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ARTICLES

THE INCOHERENCE OF PRISON LAW

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## THE INCOHERENCE OF PRISON LAW

*Justin Driver\** & *Emma Kaufman\*\**

*In recent years, legal scholars have advanced powerful critiques of mass incarceration. Academics have indicted America's prison system for entrenching racism and exacerbating economic inequality. Scholars have said much less about the law that governs penal institutions. Yet prisons are filled with law, and prison doctrine is in a state of disarray.*

*This Article centers prison law in debates about the failures of American criminal justice. Bringing together disparate lines of doctrine, prison memoirs, and historical sources, we trace prison law's emergence as a discrete field — a subspeciality of constitutional law and a neglected part of the discipline called criminal procedure. We then offer a panoramic critique of the field, arguing that prison law is predicated on myths about the nature of prison life, the content of prisoners' rights, and the purpose of penal institutions. To explore this problem, we focus on four concepts that shape constitutional prison cases: violence, literacy, privacy, and rehabilitation. We show how these concepts shift across lines of cases in ways that prevent prison law from holding together as a defensible body of thought.*

*Exposing the myths that animate prison law yields broader insights about judicial regulation of prisons. This Article explains how outdated tropes have narrowed prisoners' rights and promoted the country's dependence on penal institutions. It links prison myths to the field's central doctrine, which encourages selective generalizations and oversimplifies the difficult constitutional questions raised by imprisonment. And it argues that courts must abandon that doctrine — and attend to the realities of prison — to develop a more coherent theory of prisoners' constitutional rights.*

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\*\* Assistant Professor of Law, New York University School of Law. We must first acknowledge our great debt to the students at Westville Correctional Center in Westville, Indiana, where we co-taught a constitutional law course in 2019. We developed many of the ideas in this Article during weekly, three-hour discussions in that prison and on long, roundtrip drives to Westville from Chicago. The thirteen people enrolled in that course deepened, challenged, and transformed our understanding of constitutional law. Though they remain anonymous, those students shaped this piece.

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*It is a pity indeed that the judge who puts a man in the penitentiary does not know what a penitentiary is.*

— Eugene V. Debs<sup>1</sup>

## INTRODUCTION

On October 29, 1970, a group of prisoners gathered at Folsom State Prison, twenty miles north of Sacramento.<sup>2</sup> Johnny Cash had made the prison famous when he recorded a live concert from behind its grey stone walls in 1968.<sup>3</sup> But *Folsom Prison Blues* had done little to ameliorate the prison's unforgiving conditions. Now, Folsom's prisoners had a mission.

On prison-issued paper, they drafted a letter to the Warden that would come to be known as the Folsom Manifesto.<sup>4</sup> “WE THE IMPRISONED MEN OF FOLSOM PRISON SEEK AN END TO THE INJUSTICE SUFFERED BY ALL PRISONERS,” the letter began.<sup>5</sup> The prisoners then listed thirty-one demands, including:

- ◆ Permission “to form or join Labor Unions”;
- ◆ Improvements to Folsom’s “totally inadequate” hospital, where poor care was “virtually a death sentence”;
- ◆ “The constitutional rights of legal representation” and “procedural safeguards” at prison hearings;
- ◆ The right to “subscribe to political papers [and] . . . chronicals [sic] that are forwarded through the United States Mail”;
- ◆ “[A]n end to the escalating practice of physical brutality”;
- ◆ “[A]n end to the persecution and punishment of prisoners who practice the constitutional right of peaceful dissent”; and
- ◆ Prosecution of correctional officers “as a matter of law for shooting inmates . . . or any act of cruel and unusual punishment.”<sup>6</sup>

<sup>1</sup> EUGENE VICTOR DEBS, *WALLS AND BARS* 242 (1927).

<sup>2</sup> See Anoop Mirpuri, *Mass Incarceration, Prisoner Rights, and the Legacy of the Radical Prison Movement*, in *THE PUNITIVE TURN: NEW APPROACHES TO RACE AND INCARCERATION* 131, 141 (Deborah E. McDowell et al. eds., 2013).

<sup>3</sup> See JOHNNY CASH, *AT FOLSOM PRISON* (Columbia Records 1968).

<sup>4</sup> See *THE FOLSOM PRISONERS MANIFESTO OF DEMANDS AND ANTI-OPPRESSION PLATFORM* (1970) [hereinafter *FOLSOM MANIFESTO*].

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*; see also DONALD F. TIBBS, *FROM BLACK POWER TO PRISON POWER: THE MAKING OF JONES V. NORTH CAROLINA PRISONERS’ LABOR UNION* 107 (2012) (discussing the Manifesto). See generally ANGELA Y. DAVIS, *IF THEY COME IN THE MORNING: VOICES OF RESISTANCE* 67–96 (1971) (same).

The Manifesto was unsigned, but its authors were well-known members of a burgeoning labor movement in California's prisons.<sup>7</sup> One of the movement's leaders, Martin Sousa, worked in Folsom's print shop.<sup>8</sup> Through his wife, he sent copies of the letter to lawyers and organizers.<sup>9</sup> Along with their list of demands, the prisoners announced that they would strike on November 3, Election Day.<sup>10</sup>

When the time arrived, more than two thousand prisoners refused to leave their cells.<sup>11</sup> Folsom's Warden, Walter Craven, responded by locking the prisoners inside.<sup>12</sup> But when guards finally opened the cell doors, the prisoners still refused to work.<sup>13</sup> Prison activity screeched to a halt — no mail, no cleaning, no one to deliver meals.<sup>14</sup> Outside, the press clamored to find out "if Folsom had officially lost control."<sup>15</sup> Inside, guards began "nightriding," taking prisoners "into the segregation section totally nude" at three in the morning.<sup>16</sup> When those steps failed, Warden Craven dispatched guards "armed with rifles and wooden clubs" to force prisoners out of their cells.<sup>17</sup> "Not wanting to be shot or clubbed to death," the prisoners complied.<sup>18</sup> In the end, their protest lasted nineteen days, making it one of the longest and largest strikes in American prison history.<sup>19</sup>

Viewed narrowly, the Folsom prison strike might be deemed a failure. Warden Craven declined to negotiate with the prisoners — their demands fell "outside [his] purview," he would later explain — and he refused to grant most items on their agenda.<sup>20</sup> After the strike ended, its organizers were transferred from Folsom "shackled and naked on the

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<sup>7</sup> See ERIC CUMMINS, *THE RISE AND FALL OF CALIFORNIA'S RADICAL PRISON MOVEMENT 199–201* (1994); see also Huey P. Newton, *Prison, Where Is Thy Victory?*, in DAVIS, *supra* note 6, at 50, 53–56 (discussing the Manifesto within the wider context of collective resistance to prisons).

<sup>8</sup> See CUMMINS, *supra* note 7, at 199.

<sup>9</sup> See *id.* at 200.

<sup>10</sup> See *id.* at 199–201; TIBBS, *supra* note 6; BENJAMIN J. GUTHRIE & W. PAT JENNINGS, *STATISTICS OF THE CONGRESSIONAL ELECTION OF NOVEMBER 3, 1970*, H.R. DOC. NO. 63-017 (1971).

<sup>11</sup> See TIBBS, *supra* note 6, at 108. As Professor Donald Tibbs notes, the strikers waited until November 4, a day after the election, to gather more outside support. See *id.* at 107–08.

<sup>12</sup> See *id.* at 108–09.

<sup>13</sup> See *id.* at 109.

<sup>14</sup> See *id.* at 108–09.

<sup>15</sup> *Id.* at 109.

<sup>16</sup> *Id.* at 110 (quoting MAXIMUM SECURITY: LETTERS FROM CALIFORNIA'S PRISONS 205–06 (Eve Pell & Members of the Prison L. Project eds., 1970) [hereinafter MAXIMUM SECURITY]).

<sup>17</sup> *Id.* at 111 (quoting MAXIMUM SECURITY, *supra* note 16, at 206).

<sup>18</sup> *Id.* (quoting MAXIMUM SECURITY, *supra* note 16, at 207).

<sup>19</sup> See Mirpuri, *supra* note 2, at 141–42.

<sup>20</sup> *Authorities Say Folsom, Long Lockup Ended, Is Normal Again*, SACRAMENTO BEE, Nov. 24, 1970, at A10; see *Two Folsom Prison Demands Met, Warden Says*, INDEP. PRESS TELEGRAM (Long Beach), Nov. 14, 1970, at 7.

floor of [a] van.”<sup>21</sup> The rest of the prisoners returned to work and the strike was largely forgotten.<sup>22</sup>

Fifty years on, however, it is high time to remember the Folsom Manifesto. Though Warden Craven dismissed the prisoners’ demands as requests for the legislature, prisoners have gone on to litigate many of the Folsom complaints in federal court. In 1974, the Supreme Court restricted the censorship of prisoners’ mail<sup>23</sup> and held that prisoners possess due process rights in disciplinary hearings.<sup>24</sup> In 1976, the Court applied the Eighth Amendment to prison conditions, which enabled litigation over dilapidated prison hospitals and grossly inadequate health care.<sup>25</sup> In 1995, the Court scrutinized the procedures for placing prisoners in solitary confinement.<sup>26</sup> Prisoners have not always won these lawsuits; in a kind of coda to the Folsom strike, the Court ultimately rejected prisoners’ right to unionize.<sup>27</sup> But their grievances played out in federal courts through the language of constitutional rights. Ideas that were radical demands in 1970 today look like standard constitutional claims. Line by line, the Folsom Manifesto anticipated the birth of constitutional prison law.

Critics of imprisonment pay less attention to prison law than to other features of the criminal legal system. When discussing “the collapse of American criminal justice,”<sup>28</sup> commentators tend to focus on the breadth and harshness of punishment — on mass incarceration, institutional racism, and punishing the poor.<sup>29</sup> Legal academics link these trends to penal populism and perverse incentives to incarcerate.<sup>30</sup> And for good

<sup>21</sup> TIBBS, *supra* note 6, at 111.

<sup>22</sup> *See id.*

<sup>23</sup> *See* Procunier v. Martinez, 416 U.S. 396, 415 (1974), *overruled by* Thornburgh v. Abbott, 490 U.S. 401 (1989); *infra* section I.A, pp. 527–35 (tracing this history in greater detail).

<sup>24</sup> *See* Wolff v. McDonnell, 418 U.S. 539, 555 (1974).

<sup>25</sup> *See* Estelle v. Gamble, 429 U.S. 97, 104 (1976); *see also* Hutto v. Finney, 437 U.S. 678, 685 (1978) (applying the Eighth Amendment to conditions in the Arkansas penal system in 1978); *infra* pp. 533–35 (discussing Eighth Amendment prison conditions litigation).

<sup>26</sup> *See* Sandin v. Conner, 515 U.S. 472, 485–86 (1995).

<sup>27</sup> *See* Jones v. N.C. Prisoners’ Lab. Union, Inc., 433 U.S. 119, 136 (1977).

<sup>28</sup> WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE iii (2011) (attributing mass incarceration to pathological incentives that empower prosecutors and encourage harsh prosecution and sentencing).

<sup>29</sup> *See generally, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010) (examining institutional racism); LOIC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY (English Language ed., Duke Univ. Press 2009) (describing mass incarceration as an effort to reinforce capitalist class distinctions).

<sup>30</sup> *See generally, e.g.*, RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 2–6 (2019) (critiquing penal populism); JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007) (tracing the history of penal populism).

reason. Pathological politics drive incarceration and entrench both racism and economic inequality. But it is strange that debates about the structural dimensions of imprisonment are not accompanied by a more sustained critique of prison law. Outside a small group of scholars,<sup>31</sup> critical accounts of imprisonment usually overlook legal doctrines and prison regulations. The result is a field in which we ask who gets imprisoned,<sup>32</sup> why prisons exist,<sup>33</sup> and what a world without prisons might look like<sup>34</sup> but say too little about the law that actually shapes penal institutions.

Law's relative absence from debates about incarceration reflects deep ambivalence about courts. Prisons can often seem like lawless spaces, sites of astonishing brutality where legal rules are irrelevant. There is considerable truth to this perception. While law always has its limits, the gap between the arid doctrines crafted in courtrooms and the lived realities on American cellblocks is particularly stark.<sup>35</sup> At the same time, though, prisons are intensely legal institutions. Written regulations shape nearly every facet of prison life, from when prisoners pray<sup>36</sup> and how long they can grow their beards<sup>37</sup> to when they can see their children.<sup>38</sup> The body of constitutional law governing such policies plays an

<sup>31</sup> For a sample of some of the vital work in this field, see generally Sharon Dolovich, *Forms of Deference in Prison Law*, 24 FED. SENT'G REP. 245 (2012); James B. Jacobs, *Sentencing by Prison Personnel: Good Time*, 30 UCLA L. REV. 217 (1982); Judith Resnik et al., Essay, *Punishment in Prison: Constituting the "Normal" and the "Atypical" in Solitary and Other Forms of Confinement*, 115 NW. U. L. REV. 45 (2020); Margo Schlanger, *The Constitutional Law of Incarceration, Reconfigured*, 103 CORNELL L. REV. 357 (2018) [hereinafter Schlanger, *The Constitutional Law of Incarceration*]; and Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555 (2003) [hereinafter Schlanger, *Inmate Litigation*].

<sup>32</sup> See, e.g., ASHLEY NELLIS, THE SENT'G PROJECT, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS 6, 14 (2016) (explaining that "African Americans are incarcerated in state prisons at five times the rate of whites," *id.* at 14, and at least ten times the rate in five states, *id.* at 6); Sonja B. Starr & M. Marit Rehani, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 YALE L.J. 2, 77–80 (2013) (exploring the causes of persistent racial disparity in federal sentencing).

<sup>33</sup> See generally sources cited *supra* notes 29–31.

<sup>34</sup> See generally, e.g., Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156 (2015); Dorothy E. Roberts, *The Supreme Court, 2018 Term — Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1 (2019).

<sup>35</sup> For a valuable intervention on the gap that separates legal doctrine from lived reality, see generally Issa Kohler-Hausmann, *Jumping Bunnies and Legal Rules: The Organizational Sociologist and the Legal Scholar Should Be Friends*, in THE NEW CRIMINAL JUSTICE THINKING 246 (Sharon Dolovich & Alexandra Natapoff eds., 2017).

<sup>36</sup> See *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 345 (1987), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000b to 2000bb-4).

<sup>37</sup> See *Holt v. Hobbs*, 574 U.S. 352, 369–70 (2015).

<sup>38</sup> See *Overton v. Bazzetta*, 539 U.S. 126, 129–30, 136–37 (2003).

outsized role in American courts; in some jurisdictions, prisoners' constitutional claims represent nearly the entire pro se caseload.<sup>39</sup> The decisions in those cases affect millions of people.<sup>40</sup>

So while it would be foolish to overstate law's impact — to fetishize courts or exaggerate how much rights have done to protect marginalized groups — critics of American criminal justice cannot ignore prison law. In an era of mass incarceration, writing about doctrine might seem a bit like rearranging deck chairs on the *Titanic*. But the people inside prisons have repeatedly emphasized that legal rules have significant, concrete effects on their lives. Wilbert Rideau, who spent forty-four years in Louisiana's notorious Angola Prison, has credited federal courts with dramatically reducing violence and improving conditions during his time in custody.<sup>41</sup> Albert Woodfox, who lived for forty-three years in solitary confinement, has described "filing grievances [and] going to court"<sup>42</sup> as a means of survival, a source of pride, and a method to address "the horrors of prison."<sup>43</sup> Law, then, matters a great deal.

This Article aims to center prison law in conversations about the failures of the American criminal justice system. Drawing on judicial decisions, prison memoirs, and other historical sources, we trace prison law's emergence as a discrete field — a subspeciality of constitutional law and a neglected part of the discipline called criminal procedure.<sup>44</sup> We then argue that prison law is built on myths about the nature of prison life, the content of prisoners' rights, and the purpose of penal institutions. Constitutional prison cases are riddled with generalizations

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<sup>39</sup> See Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153, 167 tbl.6 (2015). As Professor Margo Schlanger points out, congressional efforts to impede prisoners' lawsuits — most notably through the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321-66 (1996) (codified as amended in scattered sections of 18 and 28 U.S.C.) — have had a "sharp impact on the prevalence and outcomes in prison litigation." Schlanger, *supra*, at 155. Nonetheless, prisoners' lawsuits, many of which are filed pro se, still constitute a sizable chunk of the work of federal courts, particularly federal trial courts. See *id.* at 167 tbl.6 (finding that prisoner lawsuits made up 94.9% of the pro se docket in U.S. district courts in 2012).

<sup>40</sup> In 2020, there were more than 1.5 million people in state prisons, federal prisons, and federal jails. See Press Release, Wendy Sawyer & Peter Wagner, Prison Policy Initiative, Mass Incarceration: The Whole Pie 2020 (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html> [<https://perma.cc/CVM3-Y5GB>]. There were an additional 631,000 people in state and local jails, and tens of thousands more people in other custodial institutions, including immigration detention centers and youth confinement facilities. See *id.* This Article focuses on the law that applies to prisons — postconviction criminal custodial facilities — rather than jails, immigration detention centers, and other types of custodial institutions.

<sup>41</sup> See WILBERT RIDEAU, IN THE PLACE OF JUSTICE: A STORY OF PUNISHMENT & DELIVERANCE 227 (2010).

<sup>42</sup> ALBERT WOODFOX, SOLITARY: UNBROKEN BY FOUR DECADES IN SOLITARY CONFINEMENT. MY STORY OF TRANSFORMATION AND HOPE 124-25 (2019).

<sup>43</sup> *Id.* at 24; see *id.* at 169.

<sup>44</sup> See *infra* p. 582 (explaining that "criminal procedure" has become shorthand for constitutional law that governs the criminal legal system); see also Sharon Dolovich, *Canons of Evasion in Constitutional Criminal Law*, in THE NEW CRIMINAL JUSTICE THINKING, *supra* note 35, at 111, 111-18 (describing the discipline of "constitutional criminal law," *id.* at 112).

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about how prisons work: blunt claims like “prisons are inherently violent” and “prisoners cannot read.” These generalizations prove critical to case outcomes, yet they shift and morph across different lines of doctrine. In certain cases, for instance, prisons are perfectly safe and prisoners are savvy and literate. Courts routinely engage in this sort of selective empiricism about prisons. Indeed, a broad survey of the field reveals that “the prison” is an empty vessel, a malleable idea at the heart of a fundamentally incoherent body of law.

Exposing the mythic prison yields three insights about the relationship between prisons and federal courts. First, prison tropes have undermined prisoners’ rights. This Article traces the development of constitutional prison law from the nineteenth century to the present. The capsule version of that history is that, after a long fallow period, courts began to recognize prisoners’ rights in the 1970s and then to retreat from liberal rulings in the 1980s. The standard story of that retreat is that courts limited prisoners’ rights through weak legal standards and a cramped view of the government’s obligations to those it incarcerates. That story is accurate, but it obscures the role that selective factual generalizations have played in policing prisoners’ relationship to the Constitution. This Article shows how prison myths have narrowed rights and enabled the country’s ongoing dependence on penal institutions.

Second, prison myths flow from the Supreme Court’s strangely transsubstantive approach to prison law. As we explain below, in the 1980s the Supreme Court adopted an unusual default standard for evaluating constitutional challenges to penal policy.<sup>45</sup> That standard applies to a wide variety of constitutional claims and produces a body of law that is less focused on the particular right at issue than the peculiarities of the prison setting. This displacement of rights encourages courts to make broad, unsupported claims about the nature of prison life. Prison doctrine thus invites prison mythmaking and all the problems that accompany it.

This Article’s final lesson is that courts know far too little about penal institutions. Constitutional prison law stands apart from more developed fields in its stubborn resistance to empirical research. Despite the existence of a rich literature on prisons, prison cases often read as if penal institutions are foreign to federal courts. But of course, they are not; people do not just magically appear in prisons. Judges place them there, and judges keep them there. Courts’ role in American incarceration makes prisons different than other fraught sites of judicial intervention. The judiciary’s deep entanglement with prisons also makes the antiempiricism of prison law especially indefensible.

In advancing these arguments, this Article contributes to both specialist debates about prisons and wider discussions in constitutional law.

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<sup>45</sup> See *infra* pp. 535–39.



As a piece of prison scholarship, it offers an uncommonly comprehensive critique. Because doctrines shape prisoners' daily lives, academic writing about prison law often focuses on the interpretation of one constitutional clause<sup>46</sup> or a particularly egregious practice.<sup>47</sup> While drilling down on one issue offers obvious benefits, it can conceal the scope of the problem. This Article steps back and offers a panoramic view of legal doctrines that courts and scholars typically treat in isolation. We aim to expose the field's underlying assumptions and to reveal the pervasiveness of prison law's deficiencies.

Meanwhile, as a piece of constitutional scholarship, this Article demonstrates the value of focusing on prisons. In the pages that follow, we show how attending to prisons can unsettle conventional wisdom in constitutional law, for instance by complicating veneration of the Warren Court and shifting the timeline of the criminal procedure "revolution." This Article also suggests that prisons are underappreciated sites of constitutional interpretation. Prison law departs from traditional constitutional law in a number of illuminating, troubling ways. Yet prison cases rarely feature in constitutional law textbooks, and where they do, they are often misunderstood. It is telling, for example, that perhaps the single most important case in modern prison law, *Turner v. Safley*,<sup>48</sup> either goes without mention in casebooks or is hailed as a victory when it was for the most part a catastrophic setback for prisoners' civil rights.<sup>49</sup> This Article encourages constitutional scholars to consider how prison law changes debates on the meaning and enforcement of rights.

