IMPORTING WELFARE STATE FAILURES INTO PRISON LAW

By Samuel Weiss*

Norwegian prisons, often touted as the world's most humane, rely on an "import model" for providing services. Under this model, the government agencies responsible for providing social services in the free world are responsible for providing the same inside of prisons. While the model serves a number of purposes, a main one is to demonstrate that prisons are not severed from the rest of society—people inside prison retain the same right to social services that they had outside of it.

In the United States, there is nothing to import: no right to safe housing, or education, or medical care. Incarcerated people cannot obtain these rights in the same format as their fellow Americans outside of prison because the imprisoned are the only ones who have them. Because the state has prevented them from providing for themselves, they are the only Americans with a right, for example, to medical care, even if the right only requires the state to clear the low bar of the Eighth or Fourteenth amendments.

While the United States lacks Norway's welfare state successes to import, the concept helps us understand that the opposite has occurred: the federal judiciary has imported welfare state failures into its doctrines governing prison conditions. Whereas Norway regulates its prisons top-down through federal legislation and regulation, the United States largely regulates its prisons bottom-up through litigation, leaving judges to determine the extent of prisoners' basic rights.

Welfare state failures should be irrelevant to the articulation of these rights as a doctrinal matter, both because the technical legal rights incarcerated people have are unique to them and because carceral facilities prevent their charges from self-care. Nonetheless, a retributive intuition takes hold: people who are in prison should not have it better than the working poor who are not, regardless of how cruel the implications. Across a broad range of subject matters, the federal judiciary looks to American welfare state failures to justify carceral barbarism.

---

* Lecturer on Law at Harvard Law School and Founder and Executive Director of Rights Behind Bars. This Article grew out of conversations I had with Sophie Angelis, who later provided excellent comments on a draft. My thanks to her for that and for being a terrific colleague and advocate. Thanks too to Xiao Wang for helpful comments and to the staff at the *Arizona Law Review* for their talent, effort, and patience.

I. TABLE OF CONTENTS

INTRODUCTION

Norwegian prisons rely on the "import model" to provide services for people in prison.[1] Under this model, the government agencies responsible for providing social services outside of prisons do the same inside them. Health care, education, and library staff inside of prisons provide similar services and report to the same supervisors as those in the free world.[2] The import model is a subset of a broader "principle of normality," in which prisons are meant to resemble life outside of them as much as security concerns permit.[3]

Although American commentators have recently stressed the tensions between reformist and abolitionist advocacy,[4] the import model simultaneously serves both reformist and abolitionist ends. For the reformers, the import model provides more accountability because prison staff are supervised by external stakeholders and not just staff inside a prison, which can serve as a black box to external parties. The practice limits conflicts of interest in which, for example, medical staff are subordinate to security staff who may have goals that conflict with

1. Sophie Angelis, *Limits of Prison Reform*, 13 U.C. IRVINE L. REV. 1, 12 (2022).
2. *Id.*
3. Thomas Ugelvik, *The Limits of the Welfare State? Foreign National Prisoners in the Norwegian Crimmigration Prison*, *in* SCANDINAVIAN PENAL HISTORY, CULTURE AND PRISON PRACTICE: EMBRACED BY THE WELFARE STATE? 405, 410 (Peter Scharff Smith & Thomas Ugelvik eds., 2017).
4. *See, e.g.*, Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 114 (2019) ("[R]eforming prisons is diametrically opposed to abolishing them.").

best medical practices.[5] There is also a better continuity in the deliverance of services, as people leaving prison already have a relationship with the service providers outside of prison.[6] Far more cross-pollination occurs between a prison and the surrounding community, resulting in less stigma around incarceration and more connections between the community and prisoners.[7]

But the import model originated from, and was coined by, Nils Christie, the Norwegian prison abolitionist,[8] and it serves both fiscal and symbolic abolitionist ends. First, American prison abolitionists may abhor the lack of resources in prisons but nonetheless be skeptical of any remedy that puts more money into a system they see as fundamentally broken.[9] The import model skips this step by putting money for education not into prisons but into education; money for prison health care not into prisons but into health care; and so on.[10]

The import model also serves important symbolic ends. "Norwegian prisoners in important ways may be said to still be included in the community outside; they are still acknowledged as citizens with important citizen's rights, even when they are serving a custodial sentence. The prison is part of the society surrounding it."[11] The U.S. Supreme Court has written that the "curtailment of certain rights is necessary, as a practical matter, to accommodate a myriad of institutional needs and objectives of prison facilities."[12] A comparison to Norway demonstrates serious disagreement on how many of these rights must be curtailed and just how severely.

The import model appears to be a success whether viewed through a technocratic or a more radical abolitionist lens. Some American commentators err in idealizing Norwegian prisons, using them as a rhetorical cudgel, a contrast with the brutality of American carceral facilities.[13] While this simplification is a mistake,[14] the Norwegian prison system is less brutal and has a much smaller footprint—both because many of its services are imported and because the

---

5. *See generally* Scott A. Allen & Raed Aburabi, *When Security and Medicine Missions Conflict: Confidentiality in Prison Settings*, 12 INT'L. J. PRISONER HEALTH 73, 73–77 (2016).

6. *About the Norwegian Correctional Service*, KRIMINALOMSORGEN, https://www.kriminalomsorgen.no/?cat=265199 [https://perma.cc/HLT7-E6GC] (last visited July 13, 2023).

7. *Id.*

8. Ugelvik, *supra* note 3, at 410.

9. *But see* Angela Y. Davis & Dylan Rodriguez, *The Challenge of Prison Abolition: A Conversation*, 27 SOC. JUST. 212, 216 (2000) ("I do not think that there is a strict dividing line between reform and abolition. For example, it would be utterly absurd for a radical prison activist to refuse to support the demand for better health care inside Valley State, California's largest women's prison, under the pretext that such reforms would make the prison a more viable institution.").

10. *See* KRIMINALOMSORGEN, *supra* note 6.

11. Ugelvik, *supra* note 3, at 411.

12. Hudson v. Palmer, 468 U.S. 517, 524 (1984).

13. Angelis, *supra* note 1, at 17–21 (noting several examples of this phenomenon).

14. Angelis notes that for centuries prison reformers from different countries have noted technocratic problems with their own prisons but turned to idealized foreign prison systems as a demonstration of reform's possibilities. *Id.* at 9–10.

incarceration rate is barely more than one-tenth the size per capita[15]—than its American equivalent.

The United States, however, may have little to learn from the import model. It has nothing to import. The social services and guaranteed rights to education, health care, and so on do not exist in the United States. This Article documents an inversion of the Norwegian import model. The United States does not import successes, but it does import failure. While Norway regulates its prisons largely top-down through federal legislation, the United States regulates its prisons bottom-up through a flood of prison litigation.[16]

This Article will proceed in three parts. First, it will discuss the importation of American welfare state failures into prison law in the context of medical care, with a particular focus on the failure of prisons to provide medication for hepatitis C. Second, it will discuss the judiciary's response to the COVID-19 pandemic through its interpretation of both compassionate release petitions and lawsuits about conditions of confinement in carceral facilities. Third, this Article will collect other examples in which the judiciary has imported the failures of the American welfare state. It will then conclude by explaining the dangers and unjustifiability of doing so.

I. IMPORTING FAILURES: HEALTH CARE

While "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution," incarcerated people have weakened versions of most of the constitutional rights belonging to free people.[17] The constitutional rights to free speech, to practice religion, to free association, to marriage, and to be free of

15. *Compare World Prison Brief Data: United States of America*, WORLD PRISON BRIEF, https://www.prisonstudies.org/country/united-states-america [https://perma.cc/B4E9-NW2H] (last visited July 17, 2023), *with World Prison Brief Data: Norway*, WORLD PRISON BRIEF, https://www.prisonstudies.org/country/norway [https://perma.cc/LKF5-VW8Z] (last visited July 17, 2023).

16. Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153, 168 (2015); Aaron Littman, *Free-World Law Behind Bars*, 131 YALE L.J. 1385, 1390 (2022) ("[F]ree-world regulatory law behind bars is not presently an upbeat one. Its protections often recede at the prison gate, for reasons entirely unrelated to security."). For exceptions, see The Prison Rape Elimination Act and its implementing regulations and Title II of the Americans with Disabilities Act and its implementing regulations. Notably, the most significant federal piece of legislation on prisons in the last 50 years is the Prison Litigation Reform Act, which did not affirmatively mandate that prisons do anything but instead made it harder for federal judges to force prisons to do anything. *See* Margo Schlanger & Giovanna Shay, *Preserving the Rule of Law in America's Jails and Prisons: The Case for Amending the Prison Litigation Reform Act*, 11 U. PA. J. CONST. L. 139, 140 (2008) ("The PLRA's obstacles to meritorious lawsuits are undermining the rule of law in our prisons and jails, granting the government near-impunity to violate the rights of prisoners without fear of consequences.").

17. Turner v. Safley, 482 U.S. 78, 84 (1987).

unreasonable searches and seizures all belong to incarcerated people in extant but weakened or even illusory forms.[18]

This Article, however, concerns different constitutional rights, not ones that are diluted versions of those of free people but instead those that incarcerated people uniquely possess. "[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being."[19] If the state both "so restrains an individual's liberty that it renders him unable to care for himself" and at the same time "fails to provide for his basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause."[20] This "affirmative duty to protect arises" from "the limitation which it has imposed on his freedom to act on his own behalf."[21]

In fulfilling these obligations, American prisons and jails cannot use the "import model" from Norway because there is not enough of a welfare state to import. The constitutional rights articulated above to "food, clothing, shelter, medical care, and reasonable safety" belong to incarcerated people alone. In articulating these rights whole cloth, however, the federal judiciary imports welfare state failures—the judiciary points to the difficulty of obtaining such benefits by the free poor to justify even more restrictive conditions on the incarcerated.

A. The Creation of the Right to Health Care[22]

"There is, of course, no general constitutional right to free health care. In prisons, however, since inmates are deprived of the ability to seek health care on

---

18. *See, e.g.*, David Shapiro, *Lenient in Theory, Dumb in Fact: Prison, Speech, and Scrutiny*, 84 GEO. WASH. L. REV. 972, 975 (2016) ("[I]ncarcerated men and women are often subjected to substantial limitations on their ability to communicate, and many of these restrictions are indefensible.").

19. DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 199–200 (1989).

20. *Id.* at 200.

21. *Id.*

22. This Article focuses on federal appellate and district court cases, not the U.S. Supreme Court. While many fields inevitably bring their major questions to the Supreme Court for resolution, prison law is—to a unique extent—not one of them. In recent years, incarcerated plaintiffs have filed roughly 7,000 lawsuits per year, and approximately one of them reaches the Supreme Court per year. *See, e.g.*, Lomax v. Ortiz-Marquez, 140 S. Ct. 1721, 1723 (2020); Murphy v. Smith, 138 S. Ct. 784, 786 (2018). And while many prison lawsuits like the ones discussed here turn on applications of rather abstract legal principles to the facts of an incident of prison misconduct, the rare case the Supreme Court has taken in recent years is more likely to resolve cleaner and more quotidian matters, such as circuit splits on interpretations of subclauses of the Prison Litigation Reform Act. *See Lomax*, 140 S. Ct. at 1723–25 (holding that a dismissal without prejudice counts as a "strike" under the PLRA's "three-strikes" rule for *in forma pauperis* status, although not if the dismissal was with leave to amend); *Murphy*, 138 S. Ct. at 785–90 (holding that a provision in the PLRA that requires a portion of the plaintiff's judgment to go to any attorney's fees award "not to exceed 25 percent" means that the court must pay the attorney's entire fee award from the plaintiff's judgment until it reaches the 25% cap and can only then turn to the defendant).

their own, the state is obligated to provide basic health care."[23] The U.S. Supreme Court's first attempt to articulate a liability standard for a failure to provide care—and, indeed, prison conditions writ large—was in the 1976 case *Estelle v. Gamble*.[24] In *Estelle*, a pro se plaintiff alleged that after being injured when a bale of cotton fell off a truck and landed on him, the medical care provided to him was inadequate and therefore violated the Eighth Amendment. The Court articulated the standard that "deliberate indifference to serious medical needs of prisoners" violates the Eighth Amendment, dismissed the prison's chief medical officer for failing to meet this bar, and remanded to the lower court to determine in the first instance whether the other prison officials did meet the standard.[25]

