrest by a factor of 4.6).

194. *See supra* notes 122-128 and accompanying text.

195. *See, e.g.*, Paul Egan, *Maggots Prompt Call for Prison Kitchen Inspections*, DETROIT FREE PRESS (June 24, 2015, 11:10 PM), https://www.freep.com/story/news/local/michigan/2015/06/24/bill-targets-aramark-requiring-prison-ktichen-inspections/29210815 [https://perma.cc/S97Y-HENF] (explaining that prison kitchens are monitored for contract compliance by the food-service subcontractor but not by the health department); *see also* Soble et al., *supra* note 62, at 93-95 (discussing how "meager systems of accountability" have failed to ensure food safety and quality for prisoners).

196. *See, e.g.*, WASH. REV. CODE ANN. § 72.09.040 (West 2021) (shifting the duty to inspect adult correctional programs and institutions from state health officials to the secretary and department of corrections); CAL. CODE REGS. tit. 15, § 3052(b) (2021) (assigning inspection duties for food service areas to the Department Food Administrator, Central Office, and/or a Department of Health Services Environmental Health Specialist).

197. Brian Smith, *No Outside Health Inspections for Prison Kitchens, Michigan Corrections Department Says*, MLIVE (Apr. 3, 2019, 6:07 AM), https://www.mlive.com/lansing-news/2014/08/no_outside_health_inspections.html [https://perma.cc/7VDL-CBBD]. On the problems posed by prison-food privatization, see generally Roland Zullo, *Food Service Privatization in Michigan's Prisons: Observations of Corrections Officers*, INST. FOR RSCH. ON LAB., EMP. & ECON, UNIV. OF MICH. (Mar. 2016), https://www.mco-seiu.org/wp-content/uploads/2018/02/Privatization-of-Prison-Food-_-Mar_final.pdf [https://perma.cc/Q5HK-4UJ4].

of Agriculture, do not "distinguish between critical and noncritical food safety violations" and do not involve a consistent recordkeeping format, leaving them close to worthless.[198]

Although these substantive and procedural exclusions are often the work of a legislature, they can also occur through regulatory acts. For example, Occupational Safety and Health Administration-approved "state plans" provide workplace-safety protections to state and local government employees in twenty-two states.[199] Many carve out incarcerated workers,[200] but some, like California's state plan, expressly include them.[201] The initial decision of the IRS to exclude incarcerated people from the coverage of the CARES Act, as discussed in Section II.F, also fell in this category.

B. Abstention

Second, regulators sometimes decline to exercise their power over prisons and jails, either by allocating inadequate resources to the oversight of those institutions or by pulling their enforcement punches. In these cases, regulators fail to detect violations or observe them but take no remedial action.

In some cases, agencies cabin regulation of prisons and jails within a special branch or project—and then defund it. The Oklahoma State Department of Health, for example, has a designated division for jail inspections.[202] In recent years, its staff, tasked with inspecting all of the state's 131 county jails and city lockups, was reduced to 1.5 full-time-equivalent employees; this made timely

198. Aly Van Dyke, *Kansas Prisons Yield Repeat Food Safety Violations*, TOPEKA CAP.-J. (Jan. 4, 2015, 12:49 PM), https://www.cjonline.com/article/20150104/NEWS/301049865 [https://perma.cc/4BXP-YQ7Y]; *see also* Tom Perkins, *Prison Guards: Michigan Is Deliberately Hiding Extent of Prison Kitchen Horror Show*, DETROIT METRO TIMES (May 23, 2018), https://www.metrotimes.com/table-and-bar/archives/2018/05/23/prison-guards-michigan-is-deliberately-hiding-extent-of-prison-kitchen-horror-show [https://perma.cc/8GCP-HG2T] ("[I]nspectors are former food-service heads on [the Michigan Department of Corrections'] payroll who falsely report that the kitchens are clean.").

199. Occupational Safety & Health Admin., *State Plans*, U.S. DEP'T LAB., https://www.osha.gov/stateplans [https://perma.cc/B6YC-7GTT].

200. *See, e.g.*, Maine State Plan for State and Local Government Employers, 80 Fed. Reg. 46487, 46488 (Aug. 5, 2015).

201. CAL. CODE REGS. tit. 8, §§ 344.44, 344.46 (2021).

202. *City and County Detention Facility Inspection Service*, OKLA. STATE DEP'T HEALTH, https://oklahoma.gov/health/protective-health/city-and-county-detention-facility-inspection-service.html [https://perma.cc/J8Z9-EC3R]; *see also* OKLA. STAT. tit. 74, § 192 (2021) (establishing standards for the inspection of county and city jails by the state's Department of Health).

follow-up incredibly unlikely.[203] For a brief time, the EPA engaged in a concerted effort to address noncompliance at prisons in the Mid-Atlantic region, imposing substantial fines on facilities for violations such as unsafe storage of chemical waste near a maintenance shop.[204] Then it shifted resources elsewhere.[205] Such decisions reflect the deprioritization of carceral institutions, but they also reflect the knock-on effects of policy decisions to invest in penal, rather than social, welfare agencies, leaving the latter too anemic to govern the former.[206]

Abstention may also occur at the remedial stage. Regulators are often reluctant to exercise their enforcement powers, particularly the most coercive ones. Sometimes this leads them—as in Arizona, where food-safety inspectors did show up, conduct inspections, and document serious problems—not to find a violation at all.[207] Regulators in such cases appear to have internalized an overriding imperative not to interrupt the operations of carceral facilities,[208] even

203. Kassie McClung, *Oklahoma Has 1.5 State Inspectors for Its 131 Jails*, ENID NEWS & EAGLE (Mar. 4, 2019), https://www.enidnews.com/oklahoma/oklahoma-has-1-5-state-inspectors-for-its-131-jails/article_9fd9d308-3ebd-11e9-855f-cbecf6a3d8e7.html [https://perma.cc/XZS3-3MHN].

204. *See, e.g.*, *EPA Cites Environmental Violations at Jessup Prison*, U.S. ENV'T PROT. AGENCY (Oct. 4, 2001), https://archive.epa.gov/epapages/newsroom_archive/newsreleases/204ec2e014e0ced1852570d60070fca3.html [https://perma.cc/T2PQ-NGUC] (noting that the U.S. Environmental Protection Agency sought a $176,680 fine against a correctional institution).

205. *See* Candace Bernd, Zoe Loftus-Farren & Maureen Nandini Mitra, *America's Toxic Prisons: The Environmental Injustices of Mass Incarceration*, EARTH ISLAND J., https://earthisland.org/journal/americas-toxic-prisons [https://perma.cc/HE3G-QPPY] ("EPA felt prisons in the Mid-Atlantic region were able to ensure environmental regulation compliance by themselves." (quoting an agency statement)).

206. *See* Lauren Weber, Laura Ungar, Michelle R. Smith, Hannah Recht & Anna Maria Barry-Jester, Associated Press, *Hollowed-Out Public Health System Faces More Cuts Amid Virus*, KAISER HEALTH NEWS (July 1, 2020), https://khn.org/news/us-public-health-system-underfunded-under-threat-faces-more-cuts-amid-covid-pandemic [https://perma.cc/8FUP-XA8K] (providing statistics on funding and workforce cuts to state and local health departments). These decisions "impoverish[] those public resources that would be crucial as a practical matter to meaningfully dismantle the carceral state," or even to regulate it. Allegra M. McLeod, *Beyond the Carceral State*, 95 TEX. L. REV. 651, 671-76 (2017) (reviewing MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS (2015)) (explaining, analogously, that Texas consumer finance regulators "simply lack[] the resources" necessary to stop payday lenders from filing charges against borrowers).

207. *See* Jenkins, *supra* note 68.

208. *Cf.* Aaron Littman, *Jails, Sheriffs, and Carceral Policymaking*, 74 VAND. L. REV. 861, 930-32 (2021) (identifying the historical trend of legislative and judicial "jail exceptionalism" in public-finance law and tracing its origin to the view that jails are "essential").

when they are not so legally constrained.[209] Food-safety inspectors may feel that they lack "the last-ditch option of shutting down a prison cafeteria altogether" because "no matter what happens during an inspection, inmates have to be fed two or three times every day," and they cannot imagine forcing prison officials to bring in prepared food from outside.[210]

Such measures may be seen as so beyond the pale that lack of will is offhandedly elided with lack of power. For example, a district court in Oregon observed that after a state fire marshal cited a prison for serious violations that could leave incarcerated people locked in a building without emergency exits, he, "in his discretion, declined to prosecute and temporarily extended the Corrections Division's compliance until it could convince the legislature to give it the money to make the changes."[211] Despite acknowledging that the marshal had the power to bring an enforcement action, the court went on to suggest that if funds were not forthcoming, the marshal "had little choice other than to extend the time for compliance."[212]

The reasons for abstention from robust regulation are likely numerous and varied. They may, in some cases, be as mundane as indifference. Or they may stem from the belief that incarcerated people deserve hardship. They may also reflect fear—founded or not—of adverse political or fiscal consequences from enforcement activities perceived as overeager. Understanding more about the dynamics of this decision-making would help to explain disparate responses, like the willingness of the health officer in Alameda County, California, but not his counterpart in Los Angeles County, to issue binding orders directing their respective sheriffs to implement COVID protocols at the county jails.[213]

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209. In some jurisdictions, free-world health and safety regulators have the power to shutter carceral facilities entirely, even if they rarely use it. *See, e.g.*, OKLA. STAT. tit. 74, § 194 (2021). In others, regulators' findings can form the basis of a closure order issued by a correctional-oversight official. *See, e.g.*, IOWA ADMIN. CODE r. 201-51.4(2) (2021).

210. Joe Fassler & Claire Brown, *Prison Food Is Making U.S. Inmates Disproportionately Sick*, ATLANTIC (Dec. 27, 2017), https://www.theatlantic.com/health/archive/2017/12/prison-food-sickness-america/549179 [https://perma.cc/DPM8-FJK9].

211. Capps v. Atiyeh, 559 F. Supp. 894, 914 (D. Or. 1983).

212. *Id.*

213. *Compare* Health Officer Order No. 21-02, CNTY. ALAMEDA, CAL. (Mar. 1, 2021), https://covid-19.acgov.org/covid19-assets/docs/shelter-in-place/21-02-covid-19-testing-requirements-eng.pdf [https://perma.cc/CHW7-XQ9S] (ordering the sheriff's office employees working in the Santa Rita Jail to comply with COVID-testing requirements), *with* Guidance for Correctional and Detention Facilities, L.A. CNTY. DEP'T OF PUB. HEALTH (Nov. 13, 2020), http://publichealth.lacounty.gov/media/coronavirus/docs/facilities/GuidanceCorrectionalDetentionFacilities.pdf [https://perma.cc/2JVA-ABS6] (providing nonbinding guidance to correctional and detention facilities regarding prevention and control of COVID).

C. *Resistance*

Third, regulatory coverage of carceral institutions sometimes fails despite regulatory authority and effort when carceral officials engage in obstructionism.

Sometimes resistance is covert. Correctional officials may intentionally hide evidence of noncompliance. For example, former detainees who worked in the kitchen at a jail in Alabama described being ordered to do a "deep clean" before inspections, throwing away donated mystery meat in cylindrical rolls marked "Not Fit for Human Consumption" and rotten chicken thighs that would otherwise have been served.[214] Of course, inspectors often have tools at their disposal to overcome this sort of behavior: unannounced inspections.

In other cases, the resistance is overt. The COVID pandemic brought to light multiple instances of such resistance, though there are doubtless numerous others never disclosed publicly.[215] In one case, the medical contractor at the Montgomery County Jail in Dayton, Ohio refused to test everyone at the jail, despite local public-health officials' instructions to do so.[216] In this case, too, regulators left an arrow in their quiver, declining to issue a formal order despite calls from community members.[217] In another, Iowa prison administrators barred investigators from the state occupational-safety agency—who were responding to complaints about improper viral testing, among other things—from accessing the grounds, demanding that they seek an administrative warrant.[218]

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214. Connor Sheets, *Jail Kitchen Workers Say Donated, Spoiled Food Keeps Costs Low for 'Beach House Sheriff*,' AL.COM (Mar. 6, 2019, 4:35 PM), https://www.al.com/news/birmingham/2018/04/jail_kitchen_workers_say_donat.html [https://perma.cc/H7GD-AFLP].

215. In another recent example, federal prison officials in Danbury, Connecticut denied first responders access to investigate and address a gas leak. *See Lawmakers: Prison Denied Entry to Responders During Gas Leak*, ASSOCIATED PRESS (Jan. 8, 2021), https://apnews.com/article/connecticut-danbury-prisons-richard-blumenthal-chris-murphy-0b6a58ca00c4134c7fd95647030cb850 [https://perma.cc/D3PB-LVSU].

216. *See* Cornelius Frolik, *Public Health Wants Everyone at Jail Tested. But Officials Resist.*, DAYTON DAILY NEWS (July 1, 2020), https://www.daytondailynews.com/news/local/public-health-wants-everyone-jail-tested-naphcare-said/TvYbKmkrGwyVtNT8tKyJlI [https://perma.cc/JJ5L-5UER].

217. *See* Cornelius Frolik, *More Than 30 Test Positive for COVID at Local Jail. Citizens Demand Action.*, DAYTON DAILY NEWS (July 1, 2020), https://www.daytondailynews.com/news/local/coronavirus-test-positive-local-jail-citizens-demand-action/xNRoOWhUnpRmCQBjYi2MIK [https://perma.cc/WP7T-WVW7].

218. *See* Daniel Lathrop, *Prison Officials Lock Out Safety Inspectors in Coralville Weeks After Killings at Anamosa Penitentiary*, DES MOINES REG. (Apr. 9, 2021, 5:10 PM), https://www.desmoinesregister.com/story/news/2021/04/09/iowa-corrections-officials-barred-investigators-coralville-after-anamosa-penitentiary-prison-attack/7158756002 [https://perma.cc/GX78-C9TQ].

Sometimes, prison and jail officials even go to court to challenge regulators' aggressive use of remedial power. In one notable case, the Industrial Board of the Pennsylvania Department of Labor and Industry attempted, over a period of a few years, to bring York County's jail into compliance with fire-safety regulations.[219] After the Board issued an order requiring that numerous violations be corrected and held a hearing, the jail sought a variance permitting it to "use fire watchers equipped with air bags and fire extinguishers, instead of a smoke detection and sprinkler system."[220] The Board denied the variance and ordered that the jail be vacated within thirty days. The county sued.[221] The state court of appeals affirmed the order closing the jail, rejecting the county's contention that an "order requiring evacuation of [a] prison is a violation of the separation of powers doctrine . . . [because it] usurps constitutionally protected judicial power by eliminating judicial discretion to sentence a person to York County Prison."[222]

When regulatory and carceral officials belong to different levels of government, as in the preceding example, or when one is elected—as is the case with nearly all the sheriffs who run the vast majority of the country's jails[223]—such a confrontation may well take place in court. But when both officials are appointed and removable without cause by the same governor, intractable disputes are more likely to be resolved politically, even if an adversarial mechanism is available.

D. Jurisdictional Mismatch

Fourth and finally, some regulatory attempts fail because the regulatory agency lacks jurisdiction over the carceral agency or function. This phenomenon emerges from idiosyncratic features of the organization of police power in the United States.

Most importantly, the devolution of health and safety regulation to localities in certain states can limit regulators' jurisdiction over state prisons, but not over county and city jails. Every state's public-health authority is divided, for practical

219. Cnty. of York v. Commonwealth, 401 A.2d 885, 886 (Pa. Commw. Ct. 1979). County detention facilities in Pennsylvania are called prisons but function like jails.

220. *Id.*

221. *Id.*

222. *Id.* at 887.

223. Littman, *supra* note 208, at 870 n.28, 876-77 n.55.

reasons, into geographically localized units; in some such units, local health officers are state officials, and in others, they are county officials.[224] In the latter case, although local regulators can partake in a range of informal engagement with prisons sited in their counties, they will generally be unable to issue orders binding them absent express authority.[225] Similarly, state regulatory agencies will generally lack jurisdiction over federal prisons,[226] unless Congress has expressly provided it.[227]

Such a situation arose during the pandemic. The Kings County, California health officer ordered a state prison within the county, Avenal—which was experiencing one of the worst outbreaks in the state[228]—to implement additional screening measures, quarantine protocols, and restrictions on staff movement.[229] The prison system's general counsel refused to comply on the ground

224. *See State and Local Health Department Governance Classification Map*, CTRS. FOR DISEASE CONTROL & PREV., https://www.cdc.gov/publichealthgateway/docs/sitesgovernance/PublicHealth-Governance-factsheet.pdf [https://perma.cc/67FA-G6UN].

225. *See, e.g.*, Del Norte Disposal, Inc. v. Dep't of Corr., 31 Cal. Rptr. 2d 746, 747-48 (Ct. App. 1994) (describing the "state's immunity from local regulations [as] merely an extension of the concept of sovereign immunity," and therefore subject to waiver, which must be express (quoting Bd. of Trs. v. City of Los Angeles, 122 Cal. Rptr. 361, 362 (Ct. App. 1975)); Auth. of Cnty. to Require Fed. & State Agencies to Follow Cnty. Pol'ys & Procs., Op. Wash. Att'y Gen. 10 (1994), https://www.atg.wa.gov/ago-opinions/authority-county-require-federal-and-state-agencies-follow-county-policies-and [https://perma.cc/2ZAP-P97L] (undertaking a preemption analysis to reach a similar result). When the public-health official is a state employee, regulation of state prisons is legally straightforward. *See, e.g.*, *COVID-19 Variant Detected in Ionia Prison; Daily Testing Starts*, ABC12 NEWS (Feb. 10, 2021, 10:26 PM), https://www.abc12.com/2021/02/10/covid-19-variant-detected-in-ionia-prison-daily-testing-starts [https://perma.cc/2NR7-EJX9] ("The Michigan Department of Health and Human Services issued an emergency public health order [] requiring daily coronavirus testing of all prison employees . . . .").

226. *Cf.* Geo Grp., Inc. v. Newsom, 15 F.4th 919, 927-31 (9th Cir. 2021) (concluding, over a dissent, that a California statute prohibiting private detention impeded federal immigration policy and was therefore preempted).

227. *See, e.g.*, Gary Gross & Robert D. Fleischner, *P&A Access Authority in Federal Facilities*, TASC 2-3 (2003), https://www.tascnow.com/wp-content/uploads/2019/03/TASC-MISC_access_fed_1003.pdf [https://perma.cc/HJ7R-CZ9S].

228. *See* Kerry Klein, *Lessons from a Prison Where Covid-19 'Spread Like Wildfire*,' U.S. NEWS & WORLD REP. (Feb. 24, 2021, 4:55 PM), https://www.usnews.com/news/health-news/articles/2021-02-24/lessons-from-a-prison-where-covid-spread-like-wildfire [https://perma.cc/F8AH-QP9N].

229. *See* Kerry Klein, *Avenal's Prison Labor Contract Allows Actions the CDC—and Kings County—Warned Could Spread COVID-19*, KVPR (Nov. 20, 2020), https://www.kvpr.org/post/avenal-s-prison-labor-contract-allows-actions-cdc-and-kings-county-warned-could-spread-covid-19 [https://perma.cc/4UHT-BRMM].

that state institutions were not within the local health officer's jurisdiction.[230] In California, county health officers act subject to the override of the state health officer,[231] suggesting that a county officer's order might be valid against a state prison if ratified. But the general counsel also stated that the state health department had "advised that its guidance shall be followed in all State facilities, rather than any applicable local guidance."[232] Had the same convicted prisoner housed at Avenal been incarcerated instead in the Kings County Jail—as is common in California due to "realignment"—he would have enjoyed the benefits of the county health officer's more aggressive measures.[233]

E. The Possibility of Progress

In each of these ways, regulatory law fails to protect incarcerated people. But these Sections invite two related follow-up questions with less certain answers: why does it do so, and—more importantly—why should we think that efforts to bolster regulatory engagement will be more successful than efforts at court-based reform? Will they not founder on the same rocks?