The piece proceeds in three Parts. Part I traces the rise and retrenchment of constitutional prison law. This Part lays the foundation for our

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<sup>46</sup> See generally, e.g., Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881 (2009) (providing an illuminating analysis of the Cruel and Unusual Punishment Clause).

<sup>47</sup> See generally, e.g., Emma Kaufman, *Segregation by Citizenship*, 132 HARV. L. REV. 1379 (2019); Jamelia N. Morgan, *Reflections on Representing Incarcerated People with Disabilities: Ableism in Prison Reform Litigation*, 96 DENV. L. REV. 973 (2019); Priscilla A. Ocen, *Incapacitating Motherhood*, 51 U.C. DAVIS L. REV. 2191 (2018); Margo Schlanger, Essay, *Incrementalist vs. Maximalist Reform: Solitary Confinement Case Studies*, 115 NW. U. L. REV. 273 (2020).

<sup>48</sup> 482 U.S. 78 (1987) (upholding prisoners' right to marry and introducing a new standard of review for prisoners' constitutional claims).

<sup>49</sup> Major constitutional law casebooks typically decline to address prison law or consign prisons to the margins. Where they mention prisons, moreover, prominent casebooks usually frame *Turner v. Safley* as a victory for marriage equality (and a precursor to *Obergefell v. Hodges*, 576 U.S. 644 (2015)) rather than as the case that solidified a weak default standard of review for prisoners' constitutional claims. See, e.g., PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 1073–74 (7th ed. 2018) (briefly mentioning *Safley* in a discussion of suspect classification doctrine); MICHAEL STOKES PAULSEN ET AL., THE CONSTITUTION OF THE UNITED STATES 1476, 1636, 1657 (3d ed. 2017) (citing *Safley* as a marriage case); GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 546 (8th ed. 2018) (same); KATHLEEN M. SULLIVAN & NOAH R. FELDMAN, CONSTITUTIONAL LAW 548–49 (20th ed. 2019) (same). As we argue below, *Safley*'s second, less well-known holding represented a dramatic and ultimately regressive turn in the development of prisoners' constitutional rights.

critique of prison law and emphasizes the role that prisoners' interpretations of the Constitution played in the development of the discipline. Part II exposes the incoherence of prison law. This Part focuses on four prominent themes that run throughout prison cases: violence, literacy, privacy, and rehabilitation. Over time, claims about these concepts — assertions like “prisons are violent” or “prisons cannot rehabilitate” — have become the organizing principles of constitutional prison law. Yet as Part II shows, these claims shift across different threads of doctrine in ways that prevent prison law from holding together as a sound body of thought. Part III examines the implications that follow from recognizing that prison law is predicated on tenuous assumptions about the nature of prison life. It argues that the mythic prison legitimates imprisonment and flows directly from the dominant doctrinal approach to prisoners' rights. We conclude that courts must abandon that doctrine to develop a thicker, more coherent theory of how imprisonment alters claims to constitutional protection.

Before undertaking this argument, a brief word on methods and terminology. Like many pieces of constitutional scholarship, this Article focuses on cases that reached the Supreme Court. This approach is somewhat atypical in prison law because lower courts have played a significant role in reforming American prisons, particularly in cases involving consent decrees. We train our attention on the Supreme Court neither to overstate its importance nor to venerate courts but rather to underscore how binding doctrines have stunted the development of prison law.

At the same time, we foreground prisoners' narratives. Too often, legal academic writing marginalizes the voices of those subject to the law. To counteract that trend, we turn to memoirs by, among many others, Jack Henry Abbott, Eldridge Cleaver, Eugene Debs, George Jackson, Emily Madison, Huey P. Newton, Bayard Rustin, Wilbert Rideau, Marilyn Sanderson, Albert Woodfox, and Malcolm X.<sup>50</sup> These citations do not solve the problem of prisoners' alienation, but they amplify prisoners' voices and place prisoners alongside sources of authority more familiar to the pages of law reviews.

Our emphasis on prisoners' experiences also motivates us to depart from some common case names. For example, courts typically refer to

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<sup>50</sup> See, e.g., MALCOLM X, *THE AUTOBIOGRAPHY OF MALCOLM X* 199 (Ballantine Books 1992) (1964) (“Usually the convict comes from among those bottom-of-the-pile Negroes, the Negroes who through their entire lives have been kicked about . . .”); ELDRIDGE CLEAVER, *SOUL ON ICE* 4 (1968) (“In Soledad state prison, I fell in with a group of young blacks who, like myself, were in vociferous rebellion against what we perceived as a continuation of slavery on a higher plane.”); GEORGE JACKSON, *June 10, 1970*, in *SOLEDAD BROTHER: THE PRISON LETTERS OF GEORGE JACKSON* 3, 4 (1970) (“Blackmen born in the U.S. and fortunate enough to live past the age of eighteen are conditioned to accept the inevitability of prison. For most of us, it simply looms as the next phase in a sequence of humiliations.”).

*Turner v. Safley* in short form as *Turner*, the surname of the prison Superintendent who was the defendant in that lawsuit.<sup>51</sup> Against that norm but consistent with standard citation rules,<sup>52</sup> we shorten the case to *Safley* after its plaintiff and make similar choices throughout. We also make a concerted effort to highlight the people involved in lawsuits in addition to the holding and constitutional legacy of each case. It takes extraordinary mettle to sue a prison warden while living inside a penal institution. Constitutional prison law was born from the bravery of prisoners, like those at Folsom, who risked retaliation to press their claims. We include prisoners' stories to reflect and honor that courage.

Finally, we use the term "prisoner" to describe people serving prison terms. American case law is filled with different words for incarcerated people, each with its own history and connotations. We use "prisoner" rather than "convict," "offender," or "inmate," the terms most common in case law and prison policy, to distance ourselves from the language of the state. We also employ "prisoner" for two other reasons. The first is technical: this is an Article about the law that governs penal institutions rather than other custodial facilities such as jails or immigration detention centers. The second is critical: the term prisoner rejects the government's appellations while underscoring that prisons are degrading spaces, where numbers replace names and humans live in barren cells. By citing prisoners' memoirs and foregrounding the people involved in constitutional litigation, we emphasize that real people are living in penal facilities. And by referring to those people as prisoners, we stress that they are subject to the extraordinary and dehumanizing exercise of state power known as imprisonment.

## I. THE CONSTITUTION IMPRISONED

There is a rich tradition of writing on the history of prisoners' rights.<sup>53</sup> But outside a small field of specialists, the story of prison law is too seldom told.<sup>54</sup> The most famous prisoners' rights cases fail to

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<sup>51</sup> See, e.g., *Shaw v. Murphy*, 532 U.S. 223, 225 (2001).

<sup>52</sup> See THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 10.9(a)(i), at 117 (Columbia L. Rev. Ass'n et al. eds., 21st ed. 2020) ("When using only one party's name in a short form citation, avoid using the name of a geographical or governmental unit, a governmental official, or another common litigant."); cf. JUSTIN DRIVER, THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND 25 n.\* (2018) (advocating this approach as a way of recognizing plaintiffs' sacrifices).

<sup>53</sup> For historical accounts of the relationship between prisons and courts, see generally MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS (1998); JAMES B. JACOBS, NEW PERSPECTIVES ON PRISONS AND IMPRISONMENT (1983); and MARGO SCHLANGER ET AL., INCARCERATION AND THE LAW: CASES AND MATERIALS (10th ed. 2020).

<sup>54</sup> See Schluger, *The Constitutional Law of Incarceration*, *supra* note 31, at 361 ("[P]risoners' rights precedents are unfamiliar to many").

make it into the constitutional pantheon. There is no *Brown*<sup>55</sup> or *Roe*<sup>56</sup> of prisons, nor for that matter is there a *Dred Scott*<sup>57</sup> or a *Korematsu*.<sup>58</sup> Prison law occupies an obscure place in the American legal academy even relative to its closest intellectual neighbor, preconviction criminal procedure, which delivers landmark cases like *Gideon*<sup>59</sup> and *Miranda*<sup>60</sup> and has generated a cottage industry of scholarship on the Warren Court.<sup>61</sup>

Yet on the heels of the criminal procedure revolution, the Supreme Court embarked on a transformative journey into the country's prisons.<sup>62</sup> In a groundbreaking series of cases, the Burger Court recognized that prisoners retain constitutional rights to due process, free speech, and religious exercise. Later courts expanded, recast, and then narrowed prisoners' constitutional protections. In the process, they built a substantial body of postconviction constitutional criminal law.

This Part provides an overview of American prison law. We begin in earnest in the 1960s, when pro se prisoners inaugurated a rights revolution with constitutional challenges to religious discrimination. We then trace the development of prison law through an improbable set of victories in the 1970s and a period of retrenchment in the 1980s. This

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<sup>55</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). See generally J.M. Balkin & Sanford Levinson, Commentary, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963 (1998) (discussing the formation of canons in legal scholarship).

<sup>56</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>57</sup> *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

<sup>58</sup> *Korematsu v. United States*, 323 U.S. 214 (1944). See generally Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379 (2011) (identifying *Dred Scott* and *Korematsu* as central cases in the American anticanon); Richard A. Primus, Essay, *Canon, Anti-canon, and Judicial Dissent*, 48 DUKE L.J. 243 (1998) (identifying the anticanon phenomenon).

<sup>59</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963). For an incisive assessment of *Gideon*'s legacy, see generally Sara Mayeux, *What Gideon Did*, 116 COLUM. L. REV. 15 (2016).

<sup>60</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>61</sup> See, e.g., LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 379–411 (2000) (discussing Warren Court criminal procedure cases); STUNTZ, *supra* note 28, at 216–43 (attributing the harshness of American punishment in part to the Warren Court's focus on criminal procedure rather than substantive criminal law); Yale Kamisar, *The Warren Court and Criminal Justice: A Quarter-Century Retrospective*, 31 TULSA L.J. 1, 3 (1995) (noting the Warren Court's conservative turn in its final years); Stephen J. Schulhofer, *Criminal Justice, Local Democracy, and Constitutional Rights*, 111 MICH. L. REV. 1045, 1061 (2013) (challenging Professor William Stuntz's account of the Warren Court's criminal procedure jurisprudence).

<sup>62</sup> Here, our claim is that the Supreme Court's treatment of prisons has been at least as significant as its efforts to regulate the police. We use the conventional language about 1960s criminal procedure cases to emphasize that point, but we note the existence of scholarly critiques questioning whether the Warren Court's policing cases were quite so "revolutionary" as is commonly supposed. See, e.g., Justin Driver, *The Constitutional Conservatism of the Warren Court*, 100 CALIF. L. REV. 1101, 1114–48 (2012) (identifying instances when the Warren Court eschewed plausible progressive outcomes); Sarah A. Seo, Essay, *Democratic Policing Before the Due Process Revolution*, 128 YALE L.J. 1246, 1291–302 (2019) (arguing that scholars tend to overlook the ways in which the Warren Court enabled, rather than constrained, police discretion).

survey reveals an unusual, understudied field of constitutional law founded on the idea that imprisonment changes the meaning of rights.

### A. *Expansion*

Prison law is as old as the prison itself. The most well-known early prison case, *Ruffin v. Commonwealth*,<sup>63</sup> reached Virginia's highest court in 1871, only a few decades after states began to construct their first prisons.<sup>64</sup> The case arose when Woody Ruffin, a prisoner leased to a private company and forced to build the Chesapeake and Ohio Railroad, killed a guard while attempting to escape.<sup>65</sup> When prosecutors charged Ruffin in Richmond, Virginia, where "all criminal proceedings against convicts in the penitentiary"<sup>66</sup> took place, he asserted a right to be tried by a jury "of his vicinage."<sup>67</sup> The court rejected Ruffin's claim on the ground that prisoners forfeit the "rights of freemen" and, in now-notorious dicta, described prisoners as "slaves of the State."<sup>68</sup>

*Ruffin* exemplified a theory of rights forfeiture — the idea that prisoners give up their right to constitutional protection by committing crimes — that is now deeply embedded in American prison law. In less-studied cases, nineteenth-century courts also considered whether prisoners have a right to medical care and whether the public should bear liability for prisoners' medical costs.<sup>69</sup> There was, in other words, a nascent body of law on prisoners' rights well before the expansion of modern prison systems.

It was not until the second half of the twentieth century, however, that cases on prisons began to form an identifiable subfield of constitutional law. Black Muslim prisoners spurred that development.<sup>70</sup> In the

<sup>63</sup> 62 Va. (21 Gratt.) 790 (1871).

<sup>64</sup> See David J. Rothman, *Perfecting the Prison: United States 1789–1885*, in *THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY* 111, 119 (Norval Morris & David J. Rothman eds., 1995).

<sup>65</sup> See *Ruffin*, 62 Va. (21 Gratt.) at 791–92.

<sup>66</sup> *Id.* at 793.

<sup>67</sup> *Id.* at 794; see *id.* at 792–93.

<sup>68</sup> *Id.* at 796. For a revisionist account of *Ruffin* that questions whether its familiar dicta accurately described the status of American prisoners during the nineteenth century, see generally Donald H. Wallace, *Ruffin v. Virginia and Slaves of the State: A Nonexistent Baseline of Prisoners' Rights Jurisprudence*, 20 J. CRIM. JUST. 333 (1992).

<sup>69</sup> See, e.g., *Spicer v. Williamson*, 191 N.C. 487, 491–92 (1926) (citing late-nineteenth-century precedent on whether the state is responsible for the costs of prisoners' medical care).

<sup>70</sup> See Clair A. Cripe, *Courts, Corrections, and the Constitution: A Practitioner's View*, in *COURTS, CORRECTIONS, AND THE CONSTITUTION: THE IMPACT OF JUDICIAL INTERVENTION ON PRISONS AND JAILS* 268, 269 (John J. DiIulio, Jr., ed., 1990) ("The rise of judicial activism in this area can be pinpointed pretty closely at the litigation brought by inmates who were members of the group then called Black Muslims."); MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA* 175 (2006) (discussing the impact of the Black Muslim movement).

1950s, as the civil rights movement unfolded outside prison walls, incarcerated members of the Nation of Islam began to organize and to contest penal policies on the inside.<sup>71</sup> In Massachusetts, Malcolm X led a group of Black Muslim prisoners in demanding changes in the prison diet and insisting on transfers to eastern-facing cells so that they could more readily pray toward Mecca.<sup>72</sup> In California, ten Black Muslim prisoners at Folsom State Prison challenged the Warden's denial of their petition to be recognized as a religious group.<sup>73</sup> In New York, Black Muslims at Clinton State Prison alleged "religious persecution" after officials refused to let them purchase a Koran.<sup>74</sup> In Virginia, a group of prisoners from Washington, D.C. — then, as now, held in the federal prison system — "charge[d] that all the Muslims in the institution" had been thrown into solitary confinement for three months "for no reason other than their religion."<sup>75</sup>

The prisoners styled these suits differently — sometimes as habeas actions,<sup>76</sup> other times as claims under 42 U.S.C. § 1983<sup>77</sup> — and the courts hearing them debated which constitutional provisions should apply.<sup>78</sup> But each case centered on the same core allegation: prison officials were preventing Black Muslims from practicing their faith. By the 1960s, such religious confrontation was sufficiently widespread that Malcolm X could declare in his autobiography that the circulation of "Muslim teachings" in prison was "probably as big a single worry as the American prison system has today."<sup>79</sup>

Muslim prisoners' free exercise claims reached the Supreme Court in 1964 after Thomas X. Cooper sued the Warden of Stateville, an Illinois

<sup>71</sup> See Edgardo Rotman, *The Failure of Reform: United States, 1865–1965*, in THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY, *supra* note 64, at 169, 193 ("[T]he civil rights movement on the streets gave support and inspiration to the pioneers of prisoners' rights litigation."). For the foremost historical account of how rising rights consciousness shaped the United States during the post–World War II era, see generally JAMES T. PATTERSON, *GRAND EXPECTATIONS: THE UNITED STATES, 1945–1974* (1996).

<sup>72</sup> See MANNING MARABLE, *MALCOLM X: A LIFE OF REINVENTION* 94 (2011) ("The local media learned about the controversy, and several articles soon appeared, the first to present Malcolm to a public audience. On April 20, 1950, the *Boston Herald* reported the incident under the headline 'Four Convicts Turn Moslems, Get Cells Looking to Mecca.' More colorful and descriptive was the *Springfield Union*: 'Local Criminals, in Prison, Claim Moslem Faith Now: Grow Beards, Won't Eat Pork, Demand East-Facing Cells to Facilitate "Prayers to Allah."'").

<sup>73</sup> See *In re Ferguson*, 361 P.2d 417, 418 (Cal. 1961) (en banc).

<sup>74</sup> *Pierce v. La Vallee*, 293 F.2d 233, 234 (2d Cir. 1961).

<sup>75</sup> *Sewell v. Pegelow*, 291 F.2d 196, 197 (4th Cir. 1961).

<sup>76</sup> See *Ferguson*, 361 P.2d at 418.

<sup>77</sup> See *Pierce*, 293 F.2d at 234.

<sup>78</sup> See Comment, *Black Muslims in Prison: Of Muslim Rites and Constitutional Rights*, 62 COLUM. L. REV. 1488, 1492–94 (1962) (noting debates over whether the allegations in "the Black Muslim cases" are best cognized as free exercise claims under the First Amendment or discrimination claims under the Fourteenth Amendment, *id.* at 1494).

<sup>79</sup> MALCOLM X, *supra* note 50, at 199.

penitentiary “then known as the ‘World’s Toughest Prison.’”<sup>80</sup> Like others before him, Cooper alleged that prison officials had blocked his access to religious services, “materials disseminated by the Black Muslim Movement,” and the Koran.<sup>81</sup> Like others, Cooper lost in lower court opinions decrying Black Muslims as a dangerous group whose “inflammatory Muslim doctrines” and “Muslim beliefs in black supremacy” posed a “serious threat” to order.<sup>82</sup> But then, in a *per curiam* opinion, the Warren Court reversed.<sup>83</sup>

*Cooper v. Pate*<sup>84</sup> may well be the shortest momentous case in Supreme Court history. The paragraph-long opinion held only that Cooper had stated a claim under § 1983.<sup>85</sup> But in doing so, the case opened the door to prisoner litigation — and, moreover, to litigation in federal rather than state court, where prisoners’ habeas claims overwhelmingly faltered.<sup>86</sup> In four spare sentences, *Cooper* invigorated constitutional prison law. In this respect, the case represents an underappreciated legacy of the Warren Court.<sup>87</sup>

It would be a mistake, though, to overstate the Warren Court’s contributions to prison law. That Court was far less active in the field than one might expect given its reputation for landmark criminal procedure precedents. Professor Morton Horwitz has called the Warren Court “the

<sup>80</sup> Toussaint Losier, “. . . For Strictly Religious Reason[s]”: *Cooper v. Pate* and the Origins of the Prisoners’ Rights Movement, 15 SOULS 19, 21 (2013); see also SCHLANGER ET AL., *supra* note 53, at 45–46 (discussing *Cooper v. Pate*, 378 U.S. 546 (1964)). See generally JAMES B. JACOBS, STATEVILLE: THE PENITENTIARY IN MASS SOCIETY (1977) (documenting the history of Stateville).

<sup>81</sup> *Cooper v. Pate*, 324 F.2d 165, 166 (7th Cir. 1963), *rev’d*, 378 U.S. 546 (1964) (*per curiam*).

<sup>82</sup> *Id.* at 167 (quoting *In re Ferguson*, 361 P.2d 417, 421–22 (Cal. 1961) (*en banc*)). These opinions echoed prison officials’ derisive descriptions of the Black Muslim movement. See PAUL W. KEVE, PRISONS AND THE AMERICAN CONSCIENCE: A HISTORY OF U.S. FEDERAL CORRECTIONS 211 (1991) (“As the country’s blacks began to win their civil rights battles, they acquired new pride in their cultural identity, and one unexpected result was the sudden popularity of the Black Muslim religion. This development deeply worried wardens . . . . Angry black inmates throughout the prisons demanded the right to hold religious meetings and ceremonies, to eat certain foods, and to receive certain printed religious materials — and all in the name of a strange religion that seemed to the custodians less like a religion than a potential rallying point for disruptive group action.”).

<sup>83</sup> See *Cooper*, 378 U.S. at 546.

<sup>84</sup> 378 U.S. 546 (1964) (*per curiam*).

<sup>85</sup> See *id.* at 546.

<sup>86</sup> See ROBERT PERKINSON, TEXAS TOUGH: THE RISE OF AMERICA’S PRISON EMPIRE 266 (2010) (“[B]ecause habeas petitions generally required a prisoner to exhaust all state remedies before turning to the federal courts, they rarely resulted in redress.”). For a primer on the history of federal habeas litigation, see generally CHARLES DOYLE, CONG. RSCH. SERV., RL33391, FEDERAL HABEAS CORPUS: A BRIEF LEGAL OVERVIEW (2010).