Justice Stevens dissented. He argued that the Court erred in focusing on the subjective state of mind of particular defendants instead of the objective character of the punishment. By relying on incarceration, he wrote, the state took on "an obligation to provide the persons in its custody with a health care system which meets minimal standards of adequacy," regardless of any individual's subjective state of mind.[26] Stevens agreed with the majority, however, that medical malpractice need not have a constitutional dimension so long as the state did not contribute to the likelihood of malpractice by failing to provide an adequate health care system. "*Like the rest of us*, prisoners must take the risk that a competent, diligent physician will make an error."[27]

Although *Estelle* seemed to require an inquiry into a defendant's state of mind, the U.S. Supreme Court's following decade of prison rights cases did not contain such inquiries.[28] That changed in 1986 in *Whitley v. Albers*, an excessive force claim brought by a non-disruptive prisoner who was shot during the staff's response to a prison disturbance.[29] The Court not only resuscitated a scienter requirement but picked an astronomical one, asking "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm."[30] It justified the departure from the deliberate indifference mens rea standard by noting that the standard "in *Estelle* was appropriate in the context presented in that case because the State's responsibility to attend to the medical needs of prisoners does not ordinarily clash with other equally important governmental responsibilities."[31]

Although the claim may have helped the *Whitley* Court in justifying a demanding mens rea standard, as an empirical matter the claim is a strange one. The leaders of prison systems agree that "inherent conflicts between security and medical objectives can make it challenging to deliver quality health care on a day-to-day

---

23. Reynolds v. Wagner, 128 F.3d 166, 173 (3d Cir. 1997).
24. 429 U.S. 97 (1976).
25. *Id.* at 104.
26. *Id.* at 117 n.13 (Stevens, J., dissenting).
27. *Id.* (emphasis added).
28. Margo Schlanger, *The Constitutional Law of Incarceration, Reconfigured*, 103 CORNELL L. REV. 357, 377 (2018).
29. 475 U.S. 312, 320–21 (1986).
30. *Id.*
31. *Id.* at 320.

basis" inside prisons.[32] The provision of medical and mental health care inside prisons often conflicts with the prison's competing goals, even absent the extreme breakdowns that characterize many prison medical delivery systems. Prisons may cancel medical appointments when locking down a facility after an incident of violence or prevent chronic care patients from keeping medications on their persons for security reasons, introducing the possibility of medication gaps.

After *Estelle*, a plaintiff must show a serious medical need that a particular prison official was aware of and disregarded. As a doctrinal matter, competing considerations (or "equally important governmental responsibilities") are not relevant. The primary defense for medical officials, therefore, is that they did not disregard a particular medical problem but instead exercised their medical judgment and determined the sought-after treatment was not necessary. Paired with the deference courts give to prison officials,[33] this is adequate to defeat most *Estelle* claims, even when the invocation of medical judgment as driving a particular decision is difficult to believe. In practice, the area left for plaintiffs to maneuver fits mostly into a few categories: delay or denial in access to a medical provider or treatment at all;[34] failure to provide medical providers who are qualified to make the relevant medical decision;[35] and the failure of prison staff to follow medical orders.[36]

One circumstance of note that appears to plainly meet the *Estelle* standard: when a plaintiff (1) clearly has a medical need; (2) a prison official was aware of it and did not provide an effective treatment; and (3) the failure to provide the treatment turned not on medical judgment but instead on administrative considerations, such as cost. Although the Court has held these "competing considerations" to be doctrinally irrelevant, they inevitably matter, and courts often seek a principle to prevent prisons from incurring liability. They often turn to the argument, also doctrinally irrelevant, that prisoners do not deserve treatment that is better or on par with that received by the American working poor. This presumably drives more outcomes implicitly than explicitly given its doctrinal immateriality, but there are nonetheless many examples of the latter.

In the 1997 case of *Maggert v. Hanks*, for example, the Seventh Circuit addressed whether a prison was required to provide sex reassignment surgery to a transgender prisoner suffering from severe gender dysphoria.[37] The case long

---

32. JOE RUSSO ET AL., CARING FOR THOSE IN CUSTODY: IDENTIFYING HIGH-PRIORITY NEEDS TO REDUCE MORTALITY IN CORRECTIONAL FACILITIES, 20 (RAND Corp. 2017).

33. *See generally* Sharon Dolovich, *Forms of Deference in Prison Law*, 24 FED. SENT'G REP. 245 (2012).

34. *See, e.g.*, Est. of Carter v. City of Detroit, 408 F.3d 305, 306 (6th Cir. 2005) (holding that a defendant who knew the plaintiff was having a heart attack and did not arrange transportation to a hospital could be found deliberately indifferent).

35. *See, e.g.*, Hayes v. Snyder, 546 F.3d 516, 526 (7th Cir. 2008) (holding that the refusal to refer to a specialist when the doctor did not know the cause of extreme pain could support a deliberate indifference finding).

36. Smith v. Smith, 589 F.3d 736, 738–39 (4th Cir. 2009) (holding a nurse liable for tearing up a medication order and refusing to provide the medication).

37. 131 F.3d 670, 671–72 (7th Cir. 1997).

predated several widely read opinions that split circuit courts on the same question.[38] Although the court resolved *Maggert* on its facts, it went on to address a "broader issue, having to do with the significance of gender dysphoria in prisoners' civil rights litigation."[39] The court collected cases holding that significant treatment for gender dysphoria was not required but argued that the opinions "make the question easier than it really is by saying that the choice of treatment is up to the prison."[40] This, the court held, was a fudge—the "less drastic" treatment the courts sanctioned was not actually effective, and the real justification for prisons using it was that it was "less costly."[41]

These cases, however, while disingenuous in their justifications, were nonetheless correct, *Maggert* held. "A prison is not required by the Eighth Amendment to give a prisoner medical care that is as good as he would receive if he were a free person, let alone an affluent free person."[42] The court noted that many Medicaid plans—Medicaid being the largest source of funding for medical services for low-income people in the United States—exclude sex reassignment surgery, and the court guessed that "as a practical matter it is extremely difficult to obtain Medicaid reimbursement for such a procedure."[43] As the court explained:

> Withholding from a prisoner an esoteric medical treatment that only the wealthy can afford does not strike us as a form of cruel and unusual punishment. It is not unusual; and we cannot see what is cruel about refusing a benefit to a person who could not have obtained the benefit if he had refrained from committing crimes. We do not want transsexuals committing crimes because it is the only route to obtaining a cure.[44]

In *Reynolds v. Wagner*, the Third Circuit rejected a constitutional challenge to a jail's policy of charging detainees for medical care.[45] Then-Judge Alito wrote for the court that "such a requirement simply represents an insistence that the prisoner bear a personal expense that he or she . . . would be required to meet in the outside world."[46] While the Eighth Amendment draws its meaning from "evolving

---

38. *See* Kosilek v. Spencer, 774 F.3d 63, 68–69 (1st Cir. 2014); Gibson v. Collier, 920 F.3d 212, 215 (5th Cir. 2019); Edmo v. Corizon, Inc., 935 F.3d 757, 767 (9th Cir. 2019). *See also* Samantha Braver, *Circuit Court Dysphoria: The Status of Gender Confirmation Surgery Requests by Incarcerated Transgender Individuals*, 120 COLUM. L. REV. 2235, 2238 (2020) (analyzing the merits of the approaches taken by *Kosilek*, *Gibson*, and *Edmo*).

39. 131 F.3d at 671.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 672.

44. *Id.* The court concluded by noting of the plaintiff, while not bearing on the case before it: "[H]e is entitled to be protected . . . from harassment by prisoners who wish to use him as a sexual plaything, provided that the danger is both acute and known to the authorities." *Id.*

45. 128 F.3d 166, 174–75 (3d Cir. 1997).

46. *Id.*

standards of decency," this cannot condemn "fee-for-service programs[, which] are very common outside prisons."[47] The opinion elaborated:

> Although it is possible that the fee-based program at issue here may cause some prisoners to refrain from seeking medical treatment as early as they might otherwise do so, the deliberate indifference standard of *Estelle* does not guarantee prisoners the right to be entirely free from the cost considerations that figure in the medical-care decisions made by most non-prisoners in our society.[48]

Courts compare the entitlement to medical care inside prison to the equivalent outside prison in contexts other than cost as well. In *Wood v. Housewright*, the Ninth Circuit rejected the claims of David Wood, who injured his shoulder in jail two months before he was admitted to Nevada State Prison.[49] A physician inserted two pins into his shoulder and prescribed him a sling to immobilize his arm and prevent the pins from being dislodged. The prison guard who admitted Wood confiscated the sling over Wood's objections, calling it a security threat. A few days later, one of the pins broke and was left floating in Wood's shoulder.

The Ninth Circuit held this treatment was perhaps grossly negligent but not deliberately indifferent, because "although Wood's treatment was not as prompt or efficient as a free citizen might hope to receive, Wood was given medical care at the prison that addressed his needs."[50] The Ninth Circuit invoked this principle in an odd context, as the prison did not merely fail to provide medical care but affirmatively confiscated a medical device, causing his injury. While medical care inside prisons is often a less prompt or efficient version of medical care in the free world, the seizure of medical devices by government officials is rare outside of prisons.

Even cases that hold prisons liable for inadequate health care can use access to health care for free people as a baseline. In *Jensen v. Shinn*, a federal district court judge in Arizona held the statewide prison system liable for providing inadequate health care to the entire state's public prison population.[51] To demonstrate the Director of the Arizona Department of Corrections's ("ADOC") deliberate indifference, the judge excerpted "shocking" testimony in which the Director claimed that, in some respects, "access to care for Arizona prisoners exceeds access to care for people in the community."[52] This testimony, the court wrote, was "completely detached from reality," as the Director "could not possibly believe prisoners have the same access to care as people in the community."[53] As a result,

---

47. *Id.* at 175.
48. *Id.* at 174.
49. 900 F.2d 1332, 1333 (9th Cir. 1990).
50. *Id.* at 1334.
51. Jensen v. Shinn, 609 F. Supp. 3d 789, 912 (D. Ariz. 2022), *amended by* No. CV-12-00601-PHX-ROS, 2022 WL 2910835 (D. Ariz. July 18, 2022).
52. *Id.* at 869.
53. *Id.*

"his answer was a blatant admission of his flagrant dereliction of responsibilities as the Director of the Arizona prison system."[54]

B. Hepatitis C Behind Bars

This break from the doctrine of *Estelle* and invocation of the principle that incarcerated people do not possess an equal "right" to health care was laid bare in a significant series of recent cases involving the treatment of hepatitis C inside prisons. In 2011, the development of a new medical treatment for hepatitis C (or "HCV") transformed public health. The Centers for Disease Control and Prevention ("CDC") approximates that in 2016, HCV directly caused or contributed to at least 18,153 deaths in the United States.[55] For several years beginning in 2012, the number of Americans killed by HCV surpassed those killed by the 60 other nationally significant infectious diseases, including human immunodeficiency virus ("HIV"), tuberculosis, and pneumococcal disease combined.[56] The U.S. Surgeon General has deemed viral hepatitis a "silent epidemic."[57] And this epidemic is particularly pronounced inside prisons, as chronic HCV disproportionately affects incarcerated people—by recent estimates, HCV is 17 to 23 times more prevalent among prisoners than the general population.[58] Less than 1% of the United States population is incarcerated today, but roughly 30% of all Americans with HCV reside in prison.[59]

Prior to 2011, HCV treatment had consisted of interferon-based treatments that required a series of "grueling shots" and "pills that gave patients flu-like symptoms."[60] These side effects, coupled with a prolonged course of treatment and

---

54. *Id.* at 869 n.37.

55. CDC, VIRAL HEPATITIS SURVEILLANCE: UNITED STATES, 2016 67 (2016), https://www.cdc.gov/hepatitis/statistics/2016surveillance/pdfs/2016HepSurveillanceRpt.pdf [https://perma.cc/A5RL-5R3J].

56. Kathleen N. Ly et al., *Rising Mortality Associated with Hepatitis C Virus in the United States*, *2003–2013*, 62 CLINICAL INFECTIOUS DISEASES 1287, 1288 fig.1 (May 4, 2016), https://www.cdc.gov/nchhstp/newsroom/2016/hcv-mortality.html [https://perma.cc/JJX5-AVKC].

57. Regina M. Benjamin, *Surgeon General's Perspectives: Raising Awareness of Viral Hepatitis*, 127 PUB. HEALTH REPS. 244, 244 (2012), https://www.cdc.gov/hepatitis/pdfs/surgeongeneral-phr_may-june2012.pdf [https://perma.cc/4MLY-DAEQ].