At a broad and basic level, it is likely true that regulators have been inhibited or are disinclined to act aggressively in the carceral context for some of the same reasons as courts: a mix of affirmative belief in harshness (whether for purposes of retribution or deterrence) and disinterest in the welfare of a politically, economically, and racially subordinated underclass.[234] The capacity of any legal-reform strategy to alter these longstanding features of our political culture is limited. But there are reasons, addressed at greater length in the Parts that follow,

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230. Letter from Jennifer Neill, Gen. Couns., Cal. Dep't Corr. & Rehab., to Milton Teske, Health Officer, Kings Cnty. Dep't Pub. Health (June 5, 2020) (on file with author).

231. CAL. HEALTH & SAFETY CODE § 131080 (West 2021).

232. Letter from Jennifer Neill to Milton Teske, *supra* note 230.

233. State and federal prisoners are frequently housed in county jails in many jurisdictions. *See* Littman, *supra* note 208, at 869. On California's policy of realignment, see generally Rebecca Sullivan Silbert, *Thinking Critically About Realignment in California*, CHIEF JUST. EARL WARREN INST. L. & SOC. POL'Y (2012), https://www.law.berkeley.edu/files/bccj/Thinking_Critically_3-14-2012.pdf [https://perma.cc/9V9J-7TUQ] (providing background on the policy of realignment).

234. In the interest of brevity, this is a vast oversimplification of the conclusions of an extensive literature. Scholars have offered intricate accounts of the political value of punitive policy in the United States. *See, e.g.*, ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA (2016); JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007). But in short, there are two possible bases on which a person or institution may be willing to subject incarcerated people to horrendous conditions: (1) the infliction of harm is useful, and/or (2) the people being harmed do not matter.

to believe that regulatory pathways may be better suited than constitutional litigation to cut through both hostile and indifferent disengagement. Simply put, regulatory law offers more powerful opportunities for interest convergence and more fruitful points of political pressure.

Constitutional law asks whether it is acceptable to subject incarcerated people to certain deprivations; regulatory law asks whether doing so is good policy.[235] The first inquiry is catalyzed by concern for prisoners' humanity, but the second one need not be.[236] The Eighth Amendment has little other than moral comfort to offer free-world denizens—at least those confident in their station—whereas regulatory law is familiar and directly responsive to their selfish concerns. Many more people think they benefit from a strong regulatory state than think they benefit from strong Eighth Amendment protections. Moreover, regulatory processes may surface points where the interests of incarcerated people and of those in the free world coincide. Such processes are equipped to question whether the deterrent effects of carceral policies actually outweigh their criminogenic effects and to query at what cost it is worth expressing disapprobation. They can offer accounting, responding directly to the priorities of those focused more on their tax bills than on the well-being of people in prisons and jails. And they are able to highlight the multitude of ways beyond public safety and the public purse that incarceration's harms cannot be confined to the "other" being punished. Regulatory law can engage seriously with incarceration's downstream impacts on the free world.

In addition, while the avenues to constitutional progress increasingly narrow, there is reason for growing optimism about the mechanisms of regulatory reform. For the moment, Eighth Amendment doctrine is firmly superintended by a Supreme Court extremely hostile to prisoners' rights. Perhaps that will change in the future, with the elevation of judges from a recent cohort of former public defenders and civil-rights lawyers.[237] But even in the best of worlds, exertion of reformist political pressure on the federal judiciary is very attenuated, and doctrinal change is halting.

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235. Such arguments have historically gained bipartisan purchase. *See, e.g.*, Beth A. Colgan, *Teaching a Prisoner to Fish: Getting Tough on Crime by Preparing Prisoners to Reenter Society*, 5 SEATTLE J. SOC. JUST. 293, 293-96 (2006) (describing arguments made by President George W. Bush-era proponents of the prison-reentry movement emphasizing the impacts of conditions of confinement on the "safety, health, and prosperity of us all").

236. This is not to endorse but rather to acknowledge the reality of indifference to incarcerated people's humanity. To the extent that law's framings can inculcate solidarity, though, it is probably more fruitful to position incarcerated people as patients and consumers—just like the rest of us—than as people deserving of gentler punishment.

237. *See* Sahil Kapur, *With Public Defenders as Judges, Biden Quietly Makes History on the Courts*, NBC NEWS (Oct. 18, 2021, 8:10 PM), https://www.nbcnews.com/politics/congress/new-

Meanwhile, the regulatory state offers innumerable, decentralized points of political engagement at the federal, state, and local levels. In this context, regulators' lack of political insulation may be a feature as much as a bug. To be sure, their exposure to politics can undermine their efforts to address conditions in prisons and jails, either because of larger partisan shifts[238] or because they are on the losing end of intragovernmental conflicts between executive agencies. But the low political salience of many regulators — only a tiny fraction of Americans could name their local public-health officer or a commissioner of the FTC, and few know what these officials do — can also create openings for organized demands to gain traction. In the present political moment, there is cause to hope that the regulatory state can reengage with carceral institutions: federal-agency appointees have brought new vision and vigor to their work; state legislatures, even in conservative jurisdictions, have shown willingness to reevaluate the tough-on-crime and tough-on-prisoners policies of yore; and there are groundswells of local energy supporting progressive shifts toward more measured, evidence-based prosecution and against costly jail expansion. Finally, the increasing corporatization of carceral services of all types opens new regulatory points of attachment that do not exist when abuses occur at the hands of state actors.

IV. SUBSTANTIVE FEATURES OF FREE-WORLD LAW

The deregulatory state of exception is troubling because free-world regulatory approaches to governing conditions in prisons and jails have significant advantages over constitutional law as tools for advocates seeking to challenge — and for officials seeking to mitigate — the harms incarceration inflicts. This Part begins to describe them. To be clear, this Article does not mean to suggest a turn away from constitutional prisoners' rights litigation, but rather puts its grave shortcomings — some inherent and others contingent — in relief. This Article urges a broadening of the toolkit and an investment in strengthening the application of free-world regulatory law behind bars.

A. Transcontextual

A first advantage of regulation of incarceration by free-world law is that it is, unlike the constitutional law of punishment, transcontextual. Formulated for the

public-defenders-joe-biden-quietly-makes-history-courts-n1281787 [https://perma.cc/4FMJ-XNB8].

238. *See, e.g.*, Wagner, *supra* note 162 and accompanying text (noting that FCC efforts to regulate prison phone rates were temporarily abandoned after President Trump was elected and replaced the chairman).

rest of society, it can embrace incarcerated people and carceral places. In some instances, no distinction is drawn, and none should be.[239] But when one is — when an imprisoned person is treated differently, either more or less favorably, than one at liberty — the exception creates a sharp point of contrast.[240]

This clarity creates room for public debate. Should it be the case that doctors who have abused their patients are permitted to practice medicine on incarcerated people and no one else? Should the federal government offer more incentives to recruit excellent correctional physicians and ensure that they are not beholden to officials at the prisons and jails where they work? Regulatory distinctions like these help to concretize the terms of a discussion in which correctional officials regularly assert that those in their custody are receiving care that meets or exceeds free-world standards.[241]

Free-world comparators are also important because the constitutional law of incarceration suffers from a fundamental stagnation. Although the constitutional thresholds for prison conditions have certainly risen over the roughly half century of modern Eighth Amendment litigation, our doctrinal standards of decency evolve only after much heel dragging. The points of comparison for an American prison or jail are other American carceral systems, so change is halting. Only when a number of jurisdictions voluntarily reform will courts compel other systems to follow suit. Yet, being the first mover in a progressive direction has — at least until recently — posed serious political risks.

By comparison, progress in other regulatory contexts can be, and sometimes is, readily applied to prisons and jails. One striking example is that in 2019, in response to a lawsuit raising environmental-law claims brought by a coalition of incarcerated people and conservationists, the federal Bureau of Prisons scrapped

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239. *See, e.g.*, CAL. CODE REGS. tit. 15, § 3052(a) (2021) (applying California's retail food-safety code to prison kitchens).

240. *See, e.g.*, *supra* notes 86-90 and accompanying text (discussing different patient-per-provider thresholds for free-world and incarcerated populations).

241. *See, e.g.*, Jimmy Jenkins, *Arizona Corrections Director Claims Prisoners Have Better Access to Health Care Than He Does*, AZCENTRAL (Nov. 16, 2021, 5:41 PM), https://www.azcentral.com/story/news/local/phoenix-breaking/2021/11/16/arizona-corrections-director-david-shinn-says-prisoners-have-better-health-care-access-than-him/8639607002 [https://perma.cc/FP5Q-XZPY]; Joseph Darius Jaafari, *Confronted with Significant Flaws in Coronavirus Data, Pa. Corrections Officials Concede 'It's Unacceptable,'* PITTSBURGH POST-GAZETTE (Feb. 1, 2021, 11:24 AM), https://www.post-gazette.com/news/crime-courts/2021/02/01/pennsylvania-corrections-prisons-significant-flaws-coronavirus-data-health-prisoners-tests/stories/202102010067 [https://perma.cc/AH2U-99UE] (reporting that the state department of corrections relied on data, subsequently admitted to be erroneous, to claim that "in [Pennsylvania] prison is safer than the community from COVID"); Littman, *supra* note 208, at 881 (describing jail officials' assertions that parents "basically beg" for their children to remain incarcerated to receive treatment for substance abuse).

plans to build a new federal prison—the most expensive ever constructed—on top of a former mountaintop-removal coal mine in Kentucky.[242]

Labor is another arena where free-world and carceral reform can potentially go hand in hand. Consider the payment of prevailing wages to incarcerated workers, a demand made by many, from striking prisoners to Ava DuVernay.[243] As a matter of constitutional prisoners' rights doctrine, revision of the Thirteenth Amendment would be required to compel prison officials to pay anything at all.[244] And courts have consistently held that the Fair Labor Standards Act and state equivalents, which guarantee minimum wages, do not apply to pretrial detainees doing work at carceral facilities because they are, in the courts' view, not "employees"—they are operating outside of the broader free-labor market, and their "'standard of living' is protected" by their custodians.[245]

A recent proposal in Allegheny County, Pennsylvania, would address this regulatory gap while benefitting those on the outside. A pending county ordinance would raise the minimum wage for the county's own employees. It would also change the definition of "employee" in the administrative code to include "regardless of incarceration status," thereby bringing all those detained in the county jail—whether pretrial or sentenced—up from a pittance to the new $15

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242. Media Release, *Prisoners and Activists Stop New Prison on Coal Mine Site in Kentucky*, ABOLITIONIST L. CTR. (June 20, 2019), https://abolitionistlawcenter.org/2019/06/20/media-release-inmates-and-activists-stop-new-prison-on-coal-mine-site-in-kentucky [https://perma.cc/SK6N-43RB]. *But see* Panagioti Tsolkas, *Incarceration, Justice and the Planet: How the Fight Against Toxic Prisons May Shape the Future of Environmentalism*, PRISON LEGAL NEWS (June 3, 2016), https://www.prisonlegalnews.org/news/2016/jun/3/ncarceration-justice-and-planet-how-fight-against-toxic-prisons-may-shape-future-environmentalism [https://perma.cc/CPH2-6A5Z] (noting the concern, expressed by a founder of one of the organizations that litigated this case, that "while environmental groups have responded positively, . . . they aren't motivated by working for the well-being of prisoners so much as they see another angle to take on the energy industry").

243. *See Prison Strike 2018*, INCARCERATED WORKERS ORG. COMM., https://incarceratedworkers.org/campaigns/prison-strike-2018 [https://perma.cc/F2XH-5UZT] (demanding that incarcerated people "be paid the prevailing wage"); 13TH (Kandoo Films 2016).

244. U.S. CONST. amend. XIII (permitting "involuntary servitude . . . as a punishment for crime whereof the party shall have been duly convicted"); *see* Raja Raghunath, *A Promise the Nation Cannot Keep: What Prevents the Application of the Thirteenth Amendment in Prison?*, 18 WM. & MARY BILL RTS. J. 395, 417-18 (2009) (recognizing that courts have consistently rejected Thirteenth Amendment challenges to forced, uncompensated labor in prisons). Some states have recently removed language from their own constitutions that paralleled the penal-servitude exception. *See, e.g.*, COLO. CONST. art. II, § 26, *amended by* 2018 Colo. Legis. Serv. 18-1002 (West).

245. Villarreal v. Woodham, 113 F.3d 202, 207 (11th Cir. 1997) (quoting Fair Labor Standards Act of 1938, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201-209 (2018))).

minimum wage.[246] In addition to providing fair compensation for labor, this change would also decrease the fiscal incentive to incarcerate people in the first place. The ordinance is expressly cognizant of the role that incarcerated workers play in the county economy and the broad distributional impacts of exploitation even beyond the walls of the jail, including findings that payment of paltry wages to incarcerated people "constitutes forced subsidization of the County's budget" and "serves to perpetuate a cycle of economic disadvantage for many of those who are dependent upon incarcerated individuals for support."[247]

B. Empirical

Another advantage of regulatory law in the carceral context is that it can offer sorely needed opportunities to both gather and consider empirical evidence about the effects of carceral policies. At present, costs and benefits are not weighed, and alternatives are not assessed,[248] either by courts considering constitutional claims[249] or even necessarily by carceral agencies during their internal rulemaking processes.[250] As Sonja Starr put it: "Regulatory [cost-benefit analysis] is now a well-established feature of the administrative state, and it is perhaps curious that nothing like it has ever been incorporated into the carceral state.

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246. Allegheny Cnty., Pa., Proposed Ordinance, at 3 (on file with author) (amending Article 1009 of the Administrative Code of Allegheny County by adding a new § 5-1009.08).

247. *Id.* at 2.

248. *See* Rachel Barkow, *The Criminal Regulatory State*, *in* THE NEW CRIMINAL JUSTICE THINKING 33, 42-44 (Sharon Dolovich & Alexandra Natapoff eds., 2017); Sarah Lawrence & Daniel P. Mears, *Benefit-Cost Analysis of Supermax Prisons: Critical Steps and Considerations*, URB. INST. 1 (Aug. 2004), https://www.ojp.gov/pdffiles1/nij/grants/211972.pdf [https://perma.cc/3UMW-FZBU]. Marie Gottschalk has argued that "[w]e can't rely on cost-benefit analysis to accomplish what only a deep concern for justice and human rights can," suggesting that "hitching the movement against mass incarceration to fiscal burden" necessarily reinforces the impression that punishment reduces crime and tacitly endorses the neoliberal "zeal to cut the welfare state," which in turn "helps to produce the crime that the carceral state was purportedly built to control." Marie Gottschalk, *The Folly of Neoliberal Prison Reform*, BOS. REV. (June 8, 2015), https://bostonreview.net/books-ideas/marie-gottschalk-neoliberal-prison-reform-caught [https://perma.cc/FZ4U-QUU2]. She is right to fear an impoverished analysis, wherein spending on incarceration is compared merely to its absence, and which fails to consider a broad palette of alternative investments.

249. *See* Justin Driver & Emma Kaufman, *The Incoherence of Prison Law*, 135 HARV. L. REV. 515, 577 (2021) (observing that relevant "research barely dents constitutional prison law" and "[c]ontrast[ing] this antiempiricism to more developed disciplines" including administrative law).

250. *See* Shay, *supra* note 1, at 344-51.

Incarceration, after all, is one of the most profound exercises of state authority."[251] As Rachel Barkow explains in the context of prosecutors—and as is no less true of correctional administrators[252]—this resistance to justifying policy judgments is part of a deeply entrenched culture of denying that these officials are even engaged in discretionary policymaking.[253] Tremendous judicial deference relieves them of the need to actually justify decisions—in administrative-law terms, they are left free to act arbitrarily and capriciously.[254] To the extent that officials do weigh evidence, they are often blinkered in doing so, failing to

251. Sonja B. Starr, *On the Role of Cost-Benefit Analysis in Criminal Justice Policy: A Response to* The Imprisoner's Dilemma, 98 IOWA L. REV. BULL. 97, 99 (2013); *see also id.* at 100 (noting the assumption that "[cost-benefit analysis] would operate principally as a *constraint* on the growth of the carceral state"). Prison systems have begun to identify new programming offered to a small fraction of incarcerated people as "evidence based." *See, e.g.*, Kasandra Ortiz, *Hancock State Prison Evidence Based Programming*, IMPACT GA. MAG. 4-5 (Dec. 2019), https://view.joomag.com/impact-georgia-magazine-december/0736250001573925203 [https://perma.cc/5UM7-CPAH]. The noteworthiness of the exception proves the rule.

252. *See* Littman, *supra* note 208, at 922-24.

253. *See* RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 134 (2019).

254. Carceral policies can and regularly do survive judicial scrutiny despite a total absence of evidentiary support, some modicum of which is ostensibly required under *Turner v. Safley*, 482 U.S. 78 (1987). Consider, for example, *Holt v. Hobbs*, the case in which the Supreme Court eventually invalidated the Arkansas Department of Corrections' prohibition on short beards. *See* 574 U.S. 352, 356 (2015). A significantly higher level of scrutiny applied to this claim than to most brought by incarcerated people because it was challenged as an infringement of religious freedom. *See* Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc-1 (2018). The prison officials' justifications for the policy—that short beards were a security threat and could allow prisoners to hide contraband—were unsupported by any evidence, and the latter suggestion at least was ridiculous. *See Holt*, 574 U.S. at 363-64 (noting that the argument was "hard to take seriously" and "almost preposterous" (quoting Transcript of Hearing on Motion for Temporary Injunction Before the Honorable Joe J. Volpe at 155, Holt v. Hobbs, No. 5:11-cv-00164-BSM (E.D. Ark. Jan. 4. 2012))). Nevertheless, no fewer than five federal judges had previously upheld the policy before it reached the Supreme Court. *See id.* at 360.

consider the broader impacts of their decisions on incarcerated people and society as a whole,[255] and focusing instead simply on security in the prison or jail environment and, perhaps, on recidivism rates.[256]

One powerful example of this, among many, arises in the context of family contact. There is strong statistical evidence, including from the few departments of corrections that have studied the question, that maintaining contact with family members during incarceration substantially reduces rates of both disciplinary infractions and recidivism.[257] A significant proportion of people with loved ones behind bars are so impoverished that they must go into debt to pay the costs of maintaining contact.[258] As a result, demand is highly elastic; when telecom rates go down, contact goes way up.[259] Constraining that contact by signing telecom-

255. *See* Sandhya Kajeepeta, Pia M. Mauro, Katherine M. Keyes, Abdulrahman M. El-Sayed, Caroline G. Rutherford & Seth J. Prins, *Association Between County Jail Incarceration and Cause-Specific County Mortality in the USA, 1987-2017: A Retrospective, Longitudinal Study*, 6 LANCET PUB. HEALTH e240 (2021) (finding that increases in counties' jail incarceration rates over time are related to subsequent increases in mortality by infectious disease, chronic lower respiratory disease, substance use, and suicide, and identifying potential pathways that might underlie those relationships); *see also* Eric Reinhart, *How Mass Incarceration Makes Us All Sick*, HEALTH AFFS. (May 28, 2021), https://www.healthaffairs.org/do/10.1377/hblog20210526.678786/full [https://perma.cc/7QBG-TQ3W] (explaining that incarceration "incubates and spread[s] infectious diseases" and reinforces "poverty, racial inequality, homelessness, and cumulative economic and health disadvantage[s]").

256. *See* Starr, *supra* note 251, at 103-08; *see also* Megan T. Stevenson & Sandra G. Mayson, *Pretrial Detention and the Value of Liberty* 1 (U. Va. Sch. L., Pub. L. & Legal Theory Paper Series 2021-14, 2021), https://ssrn.com/abstract=3787018 [https://perma.cc/NDU4-GDEG] (concluding based on survey data about the relative harms of incarceration and victimization that "a person must pose an extremely high risk of serious crime in order for [pretrial] detention to be justified"). On the need to broaden our conception of "public safety" to include not merely freedom from transgressive harm to person or property but also access to nutritious food, clean air, safe housing, a basic income, and health care, see Barry Friedman, *What Is Public Safety?*, B.U. L. REV. (forthcoming 2022).