<sup>87</sup> *Cooper* is familiar to prison scholars. See, e.g., ROBERT T. CHASE, WE ARE NOT SLAVES: STATE VIOLENCE, COERCED LABOR, AND PRISONERS’ RIGHTS IN POSTWAR AMERICA 6 (2020); James B. Jacobs, *The Prisoners’ Rights Movement and Its Impacts, 1960–80*, 2 CRIME & JUST. 429, 434 (1980). But *Cooper* is less well known outside their ranks and rarely features in constitutional scholars’ debates about the Warren Court’s criminal procedure canon. For sources on the Warren Court’s criminal procedure jurisprudence, see sources cited *supra* note 61.

first Supreme Court in American history to champion the legal position of the underdog and the outsider in American society.”<sup>88</sup> It would seem that prisoners — prototypical “underdog[s],” literally cast out by free society — should be at the center of such an outsider jurisprudence. Yet the Warren Court decided only a handful of prison cases and was hardly a laboratory of creative postconviction criminal procedure.<sup>89</sup> Instead, the major developments in postconviction constitutional law took place during the 1970s, under Chief Justice Burger, when the Court heard one prison case after the next.<sup>90</sup>

Like “the Black Muslim cases,”<sup>91</sup> the prison cases of the 1970s grew out of protests — first the strike at Folsom,<sup>92</sup> then the uprising at Attica, the country’s most famous prison rebellion.<sup>93</sup> These high-profile protests galvanized the prison reform movement and paved the way for a new chapter in federal courts’ engagement with prisoners’ civil rights. Prison scholars call this moment the end of the “hands-off” era.<sup>94</sup> That term can be misleading: hands-off was an attitude rather than a formal legal doctrine,<sup>95</sup> and courts regulated prisons intermittently before the

<sup>88</sup> MORTON J. HORWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE* 13 (1998). Prison cases are sufficiently marginal to the Warren Court legacy that a recent retrospective, written by two distinguished scholars, declined to mention even a single prison case. *See generally* GEOFFREY R. STONE & DAVID A. STRAUSS, *DEMOCRACY AND EQUALITY: THE ENDURING CONSTITUTIONAL VISION OF THE WARREN COURT* (2020).

<sup>89</sup> While *Cooper* is the signal opinion, the Warren Court did issue a few other prison opinions. In another short per curiam opinion, for example, the Court upheld an order desegregating Alabama’s prisons over the objection of prison wardens, who argued that racial segregation was necessary to manage prison violence. *See Lee v. Washington*, 390 U.S. 333, 333–34 (1968) (per curiam). In 1969, the Court invalidated a Tennessee prison policy prohibiting prisoners from assisting one another with habeas writs. *Johnson v. Avery*, 393 U.S. 483, 490 (1969).

<sup>90</sup> Lower courts began regulating prisons in earnest in the late 1960s. *See, e.g., Holt v. Sarver*, 300 F. Supp. 825, 830–34 (E.D. Ark. 1969).

<sup>91</sup> *See* Comment, *supra* note 78, at 1494 (coining this term).

<sup>92</sup> *See supra* Introduction, pp. 517–25 (describing the Folsom prison strike).

<sup>93</sup> The demands made by Attica prisoners reiterated many of the rights assertions made in the lesser-known Folsom Manifesto. *Compare The Attica Liberation Faction Manifesto of Demands and Anti-depression Platform (1971)*, 53 *RACE & CLASS* 28, 30–34 (2011), with *FOLSOM MANIFESTO*, *supra* note 4. For accounts of the Attica rebellion, see generally HEATHER ANN THOMPSON, *BLOOD IN THE WATER: THE ATTICA PRISON UPRISING OF 1971 AND ITS LEGACY* (2016); and TOM WICKER, *A TIME TO DIE: THE ATTICA PRISON REVOLT* (1975).

<sup>94</sup> *See, e.g., FEELEY & RUBIN, supra* note 53, at 30–34.

<sup>95</sup> As Schlanger and her coauthors observe, “hands off” is a phrase from a 1963 law review note. SCHLANGER ET AL., *supra* note 53, at 43 (citing Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 *YALE L.J.* 506 (1963)). Courts do, however, sometimes use the phrase “hands-off” to describe prison jurisprudence. *See, e.g., Procnunier v. Martinez*, 416 U.S. 396, 404 (1974) (“Traditionally, federal courts have adopted a broad hands-off attitude toward problems of prison administration.”), *overruled by Thornburgh v. Abbott*, 490 U.S. 401 (1989). Some even refer to it — both inaccurately and alarmingly — as legal doctrine. *See, e.g., McCann v. Sec’y, Dep’t of Pub. Safety & Corr. Servs.*, No. 2728, 2016 WL 3961169, at \*2 (Md. Ct. Spec. App. July 21, 2016); *Al-Shabazz v. State*, 527 S.E.2d 742, 757 (S.C. 2000) (“We intend to adhere to this ‘hands off’ doctrine when reviewing the outcome of any major or minor disciplinary hearing . . .”).



1970s.<sup>96</sup> The phrase does, however, convey the sea change that began with *Cooper v. Pate*.

Courts first expanded religious protection beyond the Black Muslim movement. Initially, it was unclear whether *Cooper* would be a narrow victory for the Nation of Islam or the beginning of broader understanding of prisoners' religious rights. The Burger Court chose the latter path in *Cruz v. Beto*,<sup>97</sup> a case brought by a Buddhist prisoner named Fred Cruz.<sup>98</sup> At twenty-seven, Cruz was no stranger to prison discipline.<sup>99</sup> He had served time in solitary confinement for, among other infractions, circulating copies of the Constitution and refusing to pick cotton without water.<sup>100</sup> During one stint in solitary, Cruz found a pen and used "his ration of toilet paper" to draft a complaint alleging that Texas prison officials had violated the First Amendment when they punished him for distributing Buddhist materials.<sup>101</sup> In 1972, the Supreme Court agreed.<sup>102</sup> *Cruz* was a contested decision — then-Justice Rehnquist rejected a conception of the First Amendment that provided a right "to evangelize"<sup>103</sup> — but the case marked a critical foray into daily prison life.

Other suits followed.<sup>104</sup> Two years after *Cruz*, a unanimous Supreme Court invalidated a prison policy that permitted staff to censor mail that "unduly complain[ed]" or expressed "inflammatory political, racial, religious or other views."<sup>105</sup> Several months later, the Court held that prisoners retain a due process right to challenge disciplinary procedures.<sup>106</sup> These decisions left critical questions about the scope and source of prisoners' rights unanswered. The first, for instance, grounded its holding

<sup>96</sup> See, e.g., *Johnson v. Dye*, 175 F.2d 250, 256 (3d Cir. 1949) ("The obligation of a State to treat its convicts with decency and humanity is an absolute one and a federal court will not overlook a breach of that duty."), *rev'd*, 338 U.S. 864 (1949); *Lamar v. Bd. of Comm'rs*, 30 N.E. 912, 914 (Ind. Ct. App. 1892) ("We cannot believe that the law intended, where a man was in jail and in need of medical services . . . that the prisoner should be left to suffer, and perhaps die . . . and that the county would not be liable for the services thus rendered under the employment of the jailer having the prisoner in charge.")

<sup>97</sup> 405 U.S. 319 (1972) (per curiam).

<sup>98</sup> See *id.* at 319; see also Ethan Watters, *The Love Story that Upended the Texas Prison System*, TEX. MONTHLY (Oct. 11, 2018), <https://www.texasmonthly.com/articles/love-story-upended-texas-prison-system> [<https://perma.cc/YUJ5-HMC6>] (recounting Fred Cruz's case).

<sup>99</sup> See Watters, *supra* note 98.

<sup>100</sup> See *id.*

<sup>101</sup> *Id.*; see *Cruz*, 405 U.S. at 319–22.

<sup>102</sup> See *Cruz*, 405 U.S. at 322.

<sup>103</sup> *Id.* at 324 (Rehnquist, J., dissenting).

<sup>104</sup> Increasingly, such suits were staffed by lawyers from the nascent prisoners' rights bar. The American Civil Liberties Union (ACLU), for example, established its National Prison Project "to defend the civil and constitutional rights of prisoners" in 1972. *ACLU History: Prisons*, ACLU, <https://www.aclu.org/other/aclu-history-prisons> [<https://perma.cc/EJY9-VXDB>].

<sup>105</sup> *Procunier v. Martinez*, 416 U.S. 396, 415 (1974), *overruled by Thornburgh v. Abbott*, 490 U.S. 401 (1989); see *id.* at 417–19.

<sup>106</sup> See *Wolff v. McDonnell*, 418 U.S. 539, 555–57 (1974).

in the interests of those outside prison rather than in the interests of prisoners themselves;<sup>107</sup> and the second called on lower courts to balance prisoners' due process rights against "institutional needs."<sup>108</sup> Nonetheless, they represented significant victories for a group once thought to have forfeited constitutional protection by virtue of being sentenced to prison.<sup>109</sup>

These wins were, moreover, most improbable. One need not return to the nineteenth century to find a time when the early Burger Court holdings would have sounded radical. In 1965, only seven years before *Cruz*, President Johnson convened a commission of center-left establishment figures to imagine an overhaul of the country's criminal justice system.<sup>110</sup> Led by Attorney General Nicholas Katzenbach, the Commission proposed hundreds of "liberal, even adventuresome"<sup>111</sup> reforms, including providing a guaranteed basic income and staffing crime control agencies with social workers.<sup>112</sup> Yet, in its roughly 340 pages, the Crime Report devoted little more than a column — not even a single page — to "concern for the rights of offenders."<sup>113</sup> Where it did address prisons, the Katzenbach Commission expressed skepticism about judicial oversight,<sup>114</sup> instead calling on prison officials to develop their own "standards and administrative procedures" to ensure fair decisions.<sup>115</sup> These meager recommendations, then, represented the Great Society's

<sup>107</sup> See *Procunier*, 416 U.S. at 408.

<sup>108</sup> *McDonnell*, 418 U.S. at 556. Justice Marshall dissented in *McDonnell*, arguing that prisoners ought to enjoy fuller due process protection than the majority's balancing test afforded. *Id.* at 584 (Marshall, J., dissenting).

<sup>109</sup> See *Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) 790, 795–96 (1871) ("A convicted felon . . . has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him.").

<sup>110</sup> See Thomas E. Feucht & Edwin Zedlewski, *The 40th Anniversary of the Crime Report*, NAT'L INST. JUST. J., June 2007, at 20, 20–22 (describing the Katzenbach Commission).

<sup>111</sup> ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 101 (2016) (quoting a *Life* magazine review of the Crime Report). Professor Elizabeth Hinton argues that the Katzenbach Commission (and Johnson's Great Society policies more broadly) advanced a punitive turn in criminal justice by "enthusiastically blending social welfare and punitive programs," *id.* at 105, and "integrating law enforcement" into a wide array of government agencies, *id.* at 103; see *id.* at 100–05. For a related argument, see NAOMI MURAKAWA, THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA 69–112 (2014). For a powerful critique of Professor Naomi Murakawa's book, see Margo Schlanger, *No Reason to Blame Liberals (Or, the Unbearable Lightness of Perversity Arguments)*, NEW RAMBLER (2014), <https://newramblerreview.com/book-reviews/law/no-reason-to-blame-liberals-or-the-unbearable-lightness-of-perversity-arguments> [<https://perma.cc/ZW6F-HYSM>].

<sup>112</sup> See HINTON, *supra* note 111, at 100–06. See generally PRESIDENT'S COMM'N ON L. ENF'T & ADMIN. OF J., THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967) [hereinafter CHALLENGE OF CRIME].

<sup>113</sup> See CHALLENGE OF CRIME, *supra* note 112, at 181.

<sup>114</sup> See *id.* ("[S]erious problems would be presented by subjecting [decisions about prisoners' placement] and similar actions to all of the traditional legal procedures associated with judicial due process requirements.").

<sup>115</sup> *Id.* at 181; see *id.* at 181, 183.

bold vision for prisons in 1968. Only six years later, the Court located prisoners' rights in the Constitution and began to police prisoners' access to everything from mail and contraband books to religious services and federal courts.

The 1970s also witnessed the emergence of systemic lawsuits to reform prison conditions.<sup>116</sup> In 1976, the Court held that the Eighth Amendment's prohibition on cruel and unusual punishment required the government to provide prisoners with medical care.<sup>117</sup> Two years later, the Court heard *Hutto v. Finney*,<sup>118</sup> an Eighth Amendment challenge to the brutal conditions in Arkansas's prison system. For years, Arkansas prison officials had jammed "as many as 10 or 11" prisoners, some with infectious diseases, into small cells with dirty mattresses and a single toilet that could be flushed only from the outside.<sup>119</sup> Prisoners received "fewer than 1,000 calories a day," mostly in the form of four-inch squares of dense and barely edible grue.<sup>120</sup> As the district court put it, the Arkansas prison system was "a dark and evil world completely alien to the free world."<sup>121</sup>

After a winding decade of litigation, the Supreme Court upheld the district court's remedial order. The Court then announced that the ban on cruel and unusual punishment, which at that point had been incorporated for less than two decades,<sup>122</sup> applied not just to "physically barbarous" methods of punishment like torture but also to indecent prison

<sup>116</sup> See Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994, 2003 (1999) [hereinafter Schlanger, *Beyond the Hero Judge*] (discussing this turn); Schlanger, *The Constitutional Law of Incarceration*, *supra* note 31, at 365–66 (noting that, although "[c]onstitutional challenges to conditions of confinement were unusual until the 1960s," *id.* at 365, earlier precedents had suggested that the Eighth Amendment applied to prison conditions in addition to prison sentence lengths); see also Judith Resnik, *The Puzzles of Prisoners and Rights: An Essay in Honor of Frank Johnson*, 71 ALA. L. REV. 665, 699–700 (2020) (tracing the development of this case law).

<sup>117</sup> See *Estelle v. Gamble*, 429 U.S. 97, 102–03 (1976). The success of *Estelle v. Gamble*, 429 U.S. 97, was partial in that the Court extended the Eighth Amendment only to "deliberately indifferent" — not merely negligent — failures to provide medical care. *Id.* at 105–06. But in recognizing a right to medical care, the case represented a major development for prisoners' rights.

<sup>118</sup> 437 U.S. 678 (1978).

<sup>119</sup> *Id.* at 682.

<sup>120</sup> *Id.* at 683. Grue, which is also known as "prison loaf" or "the loaf," is "a substance created by mashing meat, potatoes, oleo [margarine], syrup, vegetables, eggs, and seasoning into a paste and baking the mixture in a pan." *Id.* This substance, according to one account, is "a nutritious but awful-tasting bread . . . for the purpose of feeding the worst inmates. . . . [I]t would keep you alive — if you could get it down." TED CONOVER, *NEWJACK: GUARDING SING SING* 28 (Vintage Books 2001) (2000).

<sup>121</sup> *Hutto*, 437 U.S. at 681 (quoting *Holt v. Sarver*, 309 F. Supp. 362, 381 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971)).

<sup>122</sup> See *Robinson v. California*, 370 U.S. 660, 667 (1962); *id.* at 675 (Douglas, J., concurring).

conditions.<sup>123</sup> This conclusion expanded the Eighth Amendment's reach and established the foundation for conditions litigation, a new genre of prison reform. That litigation inaugurated an era of receivership in which federal courts became deeply involved in state prison oversight.<sup>124</sup>

Prisoners suffered significant legal setbacks in the 1970s too. The Burger Court was not invariably receptive to prisoners' claims. Between 1974 and 1984, the Court concluded that prisoners lack due process rights to avoid transfers to worse prisons,<sup>125</sup> rejected a First Amendment challenge to a policy banning prisoners from in-person interviews with journalists,<sup>126</sup> and upheld intrusive searches of prison cells.<sup>127</sup> One could hardly call this a decade of unmitigated success. Even in losing cases, though, the Court proceeded from the assumption that prisoners could assert constitutional rights.<sup>128</sup> By the mid-1980s, penal institutions were no longer spaces in which prisoners enjoyed only the protections that legislatures, in their benevolence, saw fit to extend.<sup>129</sup> The Bill of Rights existed inside the prison, in a thin but discernible form.

Perhaps more to the point, this was a period of remarkable activity in prison law. Today, it is difficult to imagine a major constitutional prison case reaching the Supreme Court every few years, not to mention two banner cases in a single Term.<sup>130</sup> This inaction is not for want of

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<sup>123</sup> *Hutto*, 437 U.S. at 685 (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)); see also *Gregg v. Georgia*, 428 U.S. 153, 169–73 (1976) (plurality opinion) (recounting the history of Eighth Amendment jurisprudence).

<sup>124</sup> For a fuller historical account of Eighth Amendment conditions litigation, see Schlanger, *Beyond the Hero Judge*, *supra* note 116, at 2005 (describing conditions litigation that led to overhauls of “the mammoth Texas prison system,” Colorado’s maximum-security prison, and California jails); Schlanger, *The Constitutional Law of Incarceration*, *supra* note 31, at 362–77.

<sup>125</sup> See *Meachum v. Fano*, 427 U.S. 215, 216 (1976).

<sup>126</sup> See *Pell v. Procunier*, 417 U.S. 817, 819, 834–35 (1974).

<sup>127</sup> See *Hudson v. Palmer*, 468 U.S. 517, 536 (1984).

<sup>128</sup> For instance, in *Pell v. Procunier*, 417 U.S. 817, the case concerning interviews with journalists, the Court treated prisoners as parties bearing First Amendment rights. See *id.* at 822. Though the case was a loss for the plaintiffs, it was an advance from *Procunier v. Martinez*, 416 U.S. 396 (1974), *overruled by* *Thornburgh v. Abbott*, 490 U.S. 401 (1989), a case decided the same Term in which the Court had relied on the First Amendment interests of those outside prisons. See *id.* at 408; *Turner v. Safley*, 482 U.S. 78, 85–87 (1987) (recounting this history of the “question[] of ‘prisoners’ rights,” *id.* at 86).

<sup>129</sup> See *Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) 790, 796 (1871) (“The bill of rights is a declaration of general principles to govern a society of freemen, and not of convicted felons and men civilly dead. Such men have some rights it is true, such as the law in its benignity accords to them, but not the rights of freemen.”).

<sup>130</sup> In the past decade, the Supreme Court has decided only a handful of prison cases, many of which concern statutory rather than constitutional questions. See, e.g., *Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1723 (2020) (construing the Prison Litigation Reform Act); *Holt v. Hobbs*, 574 U.S. 352, 356 (2015) (applying the Religious Land Use and Institutionalized Persons Act of 2000 to an Arkansas prison grooming policy).

material. Questions about prisoners' civil rights remain wide open and American prisons remain horrific institutions.<sup>131</sup> But constitutional prison law is no longer a site for new judicial interventions, at least not of the sort seen in the 1970s.

### B. Retrenchment

It risks only a mild overstatement to say that the prisoners' rights revolution ended in 1987. In June of that year, the Supreme Court issued *Turner v. Safley*, a split opinion authored by Justice O'Connor.<sup>132</sup> The case had begun nearly a decade earlier at a "complex" prison — a penal institution that holds both men and women — outside Jefferson City, Missouri.<sup>133</sup> There, Leonard Safley met Pearl Jane Watson.<sup>134</sup> The prisoners began a relationship and, when Safley was transferred, he wrote to Watson under a pseudonym<sup>135</sup> to circumvent a policy barring "inmate-to-inmate correspondence."<sup>136</sup> Eventually Safley and Watson decided to marry, but Superintendent William Turner denied their request.<sup>137</sup> Safley sued, challenging both the correspondence policy and the rule requiring a warden's permission to marry.<sup>138</sup>

The case hinged on the standard of review. Safley sought the heightened scrutiny that would apply to restrictions on speech and marriage outside prison, but the Supreme Court declined, opting instead for what is now known as the *Turner v. Safley* test: "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."<sup>139</sup> To determine if a policy meets this threshold, the Supreme Court explained that courts should consider not just the state's asserted interest but also obvious

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<sup>131</sup> See, e.g., *Alabama's Prisons Are Deadliest in the Nation*, EQUAL JUST. INITIATIVE (Dec. 3, 2018), <https://eji.org/news/alabamas-prisons-are-deadliest-in-nation> [<https://perma.cc/YJ9Q-BPXP>]; Michelle Liu, *Leaked Mississippi Prison Photos of Skimpy Meals, Moldy Showers and Exposed Wiring Prompt Call for Investigation*, MISS. TODAY (May 29, 2019), <https://mississippitoday.org/2019/05/29/leaked-mississippi-prison-photos-of-skimpy-meals-moldy-showers-and-exposed-wiring-prompts-call-for-investigation> [<https://perma.cc/QY2G-2KL7>].

<sup>132</sup> 482 U.S. at 80.

<sup>133</sup> See Mia Armstrong, *In Sickness, In Health — And In Prison*, LONGREADS (Aug. 2019), <https://longreads.com/2019/08/19/in-sickness-in-health-and-in-prison> [<https://perma.cc/62CP-P85S>]; see also Christine Jackson, *The Life and Death of Renz Prison*, VOX MAG. (Apr. 1, 2015), [https://www.voxmagazine.com/news/features/the-life-and-death-of-renz-prison/article\\_3fd4eec5-99do-5802-ad62-4f79661dd49b.html](https://www.voxmagazine.com/news/features/the-life-and-death-of-renz-prison/article_3fd4eec5-99do-5802-ad62-4f79661dd49b.html) [<https://perma.cc/PR87-7JLE>] (discussing the prison's legacy).