58. *HCV Testing and Treatment in Correctional Settings*, HCV GUIDELINES (Oct. 24, 2022), https://www.hcvguidelines.org/unique-populations/correctional [https://perma.cc/A25V-R6QP]. *See also* Brian R. Edlin et al., *Toward a More Accurate Estimate of the Prevalence of Hepatitis C in the United States*, 62 HEPATOLOGY 1353, 1355–56 (2015), https://doi.org/10.1002/hep.27978 [https://perma.cc/9825-D43K].

59. *HCV Testing and Treatment in Correctional Settings*, *supra* note 58; Aiden K. Varen et al., *Hepatitis C Seroprevalence Among Prison Inmates Since 2001: Still High But Declining*, 162 PUB. HEALTH REPS. 187, 190–92 (2014), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3904899/ [https://perma.cc/LH76-37SU].

60. *FDA Approves New Drug to Treat Hepatitis C*, CBS NEWS (Aug. 4, 2017, 11:39 AM), https://www.cbsnews.com/news/fda-approves-mavyret-abbvie-drug-to-treat-hepatitis-c/ [https://perma.cc/DVB2-7UWD].

a cure rate of only 40% to 50%, made the tradeoffs of interferon-based treatment a difficult choice.[61]

This all changed beginning in 2011, when the Food and Drug Administration ("FDA") began approving a series of direct acting antivirals (or "DAAs").[62] In 2013, the FDA's approval of sofosbuvir (brand name Sovaldi) marked the "advent of interferon-free treatments for hepatitis C" and "a landmark shift" in the treatment of the disease."[63] The FDA called the advances in HCV treatment "transformative"[64] and formally identified several DAA treatments as "breakthrough therapies."[65] In March 2017, the FDA announced that DAAs available at the time had "double[d] the viral cure rates—90% to 100%—in just . . . 12 weeks' time."[66] Medical experts have identified the development of DAAs used to treat HCV as one of the "biomedical breakthroughs" of the past decade, which "[f]rom a combined economic and public-health standpoint . . . may outstrip just about anything else" from the past ten years.[67]

Because of their effectiveness, DAAs quickly became the standard of care for virtually all patients with chronic HCV infection. This standard is articulated by the American Association for the Study of Liver Diseases ("AASLD") and the Infectious Diseases Society of America ("IDSA") in published treatment guidelines. The AASLD/IDSA guidelines are developed and maintained by a panel of HCV experts,[68] and the CDC refers health professionals who treat chronic HCV patients to the AASLD/IDSA guidelines.[69]

Since 2015, the AASLD/IDSA guidelines have stated: "Successful hepatitis C treatment results in sustained virologic response (SVR), which is

---

61. *Hepatitis C Treatments Give Patients More Options*, FDA, https://www.fda.gov/ForConsumers/ConsumerUpdates/ucm405642.htm [https://perma.cc/394D-8GFU] (last visited Aug. 1, 2020).

62. Ayman Geddawy et al., *Direct Acting Anti-hepatitis C Virus Drugs: Clinical Pharmacology and Future Direction*, 5 J. TRANSNAT'L INTERNAL MED. 8, 8–9 (2017).

63. Richard Knox, *Treatments: FDA Expected to Approve New, Gentler Cure for Hepatitis C*, NPR (Dec. 5, 2013, 4:00 AM), https://www.npr.org/sections/health-shots/2013/12/05/248934833/fda-set-to-approve-hepatitis-drug [https://perma.cc/MU58-U2GE].

64. *Hepatitis C Treatments Give Patients More Options*, *supra* note 61.

65. *FDA Approves Sovaldi for Chronic Hepatitis C*, HIV.GOV (Dec. 6, 2013), https://www.hiv.gov/blog/fda-approves-sovaldi-for-chronic-hepatitis-c/ [https://perma.cc/J9LV-E865].

66. *Hepatitis C Treatments Give Patients More Options*, *supra* note 61.

67. Max Nisen, *The 2010s Were a Decade of Drug Breakthroughs*, L.A. TIMES (Dec. 30, 2019, 3:57 PM), https://www.latimes.com/business/story/2019-12-30/drug-breakthroughs-of-the-2010s [https://perma.cc/J8DX-TBCH]; Christine Farr, *These Biomedical Breakthroughs of the Decade Saved Lives and Reduced Suffering*, CNBC (Dec. 28, 2019, 9:31 AM), https://www.cnbc.com/2019/12/27/biomedical-breakthroughs-of-the-2010s-crispr-hep-c-treatment-prep.html [https://perma.cc/6BLH-C533].

68. *Methods*, HCV GUIDELINES, https://www.hcvguidelines.org/contents/methods [https://perma.cc/Q2GW-KRFJ] (last visited Feb. 18, 2023).

69. *Hepatitis C FAQs for Health Professionals*, CDC, https://www.cdc.gov/hepatitis/hcv/hcvfaq.htm [https://perma.cc/2G6X-E4QP] (last visited Feb. 18, 2023).

tantamount to virologic cure and, as such, is expected to benefit nearly all chronically infected persons."[70] They add that "from a medical standpoint, data continue to accumulate that demonstrate the many benefits, both within and outside of the liver, that accompany HCV eradication."[71] Therefore, the guidelines "recommend treatment for *all* patients with chronic HCV infection, except those with short life expectancies that cannot be remediated by treating HCV, by [liver] transplantation, or by other directed therapy."[72] Accordingly, once it is confirmed that a patient is infected with HCV, the recommended course of action in all but the most limited of circumstances is treatment with DAAs. With regard to testing for the presence of HCV infection, the AASLD/IDSA guidelines recommend periodic testing of "persons with ongoing risk factors for HCV exposure," with incarceration itself listed as a risk factor for exposure.[73]

Despite being the center of the HCV epidemic, prisons quickly became the lone class of medical providers failing to provide DAAs to virtually any patients with HCV, no matter how acute the case. A series of class action lawsuits ensued. One might expect them to have quickly induced change via settlement or adjudication, as DAA drugs are not only cost-effective but cost-*saving*, meaning that they are so effective in preventing downstream medical problems that they yield a net fiscal benefit to medical systems as a whole despite their high cost.[74] A number of the cases did.[75] Some of the cases that did not, however, demonstrated the importation of welfare state failures.

---

70. *When and in Whom to Initiate HCV Therapy*, HCV GUIDELINES, https://web.archive.org/web/20151212105917/http://www.hcvguidelines.org/full-report/when-and-whom-initiate-hcv-therapy [https://perma.cc/WQM6-E48Z] (last visited Feb. 18, 2023) (emphasis added). Current guidelines AASLD/IDSA reflect the same language and treatment approaches.

71. *Id.*

72. *Id.* (emphasis added).

73. *See HCV Testing and Linkage to Care*, HCV GUIDELINES, https://web.archive.org/web/20151221092600/http://www.hcvguidelines.org/full-report/hcv-testing-and-linkage-care [https://perma.cc/D88H-KLBQ] (last updated Oct. 24, 2022).

74. *See* Jagpreet Chhatwal et al., *Direct-acting Antiviral Agents for Patients with Hepatitis C Virus Genotype 1 Infection Are Cost-saving*, 15 CLINICAL GASTROENTEROLOGY & HEPATOLOGY 827, 836 (2017), https://www.cghjournal.org/article/S1542-3565(16)30673-5/fulltext [https://perma.cc/CT8J-M3WK].

75. *See, e.g.*, Nicholas Florko, *With Little More Than a Typewriter, an Idaho Man Overturns the Entire State's Policy on Hepatitis C Treatment in Prison*, STAT (Dec. 15 2022), https://www.statnews.com/2022/12/15/typewriter-in-prison-overturns-idaho-hepatitis-c-policy/ [https://perma.cc/92V6-PCS7]; Nicholas Randinone, *Multimillion-Dollar Settlement in Hepatitis C Class-Action Suit Against Connecticut Prisons Goes Before Legislature*, HARTFORD COURANT (Jan. 13, 2021, 9:54 PM), https://www.courant.com/2021/01/13/multimillion-dollar-settlement-in-hepatitis-c-class-action-suit-against-connecticut-prisons-goes-before-legislature/ [https://perma.cc/4B33-VMSV]; Matthew Clarke, *Texas Agrees to Settlement Providing Prisoners Hep C Treatment, Will Pay $950,000 in Attorney Fees*, PRISON LEGAL NEWS (Jan. 1, 2022), https://www.prisonlegalnews.org/news/2022/jan/1/texas-agrees-settlement-providing-prisoners-hep-c-treatment-will-pay-950000-attorney-fees/ [https://perma.cc/N4Q4-SL56].

In *Hoffer v. Inch*, a plaintiff class in Florida obtained an injunction requiring treatment with DAAs for all prisoners with chronic HCV.[76] The prison system appealed to the Eleventh Circuit, and the court vacated the injunction.[77] The plaintiffs argued that cost was the only basis for Florida's denial of DAAs, but the court held that Florida was entitled to consider cost:

> Indeed, the law could hardly be otherwise. It is surely uncontroversial that the deliberate indifference standard . . . does not guarantee prisoners the right to be entirely free from the cost considerations that figure in the medical-care decisions made by most non-prisoners in our society. Every minute of every day, ordinary Americans forgo or delay beneficial—and even life-altering—medical treatment because it's just too expensive. A couple decides to pass on in vitro fertilization in favor of less expensive (if also less effective) fertility treatment. A woman suffering from an autoimmune condition postpones an intravenous-immunoglobulin infusion because her insurance hasn't come through. Parents opt to delay reconstructive surgery for a physically disabled child. Healthcare can be expensive—sadly, sometimes prohibitively so. What a topsy-turvy world it would be if incarcerated inmates were somehow immune from that cold—and sometimes cruel—reality.[78]

The Eleventh Circuit later in its opinion rejected a proposed interpretation of the Eighth Amendment because it would

> impermissibly (and perversely) create a world—already discussed and dismissed—in which incarcerated prisoners would be constitutionally entitled to medical care, at taxpayer expense, that many private citizens can't get; there are, as already explained, countless instances in which ordinary Americans forgo particular medical treatments for the sole and exclusive reason that they can't afford them.[79]

Another forthright invocation of the principle that prison health care should be measured against the American health system at large came after an individual prisoner challenged a short delay in providing him DAAs in a damages action. In *Bernier v. Allen*, the majority of a D.C. Circuit panel held that a prison doctor was entitled to qualified immunity because, regardless of any constitutional violation, the right to DAAs was not clearly established only months after the recommendations for widespread use were issued.[80]

A concurrence by Judge Silberman, however, argued for a more aggressive holding. He quoted the majority as stating that the "refusal to provide timely, available, and appropriate treatment for a known, serious medical condition posing excessive risk to an inmate's health or safety would be deliberate indifference in

---

76. Hoffer v. Inch, 382 F. Supp. 3d 1288, 1317 (N.D. Fla. 2019).
77. Hoffer v. Sec'y, Fla. Dep't of Corr., 973 F.3d 1263, 1266 (11th Cir. 2020).
78. *Id.* at 1276–77.
79. *Id.* at 1277.
80. Bernier v. Allen, 38 F.4th 1145, 1147, 1154 (D.C. Cir. 2022).

violation of the Eighth Amendment."[81] This seems a straightforward restatement of *Estelle*, but he wrote that he did "not agree with that statement," as it was "too broad."[82] The concurrence quoted the majority again for its assumption that "well-pleaded allegations that a treatment decision was based exclusively on nonmedical considerations such as cost or administrative convenience rather that any medical justification can suffice to state an Eighth Amendment deliberate indifference claim," rejecting that assumption too as "an overstatement."[83] The Eighth Amendment, he wrote, "does not guarantee state-of-the-art medical care for prisoners. A federal prison is not a Johns Hopkins Hospital."[84]

The prison HCV opinions and their treatment of cost are particularly revealing in comparison to another series of lawsuits—statutory challenges to limitations on the provision of DAAs under Medicaid. In *B.E. v. Teeter*, the Western District of Washington held that DAAs met the statutory definition of "medically necessary" and therefore granted a preliminary injunction preventing Washington Medicaid from limiting DAAs to anyone with chronic HCV.[85] Although Medicaid—like prisons and insurance companies—does not have unlimited resources, there was no handwringing about the cost of the drugs, just the straightforward conclusion that the evidence showed they were medically required. In states like Delaware, Pennsylvania, Oregon, Rhode Island, and Illinois, a pre-litigation demand letter was sufficient to get Medicaid to remove any severity restriction.[86] And by the summer of 2022, only two states had Medicaid programs with any restrictions on the basis of severity, neither of which have faced litigation.[87] In sum, for the government-provided health care for the poor, there is no question that DAAs are medically necessary, but for those in prison, the intentional and systemic failure to provide DAAs is not a failure to treat a serious medical need. And in justifying the distinction, courts point to the trade-offs that all Americans face in receiving health care and insist that prisoners face them, and then some, as well.