257. Chesa Boudin, Trevor Stutz & Aaron Littman, *Prison Visitation Policies: A Fifty-State Survey*, 32 YALE L. & POL'Y REV. 149, 152 (2013) (citing studies by the Minnesota and Ohio departments of corrections); Shanhe Jiang, Marianne Fisher-Giorlando & Liping Mo, *Social Support and Inmate Rule Violations: A Multilevel Analysis*, 30 AM. J. CRIM. JUST. 71, 72-75, 82-84 (2005).

258. *See, e.g.*, Saneta deVuono-powell, Chris Schweidler, Alicia Walters & Azadeh Zohrabi, *Who Pays? The True Cost of Incarceration on Families*, ELLA BAKER CTR. FOR HUM. RTS., FORWARD TOGETHER & RSCH. ACTION DESIGN 30 (2015), https://www.ellabakercenter.org/sites/default/files/media/Who-Pays-FINAL-2.pdf [https://perma.cc/8UZ6-3PCZ] (noting that over a third of survey respondents went into debt to cover phone and visitation costs and that nearly 90% of family members responsible for these costs were women).

259. *See, e.g.*, *Justice is Calling*, S.F. FIN. JUST. PROJECT 3, 6 (Feb. 18, 2021), https://sfgov.org/financialjustice/sites/default/files/2021-02/FJP%20Justice%20is%20Calling%202-18-21.pdf [https://perma.cc/CEB5-ESMY] (noting dramatic increases in call volumes following price reductions).

munications contracts with exorbitant rates is not only inhumane—it is also indefensibly bad public policy.[260] Unlike the FCC, though, constitutional law simply has nothing to say about all of this.[261] As Chief Justice Rehnquist put it derisively, weighing costs and benefits is a "'mother knows best' approach [that] should play no part in traditional constitutional adjudication."[262]

Barkow's call for engagement of expertise in criminal-legal policymaking resonates here.[263] She highlights the absence of administrative law's rationality-promoting frameworks in the criminal-legal system.[264] For the reasons discussed below, there are some disadvantages to her proposal, insofar as she hopes to vest decision-making authority in agencies that focus exclusively on the criminal-legal system and are thus particularly susceptible to capture. But in urging that we bring cross-cutting Office of Information and Regulatory Affairs-like[265] review to bear on criminal-legal policymaking, Barkow recognizes the value of involving "outside" regulators, who can intervene when an official responsible for criminal-legal policy—here, a prison or jail administrator—adopts a narrow frame of reference, "look[ing] only at the goals [he or she] seeks to further" and "not consider[ing] how resources [he or she] spends might be used for other benefits in the public interest."[266]

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260. Other countries to which the United States is often compared have all taken a decidedly different approach, "striv[ing] for 'normalization,' or making prisoners' lives as much like the free world as possible." Giovanna Shay, *Visiting Room: A Response to* Prison Visitation Policies: A Fifty-State Survey, 32 YALE L. & POL'Y REV. 191, 194 (2013) (quoting Ram Subramanian & Alison Shames, *Sentencing Practices in Germany and the Netherlands: Implications for the United States*, VERA INST. OF JUST. 7, 19 (2013), https://www.vera.org/downloads/Publications/sentencing-and-prison-practices-in-germany-and-the-netherlands-implications-for-the-united-states/legacy_downloads/european-american-prison-report-v3.pdf [https://perma.cc/34NX-ZW2T]).

261. Under *Overton v. Bazzetta*, 539 U.S. 126 (2003), and its progeny, "administrative discretion almost exclusively determines the contours of prison visitation [and telecommunication], unconstrained except at the margins by judicial oversight." Boudin et al., *supra* note 257, at 152-54.

262. Murray v. Giarratano, 492 U.S. 1, 11 (1989).

263. BARKOW, *supra* note 253, at 165-85.

264. *Id.* at 178 (discussing the value of judicial review of arbitrary and capricious agency actions and the benefits it could confer if extended to criminal-justice agencies).

265. The Office of Information and Regulatory Affairs is housed in the Office of Management and Budget, within the executive office of the White House. It is commonly thought of as a "regulator of regulators." Jacob E. Gersen, *Administrative Law Goes to Wall Street: The New Administrative Process*, 65 ADMIN. L. REV. 689, 701 (2013). Because state and local carceral systems are decentralized, no single super-regulator could serve this function, but a constellation of external regulators can promote consideration of factors beyond the correctional.

266. BARKOW, *supra* note 253, at 180-81.

She also observes that criminal-legal policy "intersect[s] with other substantive areas" of social policy, many of which shape alternatives to incarceration, and, in turn, calls for "coordinat[ion] among the relevant agencies and professionals in these areas."[267] It is commendable when the leaders of carceral institutions opt to collaborate with their colleagues in other sectors of government, allowing their decisions to be influenced by a broad range of social policy considerations. But given that prison and jail administrators have long been permitted to operate with impunity and without meaningful oversight, empiricism may need to be imposed; prison officials may not themselves volunteer to spend scarce resources on flood precautions, or comprehensive testing for infectious diseases, or free phone calls.

There is one especially important empirical reality with which the constitutional law of punishment utterly fails to grapple: the egregiously disparate impact of carceral policy on communities of color. As of 2019, Black people are over five times as likely as white people to be imprisoned.[268] Although most incarcerated people are poor, race overpowers socioeconomic class as a determinant of incarceration: a Black son raised by a family in the top 1% of income earners (i.e., by millionaires) is as likely to be incarcerated as a white son raised in a household earning about $36,000—just over one-and-a-half times the federal poverty line for a family of four.[269] While equal-protection claims have enjoyed some success in eliminating much of the racial segregation previously imposed within prison systems,[270] the constitutional prohibitions on race discrimination require discriminatory intent.[271]

As a result, there is a striking disconnect between scholarship and public debate around mass incarceration—which often center race—and traditional prison-conditions litigation.[272] Complaints in prisoners' rights cases generally

267. *Id.* at 183-85.

268. E. ANN CARSON, BUREAU OF JUST. STATS., U.S. DEP'T OF JUST., PRISONERS IN 2019, at 10 (Oct. 2020), https://bjs.ojp.gov/content/pub/pdf/p19.pdf [https://perma.cc/74XS-GMZW].

269. Raj Chetty, Nathaniel Hendren, Maggie R. Jones & Sonya R. Porter, *Race and Economic Opportunity in the United States: An Intergenerational Perspective*, 135 Q.J. ECON. 711, 744-45 (2020); Off. Assistant Sec'y for Plan. & Evaluation, *Prior HHS Poverty Guidelines and Federal Register References*, U.S. DEP'T HEALTH & HUM. SERVS., https://aspe.hhs.gov/prior-hhs-poverty-guidelines-and-federal-register-references [https://perma.cc/EF46-HTM8].

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

271. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977); *see also* Andrea C. Armstrong, *Race, Prison Discipline, and the Law*, 5 U.C. IRVINE L. REV. 759, 773-78 (2015) (discussing problems with the application of this discriminatory-intent requirement in the prison context and arguments against its application).

272. Shay, *supra* note 1, at 339 ("Because of the racially disparate impact of mass incarceration . . . [a] 'hands-off' policy now maintains status regimes of race and class.").

say nary a word[273] about the fact that most of the people eating moldy bread and bologna for days on end, most of the people decompensating in solitary confinement, and most of the people contracting COVID in crowded dormitories are Black and brown.[274] Regulatory law, however, can and sometimes does take account of the racially disparate impact of carceral conditions. For example, the FCC Commissioner who led the agency's efforts to regulate prison phone-call rates placed front and center the burden of incarceration on Black families and children in making the case for regulation; this impetus for action struck a chord with others on the Commission and was referenced in the agency's rulemaking.[275]

It is essential not to overstate regulatory law's promise in this regard. The federal courts have gutted avenues for challenging agencies' failures to consider

273. This is a criticism of the legal framework, not necessarily of the litigators; whether to highlight to courts racial disparities that are not formally actionable may be a difficult strategic question.

274. Further analysis is warranted to determine whether, once incarcerated, a Black or Latinx prisoner is more likely to contract or die of COVID than a white prisoner. *See* Jordan Wilkie, *Prisons Contribute to Racial Imbalance in COVID-19 Impact in NC*, CAROLINA PUB. PRESS (Feb. 11, 2021), https://carolinapublicpress.org/42342/prisons-contribute-to-racial-imbalance-in-covid-19-impact-in-nc [https://perma.cc/CF8H-YH4W] (suggesting not, based on a preliminary analysis of incomplete data); Neal Marquez, Destiny Moreno, Amanda Klonsky & Sharon Dolovich, *Racial and Ethnic Inequalities in COVID-19 Mortality Within Texas Carceral Settings* (forthcoming), https://www.medrxiv.org/content/10.1101/2021.09.26.21264145v2 [https://perma.cc/9BCV-XXBX] (showing significant disparities in excess mortality rates by race and ethnicity in the Texas prison system during the first year of the COVID pandemic). In any event, the burden of the pandemic on communities of color was certainly exaggerated by the fact that their members are so disproportionately likely to be confined in prisons and jails.

275. Mignon Clyburn, Fed. Commc'ns Comm'n Comm'r, Breaking the Cycle of Prison Poverty One Phone Call at a Time, Address at the Big Tent Meeting 1-2 (Sept. 25, 2015), https://docs.fcc.gov/public/attachments/DOC-335569A1.pdf [https://perma.cc/UA4N-KAYA]; FED. COMMC'NS COMM'N, REPORT AND ORDER ON REMAND AND FOURTH FURTHER NOTICE OF PROPOSED RULEMAKING: RATES FOR INTERSTATE INMATE CALLING SERVICES, No. 12-375, at 93 (Aug. 7, 2020), https://docs.fcc.gov/public/attachments/FCC-20-111A1.pdf [https://perma.cc/T8C2-LUDQ] (statement of Comm'r Geoffrey Starks) (describing Starks's observation during his visit to a D.C. jail that "they were all men of color"); FED. COMMC'NS COMM'N, THIRD REPORT AND ORDER, ORDER ON RECONSIDERATION, AND FIFTH FURTHER NOTICE OF PROPOSED RULEMAKING: RATES FOR INTERSTATE INMATE CALLING SERVICES, No. 12-375, at 15 n.94 (May 20, 2021), https://docs.fcc.gov/public/attachments/DOC-372023A1.pdf [https://perma.cc/6F39-Y9UR] (observing that high phone rates place a "tremendous burden on low-income" families and a "disproportionate number of incarcerated people are racial minorities from low-income families" (quoting comments by Prisoners' Legal Services and the Multicultural Media, Telecom and Internet Council)).

racially disparate impact.[276] But the requirement to consider discriminatory effects under the implementing regulations of Title VI[277] or equivalent provisions of state law[278]—privately unenforceable though it may presently be—creates an opening for an engaged regulator to address head-on the racialized impact of conditions of confinement.[279]

One final point bears discussion. Some scholars, most notably Jocelyn Simonson, endorse movement calls for a radically reoriented sense of who counts as an "expert"—whose and what kind of evidence matters—in governing policing.[280] Applied to the carceral context, this critical (in both senses) perspective holds that the most valuable "data" available to those regulating prison and jail conditions are the lived experiences of people who have been—or still are—behind bars. Indeed, it says, they are the ones who should be doing the regulating. Given the extent to which carceral agencies have operated with impunity and without oversight (to a degree even greater than policing agencies), the literal disenfranchisement of many of those most directly affected by incarceration, and the acute and immediate personal danger of organizing and asserting power

276. *See* David Freeman Engstrom, Daniel E. Ho & Cristina Isabel Ceballos, *Disparate Limbo: How Administrative Law Erased Antidiscrimination*, 131 YALE L.J. 370, 411-28 (2021).

277. *See generally* Olatunde C.A. Johnson, *The Agency Roots of Disparate Impact*, 49 HARV. C.R.-C.L. L. REV. 125 (2014) (explaining agencies' longstanding role in developing and implementing disparate-impact standards under Titles VI and VII).

278. Under some states' equivalent civil-rights laws, incarcerated people are covered. *See, e.g.*, CAL. GOV'T CODE § 11135 (West 2017); *see also* Alan Ramo, *Environmental Justice as an Essential Tool in Environmental Review Statutes: A New Look at Federal Policies and Civil Rights Protections and California's Recent Initiatives*, 19 HASTINGS ENV'T L.J. 41, 56-57 (2013) (observing that section 11135's implementing regulations "explicitly endorse the disparate impact test"). In others, incarcerated people and carceral institutions have been specifically excluded, though to varying degrees. *See, e.g.*, OR. REV. STAT. § 659A.400(2) (2021); Abraham v. Corizon Health, Inc., 985 F.3d 1198 (9th Cir. 2021) (certifying to the Oregon Supreme Court the question of whether a private contractor providing jail health-care services falls within the statutory exemption for the jail itself); MICH. COMP. LAWS ANN. § 37.2301 (West 2021); Does 11-18 v. Dep't of Corr., 917 N.W.2d 730, 733-36 (Mich. App. 2018) (invalidating the statutory exclusion of prisoners). Even a carve-out for incarcerated people, though, does not mean that the disparate impacts of regulations (like those governing financial transactions) affecting the families of incarcerated people are not cognizable.

279. *See* Johnson, *supra* note 277, at 133.

280. Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 849-58 (2021); *see also* Lauren M. Ouziel, *Democracy, Bureaucracy, and Criminal Justice Reform*, 61 B.C. L. REV. 523, 579-82 (2020) (focusing instead on the "[d]eliberative mechanisms [that] would ideally open a dialogue between the enforcement bureaucracy and the various communities of interest that comprise the criminal justice public").

while incarcerated,[281] dramatic shifts in this direction seem implausible in the short term. But some avenues for regulators to hear and credit not only the accounts but also the proposals of incarcerated people and their loved ones exist and are discussed below.[282] These can and should be entrenched and expanded upon, so that, in Simonson's formulation, "the state can help those it newly recognizes as experts to understand and parse through complicated realities together."[283]

C. Supraminimal

Relatedly, the constitutional law of incarceration is silent on a range of fronts where conditions, though deeply harmful and starkly divergent from free-world norms, clear a minimal threshold.[284] This silence is particularly troubling in situations where it would actually be quite easy to treat incarcerated people better. Food is a good example. "Sack lunches" of moldy white bread and bologna pass constitutional muster, but healthy and palatable meals would enhance incarcerated people's physical and emotional well-being. Moreover, unlike reforms that require renovations to physical plants or increased staffing, providing decent food would be cheap.[285] But the Eighth Amendment, unlike food-safety regulations, does not promote ongoing improvement; its fundamentally pass/fail grading rubric does not recognize the difference between a D and a B+.

Particularly at the state and local level, where broad police powers are limited more by political will than anything else, innovations in the regulation of carceral environments can occur in laboratories of decarceral reform.[286] A state public-utilities commission can create a model for imposing price constraints on prison-telecommunications contractors, and state Medicaid officials can apply for a

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281. *See, e.g.*, Jamiles Lartey, *US Inmates Claim Retaliation by Prison Officials as Result of Multi-State Strike*, GUARDIAN (Aug. 31, 2018, 5:31 PM EDT), https://www.theguardian.com/us-news/2018/aug/31/us-inmates-prison-strike-retaliation [https://perma.cc/W8W7-6SUK].

282. *See infra* notes 359-368 and accompanying text.

283. Simonson, *supra* note 280, at 858.

284. *See* Hadar Aviram, *Taking the Constitution Seriously? Three Approaches to Law's Competence in Addressing Authority and Professionalism*, *in* THE NEW CRIMINAL JUSTICE THINKING 155, 162-63 (Sharon Dolovich & Alexandra Natapoff eds., 2017).

285. *See* Marcus Harrison Green, *Reaping Benefits Beyond Better Prison Menus, Inmates Grow Their Own Food*, CHRISTIAN SCI. MONITOR (Mar. 30, 2016), https://www.csmonitor.com/World/Making-a-difference/Change-Agent/2016/0330/Reaping-benefits-beyond-better-prison-menus-inmates-grow-their-own-food [https://perma.cc/36QW-5RUM].

286. *See* Nestor M. Davidson, *Localist Administrative Law*, 126 YALE L.J. 564, 628-29 (2017) (discussing the "promise of local experimentalism" by administrative agencies, "particularly in areas such as public health").

waiver that permits them to offer federally funded substance-use treatment in county jails.[287] Meaningful change can even occur at the local level.[288]

Progress through regulatory federalism is important. First and most obviously, the federal courts are no friends of prisoners, and the Supreme Court has become even less receptive of late.[289] Federal legislation and regulation can have a significant impact, particularly when it takes the form of a civil-rights law like the Americans with Disabilities Act or a massive spending program like Medicaid. But because the vast majority of incarcerated people (including many federal detainees) are held in state and local facilities, federal control of most carceral institutions is indirect, and Spending Clause legislation like the Prison Rape Elimination Act has weak enforcement mechanisms.[290]

Second, state- and local-level reform is a critical antidote to the "one-way ratchet" of criminalization and mass incarceration.[291] The recent spread of free-phone-call policies—first from jails in one major metropolis to other big cities and then to coverage of all prisons and jails in a nearby state—illustrates the promise of this dynamic.[292] Models of regulatory engagement with carceral systems can spur further action.

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287. *See, e.g.*, CAL. PUB. UTILS. COMM'N, ASSIGNED COMMISSIONER'S PHASE II SCOPING MEMO AND RULING EXTENDING STATUTORY DEADLINE, Rulemaking 20-10-002, at 4 (2021), https://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M426/K695/426695144.pdf [https://perma.cc/ZE3A-PB5R] (considering whether the California Public Utilities Commission should recognize its jurisdiction to regulate not only prison and jail phone calls but also video calling, written electronic communication, and entertainment services provided to incarcerated people); TARGETING JUSTICE-INVOLVED POPULATIONS THROUGH 1115 MEDICAID WAIVER INITIATIVES, STATE HEALTH ACCESS DATA ASSISTANCE CTR. (Dec. 23, 2019), https://www.shadac.org/sites/default/files/publications/Justice-involved1115-waiver-initiatives_01.2020.pdf [https://perma.cc/X3ZK-W92J].

288. *See, e.g.*, County of Ottawa, State of Michigan, *Resolution*, FINES & FEES JUST. CTR. (Sept. 25, 2018), https://finesandfeesjusticecenter.org/content/uploads/2018/11/Board-Resolution-Clerk-Register-9-25-2018-1.pdf [https://perma.cc/EEW6-XG5S] (replacing the daily fee of $60 charged to people sentenced to county jail with a flat fee of $60).

289. *Compare* Brown v. Plata, 563 U.S. 493 (2011) (holding that a court-mandated population limit was necessary to remedy a violation of prisoners' Eighth Amendment rights), *with* Barnes v. Ahlman, 140 S. Ct. 2620 (2020) (staying a lower court's requirement that a California jail comply with COVID safety measures).

290. *See* Giovanna Shay, *PREA's Peril*, 7 NE. U. L.J. 21, 22-26 (2015).

291. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509 (2001).

292. *See* N.Y.C., N.Y., ADMIN. CODE § 9-154 (2021) (effective May 3, 2019); *Connecticut Becomes First State to Make All Prison Phone Calls Free*, *supra* note 166.

D. Prisoners' Incapacity

Constitutional prisoners' rights litigation also fails to accommodate the stunning power gradient between its plaintiffs and defendants. To the contrary, it is openly exploited to keep incarcerated people out of court. Much of this occurs by operation of the Prison Litigation Reform Act, which erects procedural hurdles such as a rigid requirement that incarcerated plaintiffs fully exhaust often-labyrinthine grievance processes before filing suit,[293] and creates a screening process designed to throw out poorly pleaded pro se complaints without requiring any response from defendants or giving plaintiffs an opportunity to amend—as is routine in cases brought by litigants who are not incarcerated.[294] Both the administrative complaint process and the facts necessary to properly plead a civil complaint are within the direct control of the defendants—who are also an incarcerated plaintiff's captors.