<sup>134</sup> See Armstrong, *supra* note 133.

<sup>135</sup> See *id.*

<sup>136</sup> *Safley*, 482 U.S. at 83. The policy made an exception for correspondence between prisoners who were immediate family members. *Id.* at 81–82.

<sup>137</sup> See Armstrong, *supra* note 133.

<sup>138</sup> See *Safley*, 482 U.S. at 81–82. Technically, the marriage regulation permitted the Warden to approve unions for any "compelling" reason. *Id.* at 82. In practice, however, "only a pregnancy or the birth of an illegitimate child would be considered a compelling reason." *Id.*

<sup>139</sup> *Id.* at 89.

policy alternatives, other means of exercising the right, and whether protecting the right would have a “ripple effect” on prison budgets and the relationships between prisoners and guards.<sup>140</sup>

The correspondence policy easily passed this low bar. With little hesitation, the Court concluded that banning “inmate-to-inmate” correspondence advanced valid concerns about violence, in particular “a growing problem with prison gangs.”<sup>141</sup> The Court was less sure about the marriage policy. After concluding that prisoners retain a right to marriage,<sup>142</sup> the Court sidestepped the appropriate standard for marriage restrictions, holding that Missouri’s rule failed even the reasonableness standard it had just outlined.<sup>143</sup> In the end, then, Leonard Safley secured the right to marry, but the correspondence ban survived.<sup>144</sup>

To the extent that it is remembered outside prison law circles, *Safley* is understood as a vindication of the fundamental right to marry.<sup>145</sup> For prisoners, though, the case’s lasting impact lay in the creation of a new, default standard for reviewing constitutional challenges to prison policy. The *Safley* test — which permits policies “reasonably related to legitimate penological interests” — is critically important to modern prison law. Though it reads as a simple rational basis test, the standard represents a stark departure from traditional constitutional analysis and a pivotal turn in the legal history of prison oversight.

*Safley*’s force derives from two distinct features of the test. First, it is highly deferential. In directing courts to weigh prisoners’ rights against “legitimate penological interests” and to consider the “ripple effects” of rights protection, the Supreme Court cemented a long tradition of deference to prison officials. Since the earliest prison cases, American courts have expressed reservations about their capacity to regulate penal institutions.<sup>146</sup> This skepticism has various incarnations: courts worry

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<sup>140</sup> *Id.* at 90; *see id.* at 89–90.

<sup>141</sup> *Id.* at 91.

<sup>142</sup> *See id.* at 96.

<sup>143</sup> *See id.* at 97.

<sup>144</sup> By that point, Safley’s win was moot in his own life. During a preliminary injunction hearing in 1982, five years before his case reached the Supreme Court, Safley wed Watson in a quick courthouse ceremony arranged by his attorney and condoned by district court Judge Sachs. Armstrong, *supra* note 133. They later divorced. *See Ex-inmate Glad for Fight, Despite Divorce*, SEDALIA DEMOCRAT, June 17, 1987, at 12.

<sup>145</sup> The case, for instance, was cited by the majority in *Obergefell v. Hodges*, 576 U.S. 644 (2015), as precedent for the value of marriage. *See id.* at 664; *see also* Earl M. Maltz, *Constitutional Protection for the Right to Marry: A Dissenting View*, 60 GEO. WASH. L. REV. 949, 951–52 (1992) (describing *Safley* as a decision that “enhanced” the “constitutional status of the right to marry,” *id.* at 951).

<sup>146</sup> *See, e.g.*, *Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) 790, 796 (1871) (“While in this state of penal servitude, [prisoners] must be subject to the regulations of the institution of which they are inmates, and the laws of the State to whom their service is due . . .”); *Cruz v. Beto*, 405 U.S. 319, 321 (1972) (finding a constitutional violation in a prison policy but stating “[w]e are not unmindful that prison officials must be accorded latitude in the administration of prison affairs”).

about their expertise in prison management,<sup>147</sup> the size of their dockets,<sup>148</sup> and the propriety of federal judges regulating state institutions.<sup>149</sup> Together, these concerns have made reluctance to act a core theme of American prison law. *Safley* extended this anxiety about court-led prison reform.

The second and more surprising feature of the *Safley* test is that it is transsubstantive. Though the case concerned only two rights — speech and marriage — and the Court wavered about the proper standard for marriage restrictions, the majority announced a test that purported to govern all constitutional challenges to prison policy. As Justice O'Connor described it, the *Safley* test applies any time a prison rule “impinges on inmates’ constitutional rights.”<sup>150</sup> Later Courts have adopted this expansive language, describing *Safley* as the test for “all circumstances in which the needs of prison administration implicate constitutional rights”<sup>151</sup> and the “unitary . . . standard for reviewing prisoners’ constitutional claims.”<sup>152</sup>

In practice, the doctrine is not so blunt. Different (though still deferential) standards govern important corners of constitutional prison law, including use-of-force and conditions lawsuits under the Eighth Amendment<sup>153</sup> and procedural due process challenges to solitary confinement.<sup>154</sup> But *Safley* did announce a broad default standard for prisoners’ civil rights claims. Though the Court has declined to extend that

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<sup>147</sup> See, e.g., *Procunier v. Martinez*, 416 U.S. 396, 404–05 (1974), *overruled by* *Thornburgh v. Abbott*, 490 U.S. 401 (1989).

<sup>148</sup> See, e.g., *Sandin v. Conner*, 515 U.S. 472, 482 (1995) (noting that “involvement of federal courts in the day-to-day management of prisons” threatens to “squander[] judicial resources with little offsetting benefit to anyone”).

<sup>149</sup> See, e.g., *id.* (emphasizing that “federal courts ought to afford appropriate deference and flexibility to state officials”); *Martinez*, 416 U.S. at 405 (“[W]here state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities.”). In early cases such as *Ruffin*, the concern about judicial involvement in prisons sounded in separation of powers, specifically, a sense that legislatures rather than courts ought to govern prisons. See *Ruffin*, 62 Va. (21 Gratt.) at 796. With the advent of the prisoners’ rights revolution, that anxiety seems to have morphed into a concern about federal involvement in state institutions — that is, into a federalism problem.

<sup>150</sup> *Turner v. Safley*, 482 U.S. 78, 89 (1987).

<sup>151</sup> *Washington v. Harper*, 494 U.S. 210, 224 (1990) (“[The principles stated in *Safley*] apply in all cases in which a prisoner asserts that a prison regulation violates the Constitution, not just those in which the prisoner invokes the First Amendment.”).

<sup>152</sup> *Shaw v. Murphy*, 532 U.S. 223, 229 (2001).

<sup>153</sup> See *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (introducing the “deliberate indifference” standard that governs claims to inadequate medical care); see also *Farmer v. Brennan*, 511 U.S. 825, 835 (1994) (elaborating on that standard). See generally Schlanger, *The Constitutional Law of Incarceration*, *supra* note 31, at 364 tbl.1 (laying out this and other “[p]risoners’ rights liability standards”).

<sup>154</sup> See *Sandin v. Conner*, 515 U.S. 472, 483–84 (1995) (outlining the standard applicable to prisoners’ procedural due process challenges to placement in isolation).

standard in rare cases like *Johnson v. California*,<sup>155</sup> where it applied strict scrutiny to California's policy of segregating new prisoners by race,<sup>156</sup> to focus on such exceptions is to miss something crucial about *Safley*'s scope. The *Safley* test is imperial: courts have applied it to a wide variety of constitutional claims;<sup>157</sup> courts have cited the case over 12,000 times;<sup>158</sup> and prison scholars have "described [it], fairly, as 'the most important and widely used legal standard for evaluating prisoners' rights claims.'"<sup>159</sup> In sum, the case exerts a sort of gravitational pull over the field and embodies an approach to judicial review in which the constitutional right implicated by a prison practice matters less than the fact that the right belongs to prisoners.<sup>160</sup> Once prison policy is involved, the sort of refined standards familiar from other parts of constitutional law — think, for example, about the range of tests in First Amendment doctrine — give way to reasonableness review.

This is a highly unusual way to construe constitutional rights. Typically, even in areas where courts afford deference to government officials, constitutional claims hinge on the right at issue. Take, for instance, the constitutional law of policing, the first phase of the field known as criminal procedure. The Supreme Court is extremely deferential to the police,<sup>161</sup> but the doctrines that govern police conduct — searches, arrests, use of force, extracting confessions — are distinct, detailed, and tailored to the constitutional provision (and values) at stake.

<sup>155</sup> 543 U.S. 499 (2005).

<sup>156</sup> See *id.* at 505–09 (applying strict scrutiny rather than *Safley* deference).

<sup>157</sup> For only a few of the many examples of judicial opinions applying *Safley*, see *McKune v. Lile*, 536 U.S. 24, 29 (2002) (plurality opinion) (Fifth Amendment self-incrimination challenge); *Shaw v. Murphy*, 532 U.S. 223, 225 (2001) (First Amendment challenge to a restriction on speech); *Kuperman v. Wrenn*, 645 F.3d 69, 74 (1st Cir. 2011) (First Amendment challenge to a grooming policy); *Johnson v. Goord*, 445 F.3d 532, 534 (2d Cir. 2006) (First and Fourteenth Amendment challenges to a rule on possession of stamps); *Fraise v. Terhune*, 283 F.3d 506, 515–21 (3d Cir. 2002) (free exercise challenge to a security-classification policy); *Veney v. Wyche*, 293 F.3d 726, 732 (4th Cir. 2002) (equal protection challenge to gender- and sexuality-based housing policies); and *Mann v. Reynolds*, 46 F.3d 1055, 1056 (10th Cir. 1995) (Sixth and Fourteenth Amendment challenges to a prohibition on contact visits with attorneys). Courts have even exported *Safley* from prisons to the law of jails, see *Florence v. Board of Chosen Freeholders*, 566 U.S. 318, 330 (2012) (citing both jail precedents and "the principles announced in *Turner [v. Safley]*" in a challenge to strip searches of jail detainees), and to Guantanamo Bay, see *Hatim v. Obama*, 760 F.3d 54, 58 (D.C. Cir. 2014) ("Th[e] deferential [*Safley*] standard applies to military detainees as well as prisoners.").

<sup>158</sup> In 2016, Professor David Shapiro documented over 8,000 references to *Safley* in judicial opinions. See David M. Shapiro, *Lenient in Theory, Dumb in Fact: Prison, Speech, and Scrutiny*, 84 GEO. WASH. L. REV. 972, 975 (2016). Today, a simple Westlaw search reveals that number has jumped to more than 12,000.

<sup>159</sup> *Id.* at 975–76 (quoting Christopher E. Smith, *Justice Sandra Day O'Connor and Corrections Law*, 32 HAMLINE L. REV. 477, 493 (2009)).

<sup>160</sup> See Emma Kaufman, Book Review, *The New Legal Liberalism*, 86 U. CHI. L. REV. 187, 214 (2019).

<sup>161</sup> See Anna Lvovsky, *The Judicial Presumption of Police Expertise*, 130 HARV. L. REV. 1995, 2034–37 (2017).



Entire law school courses examine the differences between a vehicle search, a body search, a pat-down, and the search of one's home. Imagine if all constitutional claims involving the police were subject to one default standard in which courts upheld police practices so long as they were "reasonably related to legitimate policing objectives." Current Fourth and Fifth Amendment doctrines are too deferential, but such a standard would render existing protections from abuses of state power almost meaningless.

The result of this transsubstantive turn has been rights retrenchment. The development of prison law since the 1980s has been bleak. Over the past three decades, the Supreme Court has invoked *Safley* to uphold policies that radically restricted prison visits,<sup>162</sup> denied reading materials to prisoners in solitary confinement,<sup>163</sup> permitted involuntary administration of antipsychotic drugs,<sup>164</sup> required an admission of guilt for participation in prison programs,<sup>165</sup> and prevented Muslim prisoners from attending Jumu'ah.<sup>166</sup> And those are only cases that made it to the Supreme Court. *Safley*'s deeper legacy has been to render prison law so unfavorable to prisoners' civil rights claims that they are almost invariably extinguished by lower courts.<sup>167</sup>

To be clear, prisoners have won some victories in the post-*Safley* era. Eighth Amendment conditions litigation continues to be its own species of prison reform, and in 2011 the Supreme Court upheld an order imposing a population cap on California's overcrowded prisons.<sup>168</sup> As mentioned above, the Court also rejected *Safley* deference in favor of strict scrutiny when faced with racially segregated prisons in the 2005 case *Johnson v. California*.<sup>169</sup> Such wins, though, are rare enough to be

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<sup>162</sup> See *Overton v. Bazzetta*, 539 U.S. 126, 129–30, 132–37 (2003).

<sup>163</sup> See *Beard v. Banks*, 548 U.S. 521, 524–25 (2006) (plurality opinion).

<sup>164</sup> See *Washington v. Harper*, 494 U.S. 210, 226 (1990).

<sup>165</sup> See *McKune v. Lile*, 536 U.S. 24, 37, 47–48 (2002) (plurality opinion).

<sup>166</sup> See *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 351–52 (1987), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000b to 2000bb-4).

<sup>167</sup> *Safley* thus represents what one of us describes as the emergence of a transsubstantive "penal power doctrine" in which courts defer to prison officials regardless of the underlying constitutional claim. Kaufman, *supra* note 47, at 1383.

<sup>168</sup> See *Brown v. Plata*, 563 U.S. 493, 499–502 (2011). Note that although *Brown v. Plata*, 563 U.S. 493, was an Eighth Amendment (that is, constitutional) challenge to California prison conditions, the question before the Supreme Court was whether the lower court's remedial order violated the Prison Litigation Reform Act. See *id.* at 500. In this respect, *Plata* exemplifies the shift, discussed below, toward litigation over statutory questions.

<sup>169</sup> See *Johnson v. California*, 543 U.S. 499, 505–09 (2005). Note, however, that lower courts applying *Johnson* have generally held that race-based lockdowns of the prison population can survive strict scrutiny so long as they do not extend beyond several months. See Kaufman, *supra* note 47, at 1422 & n.282 (surveying post-*Johnson* lower court case law).

notable.<sup>170</sup> In general, *Safley* has shifted outcomes in the government's favor and made the standard of review the dominant issue in cases involving prisoners' civil rights.<sup>171</sup>

Prison law has also migrated away from the Constitution. During the last twenty-five years, the prison docket has been increasingly occupied by two statutes enacted in 1996: the Antiterrorism and Effective Death Penalty Act<sup>172</sup> (AEDPA), which curtailed habeas relief,<sup>173</sup> and the Prison Litigation Reform Act<sup>174</sup> (PLRA), which curbed prison litigation by (among other things) imposing onerous exhaustion requirements and narrowing the permissible scope of equitable relief when prisoners' constitutional claims succeed.<sup>175</sup> Debates over these statutes have produced a more detailed body of law focused on procedural requirements, the modification and dissolution of injunctions, and attorney's fees.<sup>176</sup> Prison law has, in short, become more technical and rote.

Perhaps this development should be expected. The preceding pages have told a familiar story about the evolution of constitutional law during the post-World War II era: a rights movement materializes in the mid-twentieth century, recedes as courts grow concerned about judicial activism and leery of judicial oversight, then shifts toward debates over procedural intricacies and the intensity of judicial review rather than the substance of constitutional guarantees. In the process, a legal field becomes less radical and more domesticated. We have emphasized aspects of this history that depart from the standard account — for instance, prison law's emergence during the Burger rather than Warren Court, and the Court's unusual reliance on a transsubstantive standard of review. But prison law's origin story loosely resembles the trajectory of rights discourse in other constitutional domains, including preconviction criminal procedure.

<sup>170</sup> See Margo Schlanger, *Plata v. Brown and Realignment: Jails, Prisons, Courts, and Politics*, 48 HARV. C.R.-C.L. L. REV. 165, 165 (2013) (describing *Plata* as a "milestone" and noting that "[n]ot since 1978 had the Court ratified a lower court's crowding-related order in a jail or prison case"); Resnik, *supra* note 116, at 699 (describing *Plata* as a "reminder" that setbacks in constitutional prison law have "limited but did not end all such litigation").

<sup>171</sup> See Shapiro, *supra* note 158, at 975–76 (discussing *Safley*'s dominance); see also Harrison v. Kernan, 971 F.3d 1069, 1071, 1080 (9th Cir. 2020) (rejecting *Safley* deference — and thereby creating a circuit split — in an equal protection case concerning gender-based policies that allow female but not male prisoners to own certain property); Dolovich, *supra* note 31, at 246 ("[I]t is a rare case decided under *Turner [v. Safley]* in which the plaintiff ultimately prevails.").

<sup>172</sup> Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of the U.S. Code).

<sup>173</sup> See Schlanger, *Inmate Litigation*, *supra* note 31, at 1632–33.

<sup>174</sup> Pub. L. No. 104-134, 110 Stat. 1321-66 (1996) (codified as amended in scattered sections of the U.S. Code).

<sup>175</sup> See 42 U.S.C. § 1997e(a) (exhaustion); 18 U.S.C. § 3626(a) (injunctions).

<sup>176</sup> For a recent example of modern prison law in the Supreme Court, see *Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1723 (2020) (holding that nonprejudicial 12(b)(6) dismissals count as strikes under the PLRA's three-strikes provision).

Like that field, prison law has evolved into an identifiable subspecialty of constitutional law. In the 1960s and 1970s, prison cases could be understood as constitutional claims arising under a particular clause, which just happened to involve prisoners. Early prison cases could plausibly be categorized as First or Fourteenth Amendment cases because the doctrine resembled noncustodial First and Fourteenth Amendment law, which is to say, “normal” constitutional law. A half century ago, then, scholars might have dismissed prison law as simply “the law of the horse.”<sup>177</sup> But over time, courts have built a distinct field premised on the idea that prisoners’ rights are fundamentally different from the rights of free people.

One can learn a great deal about constitutional law by focusing on its unusual application in prisons. It is tempting to assume that prison law simply means the study of the Eighth Amendment. But as this section has shown, the field extends far beyond a jurisprudence of the Cruel and Unusual Punishment Clause. Since the mid-1960s, courts have built a canon of postconviction criminal law that covers a wide swath of the Constitution, from prisoners’ rights to marry<sup>178</sup> and unionize<sup>179</sup> to the legality of book bans<sup>180</sup> and body searches.<sup>181</sup> Some seventy years after the initial Black Muslim cases, constitutional prison law has become a full-fledged discipline, one worth studying and critiquing on its own terms.<sup>182</sup>

## II. THE SHIFTING PREMISES OF PRISON LAW

Part I recounted the emergence and consolidation of postconviction constitutional law. This Part takes up the core lesson of that story: prison law has its own internal logic and flaws. The organizing principles of constitutional prison law can get lost in a thicket of cases that address everything from cell searches, family visits, and drug tests to the right to send and receive mail. But amidst seemingly distinct lines of doctrine, common assumptions emerge.

“Prisons are inherently violent.” “Prisoners are uneducated.” “Prison programs never work.” Constitutional prison law is littered with these sorts of generalizations about prisoners and penal institutions. These assumptions often drive courts’ legal conclusions about the scope and content of prisoners’ rights. But then in other lines of doctrine courts shift course, making a different set of claims: “Prison is safe.” “Prisoners

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<sup>177</sup> Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207, 207 (1996). *But see* Lawrence Lessig, Commentary, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 501–03 (1999).

<sup>178</sup> *See* *Turner v. Safley*, 482 U.S. 78, 95 (1987).

<sup>179</sup> *See* *Jones v. N.C. Prisoners’ Lab. Union, Inc.*, 433 U.S. 119, 121 (1977).

<sup>180</sup> *See* *Beard v. Banks*, 548 U.S. 521, 524–25 (2006) (plurality opinion).

<sup>181</sup> *See* *Florence v. Bd. of Chosen Freeholders*, 566 U.S. 318, 322–23 (2012).

<sup>182</sup> *See, e.g.*, SCHLANGER ET AL., *supra* note 53, at 53–54 (outlining the field in an illuminating new textbook).

are savvy.” “Prisons rehabilitate.” In practice, it turns out, prison law is a profoundly conflicted field.

This Part unearths some of the central contradictions in constitutional prison cases. It focuses on four themes — violence, literacy, privacy, and rehabilitation — but makes no claim to exhaustiveness. In fact, one could generate a much longer list of the field’s pathologies. The goal here is to highlight some of the most basic inconsistencies in courts’ conception of prisons in an effort to imagine a more coherent account of prisoners’ rights.

### A. Violence

Prison law begins from the proposition that the Constitution can play a meaningful role in regulating penal institutions. But as courts started to impose constitutional law on prisons in the 1970s, they also began to stress that prisons are violent and unmanageable.

This concern emerged in *Jones v. North Carolina Prisoners’ Labor Union, Inc.*,<sup>183</sup> a First and Fourteenth Amendment challenge to North Carolina’s ban on prisoner unions.<sup>184</sup> The ban at issue was directed at the Prisoners’ Labor Union, a group of 2,000 prisoners across forty prisons who sought to organize “to improve working conditions.”<sup>185</sup> Prison officials objected to union meetings, arguing that, whether or not prisoners gained bargaining rights, “the concept of a prisoners’ labor union was itself fraught with potential dangers.”<sup>186</sup> The Supreme Court agreed that unions (at least prisoner unions<sup>187</sup>) were incompatible with safe imprisonment. “Prison life . . . contain[s] the ever-present potential

<sup>183</sup> 433 U.S. 119 (1977).