II. IMPORTING FAILURES: THE RESPONSE TO COVID-19

The importation of welfare state failures was also visible in the judiciary's response to COVID-19. The federal judiciary dealt with the intersection of COVID-19 and incarceration primarily in two contexts: individual petitions for compassionate release from prisoners in the federal system and class action injunctive litigation to reform conditions to stop the spread. The former saw a number of successes. The latter—at least in the context of prisons and jails rather

81. *Id.* at 1158 (Silberman, J., concurring).

82. *Id.*

83. *Id.*

84. *Id.* at 1159.

85. No. C16-227-JCC, 2016 WL 3033500, at *2, *4, *6 (W.D. Wash. May 27, 2016).

86. Robert Greenwald et al., *Enforcement of Legal Remedies to Secure Hepatitis C Virus Treatment with Direct Acting Antiviral Therapies in Correctional Facilities and Medicaid Program*, 135 PUB. HEALTH REPS. 44S, 46S (2020).

87. SUZANNE DAVIES ET AL., HEPATITIS C: STATE OF MEDICAID ACCESS: 2022 NATIONAL SUMMARY REPORT 8 (2022), https://stateofhepc.org/wp-content/uploads/2022/06/State-of-Hep-C-Report_2022-1.pdf [https://perma.cc/WX2E-YRXJ].

than immigration detention facilities[88]—saw mostly failure. Both, however, provoked the importation of the political and social failures in response to COVID into prison law. And this importation to prisoners bringing claims was in stark contrast to those in the free world, as revealed by a series of challenges to restrictions on religious gatherings brought by both incarcerated and non-incarcerated plaintiffs.

A. Compassionate Release During COVID

The Sentencing Reform Act of 1984 created a mechanism for federal prisoners to seek compassionate release before the fulfillment of their sentence if a "court, upon motion of the Director of the Bureau of Prisons," finds "that extraordinary and compelling reasons warrant such a reduction and that such a reduction is consistent with applicable policy statements issued by the [U.S.] Sentencing Commission."[89] The Bureau of Prisons, however, rarely made such motions and, even when it did, its process lacked timeliness standards, a problem when the extraordinary and compelling reason for seeking release was often impending death.[90] The 2018 First Step Act reformed the process by permitting the prisoner to directly file such a motion in federal court without an administrative gatekeeper.[91]

The reform arrived just a year before COVID hit the American prison system, and the pandemic unleashed a flood of petitions on the federal courts. Whereas January to March 2020 saw approximately 39 petitions filed per month nationwide, the following 15 months saw an average of 1,363 petitions filed, an increase of over 3000%.[92] And in 2020 alone, courts granted 1,805 federal prisoners compassionate release, a twelve-fold increase over the previous year.[93]

Much of the compassionate release litigation turned on whether the existence of the pandemic itself was an "extraordinary and compelling" reason to release someone from prison. Whereas government authorities were insisting that other populations socially distance during the early days of the pandemic, social distancing in prison is impossible.[94] Additional problems included poor sanitation

---

88. *See, e.g.*, Savino v. Souza, 459 F. Supp. 3d 317, 320, 332–33 (D. Mass. 2020); *See also* Brandon L. Garrett & Lee Kovarsky, *Viral Injustice*, 110 CALIF. L. REV. 117, 143 (2022) ("To the extent that one category of detainee-plaintiffs fared better than others, it was people in ICE detention.").

89. Sentencing Reform Act of 1984, Pub. L. No. 98–473, § 3582, 98 Stat. 1837, 1998–99.

90. Marielle Paloma Greenblatt, *In Search of Judicial Compassion: The Cantu-Lynn Divide Over Compassionate Release for Federal Prisoners*, 52 COLUM. HUM. RTS. L. REV. 140, 142–43 (2020).

91. First Step Act of 2018, Pub. L. No. 115-391, sec. 603(b), § 3582(c)(1)(A), 132 Stat. 5194, 5239.

92. Jeffrey Tsoi, *Compassionate Release as Compassionate Decarceration: State Influence on Federal Compassionate Release and the Unfinished Federal Reform*, 59 AM. CRIM. L. REV. ONLINE 1, 4 (2021).

93. U.S. SENT'G COMM'N, COMPASSIONATE RELEASE: THE IMPACT OF THE FIRST STEP ACT AND COVID-19 PANDEMIC 3, 16 (2022), https://permanent.fdlp.gov/gpo182689/20220310_compassionate-release.pdf [https://perma.cc/X3AH-7N6X].

94. Maney v. Brown, 464 F. Supp. 3d 1191, 1198– 99 (D. Or. 2020).

and a population with disproportionate co-morbidities.[95] Medical authorities were clear that the most effective solution could only be "to drastically reduce the populations of jails and prisons."[96]

Yet when individual petitioners sought relief, some courts relied on the governmental and social failures occurring outside of prison to justify keeping petitioners trapped inside prison, where such failures were inevitable. In *United States v. Huerta*, for example, the Eastern District of Tennessee wrote that the risk of contracting COVID inside was "not extraordinary, especially in light of the prevalence of COVID-19 in the general population. Because COVID-19 poses a danger to people everywhere, the pandemic alone cannot justify compassionate release."[97] In *United States v. Garcia*, the Southern District of New York noted that if the defendant "were released he would be residing with his sister and her husband in a two-bedroom apartment in Newark, New Jersey—a relative COVID-19 hot spot, where there have been 6,332 confirmed cases of the virus, and 491 deaths."[98] In *United States v. Santos*, the Southern District of Ohio conceded that the "fear of contracting COVID-19 is shared by many, both in the prisons and in the general population," which "is entirely rational." But "the danger presented by this pandemic would not be lessened by a general release of all incarcerated individuals."[99]

Once a vaccine for COVID-19 became available, courts cited comparatively to the vaccination rates inside and outside of prisons to justify keeping people in prison. In *United States v. Fowler*, the Sixth Circuit noted that "82 percent of Manchester FCI inmates are fully vaccinated, compared to only 54 percent of the general population of Kentucky."[100] In *United States v. Marshall*, the Middle District of Alabama noted that "[i]t is clear . . . that the vaccination rate at FCI Talladega exceeds that of the general population in the state of Alabama."[101] In *United States v. Bonds*, the same court held that "it is clear from these statistics that the vaccination rate at FCC Butner exceeds that of the general population in the state of Alabama."[102]

Despite ample evidence to the contrary, in the context of compassionate release petitions, some courts suggested that prisons were better protected from

---

95. *See* Laura Hawkes et al., *COVID-19 in Prisons and Jails in the United States*, 180 JAMA INTERNAL MED. 1041, 1041 (2020).

96. *Id.*

97. No. 2:08-CR-00102-JRG-1, 2022 WL 683203, at *2 (E.D. Tenn. Mar. 7, 2022).

98. 460 F. Supp. 3d 403, 409–10 (S.D.N.Y. 2020).

99. This conclusion is odd for two additional reasons. First, medical authorities were clear that, whatever the countervailing considerations, yes it would. Second, compassionate release requires an extraordinary and compelling reason *and* a reexamination of the federal sentencing factors, such as the criminal history and the particular nature of the crime. 18 U.S.C. § 3582(c)(1)(A); 18 U.S.C. § 3553(a). So, holding that one prisoner has an extraordinary and compelling reason for release does not compel concluding that either they or everyone should be released.

100. No. 21-5769, 2022 WL 35591, at *2 (6th Cir. Jan. 4, 2022).

101. No. 2:12-CR-87-WKW, 2021 WL 4848054, at *3 (M.D. Ala. Oct. 18, 2021).

102. No. 2:11-CR-75-WKW, 2021 WL 4944026, at *3 (M.D. Ala. Oct. 22, 2021).

COVID-19 than the world outside. The Eastern District of California in *Peterson v. Diaz* wrote that "prison authorities may be able to isolate highly at-risk prisoners, such as petitioner, more easily than isolation or 'social distancing' is achieved in the general population, e.g., housing in administrative segregation, partial lockdowns or transfers."[103] It added, "[p]risons are certainly able to order their afflicted employees to stay at home, and can probably, more easily find testing opportunities for their essential employees than is yet possible for the general population."[104] The Western District of New York cited to the conclusion in *Diaz*, noting that "prison officials might actually be uniquely situated to guard against communicable diseases."[105] In *Garcia*, cited above, the court wrote:

> It is not idle musing to suggest Garcia may be safer [in federal prison], where authorities provide him with regular health care and keep those infected with COVID-19 isolated, than at liberty in Newark, where he would have to manage his healthcare on his own, and where compliance with social distancing and mask requirements would be strictly voluntary.[106]

Compassionate release petitions played a non-trivial role in reducing the federal prison population during the pandemic. For many courts, however, the social and governmental failures to control the spread or get the population vaccinated outside justified subjecting prisoners to an environment where containing COVID was impossible.

B. COVID Conditions of Confinement Litigation

The pandemic also sparked a prompt series of counseled, class-action suits against carceral facilities seeking both release and changed conditions. The preexisting doctrine, although developed in the face of better understood and less serious health risks, still contained "right-remedy combinations that, if straightforwardly applied, would have required substantial intrusions on detention policy and operations."[107] Yet outside the context of immigration detention,[108] most of the suits ultimately failed. Plaintiff-classes won a number of trial victories that appellate courts undercut, while the inverse did not occur once.[109]

In *Swain v. Junior*, plaintiffs in the Metro West Detention Center in Miami quickly obtained a 14-day preliminary injunction that required the jail to take basic steps to comply with CDC guidelines.[110] These included social distancing as much as was possible; a free and sufficient supply of hand soap, paper towels, and toilet paper; a requirement that staff wear masks and gloves and regularly wash their

---

103. No. 2:19-CV-01480WBSGGHP, 2020 WL 2112062, at *2 (E.D. Cal. May 4, 2020).

104. *Id.*

105. United States v. Korn, No. 11-CR-384S, 2020 WL 1808213, at *7 n.7 (W.D.N.Y. Apr. 9, 2020).

106. United States v. Garcia, 460 F. Supp. 3d 403, 410 (S.D.N.Y. 2020).

107. Garrett & Kovarsky, *supra* note 88, at 167.

108. *Id.* at 147, 151, 173.

109. *Id.* at 166.

110. Swain v. Junior, No. 1:20-CV-21457-KMW, 2020 WL 1692668, at *1–2 (S.D. Fla. Apr. 7, 2020).

hands; and testing for anyone displaying COVID symptoms.[111] Later that month, the district court extended preliminary injunctive relief another 45 days, noting that the jail was failing, in practice if not in theory, to meet the earlier injunction's demands.[112]

The following week, the Eleventh Circuit stayed the injunctive relief pending appeal, effectively mooting the case given the respective paces of the virus and the federal appellate process.[113] The opinion opened: "No part of our country has escaped the effects of COVID-19. It is thus not surprising that several inmates at the Metro West Detention Center ('Metro West')—the largest direct-supervision jail facility in the State of Florida—have tested positive for the virus."[114]

The appellate court held that the jail was likely to win on appeal, as the district court had not articulated evidence that the defendants subjectively knew their measures were inadequate, and the injunction was irreparably harming the defendants by "hamstring[ing] [jail] officials with years of experience running correctional facilities, and the elected officials they report to, from acting with dispatch to respond to this unprecedented pandemic."[115]

In *Valentine v. Collier*, nine days after the preliminary injunction issued by the district court in *Swain*, the Southern District of Texas issued an analogous injunction largely based on CDC guidelines in the Wallace Pack Unit, a state prison in east Texas.[116] Within a week, the Fifth Circuit stayed the injunction pending the appeal.[117] The opinion's opening words were similar to those in *Swain*: "As with every other part of the country, our Nation's correctional facilities have not escaped the reach of COVID-19."[118] The court's weighing of the stay factors was also similar to *Swain*, and the court noted in weighing competing interests that "[t]here is no doubt that COVID-19 poses risks of harm to all Americans, including those in the Pack Unit."[119]

Valentine and *Swain* were part of a larger pattern of appellate courts intervening to undo district court orders requiring COVID mitigation measures in jails and prisons.[120] This was occurring at a time when the United States was vastly

---

111. *Id.* at *2.