Substantively, too, Eighth Amendment doctrine fails to apply the heightened duty of care that tort law imposes in other contexts where one party is unable to protect him or herself and the other is especially well situated to do so.[295] The Supreme Court has plainly stated as much since the dawn of modern prisoners' rights litigation. In the foundational case *Estelle v. Gamble*, the Court recognized that "it is but just that the public be required to care for the prisoner, who cannot[,] by reason of the deprivation of his liberty, care for himself."[296] But the Court then proceeded to make clear that even the sort of negligence that constitutes malpractice when a patient has a choice of providers does not offend the

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293. *See* Ross v. Blake, 578 U.S. 632, 635-36 (2016) (finding no "special circumstances" exception to the PLRA's administrative-exhaustion requirement); Booth v. Churner, 532 U.S. 731, 738-41 (2001) (requiring exhaustion of administrative remedies even if the only relief sought is categorically unavailable under administrative processes); *see also* Allen E. Honick, Note, *It's "Exhausting": Reconciling a Prisoner's Right to Meaningful Remedies for Constitutional Violations with the Need for Agency Autonomy*, 45 U. BALT. L. REV. 155, 179 & nn.204-07 (2015) (citing cases dismissed for failure to exhaust where the plaintiff "was hospitalized outside the institution," held "in solitary confinement without access to the necessary forms," illiterate, or suffering from a brain injury).

294. 28 U.S.C. §§ 1915(e)(2), 1915A (2018).

295. Some states' tort laws do apply heightened duties of care in prisoner cases. *See, e.g.*, Edison v. United States, 822 F.3d 510, 521 (9th Cir. 2016); Multiple Claimants v. N.C. Dep't of Health & Hum. Servs., 646 S.E.2d 356, 357-61 (N.C. 2007); Wilson v. City of Kotzebue, 627 P.2d 623, 628 (Alaska 1981).

296. 429 U.S. 97, 104 (1976) (quoting Spicer v. Williamson, 132 S.E. 291, 293 (N.C. 1926)). Even this conclusion, that officials could not deprive incarcerated people of health care entirely, was founded in large part on the enactment of "modern legislation" to that effect. *Id.* at 103 n.8.

Constitution when the patient has none.[297] To the contrary, the constitutional prohibition is on deliberate indifference; as a formal matter, it permits negligence, and as a practical matter, it can affirmatively encourage willful blindness. Concerned with abusiveness more than vulnerability, its lens is focused squarely on the powerful rather than the powerless. As a general matter, regulatory law's articulation of and demand for compliance with clear, objective standards is a major improvement on this state of affairs. As Sharon Dolovich has argued, a stricter liability standard would move past current Eighth Amendment doctrine's focus on defendants' knowledge and intent to take seriously the state's "carceral burden" to protect those it prevents from protecting themselves.[298]

In some contexts, regulatory law — enacted as it is in full view of the modern carceral state — can even be sensitive to the power dynamics that govern life behind bars. For example, federal regulations recognize incarcerated people's disempowerment and extend additional protection on that basis. Protocols for human-subjects research are the most elaborate example.[299] Institutional Review Boards are specifically required to account for the possibility that incentives for participation that improve "living conditions, medical care, quality of food, amenities and opportunity for earnings" will take on outsize importance in the "limited choice environment of the prison."[300] They must also consider the power that officials wield, ensuring that selection procedures are "immune from arbitrary intervention by prison authorities" and that a "parole board[] will not take into account a prisoner's participation."[301]

This solicitude can extend to other contexts as well. For example, regulations regarding the planning of pipeline routes take special account of nearby prisons, because they are "occupied by persons who are confined" and therefore sitting ducks, vulnerable to the risk of a pipeline failure.[302] Another example: the HPSA regulations discussed in Section II.C, which recognize that prisoners, like people

297. *Id.* at 105-06. As the Court took pains to note, incarcerated people can in theory seek damages in state court for malpractice committed against them by prison medical providers. *Id.* at 107 & n.15. But this offers them no opportunity to prospectively challenge the adequacy of (or simply avoid, as they would in the free world) a health-care system in which malpractice is pervasive.

298. *See* Dolovich, *supra* note 21, at 964-72.

299. These protections have significant shortcomings in practice. *See* Laura I. Appleman, *The Captive Lab Rat: Human Medical Experimentation in the Carceral State*, 61 B.C. L. REV. 1, 27-29 (2020).

300. 45 C.F.R. §§ 46.305(a)(2) (2020).

301. *Id.* § 46.305(a)(4), (6); *see also id.* § 46.304 (requiring a majority of board members to be independent of the prison and one to be a prisoner or prisoner representative).

302. 49 C.F.R. § 192.903 (2020).

in rural communities, cannot seek care elsewhere when their providers are overtaxed.

E. Prisons' Permeability

Finally, free-world regulatory law often reflects with nuance the interrelatedness of carceral institutions with the rest of society, while Eighth Amendment doctrine engages with the free world mostly as a point of simplistic comparison. As the Court explained in *Sandin v. Connor*, internal prison-management decisions implicate due-process protections only when they impose an "atypical and significant hardship . . . in relation to the ordinary incidents of prison life."[303] Contested and ill-defined though this benchmark may be, the Court makes very clear what "prison life" is not — life in the free world — explaining that "incarceration brings about the necessary withdrawal or limitation of many privileges and rights," without offering much guidance as to which ones remain.[304] According to *Sandin*, only the carceral baseline matters — conditions outside are irrelevant to a court's assessment of the severity of the hardship inflicted.[305]

With respect to health-care claims, community standards are considered as reference points in constitutional cases, though often dismissively: "Even in the free world, people must wait for surgeries."[306] So too for claims about exposure to toxins: a prisoner forced to work without a mask and breathe corn dust, causing nosebleeds, hair loss, and facial sores, failed to state an Eighth Amendment claim when workers in "the surrounding agricultural community" did similar work without masks.[307] Relatedly, physical injuries alleged in excessive-force and failure-to-protect cases are regularly rejected as de minimis and therefore insufficient to meet the requirement of the PLRA because "there are numerous scrapes, scratches, cuts, abrasions, bruises, pulled muscles, back aches, leg aches, etc., which are suffered by free world people in just every day [sic] living for

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303. 515 U.S. 472, 484 (1995).

304. *Id.* at 485 (quoting Jones v. N.C. Prisoners' Lab. Union, Inc., 433 U.S. 119, 125 (1977)).

305. The *Sandin* Court also recognized that actions which shift the boundary between incarceration and the free world — that is, which "inevitably affect the duration of [one's] sentence" — implicate liberty interests. *Id.* at 487.

306. Richie v. Univ. of Tex. Med. Branch Hosp. Galveston, No. 2:12-cv-322, 2012 WL 12871940, at *1 (S.D. Tex. Oct. 18, 2012). In a society without universal health coverage, it may well be that some people — including many of those who have been or will be incarcerated — go without necessary health care because they are poor. *See id.* (observing that waits for surgery in the free world may be "based on economics and expense").

307. Jackson v. Cain, 864 F.2d 1235, 1245 (5th Cir. 1989).

which they never seek professional medical care."[308] Across contexts, courts are limited to asking some permutation of "Is prison worse?" and "Should it be?" In this paradigm, the carceral and the free world are sharply divided. Free-world standards operate as a safe harbor, not a floor, for constitutional claims.

But the relationships between prison and jail environments and the "outside" world are much more complex than that. As Hadar Aviram and Chad Goerzen argue, prisons are "permeable," not hermetically sealed environments to be mechanistically compared to the world beyond their gates.[309] As they explain, institutional and free-world society do not come into contact only at the moments of people's transitions into and out of incarcerated status. Instead, carceral institutions are woven into the communities in which they are situated, those from which incarcerated people come, and society more broadly: "[T]he membrane between prisons and their surrounding communities is quite thin: various people (correctional officers, prisons workers, volunteers, visitors, tourists), things (money, goods, factory raw material), and intangibles (tax money, critique) pass through the membrane on a daily basis."[310]

Transcontextual regulatory law is much better equipped than the constitutional law of punishment to take account of this interrelatedness — and, critically, to assess and weigh the adverse impacts of carceral conditions on society writ large.[311] Telecommunications and financial-services regulators can not only compare prison and jail pricing to pricing offered on the free market, but can also consider the impacts of high prices (entrenched poverty and severed family ties) on loved ones in the free world. These are individuals who lack standing to sue and are irrelevant to constitutional analyses. Similarly, labor and workplace-

308. Luong v. Hatt, 979 F. Supp. 481, 486 (N.D. Tex. 1997); 42 U.S.C. § 1997e(e) (2018) (requiring a prisoner to make "a prior showing of physical injury" in order to bring an action under the PLRA). The injuries alleged in this case were ones for which many would seek medical care: other prisoners "stomped on his face" while he was sleeping, leaving him with a bleeding tongue and an injured shoulder, and he was attacked with a broomstick, leaving him with cuts on his face and in his mouth. *Luong*, 979 F. Supp. at 483.

309. HADAR AVIRAM & CHAD GOERZEN, FESTER: CARCERAL PERMEABILITY AND THE CALIFORNIA COVID-19 PRISON CRISIS (forthcoming 2024) (manuscript at 4-5, 18) (on file with author); *see also* Jenny E. Carroll, *Pretrial Detention in the Time of COVID-19*, 115 NW. U. L. REV. ONLINE 59, 81-86 (2020) (making a similar argument regarding jails).

310. AVIRAM & GOERZEN, *supra* note 309 (manuscript at 5).

311. If harsh conditions of confinement increased the deterrent effect of criminal law, some of these negative impacts on society might be counterbalanced by the benefits of reduced crime. But in fact, the most rigorous studies available suggest that harsher conditions increase rather than decrease recidivism. M. Keith Chen & Jesse M. Shapiro, *Do Harsher Prison Conditions Reduce Recidivism? A Discontinuity-Based Approach*, 9 AM. L. & ECON. REV. 1, 3 (2007); David Lovell, L. Clark Johnson & Kevin C. Cain, *Recidivism of Supermax Prisoners in Washington State*, 53 CRIME & DELINQUENCY 633, 649-50 (2007); Daniel P. Mears & William D. Bales, *Supermax Incarceration and Recidivism*, 47 CRIMINOLOGY 1131, 1151 (2009).

safety regulators can consider the impacts of incarcerated people's work on the broader market; paying incarcerated people higher wages both affords them fairer compensation and decreases their competitive threat to free-world workers in the same industries.

The public-health context is replete with other examples. During the pandemic, state public-health regulators in some jurisdictions prioritized prisoners for vaccination both because they were at extremely high risk of infection and death,[312] and because outbreaks propagated inside a prison or jail leaked out into the surrounding community and gravely ill prisoners occupied scarce ICU beds at free-world hospitals.[313] In other instances, regulators failed to apprehend the interconnectedness of a prison and its surrounding community, such as when the California Department of Public Health agreed to exclude infections reported during a devastating outbreak at Lompoc federal prison in determining when to permit Santa Barbara County's lockdown to ease, reducing local public-health officials' incentive to get involved in mitigation efforts at the facility.[314]

Unlike the Eighth Amendment, which fundamentally positions incarcerated people and staff as adversaries, free-world regulatory law may also offer greater opportunities for interest convergence between these unlikely allies, at least to the extent that regulatory activity does not seem poised to shrink the size of the carceral project and therefore threaten employment. Staff and prisoners work and live in the same physical sites. In some cases, as with environmental toxins and infectious diseases, their mere shared physical presence results in similar exposure.[315] In others, the work that staff do is made markedly harder and even

312. *See* Meghan Peterson, Forrest Behne, Beza Denget, Kathryn Nowotny & Lauren Brinkley-Rubinstein, *Uneven Rollout of COVID-19 Vaccinations in United States Prisons*, HEALTH AFFS. BLOG (Apr. 15, 2021), https://www.healthaffairs.org/do/10.1377/hblog20210413.559579/full [https://perma.cc/HEJ6-NNVR]; Saloner et al., *supra* note 36, at 603.

313. *See* Eric Reinhart & Daniel L. Chen, *Carceral-Community Epidemiology, Structural Racism, and COVID-19 Disparities*, 118 PROC. NAT'L ACAD. SCIS. 1, 1-2 (2021).

314. Abbie VanSickle, *How to Hide a COVID-19 Hotspot? Pretend Prisoners Don't Exist*, MARSHALL PROJECT (May 27, 2020, 6:00 AM), https://www.themarshallproject.org/2020/05/27/how-to-hide-a-covid-19-hotspot-pretend-prisoners-don-t-exist [https://perma.cc/72AE-3ECN] (contending that state officials justified their decision based on assertions that "inmates of state and federal prisons generally do not return to the counties in which they are incarcerated," and that "individuals in the Lompoc prison are not out in the community, so it's really a whole separate population").

315. For example, Dr. Charles Lee, President of the American College of Correctional Physicians, testified in support of prioritized vaccination of both incarcerated people and correctional and health-care staff at the December 19, 2020 meeting of the Advisory Committee on Immunization Practices. Ctrs. Disease Control & Prevention, *December 19, 2020 ACIP Meeting – Public Comment*, YOUTUBE, at 05:05 (Dec. 30, 2020), https://www.youtube.com/watch?v

sometimes more dangerous by regulatory failures; for example, conflicts over food consume a tremendous amount of officers' time and energy and can escalate into serious incidents.[316]

V. PROCEDURAL FEATURES OF FREE-WORLD LAW

As tools to ameliorate conditions in prisons and jails, free-world regulatory processes also offer significant procedural advantages over traditional constitutional litigation, as well as certain shortcomings. This Part considers some of them.[317]

A. Remedies

Due to the strictures of the PLRA and the federal judiciary's overwhelming deference to prison and jail administrators, remedial orders in conditions cases suffer from certain dramatic weaknesses that free-world regulatory law is better at avoiding.[318]

First, while constitutional prison law is averse to strict line drawing, precise prescription is in the regulatory heartland.[319] This distinction stems from their respective substantive requirements. Constitutional law tells the captain in charge of a prison's kitchen that if he knows that incarcerated people are routinely becoming ill from bacteria on poorly cleaned trays and fails to take any steps to address the problem, he may be liable.[320] Food-safety law, meanwhile, sets a specific threshold: trays must be washed using "water at a temperature of

=Lh5oytRL-Hc [https://perma.cc/6LDX-R6N9]. *See also* Don Thompson, *Study: Valley Fever Has Killed 3 Prison Workers, 103 Sickened*, FRESNO BEE (Feb. 6, 2014, 10:44 PM), https://www.fresnobee.com/news/health-care/article19518519.html [https://perma.cc/PW2Q-982R] (describing an illness that killed both prison staff and prisoners).

316. *See* Zullo, *supra* note 197, at 12-22 (discussing the range of problems reported by correctional officers regarding food service).

317. *See also supra* notes 293-294 and accompanying text.

318. Due to the challenges of obtaining a finding of liability, a significant proportion of remedial orders are actually consent decrees; some—thanks to the PLRA's limits on consent decrees—are private settlement agreements, unenforceable in federal court except through reopening of the litigation. 18 U.S.C. § 3626(c) (2018). Because they are negotiated to be acceptable to defendants, they can contain problematic exceptions or inadequate monitoring provisions.

319. One reason that statutory disability-rights claims may offer more purchase than constitutional claims in prisoners' rights litigation is that there are enforcing regulations to "add substance." Jamelia N. Morgan, *The Paradox of Inclusion: Applying* Olmstead*'s Integration Mandate in Prisons*, 27 GEO. J. ON POVERTY L. & POL'Y 305, 309 (2020).

320. *See, e.g.*, Odom v. Sielaff, No. CV-920571(DGT), 1995 WL 625786, at *4-5 (E.D.N.Y. Oct. 12, 1995).

at least 170 degrees Fahrenheit."[321] It also prescribes methods of testing and acceptable results: the water temperature must be verified using a "thermometer accurate to plus or minus two degrees Fahrenheit . . . convenient to the sink for frequent checks of water temperature," and the washing must "produce an average plate count per utensil surface examined of not more than 100 colonies, and free from coliform organisms."[322] To return briefly to a point made previously: this level of specificity is valuable because food-safety regulators, unlike correctional officers, are experts in how to effectively sterilize flatware—both in how hot water needs to be to kill bacteria, and also in procedures sufficient to ensure that kitchen workers indeed use water that hot.

Yet even once a violation is found in a constitutional prison-conditions case, courts still hesitate to tell defendants how to fix it with any exactitude. As the Supreme Court has repeatedly held, officials should be given "the first opportunity to correct the errors made in the internal administration of their prisons"; courts should not "dictat[e] precisely what course the State should follow," but rather "charge[] the Department of Correction with the task of devising a Constitutionally sound program" to address its violation.[323] Courts are not to micromanage, "becom[ing] . . . enmeshed in the minutiae of prison operations."[324] Specifically, the Supreme Court has admonished, lower courts are not to adopt past orders that have successfully resolved similar violations in subsequent cases, even subject to modification as appropriate; instead, defendants must have wide discretion to try whatever remedial approach they deem most suitable.[325]

Whatever the merits of this approach as a matter of "comity," it is not an ideal way to regulate.[326] Ordering carceral officials to take steps of their own choosing is a very efficient way to ensure that they are no longer subjectively deliberately indifferent. If they implement the steps in good faith, they are definitionally shielded from liability, at least until it becomes clear that their approach is not working. But it is a poor means of ensuring prompt improvement in the outcome. The food-safety inspector need not suffer such reticence. Her order instructs the captain—whether or not he believes these steps to be necessary and regardless of his preference for an alternate approach—to repair or replace the

321. N.Y. Comp. Codes R. & Regs. tit. 10, § 14-1.112 (2021).

322. *Id.*

323. Lewis v. Casey, 518 U.S. 343, 362 (1996) (citations and quotation marks omitted).

324. *Id.*

325. *Id.* at 362-63.

326. *Id.* at 362. Plaintiffs' lawyers often have input on the contents of a remedial order, and regulatory processes can involve negotiated rulemaking or settlements that give regulated entities (would-be defendants in litigation) some say. But there is nonetheless a fundamental difference between oversight by an entity that owns its expertise and institutional competence, like a regulatory body, and oversight by an entity that disclaims them, like a court.

kitchen's boiler and test it using a calibrated thermometer to ensure that, upon reinspection, it complies with the standard applicable to every other food-service facility and delivers to the dishwasher water heated to above 170 degrees.[327]

Second, free-world regulatory law is preventative, while constitutional prison law is, at least under the PLRA, definitively not. In a range of arenas, regulatory law requires measures not strictly necessary to mitigate a particular harm; instead, it overcorrects, to create a reasonable buffer of protection and account for the possibility of marginal noncompliance. But the PLRA requires that courts entering any form of prospective relief, even by the defendants' consent, find that it is "narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right."[328] This treble "need-narrowness-intrusiveness" formulation commonly operates to bar measures that are preventative even in the slightest.[329] Given the complexity of reforming institutions that are large, rigid, and opaque, this limitation can prove a serious obstacle to meaningful change.

Relatedly, regulatory schemes are also much better able to address problems preemptively. Supreme Court doctrine has recognized that prison and jail conditions creating a substantial risk of serious harm can violate the Constitution even when the harm has not yet occurred.[330] However, there are real limits to this avenue, given how challenging it is to show defendants' subjective awareness—and sometimes even the objective threat—of a risk that has not yet materialized. Free-standing regulatory law is preferable to private rights of action in situations where it is hard to predict who will be harmed and especially when technical expertise is necessary to appreciate the risk of harm.

In certain cases involving decisions by carceral officials that carry long-term consequences, there is also a more fundamental problem of standing. Consider, for example, the construction of a prison on land with valley-fever spores in the

327. Even if the food-safety inspector grants a variance, the terms of the variance will precisely delimit the acceptable alternative.

328. 18 U.S.C. § 3626(a)(1)(A) (2018).