<sup>184</sup> See *id.* at 122. While the North Carolina ban did not prohibit individual prisoners from identifying as union members, it barred all union mailings and union meetings. *Id.*

<sup>185</sup> *Id.* (alterations omitted). In one form or another, prisoners have been forced to work for little or no pay since the earliest days of the Republic. For a history of prison labor since the country’s founding, see generally REBECCA M. MCLENNAN, *THE CRISIS OF IMPRISONMENT: PROTEST, POLITICS, AND THE MAKING OF THE AMERICAN PENAL STATE, 1776–1941* (2008). See also DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* (2008) (examining the history of convict leasing).

<sup>186</sup> *N.C. Prisoners’ Lab. Union*, 433 U.S. at 126.

<sup>187</sup> By contrast, prison officers’ unions are common and exert significant power in both prisons and democratic politics. See Avlana K. Eisenberg, *Incarceration Incentives in the Decarceration Era*, 69 VAND. L. REV. 71, 73–74 (2016) (examining officer unions’ lobbying power); Dhammika Dharmapala et al., *Collective Bargaining, Racial Diversity, and Civil Rights Litigation: Evidence from Florida Jails 8–10* (2021) (unpublished manuscript) (on file with authors) (linking corrections officer unions to civil rights litigation against jails); cf. Dhammika Dharmapala et al., *Collective Bargaining Rights and Police Misconduct: Evidence from Florida*, 2020 J.L. ECON. & ORG. 1, 5 (finding that collective bargaining rights for sheriffs’ offices led to a forty percent increase in violent incidents of misconduct).

for violent confrontation and conflagration,” then-Justice Rehnquist explained for the Court.<sup>188</sup> This threat, he noted, stemmed from the fact that prisoners “have violated one or more of the criminal laws established by society for its orderly governance.”<sup>189</sup> Such people possessed a right to associate but not a right to organize.<sup>190</sup>

*North Carolina Prisoner’s Union* embraced what one might call the deviance theory of prison violence: prisons are unsafe because of the malevolent people who populate them. This theory surfaced again six years later in *Hudson v. Palmer*,<sup>191</sup> a Fourth and Fourteenth Amendment challenge to “shakedowns” of prison cells.<sup>192</sup> The cell in question belonged to Russell Palmer, a Virginia prisoner, who argued that guards had searched and destroyed his property in order to harass him.<sup>193</sup> The Supreme Court rejected Palmer’s claim after concluding that prisoners have no “justifiable” expectation of privacy in their cells.<sup>194</sup> The Court’s reasoning was a petrifying account of prison life:

Prisons, by definition, are places of involuntary confinement of persons who have a demonstrated proclivity for antisocial criminal, and often violent, conduct. Inmates have necessarily shown a lapse in ability to control and conform their behavior to the legitimate standards of society by the normal impulses of self-restraint; they have shown an inability to regulate their conduct in a way that reflects either a respect for law or an appreciation of the rights of others.<sup>195</sup>

The majority proceeded to catalogue statistics on “violent crime in our Nation’s prisons”<sup>196</sup> and to decry “the flow of illicit weapons into prisons” and “escape plots” that require constant “vigilan[ce]” by prison staff.<sup>197</sup> The Court concluded that within “this volatile ‘community’” — note the last word in scare quotes — prison officials could not be expected to honor the Fourth Amendment.<sup>198</sup>

Though it was more impassioned (or, as the dissenters put it, “nihilistic”<sup>199</sup>) than *North Carolina Prisoner’s Union*, the *Palmer* decision relied on the same broad theory of prison violence. Under this theory, prison violence is not a product of policy, leadership, or culture so much as a reflection of prisoners’ antisociality and essential lawlessness. This conception of prisoners dates back to nineteenth-century debates about

<sup>188</sup> *N.C. Prisoners’ Lab. Union*, 433 U.S. at 132.

<sup>189</sup> *Id.* at 129.

<sup>190</sup> *See id.* at 121.

<sup>191</sup> 468 U.S. 517 (1984).

<sup>192</sup> *Id.* at 519.

<sup>193</sup> *See id.* at 519–20.

<sup>194</sup> *Id.* at 525; *see id.* at 525–26.

<sup>195</sup> *Id.* at 526.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 527.

<sup>198</sup> *Id.* at 526.

<sup>199</sup> *Id.* at 553 (Stevens, J., dissenting).

the nature of criminality and echoes some of the uglier ideas animating phrenology.<sup>200</sup> Its unmistakable implication is that prisons are different from institutions filled with law-abiding people and, as such, are resistant to the rule of law. Accordingly, the theory runs, courts should stand back and let prison officials do their level best at an extraordinarily difficult job.

This line of thought continues today. Though modern prison cases are rarely as graphic as *Palmer*, courts weighing prisoners' civil rights claims routinely rehearse the problems of "prison administration."<sup>201</sup> At times — often when race is involved — this euphemistic language cedes to more lurid descriptions of prison violence. In a 2005 case concerning solitary confinement, for instance, Justice Kennedy concluded that the "brutal reality of prison gangs . . . fueled by race-based hostility"<sup>202</sup> justified "Supermax" isolation.<sup>203</sup> Justice Thomas struck a similar note in *Beard v. Banks*,<sup>204</sup> a case in which the Court upheld a Pennsylvania policy denying nearly all reading material to prisoners in solitary confinement.<sup>205</sup> Writing in concurrence, Justice Thomas described "[j]udicial scrutiny of prison regulations" as "an endeavor fraught with peril" and cited "race-based prison violence" after *Johnson v. California*<sup>206</sup> as evidence of the "grave dangers inherent in prison administration" and the futility of judicial oversight.<sup>207</sup> In general, though, the discussion of violence in contemporary prison cases is more staid. In place of alarms about conflagration, we now get references to "security" and "order," the watchwords for lurking concerns about violence.

To be sure, many American prisons *are* violent.<sup>208</sup> Our claim is not that prisons are safe but rather that the Supreme Court tends to portray

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<sup>200</sup> See generally CESARE LOMBROSO, *THE CRIMINAL MAN* (Mary Gibson & Nicole Hahn Rafter eds., Duke Univ. Press 2006) (1876) (arguing that criminality is inherited and innate).

<sup>201</sup> *Johnson v. California*, 543 U.S. 499, 524 (2005) (Thomas, J., dissenting) (quoting *Washington v. Harper*, 494 U.S. 210, 224 (1990)); see also *Overton v. Bazzetta*, 539 U.S. 126, 133 (2003) (describing "internal security" as "perhaps the most legitimate of penological goals"); *Sandin v. Conner*, 515 U.S. 472, 482 (1995) (discussing the difficulty of prison administration).

<sup>202</sup> *Wilkinson v. Austin*, 545 U.S. 209, 227 (2005).

<sup>203</sup> *Id.* at 213.

<sup>204</sup> 548 U.S. 521 (2006) (plurality opinion).

<sup>205</sup> See *id.* at 524–25.

<sup>206</sup> *Id.* at 536 (Thomas, J., concurring in the judgment).

<sup>207</sup> *Id.* at 537.

<sup>208</sup> See DAVID ALAN SKLANSKY, *A PATTERN OF VIOLENCE: HOW THE LAW CLASSIFIES CRIMES AND WHAT IT MEANS FOR JUSTICE* 186–87 (2021) (noting that "[p]rison violence is notoriously common," but also that "reliable statistics are difficult to come by," *id.* at 186, and that "rates of prison violence . . . vary widely, not just over time but between institutions," *id.* at 187); see also U.S. DEP'T OF JUST. ET AL., *INVESTIGATION OF ALABAMA'S STATE PRISONS FOR MEN* 1 n.2, 11–27, 34–46 (2019), <https://www.justice.gov/crt/case-document/file/1149971/download> [<https://perma.cc/8JX4-3N8P>] (describing "physical and sexual violence," unsanitary living conditions, and instances of "excessive force and sexual abuse from staff" in Alabama prisons, *id.* at 1 n.2).

“the prison” as a uniformly, inherently volatile institution. Since the 1970s, the idea that prison is violent has become a — perhaps the — founding assertion of prison law. Yet the Court wields this claim inconsistently. Although prison cases typically treat violence as inevitable, the Court also selectively asserts that prison can be ordinary, routine, and even banal.

In some cases, for example, prison is merely unpleasant. Take *Rhodes v. Chapman*,<sup>209</sup> the case that upheld the constitutionality of “double celling.”<sup>210</sup> *Chapman* reached the Court in 1981, in the early years of mass incarceration.<sup>211</sup> As prison populations began to outpace prison capacity, wardens in Ohio started to house prisoners together in one cell, a practice that prisoners argued intensified prison violence.<sup>212</sup> When faced with an Eighth Amendment challenge to double celling, the Court departed from its standard volatile portrayal of prison life. Although violence in the prison had increased, the Court explained, it had done so “only in proportion to the increase in population.”<sup>213</sup> And in any event, the Court dismissively concluded, “the Constitution does not mandate comfortable prisons.”<sup>214</sup> Only Justice Marshall dissented, noting the majority’s unusual depiction of prison life. “From reading the Court’s opinion in this case,” Justice Marshall wrote, “one would surely conclude that the Southern Ohio Correctional Facility . . . is a safe, spacious prison that happens to include many two-inmate cells because the State has determined that that is the best way to run the prison.”<sup>215</sup>

<sup>209</sup> 452 U.S. 337 (1981).

<sup>210</sup> *Id.* at 340; *see id.* at 344.

<sup>211</sup> *See id.* at 337; THE SENT’G PROJECT, FACT SHEET: TRENDS IN U.S. CORRECTIONS 1–3 (2021), <https://www.sentencingproject.org/wp-content/uploads/2021/07/Trends-in-US-Corrections.pdf> [<https://perma.cc/P6DN-HNFF>] (documenting an increase in prison populations in the early 1980s). The overcrowding at issue in *Chapman* began during the mid-1970s, slightly ahead of this national trend. *See Chapman*, 452 U.S. at 341.

<sup>212</sup> *See Chapman*, 452 U.S. at 341–43. Victor Hassine’s prison memoir links double celling to an increase in prison rape. *See VICTOR HASSINE, LIFE WITHOUT PAROLE: LIVING IN PRISON TODAY* 154–55 (Robert Johnson & Ania Dobrzanska eds., 4th ed. 2009).

<sup>213</sup> *Chapman*, 452 U.S. at 343.

<sup>214</sup> *Id.* at 349. Then-Justice Rehnquist had made this point in harsher terms four months earlier, when he stayed a district court order to eliminate overcrowding in an Oregon prison pending the resolution of *Rhodes v. Chapman*. As he wrote then: “[N]obody promised [prisoners] a rose garden.” *Atiyeh v. Capps*, 449 U.S. 1312, 1315–16 (1981). Then-Justice Rehnquist was similarly glib in *Bell v. Wolfish*, 441 U.S. 520 (1979), a Fifth Amendment challenge to double celling in jails, where he concluded that “there is [no] ‘one-man, one cell’ principle lurking in the Due Process Clause.” *Id.* at 542.

<sup>215</sup> *Chapman*, 452 U.S. at 369 (Marshall, J., dissenting).

Had *Chapman* come down differently, it would have been a major victory, perhaps even an impediment to the explosion in American incarceration rates that began in the 1980s.<sup>216</sup> As it stood, the case narrowed the Eighth Amendment's scope and, more to the point, diverged from the terror-inducing account of violence that defines so many constitutional prison cases. In *Chapman*, violence was manageable and tolerable — a problem of comfort rather than security.<sup>217</sup> Violence, moreover, was a phenomenon that prison officials could contain through sound policy. This portrait is a far cry from the antisocial institutions the Court painted only three years later in *Palmer*.<sup>218</sup>

The Supreme Court has since doubled down on the proposition that prison can be mundane. In 1995, the Court issued *Sandin v. Conner*,<sup>219</sup> one of several decisions examining the constitutionality of solitary confinement.<sup>220</sup> *Conner* concerned a basic puzzle in prison law: Given that prison involves the lawful deprivation of liberty, when does a prisoner have a liberty interest that triggers the protections of the Due Process Clause? By the mid-1990s, judges had been grappling with that question for decades and had experimented with several different approaches to prisoners' due process claims.<sup>221</sup> In *Conner*, the Supreme Court settled on a new test: the Due Process Clause engages when prison practices impose "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."<sup>222</sup> The Court, in other words, pegged prisoners' due process rights to the "ordinary" prison, holding that procedural protections apply only when prison officials subject prisoners to unusual harms.

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<sup>216</sup> A constitutional rule against double celling would have made it much harder to increase incarceration rates without significant, expensive prison construction. Cf. THE SENT'G PROJECT, *supra* note 211, at 1. On the other hand, a win in *Chapman* might simply have precipitated an even bigger boom in prison construction as states built new facilities to house the growing prison population without using double cells. For one argument that successful prison litigation can have the perverse consequence of spurring prison construction, see generally Heather Schoenfeld, *Mass Incarceration and the Paradox of Prison Conditions Litigation*, 44 LAW & SOC'Y REV. 731 (2010).

<sup>217</sup> At the time, some commentators balked at this description of prison violence. In the *L.A. Times*, one reporter described *Chapman* as "a remarkable decision that will satisfy everybody who is uninformed about prison life and is sincerely committed to ignorance on the subject." Phil Kerby, *Fuses Are Burning in America's Prisons*, L.A. TIMES, June 18, 1981, at F1.

<sup>218</sup> See *Hudson v. Palmer*, 468 U.S. 517, 526 (1984).

<sup>219</sup> 515 U.S. 472 (1995).

<sup>220</sup> See *id.* at 485–86; see, e.g., *Davis v. Ayala*, 576 U.S. 257, 286–90 (2015) (Kennedy, J., concurring); *Wilkinson v. Austin*, 545 U.S. 209, 221–24 (2005).

<sup>221</sup> As the *Conner* majority explained, the Supreme Court first recognized that prisoners retain a limited right to due process in *Wolff v. McDonnell*, 418 U.S. 539 (1974). See *Conner*, 515 U.S. at 477–83 (describing the development of due process doctrine in prison law). The question then became when a prisoner has a protected liberty interest and, specifically, whether that interest arises from state laws and prison regulations or the Due Process Clause itself. See *id.* at 483–87.

<sup>222</sup> *Conner*, 515 U.S. at 484.



This test creates a baseline problem. If a prisoner can state a due process claim only when his treatment is abnormal, it becomes essential to know what “normal” means in prison. Courts, in other words, must decide what conditions and policies constitute the norm against which to measure allegedly unconstitutional prison practices. Prison scholars have critiqued this approach, noting that courts treat deplorable conditions — such as extended isolation and sensory deprivation — as normal and in so doing render abusive practices acceptable.<sup>223</sup>

The *Conner* test also assumes the existence of something called “an ordinary prison.” For present purposes, *Conner*’s most pertinent feature is that the Supreme Court envisioned prison life as static and relatively safe. Chief Justice Rehnquist’s majority opinion framed practices protected by the Due Process Clause as deviations from the regular rhythm of day-to-day life behind bars — a life that involved fewer “privileges and rights” than exist in the free world but was nonetheless predictable, even boring.<sup>224</sup> This picture of prison is much less dramatic than the account in which prisons pulsate with uncontrollable violence.

Of course, prison could be both ordinary and violent. This is precisely the critique prison scholars have advanced: *Conner* licensed judges to normalize violence.<sup>225</sup> After *Conner*, if the average prison is a perilous and violent place, only the most extreme violence raises a constitutional concern. Even in relatively calm prisons, moreover, life can vacillate between boredom and spectacle. In a memoir about his incarceration, Professor Shon Hopwood described this balance:

Prison is danger in a box, but it is also, at bottom, a grinding routine of boredom. You wouldn’t think those two things go together, but they do. The most dangerous moments often come because someone is so bored they finally have to start trouble just to break the torture of monotony.<sup>226</sup>

The paradox, then, is that idleness promotes disorder, making it possible for prison to be at once violent and dull.

But again, the point is not that prison is always violent or always safe. Criminologists would tell you that violence rates depend on which prison you are in or, put differently, that “prison” is not a monolith but a network of institutions, each with its own history and culture.<sup>227</sup> In-

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<sup>223</sup> See Resnik et al., *supra* note 31, at 48.

<sup>224</sup> *Conner*, 515 U.S. at 485; see *id.* at 485–86.

<sup>225</sup> See Resnik et al., *supra* note 31, at 48.

<sup>226</sup> SHON HOPWOOD, *LAW MAN: MEMOIR OF A JAILHOUSE LAWYER* 67 (2017).

<sup>227</sup> See, e.g., Norval Morris, *The Contemporary Prison: 1965–Present*, in *THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY*, *supra* note 64, at 227, 227 (“[T]here is an astonishing diversity to the institutions in which [prisoners] are held. Prisons range in security from double-barred steel cages within high walled, electronically monitored perimeters to rooms in unlocked buildings in unfenced fields. They range in pain from

stead, the critique is that courts invoke the *idea* of prison violence selectively and inconsistently. In some cases, prison is a Darwinian hellscape and law appears virtually powerless to improve the “pains of imprisonment.”<sup>228</sup> In others, prison is uncomfortable but tolerable and amenable to legal intervention. Whichever account is more accurate, it is the specter of violence, rather than its reality, that does the real work in American prison law.

### B. Literacy

The Supreme Court depicts prisoners inconsistently, too. This problem is most glaring in First Amendment cases on prisoners’ rights to mail, visits, and access to court.

In cases on the right to petition courts, for example, the Supreme Court describes prisoners as incapable and uneducated. This notion first appeared in *Johnson v. Avery*,<sup>229</sup> a case decided in the twilight of the Warren Court era, when much of the action in prison law still flowed through habeas litigation. *Johnson* arose from a Tennessee prison policy that barred prisoners from assisting each other with habeas claims or “promoting a business of writing Writs.”<sup>230</sup> William Joe Johnson, who was known as “Joe Writs,” challenged the policy — naturally, in a habeas petition of his own.<sup>231</sup>

The Supreme Court invalidated the rule on the ground that illiterate prisoners needed jailhouse lawyers. Writing for the majority, Justice Fortas asserted that, with the exception of the unusually “gifted” and “a few old hands,” prisoners were “in effect, denied access to the courts” by their illiteracy.<sup>232</sup> Justice Douglas concurred, describing the prison as “a community where illiteracy and mental deficiency is notoriously high.”<sup>233</sup> Even Justice White, who dissented, agreed with the majority’s account of prisoners’ capacities. As he put it — evidently conflating literacy with intelligence, and perhaps even moral enlightenment —

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windowless rooms of close-confined, sensory-deprived isolation to work camps of no physical adversity whatsoever. There are ‘open prisons’ indistinguishable from farms and ‘prisoners’ who spend their days working unescorted and unsupervised in the community; there are ‘weekend prisons’ and ‘day prisons’; there are ‘coeducational prisons’; and there are prisons of grindingly dull routine interrupted by occasional flashes of violence and brutality.”)

<sup>228</sup> GRESHAM M. SYKES, *THE SOCIETY OF CAPTIVES: A STUDY OF A MAXIMUM SECURITY PRISON* 64 (1958) (coining this term).

<sup>229</sup> 393 U.S. 483 (1969).

<sup>230</sup> *Id.* at 484 (quoting the contested Tennessee prison regulation).

<sup>231</sup> See *Johnson v. Avery*, 252 F. Supp. 783, 784 (M.D. Tenn. 1966); David L. Hudson Jr., *Remembering Johnson v. Avery, the Jailhouse Lawyer Case*, TENN. BAR J., Apr. 2017, at 20, 20 (quoting Joe Hatcher, “*Jailhouse Lawyer*” Upheld, ATLANTA J. & CONST., Feb. 23, 1969, at 2D).

<sup>232</sup> *Johnson*, 393 U.S. at 488.

<sup>233</sup> *Id.* at 496 (Douglas, J., concurring).

“jails are not characteristically populated with the intelligent or the benign.”<sup>234</sup>

In some ways, *Johnson v. Avery* was a contested case. Justice Fortas changed his vote at the last minute,<sup>235</sup> and the opinions framed jailhouse lawyers quite differently, in the majority as altruists<sup>236</sup> and in the dissent as “inept” peddlers of “false hopes.”<sup>237</sup> But the Justices shared the perception that most prisoners were functionally illiterate. This concern was common at the time. In a major address one year after *Johnson*, newly appointed Chief Justice Burger complained that a “distressing percentage of prisoners [could not] read or write.”<sup>238</sup> Chief Justice Burger would later amplify the point in a commencement speech at George Washington University, describing “the number of young, functional illiterates” in prison as “appalling.”<sup>239</sup>

More recent decisions reiterate the view that illiteracy is widespread. In the 1996 case *Lewis v. Casey*,<sup>240</sup> for example, the Court described prisoners as “a mostly uneducated and indeed largely illiterate” population.<sup>241</sup> As a precedent on the right of access to courts, *Casey* limited *Johnson*. The opinion rejected a claim by Arizona prisoners who argued that prison officials had provided inadequate legal assistance to “illiterate and non-English-speaking inmates.”<sup>242</sup> In effect, the Court held, Arizona prisoners were “demand[ing] permanent provision of counsel,” a service beyond what “the Constitution requires.”<sup>243</sup> The *Casey* Court thus narrowed the right of access recognized in *Johnson*.