112. Swain v. Junior, 457 F. Supp. 3d 1287, 1312, 1317 (S.D. Fla. 2020).

113. Swain v. Junior, 958 F.3d 1081, 1085 (11th Cir. 2020).

114. *Id.*

115. *Id.* at 1089–90.

116. No. 4:20-CV-1115, 2020 WL 1899274, at *1 (S.D. Tex. Apr. 16, 2020), *vacated and remanded*, 960 F.3d 707 (5th Cir. 2020).

117. Valentine v. Collier, 956 F.3d 797, 799 (5th Cir. 2020).

118. *Id.*

119. *Id.* at 804. In a similar case brought by an individual in Louisiana who originally obtained injunctive relief, the Fifth Circuit again reversed, citing to *Valentine*. Marlowe v. LeBlanc, 810 F. App'x 302, 307 (5th Cir. 2020). Its irreparable harm analysis invoked *Valentine*: "COVID-19," the court wrote, "unquestionably poses risks of harm to all Americans—particularly those like Plaintiff who have underlying health conditions." *Id.* But the four stay factors nonetheless favored the State, mooting Marlowe's relief. *Id.*

120. *See* Brandon L. Garrett & Lee Kovarsky, *Viral Injustice*, 110 CALIF. L. REV. 117, 164–66. This included a staying of relief by the U.S. Supreme Court obtained by

overrepresented in COVID cases and deaths, as the relevant courts often noted.[121] Although less tied to the actual doctrine than the compassionate release opinions, the courts' repeated invocations of the threat COVID poses to all Americans used social and political failures outside of carceral facilities to justify ensuring failure inside of them.

C. Congregate Religious Settings During COVID

One might read the above cases as, sensibly, giving deference to public health regulations in the context of a fast-moving pandemic. Two sets of parallel cases, however, seem to indicate otherwise. During the pandemic, religious institutions brought challenges to limitations on congregating as applied to religious gatherings. Courts took them seriously and often ruled in the religious groups' favor. Prisoners too brought claims challenging the shutdown of congregate religious services inside prison. And unlike for churches outside, the prisoners had a powerful doctrinal weapon in their favor: the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), which applies strict scrutiny to limits on religion in certain circumstances, including in prisons.[122] A federal judiciary, however, that often granted extraordinary relief to religious institutions outside of prison dismissed as frivolous challenges brought inside of it, despite the nominally much stricter standard.

Roughly three months after lockdowns in response to COVID-19 began in the United States, the U.S. Supreme Court began receiving requests for emergency relief from religious entities challenging the restrictions under the First Amendment.[123] In cases like *South Bay United Pentecostal Church v. Newsom*, the Court denied those requests over dissents from conservative justices, who argued that a state's imposition of occupation limits on churches discriminates against religion in violation of the First Amendment if it fails to impose similar limits on all secular activities that, in the Court's view, pose a similar risk.[124] The state "has substantial room to draw lines, especially in an emergency," dissenting justices wrote.[125] "But as relevant here, the Constitution imposes one key restriction on that line-drawing: The State may not discriminate against religion."[126]

---

detainees against the Orange County Jail, essentially mooting the remedy, although the Court did so only in an unsigned order without providing any reasoning. Barnes v. Ahlman, 140 S. Ct. 2620, 2620 (2020).

121. Swain v. Junior, 457 F. Supp. 3d 1287, 1293 (S.D. Fla. 2020) ("As of the date of this Order, the United States is home to more than one million coronavirus cases. This number represents nearly one-third of the world's reported COVID-19 cases and includes at least 58,000 known deaths.").

122. 42 U.S.C. §§ 2000cc–cc-5; Holt v. Hobbs, 574 U.S. 352, 358 (2015) (discussing RLUIPA's "expansive protection for religious liberty" in the context of a prison case).

123. Mark Storslee, *The COVID-19 Church-Closure Cases and the Free Exercise of Religion*, 37 J.L. & RELIGION 72, 72 (2022).

124. 140 S. Ct. 1613, 1615 (2020) (Kavanaugh, J., dissenting).

125. *Id.*

126. *Id. See also* Calvary Chapel Dayton Valley v. Sisolak, 140 S. Ct. 2603, 2604 (2020) (Alito, J., dissenting) ("We have a duty to defend the Constitution, and even a public health emergency does not absolve us of that responsibility.").

By November 2020, Justice Ginsburg had died and her replacement, Amy Coney Barrett, had been confirmed. The succession provided the fifth vote for religious entities seeking relief before the Court. In *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Court enjoined New York State from enforcing its population caps on religious services taking place in areas with heavy spread of COVID.[127] The Court later enjoined similar caps in California,[128] vacated a lower court decision denying relief to religious bodies in Colorado with an instruction to apply the principles of *Roman Catholic Diocese of Brooklyn*,[129] and enjoined the enforcement of California's caps on at-home religious gatherings because equivalent caps did not exist for certain secular public businesses.[130]

Even though these challenges were brought under the Free Exercise Clause and not the much higher standard of RLUIPA, the Supreme Court took them seriously enough to consider, and ultimately begin granting, emergency relief by vacating public health orders in the midst of a pandemic. Incarcerated plaintiffs had a different experience. For example, a group of imprisoned plaintiffs in Michigan's Parnall Correctional Facility sought a preliminary injunction permitting the resumption of congregate religious services, arguing that "there are fewer than ten prisoners in most religious groups, there have been no outbreaks of COVID-19 at Parnall for months, other programs at Parnall have resumed, and all but a few prisoners at Parnall carry COVID-19 antibodies."[131] The court denied the motion, explaining that "there is no doubt that the coronavirus pandemic has required restrictive measures to be imposed in prisons just as in free society."[132] It continued, "[s]uch measures may be even more necessary in prisons, where social distancing is much more difficult and such things as masks, soap, and hand sanitizer are less readily available."[133]

In *Parker v. Gauna*, a Texas prisoner alleged that he had been kept in a facility that burdened his ability to practice Christianity because "the unit did not have any Bibles or religious services available during most of his two months stay."[134] The district court dismissed his claim as frivolous and without leave to amend. He had failed, the court held, to identify how preventing a Christian from gathering or having a bible burdened his faith.[135] The court cited to *South Bay Pentecostal Church*, explaining that the "Supreme Court recently held that the State may temporarily limit civilian gatherings as a means to eliminate the legitimate risks of contagions spreading during pandemics."[136] In *South Bay*, of course, the Supreme

---

127. 141 S. Ct. 63, 66 (2020).

128. *See* S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 716 (2021).

129. High Plains Harvest Church v. Polis, 141 S. Ct. 527, 527 (2020).

130. Tandon v. Newsom, 141 S. Ct. 1294, 1297 (2021).

131. Rouse v. Trump, No. 20-CV-12308, 2020 WL 6701899, at *1 (E.D. Mich. Nov. 13, 2020).

132. *Id.* at *3.

133. *Id.*

134. No. 2:20-CV-293, 2021 WL 9352586, at *6 (S.D. Tex. Feb. 12, 2021), *report and recommendation adopted*, No. 2:20-CV-00293, 2022 WL 3927843 (S.D. Tex. Aug. 30, 2022).

135. *Id.* at *7.

136. *Id.*

Court was rejecting emergency injunctive relief under the First Amendment, not screening a complaint for frivolity under RLUIPA. The court simply assumed without hearing from the defendants, as the dismissal was pre-service under a frivolity screening, that the plaintiff's own allegations indicated that "prison officials had a legitimate penological reason to impinge upon Plaintiff's First Amendment rights by restricting inmate gatherings to prevent COVID-19 from spreading."[137]

A series of pro se cases produced similar results. In *Stovall v. Prisk*, the Western District of Michigan considered the shutdown of weekly in-person Muslim religious services, holding that, "[a]t most, Plaintiff's inability to gather with other practicing Muslims to conduct Al-Jumuah services during the four days on which such services were cancelled appears to be a de minimis burden on Plaintiff's religious practice."[138] The court dismissed the claim as frivolous. In *Traore v. Rikers Island C-95 & C-76*, the Southern District of New York held that "Plaintiff's allegations that there were 'no religious services of any kind' does not suggest significant interference with his right to practice his religion."[139] The Western District of Virginia held that:

> Although [the plaintiff sought] to hold the defendants responsible for allegedly suspending in-person religious services, gatherings, and activities, he [did] not describe how the inability to attend such events burdened his ability to practice his Protestant beliefs, much less imposed a substantial burden.[140]

The Southern District of West Virginia dismissed a similar claim challenging the denial of a religious leader's visits, holding that the prison "implemented a strict no visitor policy due to the unprecedented health crisis."[141] While the courts broke towards placing religious liberty above the judgment of public health officials in free exercise cases, nothing of the sort happened for incarcerated plaintiffs, whose claims under the much stricter RLUIPA standard were dismissed.

III. IMPORTING FAILURES ACROSS PRISON LAW

Importing welfare state failures into prison law may be particularly pronounced in the context of health care and the carceral response to COVID-19, but the same phenomenon is visible across prison conditions law. Compared to its peer countries, the United States is unusually violent;[142] it has an unusually high

---

137. *Id.*

138. No. 2:22-CV-146, 2022 WL 4376599, at *4 (W.D. Mich. Sept. 22, 2022).

139. No. 22-CV-1432 (LTS), 2022 WL 1556946, at *4 (S.D.N.Y. May 16, 2022).

140. Farnsworth v. Northam, No. 7:21-CV-00463, 2022 WL 17477928, at *3 (W.D. Va. Dec. 5, 2022), *reconsideration denied*, No. 7:21-CV-00463, 2023 WL 3395091 (W.D. Va. May 11, 2023).

141. Marcum v. Jividen, No. 2:20-CV-00394, 2020 WL 8771480, at *6 (S.D.W. Va. Nov. 4, 2020), *report and recommendation adopted*, No. 2:20-CV-00394, 2021 WL 864769 (S.D.W. Va. Mar. 8, 2021).

142. *See generally* Erin Grinshteyn & David Hemenway, *Violent Death Rates in the US Compared to Those of the Other High-Income Countries*, 123 PREVENTIVE MED. 20 (2019).

number of deaths from drug overdoses;[143] and an unusual percentage of its population goes to bed hungry.[144] Courts rely on these social and political failures in replicating or exaggerating those same conditions inside the Country's prisons and jails.

A. Protection from Violence

In *Farmer v. Brennan*, a pro se incarcerated transgender woman brought a *Bivens* claim against federal prison officials for subjecting her to an unconstitutional risk of violence.[145] The district court dismissed her claim, and the Seventh Circuit summarily affirmed, but the U.S. Supreme Court vacated and remanded. The Court held that prisoners have such a right to be protected from violence, as "having stripped them of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course."[146] Although the Court granted certiorari to define the meaning of "deliberate indifference" and did so in a defendant-friendly way—requiring criminal law recklessness instead of civil law recklessness—it nonetheless vacated the lower court decision for relying dispositively on the plaintiff's failure to notify the defendants of the risk to her of sexual assault.[147] Defendants could have, the Court noted, been aware of a substantial risk to the plaintiff merely because of the background level of sexual violence and the particular risk to transgender women.

Contrast this result with the free world. In *DeShaney v. Winnebago County Department of Social Services*, an abused child sued social workers and other local officials who had reason to believe his father was beating him but took no actions to protect him.[148] The father beat the boy so badly that he fell into an emergency coma, required brain surgery, and required institutionalization for the rest of his life. The Court rejected his substantive due process claim, holding that the Due Process Clause "is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security."[149] The Due Process Clause simply "does not require the State to provide its citizens with particular protective services."[150]

The Court noted that "[i]t is true that in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with

---

143. *See generally* Jessica Y. Ho, *The Contemporary American Drug Overdose Epidemic in International Perspective*, 45 POPULATION & DEV. REV. 7 (2019).

144. *See* Cathleen Jo Faroque & M. Rezaul Islam, *Hunger Reduction in the United States of America: Analysis of Factors Contributing to Hunger*, 3 J. INT'L. SOC. ISSUES 13, 13 (2015) ("As the United States is considered a highly developed nation, researchers often overlook it when examining world hunger. However, food insecurity has been a significant problem in the United States with one in six or 50.2 million people residing in food insecure households.").

145. 511 U.S. 825, 825 (1994).

146. *Id.* at 833 (citing Estelle v. Gamble, 429 U.S. 97, 103–04 (1976); DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 199–200 (1989)).

147. *Id.* at 842, 849, 851.

148. 489 U.S. 189, 189, 191 (1989).

149. *Id.* at 195.