329. *See, e.g.*, Benjamin v. Fraser, 343 F.3d 35, 41, 53 (2d Cir. 2003) (vacating a provision that beds be placed so that incarcerated people's heads were at least six feet apart while sleeping in order to prevent disease transmission based on expert evidence that "droplets . . . remain airborne for at least three feet but generally not as far as 6 feet" (quoting Benjamin v. Fraser, 156 F. Supp. 2d 333, 349 (S.D.N.Y. 2001))); Maynor v. Morgan Cnty., No. 5:01-cv-851-AKK, 2018 WL 4184574, at *4, *7 (N.D. Ala. Aug. 31, 2018) (finding that the failure to refer detainees showing signs of serious mental illness at intake created a substantial risk of serious harm but the requirement to do so, which "squarely and directly address[ed] the inadequacies," failed to satisfy the need-narrowness-intrusiveness requirement).

330. Helling v. McKinney, 509 U.S. 25, 33-37 (1993).

soil.[331] These spores will pose a threat to the people—particularly the people of color[332]—who are subsequently incarcerated there, but these people would struggle to assert standing to challenge the prison's construction. Indeed, they would likely not have any way of knowing its relevance to them or of appreciating the future harms that would befall them. By the time they are suffering from potentially fatal lung infections, it will be too late.[333]

The constitutional doctrine of deliberate indifference is a particularly poor fit for challenging the failure to take preventative measures that would protect incarcerated people against unforeseen future harms like the next pandemic or environmental disaster.[334] Prisons and jails are often sited at the "edge of civilization," where they are particularly vulnerable to natural disasters.[335] Incarcerated people are immobilized; they cannot fend for themselves as wildfire approaches or floodwaters rise.

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331. *See* Plata v. Brown, 427 F. Supp. 3d 1211, 1214-15 (N.D. Cal. 2013).

332. *Id.* at 1214-16 (recognizing medical evidence that "African-Americans, Filipinos, people with weak immune systems . . . and those with chronic illnesses such as diabetes and chronic lung disease" are at a higher risk of developing severe disease).

333. Once the harm has materialized or is imminent, various procedural obstacles—including the PLRA's exhaustion requirement, 42 U.S.C. § 1997e(a) (2018); restriction on the duration of preliminary injunctive relief, 18 U.S.C. § 3626(a)(2) (2018); and prohibition on entering a prisoner-release order until a defendant "has had a reasonable amount of time to comply" with a "previously entered . . . order for less intrusive relief," 18 U.S.C. § 3626(a)(3)(A) (2018), and without the approval of a three-judge court, *id.* § 3626(a)(3)(C)—also make emergency relief difficult to obtain.

334. One of the benefits of regulatory expertise is its ability to foresee the possibility of future catastrophes. To the average American (and to the average prison or jail official), the COVID pandemic was shocking. To public-health experts, its general contours were unsurprising. *See Playbook for Early Response to High-Consequence Emerging Infectious Disease Threats and Biological Incidents*, EXEC. OFF. PRESIDENT U.S. 9 (2016), https://s3.documentcloud.org/documents/6819268/Pandemic-Playbook.pdf [https://perma.cc/XE4B-3HV4] (identifying the novel coronavirus pandemic as a Tier 1 risk).

335. Brian Edsall, *In Natural Disasters, Are Inmates Expendable?*, CRIME REP. (Oct. 3, 2017), https://thecrimereport.org/2017/10/03/in-natural-disasters-are-inmates-expendable [https://perma.cc/7W34-NRDY] (reporting that a jail destroyed by extreme flooding was rebuilt in the same location); *see also* Yolanda Martinez, Anna Flagg & Andrés Caballero, *Prisons and the Deluge*, MARSHALL PROJECT (Oct. 20, 2017, 3:00 PM), https://www.themarshallproject.org/2017/10/20/prisons-and-the-deluge [https://perma.cc/8L7Q-WQAL] (mapping approximately 20,000 incarcerated people who were evacuated from flood zones during hurricanes occurring over the course of a single month in Texas, Florida, and Puerto Rico).

In 2005, Hurricane Katrina left abandoned jail detainees drowning in the Orleans Parish Prison.[336] Despite notice of a serious flood risk from a federally mandated disaster-relief report, no one had taken responsibility for producing and implementing responsive policies, leading to plans that were unclear or totally inadequate.[337] Chaos resulted. Unfortunately, more recent examples abound.[338] In considering litigation responses to such calamities, Ira Robbins recognized

336. *See* Nat'l Prison Project, *Abandoned & Abused: Orleans Parish Prisoners in the Wake of Hurricane Katrina*, AM. CIV. LIBERTIES UNION 9 (Aug. 10, 2006), https://www.aclu.org/files/pdfs/prison/oppreport20060809.pdf [https://perma.cc/VP3N-9XBT].

337. *See id.* at 23, 25 (reporting that the Sheriff's attorney responded to a public-records request by stating that "[a]ll documents re[garding] evacuation plans were underwater – can't find any now" (second alteration in original)). In the aftermath of this event, there was much deflection of responsibility. *See id.* at 89 (reporting that the Sheriff's attorney stated that obtaining the fire-evacuation plan would require breaking into the locked file cabinets of the fire-safety officer, who had disappeared); Melissa Anne Savilonis, Prisons and Disasters 27 (Jan. 1, 2014) (Ph.D. dissertation, Northeastern University), http://melissasurette.com/wp-content/uploads/2015/08/Prisons-and-Disasters.pdf [https://perma.cc/2DNT-D2DL] (describing the "misconception" by federal agency officials that emergency planning for correctional facilities will be "handled by another agency"). For a regulatory reform proposal suggesting the creation of "vulnerable populations coordinators" whose ambit would include prisoners, see Sharona Hoffman, *Preparing for Disaster: Protecting the Most Vulnerable in Emergencies*, 42 U.C. DAVIS L. REV. 1491, 1541-46 (2009).

338. When Hurricane Harvey hit Texas in 2017, some prisoners were evacuated, but others were left behind in state and federal facilities without running water, forced to defecate in trash bags. John Washington, *After Harvey, Texas Inmates Were Left in Flooded Prisons Without Adequate Water or Food*, NATION (Oct. 13, 2017), https://www.thenation.com/article/archive/after-harvey-texas-inmates-were-left-in-flooded-prisons-without-adequate-water-or-food [https://perma.cc/P4PG-DKX7]. In the depths of winter 2019, malfunctioning power and heat systems left people in freezing cells for over a week at a federal jail in Brooklyn; those who relied on electricity to run breathing machines or request prescription refills through kiosks were in dire straits. Annie Correal, Andy Newman & Christina Goldbaum, *Protesters Try to Storm Brooklyn Jail with Little Heat or Electricity*, N.Y. TIMES (Feb. 2, 2019), https://www.nytimes.com/2019/02/02/nyregion/brooklyn-federal-jail-heat.html [https://perma.cc/8VJ7-XTVG]. Increasingly frequent and severe heat waves have led to deaths, especially in humid parts of the country. *See* Maurice Chammah, *"Cooking Them to Death": The Lethal Toll of Hot Prisons*, MARSHALL PROJECT (Oct. 11, 2017, 7:00 AM), https://www.themarshallproject.org/2017/10/11/cooking-them-to-death-the-lethal-toll-of-hot-prisons [https://perma.cc/M8ZP-7RDX]; Daniel W.E. Holt, *Heat in US Prisons and Jails: Corrections and the Challenge of Climate Change*, SABIN CTR. FOR CLIMATE CHANGE L. 33-64 (Aug. 2015), https://web.law.columbia.edu/sites/default/files/microsites/climate-change/holt_-_heat_in_us_prisons_and_jails.pdf [https://perma.cc/W6P9-WU73] (discussing regulatory bases for addressing extreme heat in carceral facilities, including the enforcement of disability law and workplace-safety law, standards for congregate-living facilities, and mandatory environmental-impact analyses).

daunting obstacles to constitutional challenges to carceral officials' failure to engage in emergency planning.[339] By contrast, free-world disaster law can mandate and ensure oversight of appropriate emergency planning, and it permits outside intervention when prison and jail officials fail to protect incarcerated people in times of crisis.[340]

Third, regulatory remedies are more durable. Due to the PLRA's termination provisions, injunctive relief in prison-conditions cases often comes to an abrupt end just as it is starting to work.[341] Prospective relief is presumptively subject to termination after two years (a rather short time for institutional reform to occur), absent a written finding by the court that the record reflects that the relief "remains necessary to correct a current and ongoing violation."[342] This, courts have concluded, is not "broad enough to include the persistence of practices that have led to violations of federal law in the past,"[343] even if the court finds that there is a "substantial and very real danger that a violation of rights will follow the termination of the injunction,"[344] or that "government officials are 'poised' to resume a prior violation of federal rights."[345] Moreover, courts may leave the pro-

339. Ira P. Robbins, *Lessons from Hurricane Katrina: Prison Emergency Preparedness as a Constitutional Imperative*, 42 U. MICH. J.L. REFORM 1, 25-28 (2008).

340. *See* Savilonis, *supra* note 337, at 23-25, 64-76; William Omorogieva, *Prison Preparedness and Legal Obligations to Protect Prisoners During Natural Disasters*, SABIN CTR. FOR CLIMATE CHANGE L. 21-33, 51-58 (May 2018), http://columbiaclimatelaw.com/files/2018/05/Omorogieva-2018-05-Prison-Preparedness-and-Legal-Obligations.pdf [https://perma.cc/AWH9-2E94]. Even when prisons and jails have not taken adequate steps to prepare for the impacts of disasters on those they confine, they may already include incarcerated people in emergency-management plans as laborers. J. Carlee Purdum & Michelle A. Meyer, *Prisoner Labor Throughout the Life Cycle of Disasters*, 11 RISKS, HAZARDS & CRISIS PUB. POL'Y 296, 313-15 (2020); Jordan Carlee Smith, Inmate Populations in a Disaster: A Labor Force, a Vulnerable Population, and a Hazard 37-41 (Dec. 2016) (M.A. thesis, Louisiana State University and Agricultural and Mechanical College), https://digitalcommons.lsu.edu/cgi/viewcontent.cgi?article=5492&context=gradschool_theses [https://perma.cc/2Y4M-58VP].

341. Before the passage of the PLRA, and as is still the case in many other contexts, permanent injunctions were generally of indefinite duration. *See* Schlanger, *supra* note 8, at 543.

342. 18 U.S.C. § 3626(b)(3) (2018); *see also* Schlanger, *supra* note 8, at 543-46 (discussing efforts to stipulate around the termination provision). A motion to terminate prospective relief prompts an automatic stay on a timeline (thirty days, extendable once) that can make it nearly impossible for the parties to prepare and for a court to hear and consider evidence. 18 U.S.C. § 3626(e) (2018).

343. Cason v. Seckinger, 231 F.3d 777, 783 (11th Cir. 2000).

344. *Id.* (quoting Parrish v. Ala. Dep't Corr., 156 F.3d 1128, 1129 (11th Cir. 1998)).

345. *Id.* at 784 (quoting H.R. REP. No. 105-405, at 133 (1997) (Conf. Rep.)). Note the contrast between this standard—which places the onus on plaintiffs and seems to require them to prove a certainty of repetition even when it is clear that the coercive force of the court's order

visions of an injunction in place following a motion to terminate only after making "specific, provision-by-provision" findings that each aspect of the order "currently complies with the needs-narrowness-intrusiveness requirements, given the nature of the current violations."[346] So, even an injunction that remains necessary due to officials' failure to correct egregious problems will have to be trimmed.

By contrast, regulatory processes are in most cases ongoing or at least periodic. For example, telecommunications providers are required to file frequent compliance reports with the FCC,[347] and the Commission's regulations remain in effect at all times, not only for a short period following a finding of egregious consumer abuse. Food safety inspectors do not wait for a patron to come down with food poisoning and file a complaint but instead visit all licensed establishments. Even when a restaurant has a sterling record, it is not free to adopt its own approach to dishwashing. The water must still be 170 degrees.

Fourth and finally, regulatory processes—rulemaking, at least, and sometimes enforcement—often have broad applicability. Telephone rate-setting by a public-utilities commission applies across a jurisdiction, and a revision to a CMS rule about Medicaid or Medicare eligibility applies across the country. Broad regulatory application is presumptive, while differential treatment, such as through a waiver, requires justification. By contrast, there are huge obstacles to obtaining broadly applicable relief in prison-conditions litigation. The disaggregation of carceral authority means that it is impossible to obtain relief for all state prisoners in the country or for all county-jail detainees in a state in one sweep, because the relevant defendants are different.[348] Even in lawsuits regarding conditions or practices existing across a state prison system, it can be hard to obtain universally applicable relief due to the challenges of obtaining statewide class certification.[349]

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is what caused the violation to abate—and the voluntary cessation exception to mootness—which places a "heavy burden" on a defendant who has changed course volitionally to show that it is "absolutely clear" that the violation will not recur. Friends of the Earth, Inc. v. Laidlaw Env't Servs., 528 U.S. 167, 189 (2000) (quoting United States v. Concentrated Phosphate Exp. Ass'n, 393 U.S. 199, 203 (1968)).

346. *Cason*, 231 F.3d at 784, 785.

347. *See* COMMON CARRIER FILING REQUIREMENTS—INFORMATION FOR FIRMS PROVIDING TELECOMMUNICATIONS SERVICES, FED. COMMC'NS COMM'N (May 18, 2021), https://www.fcc.gov/reports-research/guides/common-carrier-filing-requirements-information-firms-providing-telecommunications-services [https://perma.cc/T8TE-B255].

348. *See* Littman, *supra* note 208, at 870 (reporting that the United States has nearly 3,000 separately governed jail systems).

349. In at least one recent case brought by a team of highly skilled litigators from the ACLU National Prison Project and Rosen, Biden, Galvan & Grunfeld, a court denied certification of a statewide health-care class and subclass on commonality grounds. Sabata v. Neb. Dep't of

Many of the limitations of constitutional prison-conditions litigation discussed here—unlike those considered in the preceding Part—are not inherent but were instead instituted by Congress in the mid-1990s in the PLRA. But procedural cramping (in some cases, strangulation) is less feasible when law is transcontextual. Throwing up hurdles is harder, as a matter of both drafting and politics, when incarcerated people are only a small subset of the people to whom the substantive law applies,[350] when they need not be formally involved in the regulatory process,[351] and when regulatory activity is not centralized in a federal judicial stream coalescing in the Supreme Court[352] but rather takes place primarily under the auspices of a diverse array of federal, state, and local agencies.

B. Sites and Agents

Regulatory processes and regulators likewise have certain advantages over courts and litigators as sites and agents of regulation affecting prisons and jails. They also have some notable disadvantages, which this Part considers as well.

Some advantages are logistical. Regulators are everywhere—public-health officials are assigned to all of Texas's 252 counties, whereas it is unlikely that any lawyers handling prison-conditions cases live in or even near most of its smallest

Corr. Servs., 337 F.R.D. 215, 261-68 (D. Neb. 2020). In other cases, class certification has been granted and affirmed on interlocutory appeal. *See, e.g.*, Parsons v. Ryan, 289 F.R.D. 513 (D. Ariz. 2013), *aff'd*, 754 F.3d 657 (9th Cir. 2014), *reh'g en banc denied*, 784 F.3d 571 (9th Cir. 2015) (mem.). Perhaps because statewide prisoner class actions are so tremendously resource intensive, especially since *Wal-Mart Stores v. Dukes*, 564 U.S. 338 (2011), they have simply not been attempted in many jurisdictions.

350. *Cf.* 18 U.S.C. § 3626(g)(2) (2018) (limiting the applicability of the PLRA's restrictions on remedies to "civil proceeding[s] arising under Federal law with respect to the . . . effects of actions by government officials on the lives of persons confined in prison").

351. *Cf.* 42 U.S.C. § 1997e(a) (2018) (limiting the applicability of the PLRA's exhaustion requirement to actions brought by prisoners).

352. In most state court systems, state constitutional analogues to the Eighth Amendment and due-process clauses are interpreted in line with federal precedent, although there are some deviations favorable to prisoners. *See, e.g.*, *In re* Pers. Restraint of Williams, 198 Wash. 2d 342, 362 (2021) (holding that "in the context of prison conditions, which includes prisoners' health and welfare, Washington's cruel punishment clause provides greater protection than its federal counterpart"). Some states have their own PLRA equivalents as well. *See* Alexander Volokh, *The Modest Effect of* Minneci v. Pollard *on Inmate Litigants*, 46 AKRON L. REV. 287, 315-17 (2013).

jurisdictions.[353] Unlike prisoners' rights lawyers, they are publicly funded.[354] Regulators also have access to prison facilities. Indeed, they are entitled to routine entry into and inspection of prisons and jails, and to information that correctional officials often refuse to disclose to the public.[355] There are problems with whitewashing by prison and jail officials, but these pale in comparison to the obstacles litigators face during pre-filing discovery in a conditions-of-confinement case, where they often resort to a mix of handwritten correspondence with incarcerated clients, long drives to rural facilities, and public records requests.[356] Even in the throes of litigation, getting lawyers and experts reasonable

353. Dramatic disparities in litigation volume exist both within states and between them. Texas incarcerates about three times as many people as does New York, but the Civil Rights Litigation Clearinghouse, which catalogs most major counseled impact litigation in this arena, contains about three times as many New York cases, and lawyers involved in such cases, as Texas cases and lawyers. C.R. LITIG. CLEARINGHOUSE (Oct. 19, 2021), https://www.clearinghouse.net [https://perma.cc/ML2B-JYHQ]. Although pro se prisoners in New York do file civil-rights lawsuits more frequently than their counterparts in Texas, the disparity is not nearly as large. *See* Margo Schlanger, *Prison and Jail Civil Rights/Conditions Cases: Longitudinal Statistics* (U. Mich. L. & Econ. Rsch. Paper, 2021), https://ssrn.com/abstract=3834658 [https://perma.cc/LPC8-CQ6V] (reporting that in 2018, there were 7.7 civil-rights cases filed per 1,000 incarcerated people in Texas, as compared to 17.1 cases filed per 1,000 incarcerated people in New York). On other factors that could be at play in sustaining more or less vibrant civil rights "ecosystems," see Joanna C. Schwartz, *Civil Rights Ecosystems*, 118 MICH. L. REV. 1539, 1584-90 (2020). Local regulators in small communities may be less socially and politically insulated and therefore less likely to challenge prison and jail officials.

354. *See* Omnibus Consolidated Rescissions & Appropriations Act of 1996, § 504(a)(15), Pub. L. No. 104-134, 110 Stat. 1321, 1321-53, 1321-55 (prohibiting the use of Legal Services Corporation funding for the representation of incarcerated people).

355. *See, e.g.*, IOWA ADMIN. CODE r. 661-200.4 (2021) (authorizing the fire marshal to conduct inspections at any time and without notice).