The two opinions, however, contain remarkably similar descriptions of prisoners. Though the outcomes in *Johnson* and *Casey* differed, the decisions diverged on the implications of prisoners’ illiteracy, not its existence. In *Johnson*, prisoners’ illiteracy entitled them to assistance from jailhouse lawyers. In *Casey*, illiteracy made prisoners too difficult — or

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<sup>234</sup> *Id.* at 501 (White, J., dissenting).

<sup>235</sup> See JOHN A. FLITER, PRISONERS’ RIGHTS: THE SUPREME COURT AND EVOLVING STANDARDS OF DECENCY 86 (2001).

<sup>236</sup> See *Johnson*, 393 U.S. at 488–90.

<sup>237</sup> *Id.* at 501 (White, J., dissenting).

<sup>238</sup> Warren E. Burger, Chief Just., U.S. Sup. Ct., Address at the Centennial Convocation of the Association of the Bar of the City of New York (Feb. 17, 1970), in REC. ASS’N BAR CITY N.Y., Mar. 1970, at 14, 20. Chief Justice Burger joined the Court several months after the decision in *Johnson v. Avery*. See *Justices 1789 to Present*, SUP. CT. OF THE U.S., [https://www.supremecourt.gov/about/members\\_text.aspx](https://www.supremecourt.gov/about/members_text.aspx) [<https://perma.cc/54HP-MM3D>].

<sup>239</sup> Al Kamen, *Justice Burger Proposes Steps to Improve Prisons*, WASH. POST (May 25, 1981), <https://www.washingtonpost.com/archive/politics/1981/05/25/justice-burger-proposes-steps-to-improve-prisons/abee6491-3f45-4985-8436-81d3c0f94adf> [<https://perma.cc/77L2-MA5N>].

<sup>240</sup> 518 U.S. 343 (1996).

<sup>241</sup> *Id.* at 354.

<sup>242</sup> *Id.* at 348; see *id.* at 346–47, 356–57.

<sup>243</sup> *Id.* at 354.

perhaps really too expensive<sup>244</sup> — to assist. Both decisions, though, took it as given that a large and constitutionally significant portion of the prison population cannot read or write.

This claim stands in stark contrast with the Court's approach to prisoners in a different line of First Amendment cases. When prisoners claim that visitation policies violate their rights to family life and free association, the Supreme Court tends to portray them as sophisticated institutional actors and capable communicators. Recall, for example, *Pell v. Procunier*,<sup>245</sup> the case in which the Court upheld a ban on face-to-face interviews with journalists.<sup>246</sup> In that case, the Court reasoned that a policy banning prisoners from initiating or accepting in-person interviews was constitutional because prisoners could find alternative ways to communicate with the media.<sup>247</sup> Specifically, the Court asserted, prisoners could simply *write letters*: “[I]t is clear that the medium of written correspondence affords inmates an open and substantially unimpeded channel for communication with persons outside the prison, including representatives of the news media.”<sup>248</sup> Thus, a mere five years after describing illiteracy rates as “notoriously high,”<sup>249</sup> the Court concluded that prisoners’ ability to write saved an otherwise unconstitutional regulation.

The Court extended this strained reasoning to uphold an even harsher policy in *Overton v. Bazzetta*.<sup>250</sup> Michelle Bazzetta was serving a life sentence in 1995<sup>251</sup> when the Michigan Department of Corrections decided to limit prison visits.<sup>252</sup> As in so many prison cases, the new policy was a result of overcrowding.<sup>253</sup> In the early 1990s, growing incarceration rates led to an increase in prison visits and, in turn, to a perceived uptick in “drug trafficking” and “difficulty . . . supervising young children who became bored or restless during long hours” in

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<sup>244</sup> It is easy to read *Casey* as a decision concerned first and foremost with the costs of facilitating meaningful access to courts. *See id.* (rejecting a conception of the right of access that would require “the State [to] enable the prisoner to *discover* grievances, and to *litigate effectively* once in court”). *See generally* STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES* (1999) (noting that legally enforceable rights cost money).

<sup>245</sup> 417 U.S. 817 (1974).

<sup>246</sup> *See id.* at 834–35.

<sup>247</sup> *See id.* at 823–24.

<sup>248</sup> *Id.* at 824.

<sup>249</sup> *Johnson v. Avery*, 393 U.S. 483, 496 (1969) (Douglas, J., concurring).

<sup>250</sup> 539 U.S. 126 (2003).

<sup>251</sup> *See People v. Bazzetta*, No. 237756, 2003 Mich. App. LEXIS 18, at \*1–2 (Mich. Ct. App. Jan. 3, 2003) (per curiam).

<sup>252</sup> *See Bazzetta v. McGinnis*, 148 F. Supp. 2d 813, 819–20 (E.D. Mich. 2001), *aff'd*, 286 F.3d 311 (6th Cir. 2002), *rev'd sub nom. Overton v. Bazzetta*, 539 U.S. 126 (2003).

<sup>253</sup> *See, e.g., supra* notes 209–15 and accompanying text (describing *Rhodes v. Chapman* as a response to overcrowding).

prison waiting rooms.<sup>254</sup> In response, Michigan prison officials promulgated a rule restricting visits by minors to a prisoner's children and grandchildren.<sup>255</sup> The rule had an addendum: a child could never visit if the prisoner's parental rights had been terminated.<sup>256</sup> And if a prisoner received two misconduct charges involving drugs, visits were prohibited entirely.<sup>257</sup>

Michigan's policy meant that Michelle Bazzetta could not meet her newborn niece.<sup>258</sup> The rule also affected Stacy Barker, who went to prison when her daughter Donna was three.<sup>259</sup> Several years into her prison sentence, Barker had given legal custody of her daughter to her parents, who brought Donna to visit several times a month.<sup>260</sup> Under the new visitation policy, Barker could no longer see her daughter. Then prison guards found Barker with a single Motrin pill and an expired prescription, her "second drug violation."<sup>261</sup> Thus Barker, sentenced to life in prison, could have no visitors at all.

Bazzetta and Barker sued and prevailed in the lower courts.<sup>262</sup> The Supreme Court reversed, citing letter writing and sending messages through intermediaries as adequate alternatives to in-person visits.<sup>263</sup> This outcome was surprising even in an era of prisoners' rights retrenchment. The Sixth Circuit had called Michigan's policy an "exaggerated response"<sup>264</sup> and an "arbitrary ban" that failed to meet "even the forgiving *Turner [v. Safley]* standard."<sup>265</sup> Yet the Supreme Court upheld the policy unanimously and appeared unconcerned about illiteracy. In his majority opinion, Justice Kennedy explained that illiterate prisoners could simply make phone calls, which, though expensive and thus

<sup>254</sup> *Bazzetta*, 148 F. Supp. 2d at 819.

<sup>255</sup> *See id.* at 820 (citing MICH. ADMIN. CODE r. 791.6609(2)(b), (5), (6) (1995)).

<sup>256</sup> *See id.*

<sup>257</sup> *See id.* (citing MICH. ADMIN. CODE r. 791.6609(11)(d) (1995)).

<sup>258</sup> *See* Dee-Ann Durbin, *Justices Hear Case on Prison Visitation Policies*, GRAND RAPIDS PRESS, Mar. 27, 2003, at A22.

<sup>259</sup> *See* David Shepardson, *Prison Visitation Rules Criticized; Rehabilitation Suffers Under State's Security Concerns, Critics Say*, DETROIT NEWS, June 17, 2001, at 1C.

<sup>260</sup> *See id.*

<sup>261</sup> *Id.* One Michigan prisoner, Emily Madison, lost her visitation rights for two different drug infractions: (1) possessing a Motrin tablet that she did not have a prescription for and (2) possessing expired iron pills that had been prescribed to her. *See Emily Madison, in* INSIDE THIS PLACE, NOT OF IT: NARRATIVES FROM WOMEN'S PRISONS 103, 114 (Robin Levi & Ayelet Waldman eds., 2011). Madison noted: "The visitors restriction impacted me deeply." *Id.*

<sup>262</sup> *See Bazzetta v. McGinnis*, 286 F.3d 311, 323–24 (6th Cir. 2002), *rev'd sub nom. Overton v. Bazzetta*, 539 U.S. 126 (2003); *Bazzetta v. McGinnis*, 148 F. Supp. 2d 813, 858–59 (E.D. Mich. 2001), *aff'd*, 286 F.3d 311 (6th Cir. 2002), *rev'd sub nom. Overton v. Bazzetta*, 539 U.S. 126 (2003).

<sup>263</sup> *See Bazzetta*, 539 U.S. at 135.

<sup>264</sup> *Bazzetta*, 286 F.3d at 318.

<sup>265</sup> *Id.* at 322.

“not . . . ideal,” were available.<sup>266</sup> The Court thus dismissed illiterate prisoners as a small subgroup, a constitutionally insignificant exception to the norm.

The Court adopts a similar presumption about prisoners’ capacities in cases construing the PLRA. As Part I noted, the PLRA was designed to impede prison litigation through, among other methods, exhaustion requirements and filing fees.<sup>267</sup> The statute has realized its ambition: since 1996, the PLRA has effected a “deadly blow to American prisoners,” reducing their lawsuits by nearly half.<sup>268</sup> In practice, PLRA cases are often unanimous, technical, and seemingly uncontroversial.<sup>269</sup> But they are predicated on the highly disputable assumption that prisoners can navigate a complex statute and byzantine administrative grievance procedures. When prisoners have counsel, that assumption may be warranted.<sup>270</sup> But for pro se prisoners, the presumption of legal literacy is an unforgiving legal fiction, one directly at odds with the portrayal of prisoners in constitutional access-to-court cases. As Hopwood notes in his memoir, many prisoners struggle to understand legal terms — for instance, confusing “retroactive” and “radioactive.”<sup>271</sup> Such examples suggest that ensuring access to courts by providing law libraries “makes about as much sense as furnishing medical services through books like: ‘Brain Surgery Self-Taught,’ or ‘How to Remove Your Own Appendix.’”<sup>272</sup>

The real point here is not that the Court’s prison jurisprudence is merciless (though it is) but rather that it is unstable. The depiction of prisoners in First Amendment cases ranges from capable and cunning to dim and needy. In some respects, this inconsistency is a reflection of changing judicial attitudes. The Supreme Court exhibited greater concern about illiteracy in early cases like *Johnson* than in more recent

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<sup>266</sup> *Bazzetta*, 539 U.S. at 135 (“Respondents protest that letter writing is inadequate for illiterate inmates and for communications with young children. They say, too, that phone calls are brief and expensive, so that these alternatives are not sufficient. Alternatives to visitation need not be ideal, however; they need only be available.”).

<sup>267</sup> See *Lomax v. Ortiz-Marquez*, 140 S. Ct. 1721, 1723 (2020) (quoting *Jones v. Bock*, 549 U.S. 199, 203 (2007)) (framing the PLRA as a statute passed “[t]o help staunch a ‘flood of nonmeritorious’ prisoner litigation”).

<sup>268</sup> THOMPSON, *supra* note 93, at 564; see Schlanger, *Inmate Litigation*, *supra* note 31, at 1557, 1643 (noting that by 2003 “the PLRA ha[d] shrunk the number of new federal filings by inmates by over forty percent,” *id.* at 1557); Schlanger, *supra* note 39, at 154 (describing the PLRA’s effect as “extremely substantial”).

<sup>269</sup> See generally, e.g., *Lomax*, 140 S. Ct. 1721; *Ross v. Blake*, 136 S. Ct. 1850 (2016) (rejecting a “special circumstances” exception to the PLRA’s exhaustion requirement, *id.* at 1862).

<sup>270</sup> But see Schlanger, *supra* note 39, at 167 tbl.6 (showing that 94.9 percent of prisoners’ civil rights suits were litigated pro se in 2012).

<sup>271</sup> HOPWOOD, *supra* note 226, at 234. Similarly, it seems extremely difficult to navigate the judicial system if one believes that Chicago is a state rather than a city, something Hopwood found was a common sentiment among his fellow prisoners from the Windy City. See *id.* at 16.

<sup>272</sup> Christopher E. Smith, *Examining the Boundaries of Bounds: Prison Law Libraries and Access to the Courts*, 30 HOW. L.J. 27, 36 (1987).

opinions like *Bazzetta*. Over the last half century, fears about functional illiteracy have been supplanted by fears about frivolous litigation.

But if this is a story about an increasingly hostile judiciary, the cases also suggest a more fundamental disagreement about the scope and significance of prisoners' literacy limitations. No doubt, there has been a turn away from the comparatively empathetic prison jurisprudence of the 1970s. But there is also enduring incoherence in the Supreme Court's account of prisoners. In access to court cases, illiteracy plagues the penal institution and dictates case outcomes. In visitation cases, the illiterate are an unfortunate few whose concerns ought not inflect the doctrine. Ultimately, the Supreme Court cannot seem to decide if prisoners are savvy or unsophisticated, not to mention what obligations illiteracy triggers for the state.

### C. Privacy

Thus far, we have focused on conflicting descriptive claims about prisons and prisoners. In practice, though, the problem runs deeper. The Supreme Court is not only erratic in its portrayal of penal institutions. The Court also takes internally inconsistent positions on the content of prisoners' rights.

Consider the right to privacy. In one strand of doctrine, prisoners cannot possibly be expected to hold meaningful privacy rights. The Court espoused this position most forcefully in *Hudson v. Palmer*, which refused to place limits on correctional officers' ability to search prisoner cells.<sup>273</sup> *Palmer* concerned an incident in which a correctional officer named Ted Hudson entered Russell Palmer's cell, opened his locker, and destroyed his legal documents and personal letters.<sup>274</sup> Outside prison, this fact pattern would be too easy for a criminal procedure exam: Hudson's actions would unquestionably qualify as a search subject to the Fourth Amendment.<sup>275</sup> In *Palmer*, however, the Court held that prisoners have no reasonable expectation of privacy "within the confines of the prison cell."<sup>276</sup> Privacy rights simply could not "be reconciled with the concept of incarceration."<sup>277</sup>

Though *Palmer* addressed only privacy in prison cells, the Supreme Court has since expanded its holding.<sup>278</sup> In a 2006 case concerning searches of parolees, Justice Thomas, writing for a majority, described

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<sup>273</sup> 468 U.S. 517, 536 (1984).

<sup>274</sup> See *id.* at 541 & n.3 (Stevens, J., concurring in part and dissenting in part).

<sup>275</sup> Outside of prison, people retain a reasonable expectation of privacy in their homes. See, e.g., *Florida v. Jardines*, 569 U.S. 1, 6 (2013) ("[W]hen it comes to the Fourth Amendment, the home is first among equals.").

<sup>276</sup> *Palmer*, 468 U.S. at 526.

<sup>277</sup> *Id.*

<sup>278</sup> See *Samson v. California*, 547 U.S. 843, 850 (2006).

prison as the paradigmatic privacy-free zone.<sup>279</sup> As he explained, parolees sit on a “continuum” that runs from probation to prison, with fewer and fewer privacy rights as the punishment gets more severe.<sup>280</sup> On this continuum, prison is “the strong[est] medicine,” and prisoners have no expectation of privacy at all.<sup>281</sup> Lower courts have attempted to cabin this reasoning in cases involving body-cavity searches, but even that line of doctrine treats prison as an institution in which all but the most intimate invasions of privacy fall outside the Constitution’s reach.<sup>282</sup>

It is worth emphasizing how thin and how aberrational this conception of privacy looks against the wider legal landscape. In other institutions where courts worry about drugs and weapons — schools, for one obvious example — the Supreme Court has handled concerns about institutional security by lowering its standards. School searches, for instance, require only reasonable suspicion rather than the more demanding standard of probable cause, but they are still subject to some constitutional limit.<sup>283</sup> In prison, by contrast, privacy rights are not merely diminished. With the possible exception of bodily integrity, the right to privacy vanishes.

It may be tempting to believe that *Palmer* was foreordained — that privacy and prison go together like fire and gasoline. In the 1980s, however, it was not at all obvious that privacy doctrine would end up this way. Russell Palmer won in the Fourth Circuit, and by the time his case reached the Supreme Court, every one of the federal circuit courts had held that the Fourth Amendment applied to prison searches.<sup>284</sup> Many prison systems, including the Virginia system that held Palmer, operated under policies restricting when and how officers could search prison

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<sup>279</sup> *Id.* at 846, 850.

<sup>280</sup> *Id.* at 850.

<sup>281</sup> *Id.* (quoting *United States v. Cardona*, 903 F.2d 60, 63 (1st Cir. 1990)).

<sup>282</sup> See, e.g., *Henry v. Hulett*, 969 F.3d 769, 777 (7th Cir. 2020) (“The Supreme Court has yet to address the specific question of whether convicted prisoners maintain a reasonable expectation of privacy in their bodies when it comes to visual strip searches. . . . [W]e do not read *Hudson* . . . to foreclose that right.”); *Harris v. Miller*, 818 F.3d 49, 57 (2d Cir. 2016) (per curiam) (holding that “inmates retain a limited right to bodily privacy under the Fourth Amendment” notwithstanding *Palmer*’s holding); *King v. Rubenstein*, 825 F.3d 206, 215 (4th Cir. 2016) (“[N]othing in *Hudson* indicates the Supreme Court intended to abrogate a prisoner’s expectation of privacy beyond his cell.” (quoting Joint Appendix at 171, *King*, 825 F.3d 49 (No. 15-6382))).

<sup>283</sup> See *Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364, 370–77 (2009) (invalidating a school search using the reasonable suspicion standard established in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985)); see also *DRIVER*, *supra* note 52, at 141–84 (exploring and critiquing the Supreme Court’s criminal procedure jurisprudence in schools).

<sup>284</sup> See *Palmer v. Hudson*, 697 F.2d 1220, 1224–25 (4th Cir. 1983) (holding that Palmer retained a limited privacy right in his cell), *aff’d in part and rev’d in part*, 468 U.S. 517 (1984); see also *Dennis E. Curtis, Prisoners Are Human, Have Some Rights to Decency*, L.A. TIMES, July 23, 1984, at B5 (noting that all circuits had held that the Fourth Amendment “protects prisoners against searches and seizures that are not reasonably related to the security needs of a prison administration”).



cells.<sup>285</sup> Prisoners thus had limited but real privacy rights before *Palmer*. From this perspective, the Court moved prisoners' rights in a reactionary direction, even for early 1980s prison law. Indeed, liberals deemed *Palmer* so deeply misguided that Justice Stevens read his dissent from the bench.<sup>286</sup>

For prisoners, the loss of privacy that attends incarceration is painful, even mortifying. Though prison is an involuntary home, it is nonetheless the place where prisoners live, work, and sleep. Prison cells often contain photographs, letters, and other artifacts of "better times" that "reflect the prisoner's crucial vision of self and his relationship with the outside world."<sup>287</sup> To be stripped of these possessions is, as Gresham Sykes put it, "to be attacked at the deepest layers of personality."<sup>288</sup>

Prisoners are also exposed in the most embodied sense of the term. In Wilbert Rideau's memoir recalling decades of imprisonment at Louisiana's Angola Prison, he describes "the lack of privacy" in prison as sickening: "[T]he communal toilets, showers, living quarters. Sitting on a commode in public for a bowel movement was a new and difficult experience, resulting in bouts of constipation."<sup>289</sup> Albert Woodfox, who spent forty years at Angola, had a parallel experience when he was held in a cell for psychiatric patients, "which had a big picture window built for observation":

One day I was sitting on the toilet with my sweatpants and underwear down to my ankles when a group of schoolchildren were brought in front of my cell on a tour. When they passed the plate glass window, the children paused and stared through the glass. It was one of the most humiliating moments of my life. I stared ahead, trying to project as much dignity as possible in that situation.<sup>290</sup>

Woodfox's writing illustrates how total and debilitating the loss of privacy is in custodial institutions. Sol Wachtler, a former New York State Court of Appeals judge who served time in federal prison, offered a similar account in his memoir, describing "the stunning invasion of privacy known as a 'strip search'" as a defining memory of imprisonment.<sup>291</sup> "I have learned by being commanded to strip, bend, spread,

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<sup>285</sup> See Curtis, *supra* note 284, at B5.

<sup>286</sup> See Philip Hager, *Divided High Court Votes Not to Bar Prison Searches*, L.A. TIMES, July 4, 1984, at 1, 23.

<sup>287</sup> Curtis, *supra* note 284, at B5.

<sup>288</sup> SYKES, *supra* note 228, at 69; see also JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 65–66 (2003) ("As Gresham Sykes observed thirty years ago, this deprivation of control over basic possessions is difficult to bear . . .").

<sup>289</sup> RIDEAU, *supra* note 41, at 54.

<sup>290</sup> WOODFOX, *supra* note 42, at 230. Here Woodfox, who is best known for enduring decades of solitary confinement at Angola, is describing a psychiatric cell at Amite City Jail, where he was held during his second trial.