150. *Id.* at 196.

respect to particular individuals."[151] The Court was referring to prisoners. Prison cases offered this plaintiff no help, however, because "they stand only for the proposition that when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being."[152] The duty "arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf."[153]

The Supreme Court extended *DeShaney*'s holding in *Town of Castle Rock v. Gonzales*.[154] A woman who had obtained a restraining order against her husband called the police when he took their three daughters in violation of its terms. Despite mandatory language in Colorado law that police "shall" enforce such orders, the police ignored her entreaties to help. The husband murdered the three daughters and then died by suicide. The woman brought both substantive and procedural due process claims against the police department. Citing to *DeShaney*, the Tenth Circuit rejected the argument "that Ms. Gonzales and her daughters had an inherent Constitutional right to police protection against harm from her husband."[155] The court held, however, that Gonzalez had a procedural due process right in the enforcement of the restraining order because of its mandatory language. The Supreme Court reversed, holding that police had discretion over whether to enforce the law and therefore the victims had no property right in its enforcement.[156] It is "simply common sense," the Court wrote, "that *all* police officers must use some discretion in deciding when and where to enforce city ordinances."[157]

We are therefore left doctrinally with a world in which prisoners have the right to be protected from violence and non-prisoners do not. Yet courts have invoked the exact opposite principle in excusing prison officials for violence in their facilities. In *Taylor v. Freeman*, the Eastern District of North Carolina issued a preliminary injunction after a plaintiff-class put forward evidence that their youth prison was unconstitutionally violent.[158] The Fourth Circuit reversed, with Judge Luttig writing for the court. The opinion criticized the district court's "surprising statements . . . that 'violence [in prisons] isn't inevitable . . . any more than it would be in school or the armed forces or anywhere else.'"[159] On the contrary, the court wrote, "it is virtually impossible to eliminate violence among the incarcerated."[160] Although the statistics showed that altercations were five times more common at the youth prison than at North Carolina adult prisons, the court noted that these statistics

---

151. *Id.* at 198.
152. *Id.* at 199–200.
153. *Id.* at 1005–06.
154. 545 U.S. 748, 748 (2005).
155. Gonzales v. City of Castle Rock, 366 F.3d 1093, 1099 (10th Cir. 2004), *rev'd sub nom.* Town of Castle Rock v. Gonzales, 545 U.S. 748 (2005).
156. Town of Castle Rock v. Gonzales, 545 U.S. 748, 761, 768–69 (2005).
157. *Id.* at 761 (quoting City of Chicago v. Morales, 527 U.S. 41, 62 n.32 (1999)).
158. 34 F.3d 266, 267, 271, 274 (4th Cir. 1994).
159. *Id.* at 273 n.6.
160. *Id.*

"compare favorably, if regrettably, to the level of violence at large urban public schools in North Carolina."[161]

Taylor favorably cited the Fourth Circuit's earlier holding in *Shrader v. White* that "seven inmate murders, fifty-four stabbings, and twenty-four other serious inmate-on-inmate assaults at Virginia State Prison in the five years preceding trial" did not constitute a pervasive risk of violence.[162] The court's basis—prison violence is inevitable:

> The men confined at [Virginia State Prison] have been convicted of crimes of violence. They are confined against their will. Under such circumstances acts of violence by inmates against inmates are inevitable. No amount of money and no increase in the number of prison officers is going to completely eradicate inmate violence from VSP or any other such institution. This is a maximum security prison and each inmate has been interviewed, tested and classified before being confined to VSP. Often an effort to achieve the "evolving standards of decency that mark the progress of a maturing society," runs headlong into the hardened criminals who are incarcerated in our maximum security prisons . . . To follow the plaintiff's argument *we would have to find that imprisoned felons are constitutionally entitled to more protection from crimes of violence than are law abiding citizens*.[163]

The courts here are making both empirical and normative claims. First, despite the fact that prisoners are confined in a uniquely controlled and secure environment, prison staff are incapable of limiting violence. And second, they are not constitutionally obligated to do so. Driving both claims is a conception of "prison violence [as] not a product of policy, leadership, or culture so much as a reflection of prisoners' antisociality and essential lawlessness."[164] Prisons are simply "different from institutions filled with law-abiding people and, as such, are resistant to the rule of law."[165] Courts therefore describe the right to safety for those in prison as less substantive than the same right in the free world, despite the latter not existing.

B. Drug Use

In *Shrader v. White*, quoted at length above, the Fourth Circuit rejected a broad range of claims from a prisoner-class, including that the widespread availability of drugs created a substantial risk of serious harm that constituted a

---

161. *Id.* at 273.

162. *Id.* (citing Shrader v. White, 761 F.2d 975, 988 (4th Cir. 1985) (Sprouse, J., concurring in part and dissenting in part)).

163. *Shrader*, 761 F.2d at 980 (majority opinion) (emphasis added) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

164. Justin Driver & Emma Kaufman, *The Incoherence of Prison Law*, 135 HARV. L. REV. 515, 543 (2021).

165. *Id.* at 544. Kaufman and Driver note that the U.S. Supreme Court has used the conception of prisons as violent "selectively and inconsistently," portraying prisons as violent and chaotic or subdued and banal as needed to reach desired outcomes in different doctrinal settings. *Id.* at 545, 548.

violation of the Eighth Amendment. As a partial dissent noted, estimates of intravenous drug use in the prison population ranged from 10% from defense witnesses to over half from correctional officers testifying for the prisoner-class.[166] The drug trade and other illicit activity was also responsible for "most or all violence" in the prison.[167] The majority nonetheless succinctly rejected the extent of the drug problem, explaining that "[r]isk of exposure to illegal drugs inside [Virginia State Prison] seems no greater than the risk of exposure on the outside."[168]

In *Alexander v. Padvaiskas*, the estate of a woman brought suit against jail officials because the woman was exposed to heroin after being incarcerated for shoplifting. She used, overdosed on, and ultimately died as a result of the heroin.[169] The District of Massachusetts rejected her claim, holding as dispositive that "plaintiff does not contend that the risk of exposure to drugs was greater inside the Thorndike Street lockup than outside of state custody."[170] Accepting, the court noted, that prison officials violated her rights by failing to monitor her "would be to conclude that inmates are constitutionally entitled to greater protection from the effects of illicit drugs than unincarcerated citizens."[171]

In *Nunez v. Salamack*, a prisoner in a work-release program brought an Eighth Amendment claim against the Superintendent of Edgecomb Correctional Facility alleging that the superintendent's knowing disregard of widespread drug use was interfering with the prisoner's rehabilitation.[172] The Southern District of New York rejected his claim, holding as dispositive that the prisoner "does not allege that the risk of exposure to drugs, and the deleterious effects of such exposure, were greater inside than outside Edgecombe." To accept the plaintiff's argument, the court wrote, it "would have to hold that imprisoned felons are constitutionally entitled to more protection . . . than are law-abiding citizens."[173]

C. Nutrition

The state must provide prisoners with a nutritionally adequate diet.[174] This requirement, of course, contrasts with the free world where Americans have no

166. *Shrader*, 761 F.2d at 992 (Sprouse, J., concurring in part and dissenting in part).

167. *Id.*

168. *Id.* at 981 (majority opinion).

169. No. CV 14-13675-NMG, 2015 WL 10433618, at *1 (D. Mass. Dec. 2, 2015).

170. *Id.* at *3.

171. *Id.*

172. No. 88 CIV. 4587 (MGC), 1989 WL 74940, at *1 (S.D.N.Y. June 26, 1989).

173. *Id.* (quoting *Shrader*, 761 F.2d at 980–81). *See also* Kern v. St. Charles Cnty., No. 4:20-CV-00884-SPM, 2022 WL 1262507, at *6 (E.D. Mo. Apr. 28, 2022) (noting that courts in other jurisdictions have suggested that the risk of exposure to illegal drugs inside a jail or prison does not implicate the Eighth Amendment, at least absent facts suggesting that the risk of exposure to drugs was greater inside the facility than outside of the facility); Smith v. Connections CSP, Inc., No. CV 17-1733-RGA, 2018 WL 1433840, at *4 (D. Del. Mar. 20, 2018) (citing *Shrader*, 761 F.2d at 981) (suggesting that exposure to drugs cannot state a claim under the Eighth Amendment if the exposure is not greater inside prison than outside it).

174. Ramos v. Lamm, 639 F.2d 559, 570–71 (10th Cir. 1980).

constitutional right to food. Nonetheless, courts have contrasted culinary options outside of prisons to justify substandard nutrition inside of them.

In *Sumpter v. Cribb*, a plaintiff moved for a preliminary injunction on several grounds, including that he was "being given insufficient nutrition and that he [was] having bowel problems and weakness as a result."[175] The court rejected the claim, explaining that "Plaintiff was a prisoner in a county detention center, not a guest in a hotel, and it should be expected that conditions in such a setting are often times less than ideal."[176]

In *Ross v. Davidson County Sheriff's Office*, the plaintiff alleged that he was being provided only 550–600 calories per day.[177] The Middle District of Tennessee, which cited earlier in the opinion to non-binding precedent for the authority that "inmates cannot expect the amenities, conveniences and services of a good hotel," held that the plaintiff failed to state a claim because other than the fact that he had lost a significant amount of weight, he had not alleged specific ways such deprivations were damaging his health.[178] In *Couch v. Jabe*, the Western District of Virginia rejected a plaintiff's claim that during a lockdown on Ramadan, Muslim prisoners received food for breaking their fast that was extremely cold, holding that "inmates are not average citizens, but convicted criminals and, therefore, 'cannot expect the amenities, conveniences and services of a good hotel.'"[179] In *Rodriguez v. Bryson*, a detainee alleged caloric deficiencies from missing meals during Ramadan, but the Middle District of Georgia held that "[w]ithout evidence of an injury resulting from the alleged caloric deficiency," he did not state an Eighth Amendment claim because "the Constitution does not require prison administration to provide its inmates with the amenities, conveniences and services of a good hotel."[180] In *Johnson v. Ozmint*, the District Court of South Carolina rejected a claim alleging a serious caloric deficit because the plaintiff was "an inmate in a prison . . . not a hotel patron."[181]

The lengthiest explication of this logic came not in the context of the Eighth Amendment but in a First Amendment retaliation claim brought by two prisoners, Thaddeus-X and Earnest Bell, when the prison punished both men after X helped Bell file a lawsuit against the facility.[182] A First Amendment retaliation claim requires an "adverse action" as retaliation for protected activity—the standard for such an action is far less onerous than the Eighth Amendment standard, as it simply requires that the adverse action would chill an ordinary person from engaging in

---

175. No. CA 8:14-180-JFA-JDA, 2014 WL 3809684, at *2 (D.S.C. Aug. 1, 2014).

176. *Id.* at *3.

177. No. 3:19-CV-00726, 2019 WL 4573507, at *7 (M.D. Tenn. Sept. 20, 2019).

178. *Id.* at *4, *7 (citing Agramonte v. Shartle, 491 F. App'x 557, 559 (6th Cir. 2012)).

179. 479 F. Supp. 2d 569, 588 (W.D. Va. 2006) (quoting Harris v. Fleming, 839 F.2d 1232, 1235 (7th Cir. 1988)).

180. No. 5:17-CV-00010-MTT-CHW, 2019 WL 13193452, at *3, *21 (M.D. Ga. July 10, 2019) (quoting Alfred v. Bryant, 378 F. App'x 977, 980 (11th Cir. 2010)), *report and recommendation adopted as modified*, No. 5:17-CV-10 (MTT), 2019 WL 13193451 (M.D. Ga. Sept. 6, 2019), *aff'd sub nom.* Rodriguez v. Burnside, 38 F.4th 1324 (11th Cir. 2022).

181. 456 F. Supp. 2d 688, 696–97 (D.S.C. 2006).