356. *See* Gregory Sisk, Michelle King, Joy Nissen Beitzel, Bridget Duffus & Katherine Koehler, *Reading the Prisoner's Letter: Attorney-Client Confidentiality in Inmate Correspondence*, 109 J. CRIM. L. & CRIMINOLOGY 559, 574-77 (2019) (discussing the "vital importance" of legal mail for prisoners in establishing and maintaining attorney-client relationships, given the remote locations of many prisons and limits on confidential telephone calls); Matthew Cate & Robert Weisberg, *Beyond Litigation: A Promising Alternative to Resolving Disputes Over Conditions of Confinement in American Prisons and Jails*, STAN. CRIM. JUST. CTR. 6 (Dec. 2014), https://law.stanford.edu/wp-content/uploads/2015/10/Beyond-Litigation-Cate-and-Weisberg-Final.pdf [https://perma.cc/7WKG-NY99] (describing the "journey" of pre-filing investigation of a prison of jail conditions claim as "typically start[ing] with correspondence, inmate visits, and gathering documents through requests for public records," and observing that it is "inefficient at best"); Sarah Geraghty & Melanie Velez, *Bringing Transparency and Accountability to Criminal Justice Institutions in the South*, 22 STAN. L. & POL'Y REV. 455, 458-63 (2011) (describing obstructionist responses of prison officials to requests for public records related to deaths in custody).

access to anywhere beyond a visitation booth can be challenging.[357] Occasionally, judges themselves visit facilities, to very powerful effect, but most do not.[358]

Additionally, free-world regulatory processes can involve—indeed, they can be prompted by—allies of incarcerated people on the outside,[359] often without concerns of Article III standing and issues of class representation. Unlike those behind bars, these people and organizations have access to unmonitored communications, can do internet research, and, perhaps most importantly, are free to organize without fear of reprisal. Constitutional prison-conditions claims, meanwhile, can be brought only by currently incarcerated plaintiffs.[360]

A primary example of a regulatory process being driven in this fashion is the campaign to demand that the FCC regulate prison phone rates. In this instance, free-world allies' advocacy took the form of a petition for rulemaking before a federal agency.[361] But there are a range of other avenues for initiating regulatory activity, dependent on the applicable administrative procedure act (federal or state) and enabling statute. In Florida, for example, state law requires the Department of Health, "upon request of . . . any three responsible resident citi-

357. This record-building is also wildly asymmetric. Defendant officials have total access to all relevant documents, sites, and people (including plaintiffs), while plaintiffs' attorneys' access is severely constrained; they sometimes cannot show discovery to their own clients due to attorneys'-eyes-only protective orders.

358. *See, e.g.*, Henderson v. Thomas, 913 F. Supp. 2d 1267, 1308 (M.D. Ala. 2012); Braggs v. Dunn, 257 F. Supp. 3d 1171, 1210, 1239, 1243 n.71, 1263 (M.D. Ala. 2017).

359. *Cf.* Maggie McKinley, *Petitioning and the Making of the Administrative State*, 127 YALE L.J. 1538, 1619 (2018) (offering a historical account of the function of the administrative state "in facilitating the participation of individuals and minorities in lawmaking").

360. They can also be brought by a distinctive, quasi-regulatory entity: a protection and advocacy (P&A) organization. Each state has one; in exchange for federal funding, the P&A has broad authority to protect people with disabilities, including developmental disabilities and mental illness, in the state. *See* 42 U.S.C. §§ 10801-10851 (2018). Their enabling statutes give them very broad investigatory powers, *e.g.*, 45 C.F.R. § 1326.25 (2020), and they enjoy relaxed associational-standing requirements, permitting them to bring both constitutional and ADA claims on behalf of their constituents, *see Or. Advoc. Ctr. v. Mink*, 322 F.3d 1101, 1109-13 (9th Cir. 2003). Although Congress left ambiguous the scope of a P&A's coverage of incarcerated people (did it include people receiving "outpatient" treatment, sentenced prisoners in county and city jails, and detained juveniles?), HHS promulgated regulations that "clarif[ied] some confusion in the statute" by "expanding the definition" to cover people in all detention facilities, regardless of "whether they have been convicted of a criminal offense or not, and whether the facility is municipal, State or Federal." 42 U.S.C. § 10802(4)(B)(i)(III) (2018); Requirements Applicable to Protection and Advocacy of Individuals with Mental Illness, 62 Fed. Reg. 53548, 53552 (Oct. 15, 1997) (codified at 42 C.F.R. pt. 51 (2020)).

361. *See supra* notes 154-158 and accompanying text.

zens," to conduct a sanitation examination and, as appropriate, issue an abatement order.[362] Once a regulatory process is underway, notice and comment can offer a powerful opportunity for engagement; for instance, when the Census Bureau was considering a regulatory change that would end prison gerrymandering, about 78,000 people submitted comments, virtually all of them in support.[363]

When a regulator fails to act—say, to conduct an investigation—despite a duty to do so, or abuses its discretion, mandamus or another form of judicial review can be initiated.[364] The New York Health Commissioner's decision to deprioritize incarcerated people for COVID vaccination, for example, was successfully challenged as arbitrary and capricious in a state court mandamus proceeding.[365] Perhaps more importantly, given that much regulatory activity is discretionary, incarcerated people's allies can create political pressure on free-world regulators to act. Community engagement in regulatory processes can not only promote improvements in carceral facilities, but also stimulate power-building through "a more inclusive, participatory, and productive form of democratic contestation."[366]

There is a serious downside to decentering incarcerated people as protagonists in ameliorating their own conditions, but litigation is so onerous, dangerous (given the risk of retaliation), and often ineffective that alternatives are sorely needed.[367] Moreover, people in prisons and jails can themselves be involved in regulatory processes. When the California Public Utilities Commission had a public hearing on a proposal to cap rates for intrastate prison and jail phone and video calls, it announced that it would take steps to allow incarcerated callers to

362. FLA. STAT. § 386.02 (2021); *see also id.* § 381.006(6) (mandating that the Department of Health develop a program for environmental health in prisons); *id.* § 120.69(1)(b) (authorizing any interested resident to file a relator petition for enforcement of agency action).

363. Final 2020 Census Residence Criteria and Residence Situations, 83 Fed. Reg. 5525, 5527-28 (Feb. 8, 2018). By contrast, only four comments opposed counting census respondents at their previous home address instead of their place of incarceration. *Id.* at 5528.

364. *See, e.g.*, N.Y. C.P.L.R. 7801, 7803 (MCKINNEY 2021).

365. *In re* Holden v. Zucker, No. 801592/2021E, 2021 WL 2395292, at *12 (N.Y. Sup. Ct. Mar. 30, 2021).

366. K. SABEEL RAHMAN, DEMOCRACY AGAINST DOMINATION 142 (2017).

367. *See* James E. Robertson, *"One of the Dirty Secrets of American Corrections": Retaliation, Surplus Power, and Whistleblowing Inmates*, 42 U. MICH. J. L. REFORM 611, 648 (2009) (suggesting that retaliation "may well be the normative response when an inmate files a grievance," which is a precondition to litigation).

comment, and to do so safely: incarcerated callers would not be required to provide their names or locations and would be moved to the front of the queue.[368] And beyond rulemaking, regulators could create accessible complaint processes to ensure that incarcerated people are able to report everything from broken smoke detectors to moldy meat to officials outside the corrections department or sheriff's office. In addition to allowing incarcerated people to trigger investigations and remedial action, particularly in emergency situations, regulators conducting routine oversight activities could affirmatively seek out input from incarcerated people—a food inspector could not only taste the meal being served on the day he is visiting a jail, but also ask randomly selected detainees to complete anonymous surveys about their meals.

The fact that free-world regulation of prisons and jails is transcontextual also has procedural value. In contrast to external but corrections-specific oversight,[369] regulation stands a better chance of avoiding institutional capture. Put differently and more concretely, the involvement of a public-health agency in regulating a prison's infection-control program is valuable not only because the health officer works within a frame of reference that includes community-health approaches to similar issues and can articulate the implications of inadequate responses for people outside the prison's walls, but also because she is used to the access she receives in free-world schools and retirement homes and not too familiar with carceral officials.[370] Domain rather than site specificity does mean that regulators may not be as attuned to the distinctive features of carceral institutions—like strategies for ensuring that sharp objects do not go missing in a kitchen—but they are also less likely to accept the status quo behind bars.[371] This

368. *Rulemaking Considering Regulation of Telecommunication Services Used by Incarcerated People*, CAL. PUB. UTILS. COMM'N, https://www.cpuc.ca.gov/industries-and-topics/internet-and-phone/rulemaking-considering-regulation-of-telecommunication-services-used-by-incarcerated-people [https://perma.cc/V5XZ-B9FJ].

369. These institutions vary in form, authority, and value between jurisdictions, and do not exist at all in many states. *See* Michele Deitch, *Independent Correctional Oversight Mechanisms Across the United States: A 50-State Inventory*, 30 PACE L. REV. 1754 (2010). The prison- and jail-specific oversight agencies that do exist rarely have "formal and comprehensive" authority, and many are not empowered to impose sanctions. *See id.* at 1762.

370. *Cf.* Michele Deitch, *But Who Oversees the Overseers?: The Status of Prison and Jail Oversight in the United States*, 47 AM. J. CRIM. L. 207, 254 (2020) (observing that sheriffs "are often involved in the process of writing [the] standards" with which oversight agencies assess their compliance).

371. Free-world regulators also stand a better chance than corrections-specific oversight mechanisms of avoiding targeted political attacks and even elimination. *See id.* at 269-70 (describing such attacks on corrections-specific oversight agencies).

benefit will be undermined, however, to the extent that a regulatory agency itself creates a silo for staff members who cover prisons and jails.[372]

At first blush, it might appear that courts' transsubstantive dockets would likewise insulate them against this sort of capture. But although federal district judges have broad jurisdiction, they refer most of their prisoner cases to magistrate judges, of whose dockets they take up a significant proportion.[373] In both district courts and courts of appeals, moreover, most prisoner cases — absent appointment of counsel, which is rare — are processed by dedicated staff attorneys.[374] In courts, as in regulatory agencies, the nitty-gritty of institutional design matters.

There is one final reason to prefer that prisons and jails be regulated by entities other than federal courts: if we were to take seriously the view, repeatedly expounded by courts,[375] that running carceral institutions is an executive and not a judicial function, then who more appropriate to regulate them in the first instance than (other) executive agencies? As the Supreme Court has long acknowledged, even when prison administrators are "'experts' only by act of Congress or of a state legislature," and not because of substantive expertise in the relevant field, judicial deference is nonetheless accorded based on separation-of-powers considerations.[376] Free-world regulators fit the bill in both ways: they are subject-matter experts who belong to the right branch of government.

That all said, court-based conditions regulation has — at least at first glance — two obvious advantages: contempt power and judicial independence from political pressure through lifetime appointment (in the federal system). However, the judicial contempt power is less valuable than it might appear. Courts will in many cases remain available as enforcement backstops in cases of noncompliance.[377] And, for complex reasons well beyond the scope of this Article, contempt

372. *See supra* notes 202-203 and accompanying text.

373. *See* Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1590 (2003) (reporting that prisoner cases consume up to half of magistrates' time in districts with the largest prisoner caseloads).

374. *See* Katherine A. MacFarlane, *Shadow Judges: Staff Attorney Adjudication of Prisoner Claims*, 95 OR. L. REV. 97, 105-12 (2016) (discussing the broad scope of delegation of adjudicative tasks to nonjudicial staff in prisoner cases).

375. *See, e.g.*, Callahan v. Fed. Bureau of Prisons, 965 F.3d 520, 524 (6th Cir. 2020); Pesci v. Budz, 935 F.3d 1159, 1165 (11th Cir. 2019); *see also* Cal. First Amend. Coal. v. Woodford, 299 F.3d 868, 877-78 (9th Cir. 2002) (deference founded in separation-of-powers concerns does not apply with full force when the challenged prison policy is "centrally concerned with restricting the rights of outsiders rather than prisoners").

376. Bell v. Wolfish, 441 U.S. 520, 548 (1979).

377. An enforcement action brought by a county health inspector against a sheriff who has violated her abatement order avoids many of the substantive and procedural pitfalls that constitutional

findings — even to the tune of millions of dollars in fines — do not seem to prevent recalcitrance by correctional officials.[378]

Regulators' relative lack of political insulation is a more serious issue, though, and indeed may account for some of the failures of regulation discussed in Sections III.B and C.[379] Concerns about blowback could well prevent a public-health inspector from raising a fuss about sanitation at a prison or jail. Whether she works for a state or county agency may matter a great deal in determining not only what legal authority she has, but also how bold she is willing to be. When the regulatory and carceral agencies are at the same level of government, professional courtesy will be at its zenith and disputes are likely to be resolved informally. Federal judges, though they may be reluctant to spend years, if not decades, knee-deep in conditions litigation, are better protected from such pressures.

But politics can cut both ways. The opportunity for federal, state, and local regulators to intervene in the policymaking of correctional officials can, at least in some cases, be fruitful. With different political and fiscal incentives, they may be inclined to check the authority of prison and jail administrations. For example, a decades-long practice by a number of Alabama sheriffs of pocketing unspent jail food funds for personal use was fairly resilient against constitutional assault; a federal court initially prohibited one sheriff from converting the funds

prison-conditions lawsuits encounter. *See, e.g.*, COLO. REV. STAT. § 25-1-514 (2021) (authorizing public-health directors to bring abatement actions). That said, suits by one agency against another are not themselves free of complexities. *See* Va. Off. for Prot. & Advoc. v. Stewart, 563 U.S. 247, 256-58 (2011) (is a suit by one state agency against another necessarily precluded by sovereign immunity?); W.O. v. Beshear, 459 F. Supp. 3d 833, 837-39 (E.D. Ky. 2020) (when does one state official have standing to assert the federal rights of constituents against another state official?); *see also* SEC v. Fed. Lab. Rels. Auth., 568 F.3d 990, 996-98 (D.C. Cir. 2009) (Kavanaugh, J., concurring) (is a dispute between two federal agencies justiciable?).

378. *See, e.g.*, Jensen v. Pratt, No. CV-12-00601-PHX-ROS, 2021 WL 3828502, at *10-11, 19 (D. Ariz. July 16, 2021) (finding substantial noncompliance with a prior settlement after two findings of contempt and the imposition of over $2.5 million in sanctions, rescinding the prior settlement, and setting the case for trial). Courts also have, at least in theory, the extraordinary equitable power to place prisons and jails into receivership. This was more common in conditions litigation's heyday, *see* Plata v. Schwarzenegger, 603 F.3d 1088, 1093 (9th Cir. 2010), but now almost never occurs. Since the passage of the PLRA, a single department's medical-care system, *id.* at 1090, and a few jails, *see, e.g.*, Order Appointing Receiver, Harper v. Bennett, No. 1:04-cv-1416-MHS (N.D. Ga. July 14, 2004), https://www.clearinghouse.net/chDocs/public/JC-GA-0023-0014.pdf [https://perma.cc/P58M-KNNR], have been placed into receivership.

379. *See* David M. Konisky & Manuel P. Teodoro, *When Governments Regulate Governments*, 60 AM. J. POL. SCI. 559, 559 (2016) (advancing "a *political* theory of regulation, in which the ultimate effect of regulatory policy turns not on the regulator's carrots and sticks, but rather on the regulated agency's political costs of compliance with or appeal against the regulator, and the regulator's political costs of penalizing another government").

in light of the resulting substandard food at the jail, but eventually—after finding two holders of the office in contempt and jailing one of them—withdrew the prohibition because plaintiffs could not show that it was necessary to prevent an ongoing constitutional violation.[380] After it became a national embarrassment and drew the ire of local taxpayers, the state comptroller made quick work of it under her authority to prescribe the form affidavit that sheriffs completed to request state "feed bill" funds on a monthly basis. She amended the language to include an attestation that the funds would be "used only for the appropriated purpose: 'food for prisoners in the county jail.'"[381]

Even when there is a true intragovernmental conflict, such as between a state commissioner of corrections and a state health officer, political dynamics may well cut in favor of remedial action; it is not hard to imagine that a governor might be more receptive to an argument when it is advanced by a member of her cabinet than when it is presented in litigation. Given the dismal baseline, the upside possibility that political pressure on regulators will induce them to enact meaningful reform outweighs the downside risk that political pressure will force them to take the same hands-off approach that courts do.

VI. NORMATIVE FEATURES OF FREE-WORLD LAW

As the preceding Parts argued, for those who want to make prisons and jails more humane and more rehabilitative, there are real benefits to turning attention and energy toward the robust and inclusionary free-world regulation of incarceration, as well as significant hurdles to overcome. But to those who envision a world without prisons, this may all seem like tinkering with a fundamentally unacceptable system. If one believes, as Mariame Kaba recently put it, that "the goal is not to create a gentler prison,"[382] does regulating prison only serve to normalize it? If, as historian Ashley Rubin has shown, this country's first prisons were developed in an effort to bring then-modern public-health expertise to bear

380. Maynor v. Morgan Cnty., No. 5:01-cv-851-AKK, 2018 WL 4184574, at *1, 3 (N.D. Ala. June 15, 2017).

381. Lauren Gill, *Will Alabama Sheriffs Finally Stop Diverting Jail Food Funds to Their Own Wallets?*, APPEAL (Oct. 10, 2018), https://theappeal.org/alabama-sheriffs-promise-to-stop-taking-jail-food-funds [https://perma.cc/R4CS-H6P6].

382. Mariame Kaba, *So You're Thinking About Becoming an Abolitionist*, LEVEL (Oct. 30, 2020), https://level.medium.com/so-youre-thinking-about-becoming-an-abolitionist-a436f8e31894 [https://perma.cc/2L2P-HPZD].

and "protect both prisoners and society,"[383] is skepticism not warranted—will improving conditions not just shore up a carceral edifice that has begun to crumble? Is it not better to think of prison through the lens of the Eighth Amendment, as a site of brutalizing punishment, because that at least makes clear why incarceration is rotten to its core? This Part respectfully suggests that calling upon (and remedying the shortcomings of) free-world regulatory law in carceral contexts has something to offer those who want to shutter our prisons and jails and replace our carceral state with radically different responses to harm.

To return to a theme addressed above, traditional prisoners' rights advocacy requires accepting as a basic premise that our system of carceral punishment is not inherently offensive; the state is entitled to "isolate[] [people] from the rest of society," and "withdraw[] or limit[] [] many privileges and rights."[384] Only in its extremes, Eighth Amendment doctrine teaches, is incarceration unjustified.[385] As Dylan Rodriguez articulates, constitutional "reform is merely another way of telling" those subject to the violence inherent in incarceration "that they must continue to tolerate the intolerable."[386] In Kaba's words, "the formulation suggests it is the excess against which we must rally. We must accept that the ordinary is fair for an extreme to be the problem."[387] Derecka Purnell has underscored this point: abolitionists "don't need lawyers who will seek to uphold the constitution, because most of the violence of prisons is constitutional; instead, we need lawyers who will betray the power of the constitution."[388]

So, can free-world regulatory law do any better, or is it simply a powerful stopgap, decreasing harm while abolition remains a distant horizon? Can it promote "non-reformist reforms," which "reduce the power of an oppressive system

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383. Ashley Rubin, *Prisons and Jails Are Coronavirus Epicenters—But They Were Once Designed to Prevent Disease Outbreaks*, CONVERSATION (Apr. 15, 2020, 5:59 PM ET), https://theconversation.com/prisons-and-jails-are-coronavirus-epicenters-but-they-were-once-designed-to-prevent-disease-outbreaks-136036 [https://perma.cc/9J4G-QAVF].

384. Pell v. Procunier, 417 U.S. 817, 822 (1974) (quoting Price v. Johnston, 334 U.S. 226, 285 (1948)).

385. For an analogous discussion of Fourth Amendment jurisprudence, see Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1790 & n.22 (2020) (identifying, as the first tenet of an abolitionist structural critique, that "[constitutional] jurisprudence facilitates, rather than constrains, police violence").

386. Dylan Rodriguez, *Reformism Isn't Liberation, It's Counterinsurgency*, LEVEL (Oct. 20, 2020), https://level.medium.com/reformism-isnt-liberation-it-s-counterinsurgency-7ea0a1ce11eb [https://perma.cc/7JLG-SNRX].

387. Mariame Kaba & Tamara K. Nopper, *Itemizing Atrocity*, *in* MARIAME KABA, WE DO THIS 'TIL WE FREE US: ABOLITIONIST ORGANIZING AND TRANSFORMING JUSTICE 84 (Tamara K. Nopper ed., 2021).

388. Micah Herskind, *Some Reflections on Prison Abolition*, MEDIUM (Dec. 7, 2019), https://micahherskind.medium.com/some-reflections-on-prison-abolition-after-mumi-5197a4c3cf98 [https://perma.cc/CJ5A-JFAA] (paraphrasing comments delivered by Derecka Purnell).

while illuminating the system's inability to solve the crises it creates"?[389] Potentially, in a few ways, with the three important caveats that follow.

First, while regulatory approaches to conditions of confinement can help to lay groundwork for an abolitionist future and even perhaps facilitate decarceration in limited ways, they will certainly not shutter prisons and jails on their own. The argument here is a modest one: so long as people remain incarcerated, advocacy for better—not acceptable but better—conditions will remain essential.[390] In this effort, regulatory approaches may better serve abolitionists' long-term goals.