<sup>291</sup> SOL WACHTLER, *AFTER THE MADNESS: A JUDGE'S OWN PRISON MEMOIR* 28 (1997).

lift, and do a sort of naked and public pirouette that is beyond embarrassment,” Wachtler wrote.<sup>292</sup> “If I were to discuss [prison] cases with my [fellow judges] again, I would be able to tell them of the humiliation which is visited by a strip search.”<sup>293</sup> Marilyn Sanderson, a prisoner in Colorado, has described the “labia lifts” that she and her fellow prisoners were forced to endure as “invasive” and “beyond humiliating.”<sup>294</sup>

Supreme Court doctrine ignores this reality and treats the forfeiture of privacy as an obvious, inevitable outgrowth of incarceration. Yet, in what should by now feel like a common pattern, the Court adopts an inverted approach in other prison cases. When outsiders — journalists, researchers, family members — wish to gain access to prisons, prisoners suddenly bear substantial privacy rights.

The best example of this phenomenon is *Houchins v. KQED, Inc.*,<sup>295</sup> a First Amendment case in which the Supreme Court rejected a right of access claim brought by journalists who sought to photograph a county jail after a detainee committed suicide, allegedly after being held in brutal conditions of confinement.<sup>296</sup> Again, the plaintiffs prevailed in lower courts, which recognized a constitutional “right of access to prisons and jails” for “the public and the media.”<sup>297</sup> And yet again, the Supreme Court selected a more repressive path, this time on the ground that “the Constitution . . . is [not] a Freedom of Information Act.”<sup>298</sup> To reach its conclusion, the Court invoked prisoners’ “fundamental rights of privacy,” specifically their right to avoid being “filmed and photographed at will” like “animals in a zoo.”<sup>299</sup> This concern about objectification is real; Albert Woodfox’s narrative shows as much. The irony, though, is that concerns about prisoners’ privacy come to the fore only when it serves to curtail constitutional rights.

Like *Rhodes v. Chapman*, *KQED* could well have been a transformational case. For those who wish to expose atrocities in prison, it is gut-wrenching to imagine a world in which the First Amendment protected even minimal access to penal institutions. The Court in *KQED* suggested that the Freedom of Information Act<sup>300</sup> (FOIA) could be a

<sup>292</sup> *Id.* at 28–29.

<sup>293</sup> *Id.* at 29; cf. R. DWAYNE BETTS, A QUESTION OF FREEDOM: A MEMOIR OF LEARNING, SURVIVAL, AND COMING OF AGE IN PRISON 150 (2010) (emphasizing prison’s lack of privacy).

<sup>294</sup> *Marilyn Sanderson*, in *INSIDE THIS PLACE, NOT OF IT: NARRATIVES FROM WOMEN’S PRISONS*, *supra* note 261, at 149, 158.

<sup>295</sup> 438 U.S. 1 (1978) (plurality opinion).

<sup>296</sup> *See id.* at 3–4, 15–16.

<sup>297</sup> *Id.* at 7 (citing *KQED, Inc. v. Houchins*, 546 F.2d 284 (9th Cir. 1976), *rev’d*, 438 U.S. 1 (1978)).

<sup>298</sup> *Id.* at 14 (quoting Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 636 (1975)). While *KQED* preceded *Palmer*, the case continues to be cited as precedent for the proposition that both the public and the media lack a right of access to prisons. *See, e.g.*, *Rice v. Kempker*, 374 F.3d 675, 680 (8th Cir. 2004).

<sup>299</sup> *KQED*, 438 U.S. at 5 n.2.

<sup>300</sup> 5 U.S.C. § 552.

statutory substitute for such a constitutional right,<sup>301</sup> but FOIA is subject to capacious exemptions, including one that limits “unwarranted invasion[s] of personal privacy.”<sup>302</sup> Prison officials invoke that exemption to deny researchers information about prison policies and conditions.<sup>303</sup> As an avenue for access to prisons, FOIA thus ends up looking much like the First Amendment. The result, to borrow Professor Loïc Wacquant’s phrase, is the “curious eclipse” of ethnographic research on prisons and a shocking dearth of information about how prisons actually work.<sup>304</sup>

This problem involves more than law. The opacity of American prisons is a product of a penal culture committed to prisons remaining out of sight and to harsh punishment as a positive value.<sup>305</sup> But law contributes to this culture by insulating prisons in the name of prisoners’ own privacy rights. The intellectual tension here is glaring: a right foreclosed inside prisons is mobilized to insulate penal institutions from oversight.

#### D. Rehabilitation

Judicial opinions also evince striking inconsistency regarding the basic aim of prisons. The entire field of criminal law is notoriously confused about its own purpose. First-year law students can rattle off the goals of punishment — incapacitation, retribution, deterrence, rehabilitation — and can just as quickly identify their flaws and internal complications. Incapacitation overstates individual dangerousness.<sup>306</sup> Retribution ignores the social causes of crime.<sup>307</sup> There is little evidence that prison deters.<sup>308</sup> Even if it worked, deterrence might justify a short

<sup>301</sup> *KQED*, 438 U.S. at 14.

<sup>302</sup> § 552(a)(2)(E). FOIA also contains a privacy exemption for medical files. § 552(b)(6).

<sup>303</sup> See Emma Kaufman, *The Prisoner Trade*, 133 HARV. L. REV. 1815, 1840–42 (2020) (discussing the limitations of FOIA research into prisons).

<sup>304</sup> Loïc Wacquant, *The Curious Eclipse of Prison Ethnography in the Age of Mass Incarceration*, 3 ETHNOGRAPHY 371, 371 (2002).

<sup>305</sup> See BARKOW, *supra* note 30, at 105–24 (exploring the irrational politics of fear that drives American imprisonment); see also N.Y. STATE SPECIAL COMM’N ON ATTICA, ATTICA: THE OFFICIAL REPORT OF THE NEW YORK STATE SPECIAL COMMISSION ON ATTICA xii (1972) (“The worrisome reality is that prisons, prisoners, and the problems of both are essentially invisible in the United States. We Americans have made our prisons disappear from sight as if by an act of will.”).

<sup>306</sup> The literature on the justifications for punishment is vast. For one recent example of this argument, see generally Guyora Binder & Ben Notterman, *Penal Incapacitation: A Situationist Critique*, 54 AM. CRIM. L. REV. 1 (2017).

<sup>307</sup> See generally, e.g., Justin D. Levinson et al., *Race and Retribution: An Empirical Study of Implicit Bias and Punishment in America*, 53 U.C. DAVIS L. REV. 839 (2019).

<sup>308</sup> See generally, e.g., Aaron Chalfin & Justin McCrary, *Criminal Deterrence: A Review of the Literature*, 55 J. ECON. LITERATURE 5 (2017).

sentence where retributivism would favor a long one. The list of critiques goes on and ineluctably returns to the central problem: we do not really know why we incarcerate.<sup>309</sup>

This blind spot surfaces in prison law when courts discuss rehabilitation. In one form or another, the concept of rehabilitation has shaped American prisons for centuries. The country's first penal institutions were built around competing theories of rehabilitation. In the Pennsylvania model introduced at Eastern State Penitentiary in the 1820s, prison planners believed that solitary confinement would elicit penitence and produce law-abiding citizens.<sup>310</sup> At Auburn State Prison in New York, officials wagered that labor rather than isolation would best reform criminals.<sup>311</sup> These "rival systems"<sup>312</sup> had differences — and in a testament to the country's enduring reliance on prison labor, the Auburn model ultimately prevailed<sup>313</sup> — but both understood the prison as a space that had the capacity and responsibility to transform people's characters.<sup>314</sup> This basic theory of imprisonment, which Professor Francis Allen labeled "the rehabilitative ideal," persisted into the twentieth century as prisons became sites for the delivery of education programs, drug treatment, and job training.<sup>315</sup>

The standard narrative among criminologists and legal scholars is that the rehabilitative ideal peaked in the mid-twentieth century and

<sup>309</sup> See Sharon Dolovich, *Exclusion and Control in the Carceral State*, 16 BERKELEY J. CRIM. L. 259, 261 (2011) ("[A] closer look at the way the system actually operates makes clear the poor fit between [the] . . . conventional explanations [for prison] and the realities of American penal practice.").

<sup>310</sup> See Rothman, *supra* note 64, at 116–19.

<sup>311</sup> See *id.*

<sup>312</sup> *Id.* at 117.

<sup>313</sup> For one argument that prison labor has always played a central role in American incarceration policy, see MCLENNAN, *supra* note 185, at 14–52 (2008).

<sup>314</sup> See Rothman, *supra* note 64, at 117.

<sup>315</sup> Francis A. Allen, Edson R. Sutherland Professor of L., Univ. of Mich. L. Sch., *The Decline of the Rehabilitative Ideal in American Criminal Justice* (Apr. 13, 1978), in 27 CLEV. ST. L. REV. 147, 148–49 (1978) [hereinafter Allen, Address] (arguing that the "rehabilitative ideal" — "the notion that the sanctions of the criminal law should or must be employed to achieve fundamental changes in the characters, personalities, and attitudes of convicted offenders" — "dominated thought about [American] criminal justice . . . throughout most of the 20th century," *id.* at 148). See generally FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE* (1981). In the standard account, the rehabilitative ideal refers to a specific mode of punishment in which the prisoner is transformed through medical and psychiatric interventions. This model of punishment took root in the progressive era and differs from Jacksonian theories of imprisonment premised on isolation and labor, but both approaches "imagine prisons as transformative institutions." Kaufman, *supra* note 303, at 1829 n.76; see also Rothman, *supra* note 64, at 115–24 (describing Jacksonian incarceration). We refer to nineteenth- and twentieth-century forms of imprisonment as instances of "the rehabilitative ideal" to emphasize the similarities between these theories of punishment and the government's enduring commitment to the idea that prison can reform.

declined precipitously in the 1970s.<sup>316</sup> Ample evidence supports this account. Beginning in the 1970s, the concept of rehabilitation was subject to sustained attacks from across the political spectrum.<sup>317</sup> Left-leaning critics argued that rehabilitative programs were paternalistic and that indeterminate sentences led to racial discrimination.<sup>318</sup> Conservatives claimed that rehabilitation was ineffective, expensive, and too soft on crime.<sup>319</sup> These ideas had penetrated the corridors of power by 1974, when Attorney General Bill Saxbe complained that the American criminal justice system was “operating on a premise that we can’t substantiate.”<sup>320</sup> Rehabilitation, he asserted, is “a myth.”<sup>321</sup>

Critiques like these led to changes in the criminal legal system, most notably a turn away from indeterminate sentences that tied the length of imprisonment to completion of prison programs.<sup>322</sup> As Francis Allen himself observed, this “defection[] from the rehabilitative ideal” was incomplete.<sup>323</sup> Prison officials continued to use the “techniques of rehabilitation” — psychotherapy, education, training in job skills — well after the decline of indeterminate sentencing, and to this day imprisonment involves extensive “programming.”<sup>324</sup>

<sup>316</sup> See Allen, Address, *supra* note 315, at 148–50; see also DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 8 (2001) (discussing the “fall from grace of rehabilitation”); Loïc Wacquant, *The New “Peculiar Institution”: On the Prison as Surrogate Ghetto*, 4 *THEORETICAL CRIMINOLOGY* 377, 385 (2000) (arguing that, unlike the midcentury carceral system, the contemporary prison “does not carry out a positive economic mission of recruitment and disciplining of the workforce: it serves only to warehouse the precarious and deproletarianized fractions of the [B]lack working class”).

<sup>317</sup> See Jessica M. Eaglin, *Against Neorehabilitation*, 66 *SMU L. REV.* 189, 199–200 & nn.60–61, 64 (2013) (collecting sources on the decline of rehabilitative theory from law, history, and political science). As Professor Jessica Eaglin notes, Professor Robert Martinson’s essay *What Works*, which challenged the effectiveness of rehabilitative programs, became a central citation in arguments about sentencing reform. *Id.* at 200 (citing Robert Martinson, *What Works? — Questions and Answers About Prison Reform*, 35 *PUB. INT.* 22, 28 (1974)).

<sup>318</sup> See *id.*

<sup>319</sup> See *id.*

<sup>320</sup> Ronald J. Ostrow, *Criminal Rehabilitation “a Myth,” Saxbe Says*, *L.A. TIMES*, Oct. 1, 1974, at A4.

<sup>321</sup> *Id.*; see also Ronald J. Ostrow, *Saxbe Urges Citizens to Judge Judges, Reject Leniency at Polls*, *L.A. TIMES*, Dec. 6, 1974, at A1 (reporting that “Atty. Gen. William B. Saxbe [asserted] that judges have been sold an overly optimistic ‘bill of goods’ on rehabilitation of criminals” and were operating under the false assumption that, in Saxbe’s words, “we could rehabilitate Jack the Ripper”).

<sup>322</sup> See GARLAND, *supra* note 316, at 8; see also 28 U.S.C. § 994(a), (k) (establishing the Sentencing Commission in 1984 and instructing the Commission to “insure that the [Sentencing G]uidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant,” *id.* § 994(k)).

<sup>323</sup> Allen, Address, *supra* note 315, at 149; see *id.* at 149–50; see also Eaglin, *supra* note 317, at 201 (arguing that drug courts reflect the continuing influence of rehabilitation theory); GARLAND, *supra* note 316, at 8 (noting that treatment programs “continue to operate” and are often “targeted towards ‘high risk’ individuals such as sex offenders, drug addicts, and violent offenders”).

<sup>324</sup> Allen, Address, *supra* note 315, at 149–50. For an illustrative example of the programming currently available in American prisons, see *Programs*, N.Y. STATE DEP’T OF CORR. & CMTY.

There is no question, though, that by the 1980s rehabilitation had receded as the dominant justification for incarceration and the nation had shifted toward warehousing rather than reforming its prisoners. People who lived and worked inside prisons noted this shift. Hopwood puts it bluntly: “When the federal prison system was created, its primary concern was rehabilitating people. Not anymore.”<sup>325</sup> Ted Conover, an undercover journalist who worked at New York’s Sing Sing prison before writing *Newjack*, reported that correctional officers had a similar view. “[R]ehabilitation is not our job,” one told him.<sup>326</sup> “The truth of it is that we are warehouseers of human beings.”<sup>327</sup>

The abandonment of rehabilitation is thus widely recognized. In fact, it may be the one point on which academics, politicians, prisoners, and correctional officers agree. Though the precise date that the theory died is difficult to pin down, conventional wisdom holds that by the end of the 1970s the prison was no longer understood as a form of treatment.

This narrative resonates in recent prison cases, in which the Supreme Court has joined the chorus in rejecting rehabilitation. In 2011, the Court decided *Tapia v. United States*,<sup>328</sup> a case in which a district court judge had lengthened a prison sentence in order to permit a prisoner to complete a drug treatment program.<sup>329</sup> The judge had selected the sentence on the theory that it would be rehabilitative; the guideline sentence was forty-one to fifty-one months, and the judge opted for the longer term “to provide needed correctional treatment,” namely a “500 Hour Drug Program.”<sup>330</sup> A unanimous Supreme Court invalidated this approach. Writing for the Court, Justice Kagan explained that it was improper — a violation of the Sentencing Reform Act of 1984<sup>331</sup> (SRA) — for the district court to sentence a prisoner “for the purpose of rehabilitating [her] or providing [her] with needed educational or vocational training, medical care, or other correctional treatment.”<sup>332</sup>

The outcome in *Tapia* was driven by statutory text, specifically, the SRA’s prohibition on rehabilitative sentencing. But the case offers a

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SUPERVISION, <https://doccs.ny.gov/programs> [<https://perma.cc/YA39-49XQ>] (listing the “variety of programs and services for incarcerated individuals to redirect their lives and become productive, law-abiding members of society”).

<sup>325</sup> HOPWOOD, *supra* note 226, at 247; see JACK HENRY ABBOTT, IN THE BELLY OF THE BEAST: LETTERS FROM PRISON 37 (1981) (“No one expects me to become a better man in prison. So why not say it: The purpose is to ruin me, ruin me completely. The purpose is to mark me, to stamp across my face the mark of this beast they call prison.”).

<sup>326</sup> CONOVER, *supra* note 120, at 41 (“[P]rison was, above all, a storage unit.”).

<sup>327</sup> *Id.*

<sup>328</sup> 564 U.S. 319 (2011).

<sup>329</sup> See *id.* at 321–22.

<sup>330</sup> *Id.* at 322 (quoting Joint Appendix at 27, *Tapia*, 564 U.S. 319 (No. 10-5400)); see *id.* at 321–22.

<sup>331</sup> Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of the U.S. Code).

<sup>332</sup> *Tapia*, 564 U.S. at 329–30 (quoting 28 U.S.C. § 994(k)).

nice example of the broader shift away from the rehabilitative ideal in modern prison law. In describing the SRA's origins, Justice Kagan told a familiar story about the evolution of the American criminal justice system: punishment was once "premised on a faith in rehabilitation," but this model had fallen "into disfavor" in the face of evidence that rehabilitation "had failed."<sup>333</sup> As Justice Kagan framed it, by the late 1980s everyone agreed that prisons do not rehabilitate.

The Court was especially explicit about this point in *Tapia*, but it has implicitly recognized rehabilitation's demise in cases licensing harsh penal practices. Take, for example, *Wilkinson v. Austin*,<sup>334</sup> which upheld the procedures for placing prisoners in "Supermax" confinement.<sup>335</sup> Justice Kennedy's opinion in that case made clear that solitary confinement is no genuine effort to rehabilitate:

Incarceration at [Ohio State Penitentiary] is synonymous with extreme isolation. . . . [The] cells have solid metal doors with metal strips along their sides and bottoms which prevent conversation or communication . . . . All meals are taken alone . . . . Opportunities for visitation are rare and in all events are conducted through glass walls. It is fair to say [the prison's] inmates are deprived of almost any environmental or sensory stimuli and of almost all human contact.<sup>336</sup>

Citing these brutal conditions, scholars have condemned solitary confinement for inducing and exacerbating mental illness.<sup>337</sup> Prisoners, meanwhile, describe extended stretches in solitary confinement as "torture."<sup>338</sup> Jack Henry Abbott, who knew isolation cells intimately from his time in numerous prisons, called solitary confinement "the horrible decay of truly living death" in which "[t]ime descends in your cell like the lid of a coffin in which you lie and watch it as it slowly closes over you."<sup>339</sup>

Two centuries ago, penal theorists believed this sort of harsh treatment spurred rehabilitation.<sup>340</sup> Jacksonian prison planners argued that

<sup>333</sup> *Id.* (quoting *Mistretta v. United States*, 488 U.S. 361, 366 (1989)).

<sup>334</sup> 545 U.S. 209 (2005).

<sup>335</sup> *Id.* at 213.

<sup>336</sup> *Id.* at 214.

<sup>337</sup> See, e.g., ALISA ROTH, *INSANE: AMERICA'S CRIMINAL TREATMENT OF MENTAL ILLNESS* 30 (2018).

<sup>338</sup> CHRISTINE MONTROSS, *WAITING FOR AN ECHO: THE MADNESS OF AMERICAN INCARCERATION* 37 (2020).

<sup>339</sup> ABBOTT, *supra* note 325, at 44–45; see *id.* at 45 ("My years in solitary confinement altered me more than I care to admit, even to myself."). Another prisoner serving time in solitary confinement stated: "Monsters. This is what they make in here, monsters. And then they drop you out in society and tell you, 'Be a good boy.' You can't conduct yourself like a human being when they treat you like an animal." JEFF SMITH, *MR. SMITH GOES TO PRISON: WHAT MY YEAR BEHIND BARS TAUGHT ME ABOUT AMERICA'S PRISON CRISIS* 98 (2015).

<sup>340</sup> See David M. Shapiro, *Solitary Confinement in the Young Republic*, 133 HARV. L. REV. 542, 573 n.242 (2019) (discussing the emergence and subsequent rejection of the early American idea that "prolonged solitary confinement" was "a method of rehabilitation").

solitude was transformative,<sup>341</sup> and the earliest techniques of rehabilitation “included the use of the whip and the club.”<sup>342</sup> In modern case law, however, solitary confinement is not a cure for criminality. Today’s prison cases treat isolation as a way to manage violence rather than a means to character improvement. On this account, the rehabilitative ideal is a thing of the past, long since replaced with concerns about institutional order.

But then the Supreme Court contradicts itself yet again. Against the background of cases like *Tapia* and *Austin*, the Court has extolled the value of rehabilitation to justify the denial of prisoners’ constitutional rights. Recall, for example, *Overton v. Bazzetta*, the case in which the Court upheld Michigan’s restrictive visitation policy.<sup>343</sup> In that case, prison officials defended the policy on the ground that it promoted prisoners’ rehabilitation by reducing “the incidence of substance abuse.”<sup>344</sup> The Pennsylvania Department of Corrections succeeded with a similar argument in *Beard v. Banks*,<sup>345</sup> a First Amendment challenge to the practice of denying reading material to “recalcitrant”<sup>346</sup> and “incurable” prisoners.<sup>347</sup> In *Banks*, the Department of Corrections argued that making reading material a privilege for good behavior “encourage[d] [prisoners’] progress and discourage[d] backsliding.”<sup>348</sup> Justice Stevens questioned this “deprivation theory of rehabilitation,”<sup>349</sup> noting that it had no limiting principle, but a plurality of the Court accepted the proposition that the rehabilitative effects of a book ban could justify the infringement of First Amendment rights.<sup>350</sup>

The Supreme Court embraced another version of this theory in *O’Lone v. Estate of Shabazz*,<sup>351</sup> a free exercise case. *Shabazz* emerged from Leesburg State Prison in New Jersey, where overcrowding (a constant theme in prison law) required some prisoners to work outside during the day.<sup>352</sup> Prisoners on these “outside details” were prohibited from

<sup>341</sup> See Rothman, *supra* note 64, at 117.