182. Thaddeus-X v. Blatter, 175 F.3d 378, 384 (6th Cir. 1999).

their First Amendment rights.[183] For X, there was no question of an adverse action as the alleged behavior towards him was abhorrent. Bell, by contrast, faced only the following: a staff member told Bell that the warden had assigned him to harass Bell for filing the lawsuit; the staff refused to provide Bell with paper or pens and blocked all his communications with X; and as part of the harassment, the prison only gave him cold food. The Sixth Circuit, sitting en banc, held that X's allegations plainly met the standard. But the appellate court also ruled that, because the district court applied the incorrect legal standard in the first instance, it should consider whether Bell experienced an adverse action upon remand.[184]

Judge Suhrheinrich wrote separately to mock the idea that being served cold food could "reasonably be said to deter the average citizen of ordinary firmness."[185] He asserted that:

> Two-thirds of most American meals are typically eaten cold. Cold cereal or a bagel for breakfast and a sandwich for lunch are standard American fare. Our military defends the nation in times of war on a diet of cold food rations. And cold food is not always a matter of expediency. Steak tartare and shrimp cocktail, served in the finest restaurants, are served cold. One man's vichyssiose [sic] is another man's cold potato soup.
>
> . . .
>
> As the majority stresses, "context matters." Plaintiffs here are not average citizens, but convicted criminals, and therefore "cannot expect the amenities, conveniences and services of a good hotel."[186]

Again, we see in this opinion both empirical and normative claims. First, the opinion asserts, without citation, that many Americans outside of prison choose to mostly eat dishes that are served cold (although Judge Suhrheinrich lists only dishes intended to be served cold, not hot prison meals left to cool to retaliate against a specific prisoner). And second, as in the previous cases, the opinion asserts that "convicted criminals" have less of a right to adequate nutrition than "average citizens."

D. Environmental Conditions

Constitutional prison cases have long been concerned with whether the environmental conditions of prison cells subject prisoners to a substantial risk of serious harm. The first federal case to order wholesale reform of a prison ended up at the U.S. Supreme Court in 1978 on a question of remedy, specifically, whether a cap of 30 days in punitive segregation was appropriate.[187] The Court held that it was, explaining the segregation cells were "overcrowded," "vandalized," "filthy," and "unsanitary," in addition to being violent.[188]

---

183. *Id.* at 394, 396.
184. *Id.* at 398–99.
185. *Id.* at 404 (Suhrheinrich, J., concurring in part and dissenting in part).
186. *Id.* at 404–05 (citing Harris v. Fleming, 839 F.2d 1232, 1235 (7th Cir. 1988)).
187. Schlanger, *supra* note 28, at 369; Hutto v. Finney, 437 U.S. 678, 680 (1978).
188. *Hutto*, 437 U.S. at 686–88.

Decades later, one of the most surprising outcomes at the U.S. Supreme Court in recent years also involved environmental conditions. Operating pro se, Trent Taylor introduced evidence that after a purported suicide attempt inside a Texas prison, he was held in two cells covered in human excrement, where he was forced to sleep naked for six days. The Fifth Circuit held that he established a constitutional violation as to his conditions of confinement but that the defendants were nonetheless entitled to qualified immunity because no case law put the constitutionality of such conditions "beyond debate."[189]

The Supreme Court summarily reversed, holding that the illegality of holding someone in such conditions was obvious and therefore that the defendants were not entitled to qualified immunity.[190] The opinion "marked the first time in nearly twenty years that the Court rejected an official's claim of immunity and found that the plaintiff had successfully demonstrated that prior law clearly established that the defendant's alleged conduct violated the Constitution."[191] The "Court's reasoning was even more noteworthy" because it focused not on which specific case could put the defendants on notice but instead on the obviousness of such conduct being unlawful.[192]

While some courts have interpreted *Taylor* as a "substantial course-correction," others have held that its "unusual and extreme facts" limit its applicability to qualified immunity broadly.[193] The Fifth Circuit, for instance, has held that while "[i]t might seem that things changed with the recent opinion in *Taylor* . . . instead, that decision emphasizes the high standard" of qualified immunity.[194] *Taylor*, the court held, "was based upon the Supreme Court's conclusion of how particularly egregious and over the top the misconduct at issue was."[195] The Ninth Circuit similarly held that "*Taylor* only highlights the level of blatantly unconstitutional conduct necessary to satisfy the obviousness principle."[196]

The facts of *Taylor* were indeed shocking. But perhaps more so to the justices than to incarcerated people, prison staff, and the lower courts. District courts regularly encounter pro se prisoners alleging cells that are covered in waste, freezing cold temperatures, derision from staff, and the other conditions that the Court found sufficient to merit summary reversal in *Taylor*. While the combination of the evidence in *Taylor* was particularly powerful—although it is unclear whether this is because his facts were truly an outlier or because Taylor was a particularly gifted jailhouse lawyer in building his record[197]—courts routinely dismiss allegations of a

---

189. Taylor v. Stevens, 946 F.3d 211, 222 (5th Cir. 2019) (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011)), *vacated sub nom.* Taylor v. Riojas, 141 S. Ct. 52 (2020).

190. *Riojas*, 141 S. Ct. at 53.

191. Jennifer E. Laurin, *Reading* Taylor*'s Tea Leaves: The Future of Qualified Immunity*, 17 DUKE J. CONST. L. & PUB. POL'Y 241, 245–46 (2022).

192. *Id.* at 246 (quoting Hope v. Pelzer, 536 U.S. 730, 741 (2002)).

193. *Id.* at 246–47.

194. Cope v. Cogdill, 3 F.4th 198, 206 (5th Cir. 2021), *cert. denied*, 142 S. Ct. 2573 (2022).

195. *Id.* (quoting *Riojas*, 141 S. Ct. at 53).

196. O'Doan v. Sanford, 991 F.3d 1027, 1044 (9th Cir. 2021).

197. *See* Joanna C. Schwartz, *Civil Rights Without Representation*, 64 WM. & MARY L. REV. 641, 673 (2023).

similar type. In *Taylor*, the Court held that Taylor's allegations stated a constitutional violation; the record evidence supported his allegations; no reasonable officer could have thought the record showed otherwise; and the extraordinary step of summary reversal was appropriate.[198] But district courts frequently dismiss similar allegations with cursory analysis. And in doing so, they often invoke the principle that prisons are not nice hotels and cannot be held to those standards.

In *Alfred v. Bryant*, a prisoner appearing pro se alleged that he was placed in disciplinary solitary confinement in a cell without a functioning toilet and without a mattress, so he had to sleep on a steel bedframe.[199] Staff mocked him for the stench coming from his cell—he repeatedly had to clean sewage from the overflowing toilet by hand, and at one point he slipped in the flooded cell and injured his back.[200] The conditions lasted for 18 days. The district court dismissed his complaint under a pre-service screening order for frivolity, explaining that "[t]he Court is convinced that the Complaint is frivolous as it appears that the Plaintiff has little or no chance of success on a claim of constitutional deprivation."[201] When Alfred appealed, again pro se, the district court certified that the appeal was not brought in good faith because the case was meritless, denying Alfred *in forma pauperis* status despite his poverty.[202]

The Eleventh Circuit affirmed without holding oral argument. The court held that the "conditions of confinement did not rise to the level of an Eighth Amendment violation," even plausibly, because "[i]nmates cannot expect the amenities, conveniences and services of a good hotel."[203]

District courts both in the Eleventh Circuit and outside of it have cited to this principle from *Alfred* to explain why similar conditions do not merit constitutional scrutiny. In *Chapman v. Proctor*, for example, a pro se plaintiff brought a conditions of confinement claim against a local jail after he was allegedly placed on suicide watch as punishment, despite not being suicidal or threatening self-harm.[204] In his suicide watch cell, "he did not have a bed, toilet, sink, clothing, toiletries, utensils, or adequate heat, was unable to use the grate in his cell, which functioned as a toilet, to defecate, and he was not able to wash his hands or clean himself while in the cell." The Southern District of Georgia held that the allegations were insufficient to state a claim, with the magistrate judge citing to *Alfred* for the

198. Major League Baseball Players Assn. v. Garvey, 532 U.S. 504, 512–13 (2001) (Stevens, J., dissenting) (describing "the extraordinary remedy of a summary reversal").

199. 378 F. App'x 977, 977–78 (11th Cir. 2010).

200. *Id.* at 978.

201. Alfred v. Bryant, No. 3:08-cv-198-J-32HTS, 2009 WL 10699569, at *3 (M.D. Fla. Feb. 12, 2009), *aff'd*, 378 F. App'x 977 (11th Cir. 2010).

202. Order Denying Motion for Leave to Appeal in Forma Pauperis, Alfred v. Bryant, No. 3:08-cv-198-J-32HTS, 2009 WL 10699569 (M.D. Fla. Feb. 12, 2009), *aff'd*, 378 F. App'x 977 (11th Cir. 2010), ECF No. 33.

203. *Alfred*, 378 F. App'x at 980 (internal quotation marks omitted) (quoting Harris v. Fleming, 839 F.2d 1232, 1235 (7th Cir. 1988)).

204. No. 2:20-CV-91, 2022 WL 822466, at *1, *2 (S.D. Ga. Jan. 10, 2022), *report and recommendation adopted*, No. 2:20-CV-91, 2022 WL 501390 (S.D. Ga. Feb. 18, 2022).

principle that "[i]nmates cannot expect the amenities, conveniences and services of a good hotel."[205]

Two things are notable about this repeated comparison to hotels in the context of both environmental conditions and nutrition. First, courts do not compare the conditions to one's home, and appropriately so. In one's own home, one is responsible for providing for one's basic needs but is also capable of doing so—prison instead simulates the forced reliance on others of a hotel.[206] Second, courts make this comparison not to *a* hotel but to a *good* hotel. While even cheap American hotels and motels do not typically force people to sleep among sewage or on steel bedframes, the courts are nonetheless explicit that even if they were to, this would not mean that people in prison are entitled to the lifestyle of the affluent.

E. Prison Release Orders and "Public Safety"

The Prison Litigation Reform Act's ("PLRA") limitation on the entering of "prison release orders," and courts' interpretation thereof, shows Congress and the courts working in concert to import welfare state failures.[207] The PLRA requires that

---

205. *Id.* at *6 (quoting *Alfred*, 378 F. App'x at 980). *See also* Herrera v. Oliver, No. CV 18-0058-KD-MU, 2019 WL 1217316, at *4, *5 (S.D. Ala. Feb. 14, 2019) (quoting *Alfred*, 378 F. App'x at 980) (granting summary judgment against a claim that a prisoner had backed up sewage in his cell and shower because "[i]nmates cannot expect the amenities, conveniences and services of a good hotel"), *report and recommendation adopted*, No. CV 1:18-00058-KD-MU, 2019 WL 1210108 (S.D. Ala. Mar. 14, 2019); Steele v. Watts, No. CV 13-00399-WS-N, 2016 WL 5662059, at *8–10 (S.D. Ala. Aug. 16, 2016) (internal quotation marks omitted) (citations omitted) (granting summary judgment against a prisoner held twelve days in jail without running water or a functioning toilet because "prisoners cannot expect the amenities, conveniences, and services of a good hotel"), *report and recommendation adopted*, No. CV 13-00399-WS-N, 2016 WL 5662024 (S.D. Ala. Sept. 29, 2016); Clem v. Limestone Cnty., No. 5:15-CV-01058-MHH-SGC, 2016 WL 3645117, at *3, *7–8 (N.D. Ala. March 10, 2016) (internal quotation marks omitted) (quoting *Alfred*, 378 F. App'x at 980) (dismissing a claim by a detainee who alleged he was denied adequate toilet paper for someone with his digestive medical problems, resulting in him defecating on himself, developing rashes, and being mocked by staff for doing so; the district court dismissed his conditions claim because "[i]nmates cannot expect the amenities, conveniences and services of a good hotel"), *report and recommendation adopted*, No. 5:15-CV-01058-MHH-SGC, 2016 WL 3548798 (N.D. Ala. June 30, 2016); Hollingsworth v. Daley, No. 2:15-CV-36-WOB-REW, 2016 WL 5415781, at *14 (E.D. Ky. July 19, 2016) (internal quotation marks omitted) (quoting *Harris*, 839 F.2d at 1235) (holding that being forced to sleep without a mattress on a steel bed frame does not state a constitutional violation as "[i]nmates cannot expect the amenities, conveniences and services of a good hotel"), *report and recommendation adopted sub nom.* Hollingsworth v. Daly, No. CV 2015-36 (WOB-REW), 2016 WL 5419427 (E.D. Ky. Sept. 26, 2016), *aff'd sub nom.* Hollingsworth v. Daley, No. 16-6626, 2018 WL 2064801 (6th Cir. Jan. 17, 2018).

206. Although, of course, one can typically leave a hotel covered in sewage and go to a different one.

207. "Prison release order" is a bit of a misnomer. These orders typically function as population caps for a facility or prison system to implement over time, and given the constant background churn in and out of the facilities, slightly altering the rate at which people enter and leave can create compliance with the caps absent any kind of abrupt prisoner "release." Prison systems can also transfer people to other facilities, build new ones, or take steps in response to population caps other than release.

courts "give substantial weight to any adverse impact on public safety" before entering any prospective relief.[208] Its clause on prison release orders goes further, requiring a series of procedural hurdles—for example, only a three-judge court may enter a prisoner release order, and even then only when it finds by clear and convincing evidence that "crowding is the primary cause of the violation of a Federal right; and no other relief will remedy the violation of the Federal right."[209] Here too, the court must give substantial weight to any adverse impact on public safety before arriving at this conclusion.