Second, there is a significant strain of abolitionist thinking that is not only anticarceral, but antistatist. This view prioritizes mutual aid and decentralized systems of accountability in which law—of any sort, with a carceral logic understood to be unavoidable—necessarily plays a minimal role.[391] The points raised in this Part speak instead to an abolitionist ethic that retains faith in the possibility that a strong government can be redirected towards welfarist aims like universally guaranteed health care, employment, and housing.

Third, it is important to acknowledge that only through the building and exercise of political power by people with a decarceral vision might regulatory law be made to fulfill not only an ameliorative role, but also the more transformative promise outlined here.

With those caveats in mind, this Part will proceed to address some of the ways that regulatory engagement with prisons and jails may help, both practically and rhetorically, to further the efforts of movements for decarceration. It can do so by shifting power from agencies of the penal state to agencies of the welfare state, by targeting the ways that incarceration funds itself by sapping incarcerated people and their families of financial resources, by reframing the

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389. Dan Berger, Mariame Kaba & David Stein, *What Abolitionists Do*, JACOBIN (Aug. 24, 2017), https://www.jacobinmag.com/2017/08/prison-abolition-reform-mass-incarceration [https://perma.cc/RMK4-AMXZ].

390. One might argue that all efforts to improve prison and jail conditions are fundamentally reformist, because they make the continued fact of incarceration more tolerable. But this extreme position seems morally untenable in a world where already-horrific conditions have not prompted an immediate reckoning and dramatic decarceration does not appear to be close on the horizon. Given this reality, the question facing those with a grounded abolitionist vision must be a nuanced one: what advocacy strategies are the least reformist?

391. *See, e.g.*, DEAN SPADE, MUTUAL AID: BUILDING SOLIDARITY DURING THIS CRISIS (AND THE NEXT) 15-20 (2020) (describing how mutual aid prepares people not only to resist legal systems but also to work outside them); Daniel Fernandez, *Dean Spade on the Promise of Mutual Aid*, NATION (Dec. 16, 2020), https://www.thenation.com/article/economy/interview-dean-spade [https://perma.cc/EW7V-W7SK] ("Hoping for a benevolent state that will someday deliver aid in a way that isn't racist or ableist or leaving out the poorest and most stigmatized people is not realistic in the US.").

moral place of incarcerated people in our legal system, and by grappling squarely with incarceration's harms to imprisoned people and their communities and with our societal responsibility for causing and to address these harms.

A. Institutional Power-Shifting

First, free-world regulatory law's application to prisons and jails can shift power from carceral institutions to other parts of government—the very parts that James Forman, Jr. shows got short shrift when Black leaders facing the challenges of drugs and violence called for an "all of the above" response and got prisons and police alone.[392]

Free-world regulatory agencies with words like "safety," "health," and "protection" in their names are the arms of government that provide the kinds of services abolitionists hope will replace carceral responses: those that offer consumer and labor protections, provide publicly funded medical and mental health care, and advocate for people with disabilities to be integrated into society. These are the portions of government that would administer the "reparative public goods" that abolitionists want to build, the "constellation of other regulatory and social projects" to be substituted for penal enforcement.[393] They are the core features of the welfare state against which mass incarceration was a concerted reaction.

As Allegra McLeod notes, when the penal-abolitionist platform of the Center for Popular Democracy, Law for Black Lives, and Chicago's Black Youth Project 100 demanded fiscal reallocation, it highlighted the fact that Chicago's Department of Police received over 17% of the city's budget, while the Department of

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392. JAMES FORMAN, JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 12 (2017); *see also* Vesla M. Weaver, *The Untold Story of Mass Incarceration*, BOS. REV. (Oct. 24, 2017), https://bostonreview.net/race-law-justice/vesla-m-weaver-untold-story-mass-incarceration [https://perma.cc/TVB4-SLY7] (reviewing James Forman's book).

393. Dan Berger & David Stein, *What Is and What Could Be: The Policies of Abolition*, LEVEL (Oct. 29, 2020), https://level.medium.com/what-is-and-what-could-be-the-policies-of-abolition-9c1b49eb5a1f [https://perma.cc/P62V-6FQZ]; Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1161 (2015); *see also* Sophie House & Krystle Okafor, *Under One Roof: Building an Abolitionist Approach to Housing Justice*, N.Y.U. J. LEGIS. & PUB. POL'Y QUORUM (Nov. 1, 2020), https://nyujlpp.org/quorum/house-okafor-building-abolitionist-approach-housing [https://perma.cc/AQ7V-ZGMY] (arguing that an abolitionist framework "recognizes that safety requires more than crime prevention: it requires . . . protection from environmental hazards; adequate food and shelter"); McLeod, *supra* at 1166, 1220, 1222-23 (explaining that Jeremy Bentham's conception of "preventive justice . . . focused on a broader regulatory environment separate from criminal law enforcement" that "reduced risks of harm and engaged people in common endeavors through infrastructure, education, and social integration").

Public Health was forced to operate on less than half a percent.[394] In late 2018, Critical Resistance and other abolitionist organizers notched what they characterized as a "huge victory" when they persuaded the American Public Health Association to adopt a policy statement that recognizes policing as a public-health issue.[395] There is no better way of crystallizing the implications of a system in which public-health agencies are weak and correctional agencies are strong than by engaging with the points of direct contestation between them.

B. Resource Redistribution

Second, free-world regulation can more directly target the extractive nature of incarceration, reallocating resources (and political power) from carceral institutions to incarcerated people and their families. And it can highlight the interconnected economic and physical subjugation of communities of color and poor communities by tracing and addressing directly the fiscal incentives of the carceral state.[396] This lens brings into sharp focus the grave distributional effects of our choice of carceral, as opposed to welfarist, responses to harm.[397] Caps on prison phone-call rates not only help maintain family ties, but also shift large sums of money from prison budgets to rent and grocery budgets. Aggressive

394. Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1635 (2019). It is conceivable that heightened regulatory engagement with prisons and jails would not be accompanied by commensurate increases in regulatory budgets, meaning that resources would be rerouted towards carceral oversight and away from other public-welfare regimes, to the detriment of the free-world communities most likely to get short shrift. But this concern should not lead advocates to hold back on calls for regulatory engagement with prisons, lest people in the free world suffer; instead, their demands should emphasize the ways that regulatory failures inside and outside prisons compound each other to repeatedly harm members of the same communities.

395. *A National Abolitionist Victory for Public Health!*, CRITICAL RESISTANCE, http://criticalresistance.org/apha [https://perma.cc/CEC9-SR6M]; *see also Advancing Public Health Interventions to Address the Harms of the Carceral System*, END POLICE VIOLENCE COLLECTIVE, https://www.endingpoliceviolence.com [https://perma.cc/G2YS-C9LZ] (containing the text of a resolution passed at an American Public Health Association conference).

396. *See* Akbar, *supra* note 385, at 1792-95 (discussing the "[i]nterconnected [f]orms of [physical and economic] [v]iolence" deployed in the process of policing); *see also* HINTON, *supra* note 234, at 1-7 (discussing the relationship between budget allocations and the rise of mass incarceration).

397. *See* Brett Story & Seth J. Prins, *A Green New Deal for Decarceration*, JACOBIN (Aug. 28, 2019), https://jacobinmag.com/2019/08/green-new-deal-decarceration-environment-prison-incarceration [https://perma.cc/SZ7K-654G] (calling for "[n]ot just restorative justice . . . but *redistributive justice*" — meaning "fewer people, serving less time, in fewer cages . . . [b]ut also *more* people, living better and healthier lives, in expanded and improved social infrastructures").

enforcement of food-safety standards in a county jail not only promotes the nutrition and general health of people incarcerated there, but also ensures that the cost of adequate food is being paid by the sheriff's office and not family members' contributions to commissary accounts.

The CARES Act litigation discussed in Section II.F teaches an important lesson in this respect. The pandemic-related stimulus payments are the closest this country has come to a nationwide universal basic income (UBI). Pilot UBI programs are afoot in a growing number of progressive localities.[398] But it remains to be seen whether expanded versions of UBI continue, as federal and state benefits programs do now, to exclude people who are currently incarcerated. Some have proposed "combin[ing] a minimally conditional cash transfer with traditional reentry interventions"—that is, giving people money when they are released from prison or jail.[399] As well-intentioned as such proposals are, a true "commitment to universality," experience with the stimulus bill shows, "would make it harder for governments to exclude [both current] felons and ex-felons from the safety net."[400]

There is some risk, however, that certain costly reforms will result in fiscal entrenchment of the carceral state. Victories in institutional-reform litigation are commonly accompanied by investment of even more resources in carceral institutions.[401] As abolitionists sagely recognize, this short-term benefit comes at a long-term cost, reinforcing the power and growing the size of the carceral

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398. *See Resources*, MAYORS FOR GUARANTEED INCOME, https://www.mayorsforagi.org/resources [https://perma.cc/ER4M-7CDV] (displaying on a map pilot programs in various cities).

399. Daniel Munczek Edelman, *Cash for Leaving Prison: A New Solution to Recidivism?*, STAN. SOC. INNOVATION REV. (Aug. 15, 2017), https://ssir.org/articles/entry/cash_for_leaving_prison_a_new_solution_to_recidivism [https://perma.cc/84SQ-CPT5]; *see also* A.B. 65, 2021-22 Leg., Reg. Sess. (Cal. 2020) (establishing a universal basic-income program for the state of California).

400. Juliana Uhuru Bidadanure, *The Political Theory of Universal Basic Income*, 22 ANN. REV. POL. SCI. 481, 495 (2019) (citing the Movement for Black Lives' 2016 manifesto). *But see* Noah Zatz, *Basic Income and the Freedom to Refuse*, LAW & POL. ECON. PROJECT (Feb. 16, 2021), https://lpeproject.org/blog/basic-income-and-the-freedom-to-refuse [https://perma.cc/CTD4-9U45] (identifying the risk that a universal basic income could "slip[] quickly through the fingers of lower-income people of color and into the coffers of the jurisdictions most aggressively criminalizing poverty," but noting that regulatory steps in the "obscure inner workings" of direct-payment schemes could shield funds from debt collection).

401. Margo Schlanger, *Civil Rights Injunctions over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 563 (2006) ("We ranted and raved for decades about getting federal judges 'out of our business'; but we secretly smiled as we requested greater and greater budgets to build facilities, hire staff, and upgrade equipment. We 'cussed' the federal courts all the way to the bank." (quoting Mark Kellar, *Responsible Jail Programming*, AM. JAILS, Jan.-Feb. 1999, at 78, 78-79)); *see also* Heather Schoenfeld, *Mass Incarceration and the Paradox of Prison Conditions Litigation*, 44 LAW & SOC'Y REV. 731 (2010) (tying the history of prison expansion in Florida to conditions litigation).

state.[402] Although the regulatory efforts discussed here mostly constrain carceral agencies — and disempower them vis-à-vis other administrative agencies — there are scenarios in which stricter regulation results in a windfall for the carceral agency, as would occur were Medicaid's inmate exclusion repealed and existing state and local appropriations for prison and jail health care not recaptured.[403] The risk of carceral entrenchment is greatest when the remedial options pursued involve investment in physical infrastructure that is difficult to repurpose, and less acute when human resources are at issue. Though these improvements may cost the same, a prison with an expensive new heating, ventilation, and air conditioning system is harder to close than a prison with an expensive new psychiatric staff.

C. Moral Reframing

Third, regulatory reform can also clarify and even reorient our moral frame — as to incarcerated people and our obligations to them — in ways that align with an abolitionist vision. As Sharon Dolovich has argued, through our "carceral bargain," the state commits to keeping separate from society those who are imprisoned, "mark[ing] [them] out as an appropriate object for erasure from the public consciousness [and] signal[ling] [their] removal from the category of moral subjects to whom respect and consideration are owed just by virtue of their shared humanity."[404] Jonathan Simon made a similar point when recounting his own brief stint in the Alameda County Jail. He recalled a sign above the breakfast

402. *See, e.g.*, Mike Cason, *What's Happened, What's Next in Alabama's Plan for New Prisons?*, AL.COM (May 12, 2021, 6:20 PM), https://www.al.com/news/2021/05/whats-happened-whats-next-in-alabamas-plan-for-new-prisons.html [https://perma.cc/7GG4-LJ6X].

403. *Cf.* Beth A. Colgan, *Beyond Graduation: Economic Sanctions and Structural Reform*, 69 DUKE L.J. 1529, 1551-52 (observing that graduated sanctions "may actually *bolster* funding for criminal legal systems," such that reform could simultaneously benefit individuals on whom fines are imposed while perpetuating the overarching systems).

404. Sharon Dolovich, *Exclusion and Control in the Carceral State*, 16 BERKELEY J. CRIM. L. 259, 274, 275 (2011). Scholarly explorations of the roots and functions of this exclusion are varied and nuanced; it is impossible to do justice to them here. *See, e.g.*, KELLY LYTLE HERNÁNDEZ, CITY OF INMATES: CONQUEST, REBELLION, AND THE RISE OF HUMAN CAGING IN LOS ANGELES, 1771-1965, at 1 (2017) ("Mass incarceration is mass elimination. That is the punch line of this book. . . . Incarceration operates as a means of purging, removing, caging, containing, erasing, disappearing, and eliminating targeted populations from land, life, and society in the United States.").

trays: "INMATES ARE TO REMAIN SILENT DURING FEEDING." "People ate, or maybe dined," he remarked. "Animals got fed . . . ."[405]

What makes a person deprived of freedom nonetheless a part of society? What are the markers of their civic personhood? At base, the administrative state delineates the bounds of society through de jure or de facto inclusion and exclusion from the protective regulatory umbrella. Who is a patient? Whose health is part of public health? Who is a consumer to be protected from corporate avarice? Whose food supply should be inspected, and whose neglected? Bluntly, who must be fed like a human, and who can be fed like livestock? Law's coverage makes an "us," a bounded society; law's exclusion makes an "other."[406] As political philosopher Lisa Guenther argues, Hannah Arendt's famous conceptualization of stateless people as existing "outside the pale of the law," without "the right to have rights," and "no longer belong[ing] to any community whatsoever" applies with some force to those who are incarcerated.[407]

This argument is the concrete sibling of a position—adopted in some abolitionist statements of demands[408]—in favor of using "people-first" language to describe those who are in prison or jail: incarcerated person, rather than "[p]risoner, inmate, felon, convict."[409] There is undoubtedly a complex relationship

405. Sara Grossman, *Faculty Profile: Law Professor Jonathan Simon on 'Othering' Through Mass Incarceration*, OTHERING & BELONGING INST., https://belonging.berkeley.edu/faculty-profile-law-professor-jonathan-simon-othering-through-mass-incarceration [https://perma.cc/J43T-9GES]. The comparison of incarcerated people's treatment to that of nonhuman animals is a deep one, deserving of more discussion. For one perspective on the relationship, see Kelly Struthers Montford, *Dehumanized Denizens, Displayed Animals: Prison Tourism and the Discourse of the Zoo*, 6 PHILOSOPHIA 73, 74-77 (2016).

406. *See* Fanna Gamal, *The Racial Politics of Protection: A Critical Race Examination of Police Militarization*, 104 CALIF. L. REV. 979, 1005-06 (2016) (arguing that exposure to police brutality and exclusion from law's protection are interrelated).

407. Lisa Guenther, *The California Shu and the End of the World*, SOC'Y + SPACE (Sept. 24, 2013), https://www.societyandspace.org/articles/the-california-shu-and-the-end-of-the-world [https://perma.cc/QPW9-TXHA] (quoting HANNAH ARENDT, ORIGINS OF TOTALITARIANISM 295-96 (1973)). Overwhelming deference to carceral authorities creates, at least at its extremes, "a grey zone of statelessness *within* the state, and within the institution that most fiercely expresses state power." *Id.*

408. *See* Anti-Prison People's Movement Assembly, *The Resolution*, UNPRISON (June 24, 2010), https://unprison.com/formerly-incarcerated-peoples-movement/the-resolution [https://perma.cc/2TZK-K8SD] (calling "for a paradigm shift in language, so that our language reflects our objectives for full human and civil rights for all people").

409. *See* Alexandra Cox, *The Language of Incarceration*, INCARCERATION 1, 1 (2020) (quoting REGINALD DWAYNE BETTS, FELON: POEMS (2019)). Some permutations of people-first language intended to decrease the stigmatization of formerly incarcerated people, such as "returning citizens," reinforce the characterization of people in prison and jail as less than full members of society.

between the meaning-making of naming and the work of the law in practice.[410] But in the end, it surely matters more whether the administrative state treats a prisoner like a person than whether it calls him one.[411]

In a recent article about prisoner education, Avlana Eisenberg makes a related point. She advances a communitarian "principle of return," "insist[ing] on conceptualizing punishment as a precursor to . . . return to civil society," and arguing that we ought not "ignore what happens within the prison environment" vis-à-vis that eventual rejoining.[412] This move explicitly concedes, however, that for the duration of incarceration, people are outside of civil society, citizens-in-waiting, on hiatus. In the view of many abolitionists, we should "trouble the concept/myth of 'reentry' with . . . a commitment to ameliorate the conditions for all of those in our society who live on the periphery and beyond, before and after they are criminalized."[413] From this perspective, the "civil death" of incarcerated people[414] is objectionable not merely because the state's resuscitation efforts upon their release are so feeble; instead, abolitionists envision a response to harm that, rather than (temporarily) expelling wrongdoers from the body politic, knits them more tightly into community.

It is helpful, as a very imperfect analogy but an illuminating point of reference, to consider another category of people whom American law once situated within a remarkably similar state of legal exception: enslaved Black people. As Alexander Reinert has demonstrated, Justice Taney's infamous phrase from *Dred Scott*,[415] that Black people "had no rights which the white man was bound to respect," was not in the strictest sense accurate; many states had legislated to prohibit some permutation of "cruel" and "unusual" punishment of enslaved

410. And there are those who argue that such a renaming can do a disservice, glossing over a lived reality that remains unreckoned with. *See* Reginald Dwayne Betts, *Incarcerated Language*, 106 YALE REV. 30, 34 (2018); *see also* Blair Hickman, *Inmate. Prisoner. Other. Discussed.*, MARSHALL PROJECT (Apr. 3, 2015, 7:15 AM), https://www.themarshallproject.org/2015/04/03/inmate-prisoner-other-discussed [https://perma.cc/D7LM-YXDL] (articulating a range of views).

411. In a variety of contexts, what law applies to a person—whether it imparts protection or vulnerability—defines them. For example, a worker is a person to whom labor law applies. *See* V.B. Dubal, *Wage Slave or Entrepreneur?: Contesting the Dualism of Legal Worker Identities*, 105 CALIF. L. REV. 65, 80 (2017) ("I maintain that rather than merely recognizing and regulating social facts, the legal adjudication of employment is both influenced by and influences social realities of work.").

412. Avlana K. Eisenberg, *The Prisoner and the Polity*, 95 N.Y.U. L. REV. 1, 4 & n.2 (2020).

413. Berger et al., *supra* note 389.

414. *See* Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1790 (2012).

415. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

people.[416] Like the modern-day Eighth Amendment standard, this limit only proscribed harm inflicted with intent; "accidentally" maiming or killing an enslaved person was not illegal.[417] And, to an even greater extent than the modern-day Eighth Amendment standard, these laws did virtually nothing in practice to check extraordinary and routine violence.[418] One lesson this history teaches is simple but profound: unlike affirmative, protective regulatory law, doctrines prohibiting cruelty are inherently doctrines of subordination.