Although the entering of release orders plummeted after the enactment of the PLRA,[210] in 2011 the U.S. Supreme Court affirmed an injunction that capped the population of California's prisons at 137.5% of design capacity.[211] Both *Plata v. Brown*, which challenged medical care provision statewide and settled in 2002, and *Coleman v. Brown*, which challenged mental health care statewide and resolved at trial in 1995, resulted in extensive equitable relief. The years following these decisions saw an increase in overcrowding undermine attempts to implement these remedial orders.[212] In 2006, Governor Arnold Schwarzenegger issued a formal proclamation that the State's prison system was in a state of emergency and was dangerous to prisoners, staff, and the public.[213] Plaintiffs in both *Plata* and *Coleman* sought a population cap; a three-judge panel convened, consolidated the cases, and held a trial, ultimately concluding that California needed to reduce its prison population to 137.5% of capacity over two years.[214]

The trial had "a sharp focus on the public safety aspects of the case" because of the PLRA's mandate.[215] The 182-page opinion, however, never defined the term "public safety" and described "public safety" using only events occurring outside of prison. The same was true at the U.S. Supreme Court, where the Court's opinion and Justice Alito's dissent debated the three-judge court's order as to "public safety," with both simply assuming it referred to events that occurred outside of prisons and jails. This means that violence against currently incarcerated people or even staff did not count in the calculus the Court was making about the balance of public safety.[216]

---

208. 18 U.S.C. § 3626(a)(1)(A).

209. *Id.* § 3626(a)(3)(E)(i)–(ii).

210. Margo Schlanger, Plata v. Brown *and Realignment: Jails, Prisons, Courts, and Politics*, 48 HARV. C.R.-C.L. L. REV. 165, 199 (2013)

211. *Id.* at 165, 180 (citation omitted).

212. *Id.* at 174–75.

213. *Id.* at 175 (citation omitted).

214. *Id.* at 165, 180 (citation omitted).

215. *Id.* at 178.

216. The definition of public safety in the PLRA is an example of a broader phenomenon in which incapacitation disregards violence inside prisons. Sharon Dolovich considers this not an oversight but a natural consequence of viewing prisoners as sub-human, writing that "the commission of crime in prison poses no real problem for the claim that incarceration incapacitates" because it "is well understood that the intended beneficiaries of the restraints of incarceration are the people who remain free. The fact of crime in prison—even brutal crime—poses no challenge to the logic of this view, because the protection of

What does and does not cause people to commit violence is, to put it mildly, beyond the scope of this Article. A vast literature, however, supports the intuitive conclusion that a functioning welfare state tends to reduce violence.[217] Back to Norway for an example: supporters of Norway's unusually mild prisons cite to them, correctly, to partly explain Norway's lower levels of recidivism.[218] But a more straightforward reason is doing much of the heavy lifting—Norway simply has much less violent crime in general. Former prisoners reentering society are therefore a subpopulation that, like virtually any other one could choose (teenagers, men, immigrants, the working class, people with last names starting with Q), commit fewer crimes in Norway than their equivalents in the United States. And this lower overall rate is downstream of a more generous welfare state.[219] The PLRA thus sets up a remedial scheme in which plaintiffs can show: 1) their constitutional rights are being violated; 2) the state is incapable of remedying this in any way absent release; 3) their release would not increase violence but simply move it from prison to society at-large; but 4) because their release could affect "public" safety, their incarceration is still required, even though the background level of violence justifying this conclusion has more to do with the conditions of society than the moral failings of these particular individuals.

CONCLUSION: THE MISGUIDED IMPORTATION OF WELFARE STATE FAILURES

Judges who import welfare failures rarely provide an explicit justification for doing so. The traditional bases for punishment—rehabilitation, incapacitation, deterrence, and retribution[220]—do not appear to provide one. Denying incarcerated people health care or programming, or subjecting them to violence, actively

---

those excluded by imprisonment is not the point." Sharon Dolovich, *Exclusion and Control in the Carceral State*, 16 BERKELEY J. CRIM. L. 259, 273 (2011). Although not in a prison release order, a lone exception to this interpretation of the PLRA's "public safety" clause is the Eastern District of Louisiana's opinion in *Jones v. Gusman* ordering relief for plaintiffs in Orleans Parish Prison, which noted that the prison "itself presents a public safety crisis, which endangers inmates [and] staff," as a result of its risk of death by violence, suicide, and fire. 296 F.R.D. 416, 458 (E.D. La. 2013).

217. *See, e.g.*, Tapio Lappi-Seppala, *Penal Policy in Scandinavia*, 36 CRIME & JUST. 217, 219 (2007). The three-judge trial court in *Coleman* acknowledged as much too, writing that "drug and alcohol rehabilitation, mental health treatment, and job training" programs

> would help increase public safety above its current level, including after issuance of our population reduction order. Clearly, a failure by the state to comply with the experts' recommendations to take these steps would be regrettable and would be contrary to the interests of public safety. Still, unlike the population cap we order here, which our analysis shows is required by the United States Constitution, the decision whether to adopt these rehabilitative measures is left to the Governor and the Legislature.

Coleman v. Schwarzenegger, 922 F. Supp. 2d 882, 1002 (E.D. Cal. 2009).

218. *See generally* Emily Labutta, *The Prisoner as One of Us: Norwegian Wisdom for American Penal Practice*, 31 EMORY INT'L. L. REV. 329 (2017).

219. Lappi-Seppala, *supra* note 217.

220. *See* Ewing v. California, 538 U.S. 11, 25 (2003) ("A sentence can have a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation.").

undermines the goal of rehabilitation. The details of incarceration do not bear on whether incarcerated people are incapacitated from committing crimes outside of prison. And although crimes committed inside prison are often not counted in crime statistics or considered doctrinally relevant,[221] abusive conditions inside prison undermine the goal of incapacitation as to crimes committed inside prison. Nor does importing welfare state failures appear to affect the prison's deterrence function.[222] Retribution seems like a poor fit too, given its reliance on society's expressive condemnation of behavior when prisons are opaque institutions that intentionally prevent society from learning what goes on inside of them.

Two recent prominent Articles cover prison law across a variety of doctrines. In *The Incoherence of Prison Law*, Emma Kaufman and Justin Driver argue that the U.S. Supreme Court relies on inconsistent empirical claims about life in prison depending on the specific legal doctrine, rendering prison law doctrine as a whole incoherent.[223] They provide overwhelming evidence for their thesis, although this result may be unsurprising, and more importantly, prison doctrine relying on consistent empirical premises may not be particularly helpful in protecting constitutional rights of incarcerated people as an end in itself. To that point, in the responsive Essay *The Coherence of Prison Law*, Sharon Dolovich argues that these smaller inconsistencies obscure a broader coherence: a doctrine that is deferential to prison officials and insensitive to prison abuses.[224] This claim too is well-argued and overwhelmingly supported but may not do a lot to explain the rare prison claims that succeed—after all, some do, if not many.

This Article offers a different meta-doctrine across areas of prison law, one that is consistent with Kaufman, Driver, and Dolovich's descriptions, whether the field is coherent or not. Judges have a moral intuition that people in prison are not entitled to better or even the same conditions as those of the working poor.[225] When they are forced to articulate the unique rights to safety, medical care, or protection from infectious disease belonging to people in prison, they often turn to the working poor as a ceiling. This notion, however intuitively compelling to judges, falls apart for reasons doctrinal, theoretical, and pragmatic.

As a doctrinal matter, the comparison is simply irrelevant. While people in prison retain negative constitutional rights, however curtailed, this Article concerns positive rights that people in prison uniquely possess.[226] This Article collects

---

221. *See supra* Section IV.E.

222. *But see* Maggert v. Hanks, 131 F.3d 670, 671–72 (7th Cir. 1997) ("We do not want transsexuals committing crimes because it is the only route to obtaining a cure.").

223. Driver & Kaufman, *supra* note 164, at 570.

224. 135 HARV. L. REV. F. 302, 302 (2022).

225. *See, e.g.*, *Maggert*, 131 F.3d at 672 ("[W]e cannot see what is cruel about refusing a benefit to a person who could not have obtained the benefit if he had refrained from committing crimes. . . . [M]aking the treatment a constitutional duty of prisons would give prisoners a degree of medical care that they could not obtain if they obeyed the law.").

226. Technically prisoners possess not the positive rights to the basic necessities of life but instead the negative right to not suffer cruel and unusual punishment by the state taking away from them the ability to care for themselves and then also having prison officials be deliberately indifferent to providing them the basic necessities of life. Courts often fudge

opinions in which courts are incredulous at the idea that prisoners could have greater rights than those in the free world. As a doctrinal matter, however, they straightforwardly do, at least in these contexts.

The theoretical error is comparing the amenities in prison to those of the outside world or the working poor as a whole. But preferences are not universal, and people outside prison can engage in the trade-offs that those inside cannot. When a pandemic like COVID-19 breaks out, an individual with diabetes or asthma might prefer to entirely socially isolate rather than risk contracting the virus. Another person might prefer to live in a deeply rural area with little violence or drugs given their past traumas or present temptations. A transgender woman might slash her food or rent budget to afford the copays on her hormone therapy because of its effect on her gender dysphoria. Or not. Prisoners have lost this ability to choose. People in prison cannot move when their neighbor threatens them with violence, cannot exercise their Second Amendment rights, and cannot forego one basic necessity to prioritize another. When courts compare conditions inside a prison to conditions outside of it, on average, they are failing to note that incarcerated people do not have the same ability to choose whether a particular condition is one they would give up other advantages to avoid suffering.

Additionally, the notion that adequate services might make prison an appealing option to the working poor misunderstands why most people in prison hate it there. As both lawyers in prison suits and the judges of their cases are, by definition, focusing on the differences between potential prison practices that make up the subject of their litigation, they may lose sight of the inherent features of all prisons: the loss of autonomy, privacy, security, and connection to the outside world.[227] As Sophie Angelis has explained, even the world's so-called best prisons in Norway tend to impress the outside world for reasons of aesthetics.[228] They are clean; the furniture looks like it is from IKEA; the windows look out onto the beautiful Norwegian countryside.[229] The people inside, meanwhile, continue to experience them as inhumane because the most fundamentally inhumane practices—cameras in private living spaces, an inability to lock the door to their living areas, the inability to choose whom they live next to, being subjected to strip searches at whim, severance from family and community—have not been, and perhaps cannot be, reformed away.[230]

Finally, and perhaps most importantly, comparing the experiences of incarcerated people and the working poor ignores the ways that brutal prisons and the state of America's working are interconnected. The inadequate welfare state itself causes higher rates of crime and thus incarceration.[231] It also causes higher

---

this distinction, *see* Farmer v. Brennan, 511 U.S. 825, 832 (1994) (describing these obligations on prison officials as "duties"), as it probably obscures more than it enlightens.

227. *See* GRESHAM M. SYKES, THE SOCIETY OF CAPTIVES: A STUDY OF A MAXIMUM SECURITY PRISON 73, 77 (Princeton Classic ed. 2007) (1958); THOMAS MATHIESON, PRISON ON TRIAL 132 (3d ed. 2006).

228. Angelis, *supra* note 1, at 54.

229. *See id.* at 19–20.

230. *Id.* at 11, 13, 14, 19.

231. *See* Labutta, *supra* note 218.

rates of incarceration directly, absent serious crime in any meaningful sense, by virtue of the numerous ways that poverty itself is criminalized.[232] Then, in turn, harsh prison conditions traumatize people and increase the recidivism rate at which people leave prison just to quickly return.[233] A defensiveness towards the "rights" of the free poor, used selectively in prison cases, does nothing to protect those rights. The comparison serves only to sanction brutality for its own sake.

232. *See generally* PETER EDELMAN, NOT A CRIME TO BE POOR: THE CRIMINALIZATION OF POVERTY IN AMERICA (2019).

233. *See* M. Keith Chen & Jesse M. Shapiro, *Do Harsher Prison Conditions Reduce Recidivism? A Discontinuity-Based Approach*, 9 AM. L. & ECON. REV. 1, 17–21 (2007); Francesco Drago et al., *Prison Conditions and Recidivism*, 13 AM. L. & ECON. REV. 103, 120–25 (2011).