D. Harm Recognition and Responsibility Allocation

Fourth, free-world regulatory processes are better able than carceral agencies and courts operating in a paradigm of punishment to recognize the harms of carceral policies and practices to incarcerated people and their communities—broadly, impacts on their health and wealth.[419] To the constitutional law of incarceration, the ordinary suffering of imprisonment is unobjectionable because it is necessary or deserved. To the abolitionist, by contrast, "revers[ing] the normalization of violence" will require moving from a narrative in which the pain of criminalized people of color is less experientially acute or morally significant than

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416. Alexander A. Reinert, *Reconceptualizing the Eighth Amendment: Slaves, Prisoners, and "Cruel and Unusual" Punishment*, 94 N.C. L. REV. 817, 834-40 (2016); *see also id.* at 850-54 (discussing the ways in which "[p]rison and slavery were . . . linked rhetorically, historically, and jurisprudentially," and observing that slavery was understood as a delegation of state power). The resonances between prison and slavery are more fully explored in Reinert's article, but they include a Thirteenth Amendment that prohibits slavery "except as punishment for a crime," U.S. CONST. amend. XIII § 1; nineteenth-century juridical descriptions of prisoners as "slave[s] of the state," Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 795-96 (1871); and a direct historical continuity between slavery and convict leasing, *see generally* DAVID M. OSHINSKY, WORSE THAN SLAVERY: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE 2 (1996) (describing a Mississippi penitentiary as the "closest thing to slavery that survived the Civil War"); DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK PEOPLE IN AMERICA FROM THE CIVIL WAR TO WORLD WAR II 54-57 (2008) (describing how convict leasing came to replace slavery after the Civil War).

417. Reinert, *supra* note 416, at 835-36, 845-46, 856-57.

418. *Id.* at 848-49. A very significant point of dissimilarity is that enslaved people had no recourse to enforcement. *Id.* at 849-50. Incarcerated people can file lawsuits, and sometimes they obtain relief. As a practical matter, however, pro se prisoner litigants face such daunting hurdles that this avenue is stymied in the vast majority of cases. In 2012, a pro se prisoner lawsuit disposed of through pretrial adjudication was about 170 times more likely to be resolved in favor of the defendant(s) than in favor of the plaintiff; of the 1.4% of cases that went to trial, plaintiffs won about one in eight, for a median award of only $3,000. Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Approaches 20*, 28 CORR. L. REP. 69, 80, 84 (2017).

419. *See, e.g.*, Ben Gifford, *Prison Crime and the Economics of Incarceration*, 71 STAN. L. REV. 71, 121-34 (2019) (suggesting that regulatory cost-benefit analyses can and should take account of costs of crime that occurs in prisons, of which incarcerated people are generally victims).

the pain others experience to one recognizing "that they hurt when they are harmed."[420] A legal framework that treats the ordinary but extreme pains of imprisonment as a baseline state is fundamentally incapable of flipping this script.

Relatedly, the turn this Article proposes could begin to shift and broaden the locus of responsibility for incarceration's harms, and even its brutality.[421] In a constitutional prison- or jail-conditions case, the defendant is normally, for reasons of sovereign immunity, a prison or jail official. Even when it is possible to sue a municipality or even a state, carceral agencies are considered as if in silos.[422] If a court looks outside the agency at all, it is only in evaluating — and, at least formally, rejecting as a defense — an administrator's assertion that the legislature has not allocated sufficient resources to permit constitutional compliance.[423] The question is not: "have we as a society fairly allocated adequate resources to provide for the health and safety of both the person who has caused harm and those he or she has harmed?" Rather, it is much narrower, limited to whether correctional officials were deliberately indifferent. In this paradigm, liability (legal and moral) for the damage done by incarceration falls squarely on the shoulders of prison and jail administrators and staff. Injuries, legal and physical, result from them doing their jobs poorly.

To the abolitionist, by contrast, the harms of incarceration stem from the fact that these jobs are being done at all — that these are the jobs we are using taxpayer dollars to fund. A free-world regulatory lens draws into crisp focus the extent to which we — society as a whole — are responsible, both narrowly, for failing to regulate prisons and jails, and more broadly, for failing to protect the health and safety of incarcerated people as part of public health and public safety, and for

420. DANIELLE SERED, UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR 222 (2019).

421. This parallels the restorative-justice movement's dogged focus on communal responsibility for the harms of, and the harms that lead people to, crime. *See* SERED, *supra* note 420, at 238 (discussing the importance of taking communal responsibility for the harms caused by mass incarceration). This communal responsibility is not in lieu of, but in addition to, the individual responsibility of someone who causes interpersonal or societal harm. *See id.* at 91-128 (arguing that incarceration "has another flaw that is rarely talked about: prison is a poor vehicle for accountability").

422. In a recent case, for example, the Eleventh Circuit concluded that it could not find that jail officials were deliberately indifferent for failing to release people to protect them from COVID infection when those particular officials lacked the authority under state law to effectuate the releases. *See* Swain v. Junior, 961 F.3d 1276, 1290-91 & n.7 (11th Cir. 2020); *see also id.* at 1297-99 (Martin, J., dissenting) (rejecting this reasoning).

423. For a discussion of the cost defense, see 1 MICHAEL B. MUSHLIN, *The Defense of Inadequate Resources*, *in* RIGHTS OF PRISONERS § 3:92 (5th ed. 2017).

investing resources in punitive institutions while divesting from supportive ones.[424]

VII. THE FUTURE OF REGULATORY LAW BEHIND BARS

Robust application of free-world regulatory law to the carceral state would go a substantial way toward addressing the plight of incarcerated people, who are now left woefully unprotected by the inadequacies of constitutional law. This penultimate Part considers what concrete steps — taken by legislators, regulators, advocates, and academics — would help to assert the dominion of free-world regulatory law behind bars.

Legislators at the federal and state levels bear significant blame for the exclusion of incarcerated people and carceral institutions from the sweep of regulatory law. They should reconsider existing carve-outs and avoid new ones. Rather than focusing, as in the original debates over the inmate exclusion from Medicaid and public-benefits law, on ensuring that the benefits of a regulatory program do not in some outlier case undermine the punitive nature of a prison sentence, they should assess the impacts of inclusion on the well-being of incarcerated people, the functioning of carceral institutions, and the interests of the broader community — including, but not limited to, the avoidance of crime. To the extent that incarcerated people are treated differently by enacting statutes, the disparity should be based on an appreciation of their particular vulnerability. If public safety or institutional security are invoked as justifications for less favorable treatment, these rationales should be interrogated, and reliable evidence demanded and tested.[425] Courts may think they need to defer to correctional officials, but legislatures do not. Moreover, state legislators in particular should take steps to promote regulatory jurisdiction over all carceral facilities, such as by empowering county public-health officials to inspect and issue remedial or-

424. For microanalyses "document[ing] the investment disparity between carceral systems and non-punitive, supportive services" at the local level, see the Carceral Resource Index developed by Leo Beletsky's Health in Justice Action Lab at Northeastern University School of Law. *National Municipal Budget Analysis: Carceral Resource Index (CRI)*, HEALTH IN JUST. ACTION LAB, https://www.healthinjustice.org/copy-of-carceral-resource-index [https://perma.cc/D3RF-8WSN].

425. Any effort to subject the policies that shape conditions in prisons and jails to empirical scrutiny must begin with data collection and transparency. *See, e.g.*, Press Release, Sen. Elizabeth Warren, Warren, Murray, Booker, Pressley, Garcia, Colleagues Will Reintroduce COVID-19 in Corrections Data Transparency Act (Feb. 10, 2021), https://www.warren.senate.gov/newsroom/press-releases/warren-murray-booker-pressley-garcia-colleagues-will-reintroduce-covid-19-in-corrections-data-transparency-act [https://perma.cc/9UM5-J9DS].

ders to state prisons. Legislators might also exploit the federal government's reliance on local governments for bedspace to exercise regulatory control over at least some facilities holding federal detainees.[426]

Fortunately, there have been glimmers of hope on the legislative landscape over the last decade. The most direct example is the passage of federal legislation to restore Pell Grant eligibility to incarcerated college students, which came amidst several other education-equity reforms.[427] In other arenas as well, legislatures have begun to take a more welfarist approach to governing carceral institutions, providing condoms to mitigate the risk of STI transmission[428] and substantially limiting the perinatal shackling of incarcerated people.[429] Exclusionary legislative treatment of incarcerated people is ripe for reexamination amidst a broader reckoning with the costs of and alternatives to incarceration.[430]

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426. Permitting local health officials to issue orders to state prison facilities is legislatively straightforward. Extending state and local regulators' jurisdiction to cover federal facilities is much less so, but there are creative approaches worth trying. Although there are a few metropolitan federal jails, the U.S. Marshals Service depends on county jails to hold federal pretrial detainees in most jurisdictions. Thanks to the Tenth Amendment's prohibition on commandeering, this happens by contract. What would happen if a state legislature prohibited any county from entering into a contract to hold federal detainees absent agreement by the Department of Justice to waive preemption and consent to the jurisdiction of state health and safety regulators to inspect and issue remedial orders, not only as to the contract facility but also as to any federal detention facility located in the state? *Cf.* Private Correctional Facility Moratorium Act, 730 ILL. COMP. STAT. 140/1 (2021) (prohibiting local government units from entering into detention contracts with private corporations, thereby precluding counties from offering favorable financial opportunities for construction and operation of private federal detention facilities).

427. Erica L. Green, *Financial Aid Is Restored for Prisoners as Part of the Stimulus Bill*, N.Y. TIMES (Dec. 23, 2020), https://www.nytimes.com/2020/12/21/us/politics/stimulus-law-education.html [https://perma.cc/98G9-7YH9].

428. *See, e.g.*, A.B. 999, 2013 Leg., Reg. Sess. (Cal. 2013) (creating a five-year plan to provide condoms in all California prisons based on findings from a pilot study conducted jointly by the state's Department of Corrections and Rehabilitation and Department of Public Health, but requiring that all nonadministrative costs be paid for through donations). Even when legislation sets a more protective standard, monitoring and compliance work by regulators on the ground remains important. *See, e.g.*, Alex Emslie, *Many Jails Not Complying with State Law on Shackling Pregnant Inmates*, KQED (Feb. 18, 2014), https://www.kqed.org/news/126817/many-california-counties-dont-fully-comply-with-law-pregnant-shackling-law [https://perma.cc/HV7M-5YMT].

429. Brett Dignam & Eli Y. Adashi, *Health Rights in the Balance: The Case Against Perinatal Shackling of Women Behind Bars*, 16 HEALTH & HUM. RTS. J. 13, 15-16 (2014).

430. It is not just abolitionists who say that incarceration fails to serve its purported harm-reducing purpose; economists and district attorneys increasingly say so too. *See, e.g.*, Amanda Y. Agan, Jennifer L. Doleac & Anna Harvey, *Misdemeanor Prosecution* 1 (Nat'l Bureau of Econ. Rsch., Working Paper No. 28600, 2021), https://www.nber.org/system/files/working_papers

For regulators, the call is to everyday bravery: to assert jurisdictional authority, to insist on access (whether physical or informational), and to demand compliance in carceral contexts. Much will depend on leadership. Does an FTC Commissioner devote staff resources to regulating commissary contractors? Does a state disaster-planning officer have her auditor's back when a county jail's evacuation plans are deemed inadequate? Having regulators—from food-service inspectors to presidential appointees—for whom incarcerated people are not strangers would make a difference.[431] The communities of color and poor communities directly affected by incarceration are the same ones it has "rob[bed] . . . of [the] material resources, social networks, and legitimacy required for full political citizenship and for organizing local institutions to contest repressive policies."[432] Opportunities for participatory control over local entities like public-health departments and public-utilities commissions could help to redirect energy towards engagement with the carceral facilities within their jurisdictions.[433] At both the local and national levels, strategic politicization of the leadership of relevant agencies could make the failure to regulate in carceral contexts more salient. Campaigns could target anyone from the director of a county's food-safety inspection department to the Administrator for the Centers for Medicare and Medicaid Services.[434]

/w28600/w28600.pdf [https://perma.cc/ULZ6-FDQ7] (finding that "nonprosecution of a nonviolent misdemeanor offense leads to large reductions in the likelihood of a new criminal complaint over the next two years," especially for first-time defendants).

431. The Allegheny County minimum-wage ordinance discussed *supra* notes 246-247 was drafted by someone who was previously incarcerated in the county jail. *See Meet Bethany Hallam*, DEMOCRAT BETHANY HALLAM FOR CNTY. COUNCIL AT-LARGE, https://www.bethanyhallam.com/bio [https://perma.cc/T9Q6-M5YD]; An-Li Herring, *Seasonal Parks Workers, Interns Would Get $15 Minimum Wage Under Bill Headed for Allegheny County Council*, 90.5 WESA (June 22, 2021, 4:39 PM ET), https://www.wesa.fm/politics-government/2021-06-22/seasonal-parks-workers-interns-would-get-15-minimum-wage-under-bill-headed-for-allegheny-county-council [https://perma.cc/9TRY-TQ6X].

432. Dorothy E. Roberts, *Democratizing Criminal Law as an Abolitionist Project*, 111 NW. U. L. REV. 1597, 1602 (2017). Forty-four percent of Black women have a family member who is incarcerated, as compared to 6% of white men. Hedwig Lee, Tyler McCormick, Margaret T. Hicken & Christopher Wildeman, *Racial Inequalities in Connectedness to Imprisoned Individuals in the United States*, 12 DU BOIS REV. 269, 269-70 (2015).

433. *See* K. Sabeel Rahman & Jocelyn Simonson, *The Institutional Design of Community Control*, 108 CALIF. L. REV. 679, 719-27 (2020) (discussing three dimensions of institutional design that shape whether local community-control projects are inclined and able to effect real change: whether they have direct power or give advisory input, whether they are representative of the constituencies directly affected by the policies at issue, and whether their interventions occur early/upstream or late/downstream in the policy-setting process).

434. For a campaign that demonstrated the salience of a lesser-known regulatory agency to racial and economic justice, see FED UP CAMPAIGN, https://fedupcampaign.org [https://perma.cc/PGZ7-J3C7].

Advocates for incarcerated people and their communities — both professional advocates, like lawyers and public-policy researchers, and people fighting for their incarcerated loved ones — can also benefit from considering whether there are important regulatory tools to use and arguments to make. Some organizations have long pursued regulatory as well as constitutional-reform strategies, and others have more recently begun to do pathbreaking work on this front. Leaders in this field include the Human Rights Defense Center (an outgrowth of Prison Legal News), headed by Paul Wright; the Prison Policy Initiative, directed by Peter Wagner; and Worth Rises, led by Bianca Tylek.[435] Prisoners' rights lawyers have generally been further behind, perhaps because constitutional litigation is the customary tool of their trade, but progressive plaintiff-side firms have stepped into the fray, such as in the recent CARES Act litigation discussed in Section II.F. Litigators who can cite the provisions of the PLRA by heart may not know how to file a petition for rulemaking, but they should consider learning. And because the decision whether to initiate a regulatory process — for example, whether to conduct a fire inspection or participate in a federal drug-discount program — is often discretionary, advocates will have to employ creative means to build political pressure.

Finally, law teachers have a role to play in expanding the canon of prison law. Because, as Sharon Dolovich observes, law school curricula often give very short shrift to anything on the "back end" of the criminal-legal system, and many do not even regularly offer a course on the constitutional law of prisons, expanding offerings to cover the topics discussed here has not been the highest priority.[436] Some material is readily available for courses that focus on incarceration: one excellent casebook, though focused primarily on constitutional claims, discusses certain statutory and regulatory law topics in a handful of sections.[437] Moreover, as Dolovich argues, the application of free-world regulatory law to incarceration

435. *About the Human Rights Defense Center*, HUM. RTS. DEF. CTR., https://www.humanrightsdefensecenter.org/about [https://perma.cc/445K-PV9Y]; *About the Prison Policy Initiative*, PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/about.html [https://perma.cc/73MK-9D3H]; *About Us*, WORTH RISES, https://worthrises.org/aboutus [https://perma.cc/USC8-7XHV].

436. Sharon Dolovich, *Teaching Prison Law*, 62 J. LEGAL EDUC. 218, 218 (2012); *see also id.* at 220 (proposing a series of courses, including one on "prison oversight and administration" and another on "the business law of corrections").

437. MARGO SCHLANGER, SHEILA BEDI, DAVID M. SHAPIRO & LYNN S. BRANHAM, INCARCERATION AND THE LAW: CASES AND MATERIALS 268-76 (10th ed. 2020) (discussing statutory labor regulation); *id.* at 421-38 (discussing statutory protection for religious exercise); *id.* at 639-40 (discussing the Prison Rape Elimination Act); *id.* at 671-701 (discussing disability rights); *id.* at 869 (discussing other assorted causes of action); *id.* at 926-32 (discussing monitoring and oversight of private prisons and prison contractors); *id.* at 981-1011 (discussing voting, standards, and external oversight).

could and should be covered in a panoply of other courses.[438] She notes that "[e]xpanding the coverage of standard law school classes in this way would considerably widen the number of future lawyers exposed to legal issues facing prisoners."[439]

This is true not only in the general sense—more law students would become familiar with and sensitized to the injustices of mass incarceration—but also in a very specific one: more lawyers would appreciate the relevance of their expertise to innovative efforts to dismantle that system.[440] Corporate lawyers may be glad to take on a pro bono medical deliberate-indifference case, perhaps mostly to get their associates some trial experience. But they would probably be more usefully employed bringing shareholder litigation against a prison-telecommunications company. If we are to train a generation of environmental regulators and state Medicaid administrators and qui tam and voting-rights lawyers attuned to the ways that their chosen specialties impact the trajectory of incarceration in this country, classrooms are good places to start.

CONCLUSION

Incarcerated people are between a rock and a hard place. The Constitution does not require that their food be free of maggots, and the law that does—the local food code—is not enforced in the prisons and jails where they live. In arenas from health care to telecommunications, prisoners are left unprotected by anemic constitutional doctrine and judicial disengagement; they are forced to receive treatment at the hands of doctors disciplined for serious misconduct and to pay exorbitant rates to speak with their loved ones. Meanwhile, the regulatory mechanisms that we in the free world rely on to keep us healthy, safe, and connected fail to protect them, whether through express exemption, abstention from effective enforcement, resistance by correctional officials, or jurisdictional incongruence.

If regulatory engagement with prisons and jails were more robust, however, it could help to meaningfully improve the lives of incarcerated people, and even undermine some of the forces that perpetuate mass incarceration, in ways that constitutional law does not and perhaps cannot.

Some of these advantages are substantive. Because regulatory law applies across contexts, progress outside prisons and jails can carry over inside them.

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438. Dolovich, *supra* note 436, at 221-22.

439. *Id.*

440. *Cf.* Benjamin Levin, *Rethinking the Boundaries of "Criminal Justice,"* 15 OHIO ST. J. CRIM. L. 619, 632-34 (2018) (book review) (urging intradisciplinary engagement between criminal-legal system scholars and those of other legal disciplines).

Regulatory law creates opportunities for serious engagement with evidence of the costs and disparate burdens of carceral policy and for interrogation of its asserted benefits. Regulatory approaches are more likely to foster progressive innovation in laboratories of reform across the country. And they better recognize that prisoners' profound vulnerability warrants enhanced protection, and that the harms of incarceration cannot be contained but instead filter out into the surrounding society.

Other advantages are procedural. Regulatory remedies are broadly prescriptive, preemptive, and durable. Free-world regulatory processes draw on an existing corps of enforcement staff with investigatory power, invite the participation of free-world allies, and can avoid institutional capture.

Regulatory engagement with prisons and jails can serve transformational goals as well. It may help to shift power and resources from carceral officials to those at welfare-promoting agencies. It can more directly confront the distributive consequences of carceral policy, addressing resource extraction from poor communities of color head-on. Finally, it can do moral work, too. Prisoners' status as outcasts from society is not only reflected but also reinforced by regulatory disengagement. A regulatory lens serves to shift attention from the artificially narrow question in an Eighth Amendment case—has a particular officer been deliberately indifferent to a prisoner's medical needs, for example—to a broader and more appropriate frame of societal responsibility.

There is good reason to think that regulatory frameworks may offer promising avenues for reform—they present opportunities for interest convergence between those "inside" and "outside," and more numerous and fruitful points of political pressure.