<sup>342</sup> Allen, Address, *supra* note 315, at 149.

<sup>343</sup> 539 U.S. 126, 131 (2003).

<sup>344</sup> *Id.* at 129; *see id.* at 129–30.

<sup>345</sup> 548 U.S. 521 (2006) (plurality opinion).

<sup>346</sup> *Id.* at 525.

<sup>347</sup> *Id.* at 540 (Thomas, J., concurring in the judgment); *see id.* at 524–25 (plurality opinion).

<sup>348</sup> *Id.* at 546 (Stevens, J., dissenting) (quoting Joint Appendix at 27, *Beard*, 548 U.S. 521 (No. 04-1739)). In *Banks*, the Court yet again reversed a lower court — this time, the Third Circuit, with then-Judge Alito in dissent. *See Banks v. Beard*, 399 F.3d 134, 148 (3d Cir. 2005) (Alito, J., dissenting), *rev’d*, 548 U.S. 521 (2006). This trend illustrates the Court’s conservatism in prison cases.

<sup>349</sup> *Banks*, 548 U.S. at 546 (Stevens, J., dissenting).

<sup>350</sup> *Id.* at 530 (plurality opinion) (concluding that the Court “need go no further than the [rehabilitation] justification” to uphold the policy).

<sup>351</sup> 482 U.S. 342 (1987), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000b to 2000b-4).

<sup>352</sup> *See id.* at 345.



returning to the main prison building, even to attend religious services.<sup>353</sup> In the venerable tradition that created prison law, Muslim prisoners sued, alleging a Free Exercise Clause violation.<sup>354</sup> Unlike those early plaintiffs, however, the prisoners in *Shabazz* lost.<sup>355</sup>

Chief Justice Rehnquist's majority opinion was an ode to the rehabilitative values of hard work. "[C]orrections officials sought a simulation of working conditions and responsibilities in society," Chief Justice Rehnquist explained.<sup>356</sup> "One of the things that society demands or expects is that when you have a job, you show up on time, you put in your eight hours . . . and you don't get off."<sup>357</sup> By replicating these conditions, the "prohibition on returns" promised to turn criminals into disciplined workers ready for release.<sup>358</sup>

The Court decided *Shabazz* before the Religious Freedom Restoration Act of 1993<sup>359</sup> (RFRA) and the Religious Land Use and Institutionalized Persons Act of 2000<sup>360</sup> (RLUIPA) codified prisoners' religious rights. The case — in which five conservative Justices tolerated the infringement of religious rights — would almost certainly come down differently today.<sup>361</sup> But it reflects the degree to which the Supreme Court has permitted rights restrictions in the name of rehabilitation. Thirty years after Black Muslim prisoners opened the door to constitutional prison law by asserting their religious freedom, the Court held that prison officials could effectively ban Muslims from participating in *Jumu'ah*, the most important weekly prayer.<sup>362</sup> The concept of rehabilitation made this extraordinary transformation possible. Moreover, the Court decided *Shabazz* in 1987, which according to the standard story is a decade *after* policymakers rejected the rehabilitative ideal.<sup>363</sup> The case suggests that rehabilitation lived on well past the 1970s, at least as a means to uphold restrictive penal policies.

<sup>353</sup> *Id.* at 346; *see id.* at 346–47.

<sup>354</sup> *See id.* at 347.

<sup>355</sup> *See id.* at 353.

<sup>356</sup> *Id.* at 351.

<sup>357</sup> *Id.* (quoting District Court Transcript at 89, *Shabazz v. O'Lone*, 595 F. Supp. 928 (D.N.J. 1984) (No. 84-1789) (testimony of a Leesburg prison official who had defended the policy as rehabilitative), *vacated*, 782 F.2d 416 (3d Cir. 1986), *rev'd*, 482 U.S. 342 (1987), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488) (codified as amended at 42 U.S.C. §§ 2000b to 2000bb-4).

<sup>358</sup> *Id.*

<sup>359</sup> 42 U.S.C. §§ 2000bb to 2000bb-4.

<sup>360</sup> 42 U.S.C. §§ 2000cc to 2000cc-5.

<sup>361</sup> *Cf., e.g., Holt v. Hobbs*, 574 U.S. 352, 355–56, 358 (2015) (unanimously concluding that an Arkansas policy prohibiting a Muslim prisoner from growing a beard longer than one-quarter inch violated RLUIPA); *Cutter v. Wilkinson*, 544 U.S. 709, 712–13 (2005) (holding that prison officials violated RLUIPA in refusing to accommodate "nonmainstream" religions, *id.* at 712).

<sup>362</sup> *See Shabazz*, 482 U.S. at 345.

<sup>363</sup> *See supra* notes 316–27 and accompanying text.

It is not especially surprising to see the Supreme Court accepting the government's justifications for its policy choices. Perhaps the Court would have upheld virtually any explanation offered by prison officials in *Shabazz* and *Banks*. On this reading, these cases reflect a tradition of reflexive deference rather than any deeply held theory of imprisonment. But if that account is accurate, it fails to explain the Court's fascination with the concept of rehabilitation in other cases. In the 2002 case *McKune v. Lile*,<sup>364</sup> for example, four Justices penned a lengthy defense of the idea that prison can transform a person's character.<sup>365</sup>

*Lile* presented the Court with a Fifth Amendment challenge to a sex offender treatment program that required participants to admit their guilt.<sup>366</sup> Nothing about the program was voluntary: Kansas prison officials "ordered [Robert Lile] to participate in [the] Sexual Abuse Treatment Program," which required all program participants to sign an "Admission of Responsibility" form<sup>367</sup> in order to "confront [their] past crimes."<sup>368</sup> Information obtained during the program could be used against prisoners in future criminal proceedings, and Kansas law required prison staff to report any "uncharged sexual offenses involving minors" that program participants discussed.<sup>369</sup> If a prisoner refused to participate, prison officials would transfer him to "a maximum-security unit, where his movement would be more limited"; move him "from a two-person to a four-person cell, [where] he would be in a potentially more dangerous environment"; and restrict his "visitation rights, earnings, work opportunities, ability to send money to family, canteen expenditures, access to a personal television, and other privileges."<sup>370</sup> Lile, who maintained his innocence, argued that this system amounted to compelled self-incrimination.<sup>371</sup>

A divided Court upheld the program's requirements. Writing for the plurality, Justice Kennedy concluded that states have "a vital interest in rehabilitating convicted sex offenders," one that justified the program's entry form.<sup>372</sup> As Justice Kennedy saw it, the act of confessing serves to rehabilitate:

Although no program participant has ever been prosecuted or penalized based on information revealed during the [sex offender program], the potential for additional punishment reinforces the gravity of the participants' offenses and thereby aids in their rehabilitation. If inmates know society will

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<sup>364</sup> 536 U.S. 24 (2002) (plurality opinion).

<sup>365</sup> *See id.* at 33.

<sup>366</sup> *Id.* at 29–30.

<sup>367</sup> *Id.* at 30.

<sup>368</sup> *Id.* at 29.

<sup>369</sup> *Id.* at 30.

<sup>370</sup> *Id.* at 31.

<sup>371</sup> *Id.* at 29–30.

<sup>372</sup> *Id.* at 33.

not punish them for their past offenses, they may be left with the false impression that society does not consider those crimes to be serious ones. The practical effect of guaranteed immunity for [program] participants would be to absolve many sex offenders of any and all cost for their earlier crimes. This is the precise opposite of the rehabilitative objective.<sup>373</sup>

It is worth pausing to observe this passage's unusual character. The Fifth Amendment right at issue in *Lile* seems like one that could readily survive imprisonment. As a practical matter, permitting prisoners to maintain their innocence seems to pose less of a threat to order than does protecting rights like speech and association, which allow prisoners to congregate and express contentious views. And unlike rights to services such as health care or access to courts, the Fifth Amendment right costs little to protect. At a more conceptual level, moreover, the Fifth Amendment concerns the distinction between guilt and innocence,<sup>374</sup> the issue at the core of the prison's legitimacy. One might think that, even if prisoners forfeit rights to a certain standard of living or expensive services, they maintain a right to assert that they ought not be imprisoned.<sup>375</sup>

There are valid objections to these comparisons, but the point here is not that the Fifth Amendment is more important than other rights prisoners assert. Instead, our aim is to highlight plausible reasons why one might expect the Fifth Amendment to be durable, even in penal institutions. Given the values animating the Fifth Amendment and the relatively low practical costs of permitting prisoners to maintain their innocence, there is a compelling case to be made that freedom from self-incrimination should survive incarceration.

In *Lile*, though, the need to rehabilitate prisoners not only trumped the Fifth Amendment right; it *necessitated* a constitutional violation. In Justice Kennedy's view, the risk of additional punishment — a risk one would otherwise have a constitutional right to avoid — is what made the sex-offender program work. The experience of legal exposure was clarifying, even purifying. In other words, Justice Kennedy seemed to believe that the act of confessing is rehabilitative precisely because it

<sup>373</sup> *Id.* at 34–35.

<sup>374</sup> See Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 866 (1995) (advancing a “reliability theory” of the Fifth Amendment); cf. Louis Michael Seidman, *Akhil Amar and the (Premature?) Demise of Criminal Procedure Liberalism*, 107 YALE L.J. 2281, 2281–82 (1998) (reviewing AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* (1997)) (noting that Amar's argument for “a general reorientation of criminal procedure toward factual guilt and innocence,” *id.* at 2282, goes against “the progressive orthodoxy of criminal procedure,” *id.* at 2281–82). See generally AMAR, *supra* (arguing that the Constitution is oriented toward protecting innocence).

<sup>375</sup> One response to this argument is that convicted prisoners are no longer innocent, which makes a preconviction approach to the Fifth Amendment inappropriate. But the claim is not that the Fifth Amendment should look identical in prison as it does at trial; rather, it is that, of all the rights prisoners assert, one might have expected freedom from self-incrimination to be particularly robust.

transgresses a constitutional right. This is a perverse way to understand the value of a constitutional guarantee.

Rehabilitation, a concept roundly rejected in *Tapia*,<sup>376</sup> thus comes roaring back in the shakiest cases, when it seems least appropriate or likely that a prisoner's claim will be denied. In *Shabazz* and *Bazzetta*, rehabilitation justified rights restrictions that would be unthinkable outside prison walls — a lifetime ban on seeing family members<sup>377</sup> and a prohibition on prayer.<sup>378</sup> In *Lile*, the Court went even further, reasoning that the waiver of a constitutional right helps to heal a prisoner's wounded soul.<sup>379</sup> These cases demonstrate that the Court selectively revives rehabilitation, well after the supposed death of the rehabilitative ideal.

### III. BEYOND THE MYTHIC PRISON

By this point, it should be clear that prison law is characterized by incoherence. Prisons are hotbeds of violence; no, prisons are uncomfortable but mundane. Prisoners are illiterate; no, they can read, write, and litigate. Prisoners forfeit privacy; no, prisoners bear privacy rights requiring prisons to be sealed from society. Rehabilitation is dead; no, long live rehabilitation, at least when it means denial of a constitutional right.

At a high level of generality, these contradictions are unsurprising. Constitutional scholars will not be alarmed to learn that a body of doctrine is rife with inconsistencies. Sociologists of punishment will not be shocked to hear that the purpose of prison is unclear. Legal academics have long argued that constitutional rights protect people less than they should,<sup>380</sup> and the basic thesis of much sociological work on punishment is that the prison's purpose changes over time and reflects the social anxieties of a given historical moment.<sup>381</sup> Our account supports these classic arguments.

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<sup>376</sup> See *Tapia v. United States*, 564 U.S. 319, 330 (2011).

<sup>377</sup> See *Overton v. Bazzetta*, 539 U.S. 126, 136 (2003).

<sup>378</sup> See *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 345 (1987), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000b to 2000b-4).

<sup>379</sup> See *McKune v. Lile*, 536 U.S. 24, 29 (2002) (plurality opinion).

<sup>380</sup> See, e.g., Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2178 (2013) (arguing that *Gideon* demonstrates the indeterminacy and regressiveness of rights); Justin Driver, Essay, *Reactionary Rhetoric and Liberal Legal Academia*, 123 YALE L.J. 2616, 2621 (2014) (describing the current "Age of Judicial Skepticism" in which legal academics are highly doubtful about the judiciary's capacities to protect constitutional rights); Kaufman, *supra* note 160, at 187–88 (collecting sources that reflect rights skepticism).

<sup>381</sup> See, e.g., GARLAND, *supra* note 316, at 5 ("[W]hile the field of crime control has a certain autonomy . . . any major transformation in the field's configuration will tend to signal correlative transformations in the structure of the social fields and institutions that are contiguous to it."); Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449, 450 (1992) (arguing that late-twentieth-century criminal justice practices reflected a new social approach to risk).

But the failures of constitutional prison law also reveal particular defects in the relationship between prisons and federal courts. This Part focuses on three observations that flow from the preceding Parts. First, the inconsistent depiction of prisons has played a critical, underappreciated role in circumscribing prisoners' rights. The shifting premises in prison cases can look like a simple case of overwriting or loose reasoning. But as we explain below, the incoherence of prison law is more pernicious: it is a form of selective empiricism that has enabled imprisonment and undermined the achievements of the prisoners' rights revolution.

Second, the Supreme Court's transsubstantive approach to prisoners' rights invites this faulty empiricism. The selective generalizations in constitutional prison cases are neither accidental nor haphazard; they are the direct consequence of the Court's decision to conflate prisoners' civil rights claims under a single, default standard. Below, we describe how the test announced in *Turner v. Safley* encourages blunt, shaky generalizations about prisons and blurs critical distinctions between rights like speech, privacy, and freedom from self-incrimination. The result is a stunted field that fails to engage with the deep constitutional questions posed by imprisonment.

Finally, and perhaps most obvious, courts know shockingly little about the institutions they populate. Though it would be naive to think that better-informed courts would necessarily adopt more humane doctrines, it is striking how rarely appellate courts grapple with the realities of prison life — and how much richer prison doctrine could be if they did.

#### A. *Statism*

This Article's central claim is that "the prison" is a myth, a shifting idea composed of selective generalizations about the purpose and inhabitants of penal institutions. If one were to read constitutional cases to understand prisons, a wildly inconsistent portrait would emerge. It is in this respect — in the factual account of prisons that emerges across different lines of doctrine — that prison law is incoherent.

In a different respect, though, these cases are remarkably consistent. Amidst all the bold and contradictory proclamations about how prisons work, the one constant in prison cases is that claims about penal institutions tend to shift in ways that benefit the government.

Recall, for instance, the literacy cases. As Part II explained, the Court veers back and forth in those cases, asserting in one line of doctrine that illiteracy is widespread and in another that most prisoners can read and write. The common thread uniting these cases is a concern about preserving the state's resources. When prisoners need aid from the government — for example, in *Casey*, where the Court rejected

Arizona prisoners' plea for better law libraries and increased legal assistance<sup>382</sup> — prisoners are uneducated, incapable people whose neediness the state could not possibly be asked to accommodate. But when prisoners are understood as a threat to the state — for example, in *Pell*, where prisoners wanted to speak to journalists about prison conditions,<sup>383</sup> or in *Bazzetta*, where prison officials alleged that visits brought drugs into prison<sup>384</sup> — prisoners suddenly become literate and savvy institutional actors.

At first pass, this pattern looks like straightforward hypocrisy: you are literate when we need you to be. But on a deeper level, the literacy cases reveal profound uncertainty about the constitutional implications of prisoners' forced dependence on the state. In cases like *Casey* and *Pell*, courts cannot seem to decide when prisoners are helpless and when that helplessness gives rise to constitutional obligations. And courts appear to be very uneasy about the fact that prisoners need the state because the state has rendered them abject.

Prisoners do not just happen to need the state's resources. They need the state's help because the government has put them in a position where they cannot secure help elsewhere. The decision to incarcerate limits prisoners' autonomy and thereby triggers some legal duty to protect and support them. But then the provision of that aid is fraught because the government is giving its resources to people convicted of crimes, who have in theory forfeited some measure of constitutional protection. This is one of the basic puzzles of prisoners' rights: imprisonment is a deprivation of rights that creates claims to new, positive rights. In elaborating constitutional prison law, courts are navigating this relationship between rights forfeiture and rights acquisition. Rather than doing so explicitly, courts avoid the tricky issue — what the state owes to those it incapacitates — by generalizing, selectively and inconsistently, about prisoners' capacities.

The same pattern appears in the violence cases. As we saw in Part II, prison violence presents an urgent threat in some cases and a minor

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<sup>382</sup> See *Lewis v. Casey*, 518 U.S. 343, 346 (1996).

<sup>383</sup> See *Pell v. Procunier*, 417 U.S. 817, 819 (1974). The regulation at issue in *Pell* was adopted two days after George Jackson's death at San Quentin prison. See *id.* at 832. Prison officials viewed his escape attempt and death as a reflection of disciplinary problems created by media attention to prison conditions during the civil rights revolution. See *Hillery v. Procunier*, 364 F. Supp. 196, 198 (N.D. Cal. 1973), *vacated*, 417 U.S. 817 (1974); see also Appellants' Reply Brief at 5–10, *Pell*, 417 U.S. 817 (No. 73-754) (discussing the security problems created by increased media coverage of prisons).

<sup>384</sup> See *Overton v. Bazzetta*, 539 U.S. 126, 129 (2003).

inconvenience in others. When the state wishes to regulate prisoners — to ban unions,<sup>385</sup> conduct searches,<sup>386</sup> limit visits,<sup>387</sup> restrict prayer<sup>388</sup> — violence is a widespread, deadly problem that justifies the restriction of constitutional rights. But when the state is asked to improve prison conditions<sup>389</sup> or provide procedural safeguards,<sup>390</sup> violence is a minor irritant that requires no constitutional protection. Violence, in short, is real when the state needs it to be.

We could go on — the privacy and rehabilitation cases fit this pattern too<sup>391</sup> — but the trend is clear: shifting factual claims about penal institutions track the government's needs and shield the state from the difficult constitutional questions created by the decision to incarcerate.

In other words, the incoherence of prison law is statist.<sup>392</sup> By adopting generalizations in some cases and then abandoning them in others, the Supreme Court allows the government to adjust the content of prisoners' rights. This approach situates executive branch actors as primary interpreters of the Constitution, whose views hold special weight. It also permits the government to determine how expensive (or cheap) it is to run penal institutions, for after all, rights have costs.<sup>393</sup> The factual inconsistencies in prison law thus enable the existence of the prison system, the state's chosen tool for sanctioning crimes. Loose empiricism about prisons enables the state-building project of populating and legitimating American penal institutions.

Over time, this selective empiricism has undermined the prisoners' rights revolution. We began this Article by tracing the history of pris-

<sup>385</sup> See, e.g., *Jones v. N.C. Prisoners' Lab. Union, Inc.*, 433 U.S. 119, 121 (1977).

<sup>386</sup> See, e.g., *Hudson v. Palmer*, 468 U.S. 517, 519 (1984).

<sup>387</sup> See, e.g., *Bazzetta*, 539 U.S. at 129.

<sup>388</sup> See, e.g., *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 345 (1987), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000b to 2000bb-4).

<sup>389</sup> See, e.g., *Rhodes v. Chapman*, 452 U.S. 337, 339 (1981).

<sup>390</sup> See, e.g., *Wilkinson v. Austin*, 545 U.S. 209, 213 (2005); *Sandin v. Conner*, 515 U.S. 472, 476 (1995).

<sup>391</sup> As section II.C demonstrated, pp. 553–58, prisoners tend to bear privacy rights when the government wants to shield prisons from oversight, but to lack them when prisoners protest invasive searches. And as section II.D, pp. 558–66, showed, the Court embraces rehabilitation as a justification for restrictive prison policies, then jettisons concerns about rehabilitation when faced with harsh practices like solitary confinement. One exception to this trend is *Tapia v. United States*, where the Court rejected rehabilitation in the process of vindicating a prisoner's challenge to her sentence. But notably, *Tapia* concerned a statutory defect in a *sentencing* rather than a constitutional claim about treatment *in prison*. See *Tapia v. United States*, 564 U.S. 319, 321 (2011). The unmistakable trend in prisoners' rights cases is that the Court adopts the myth that will best serve the state.

<sup>392</sup> For a similar use of this term in a different context, see Nicholas R. Parrillo, *Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890–1950*, 123 YALE L.J. 266, 284–85 (2013).

<sup>393</sup> See generally HOLMES & SUNSTEIN, *supra* note 244. It would, for example, cost more to adopt a capacious interpretation of prisoners' right of access to courts or right to family visitation.

oners' rights through a long era of hands-off jurisprudence, an expansion in the 1970s, and a period of retrenchment during the Rehnquist Court. In Part I, we attributed the restriction of prisoners' rights in the latter part of the twentieth century to the Supreme Court's adoption of a weak legal standard for evaluating prisoners' civil rights claims. We develop that critique of the doctrine below.

Here, we can sharpen the historical claim: in the aftermath of the civil rights era, the Supreme Court began to limit prisoners' rights, not just by inventing deferential legal standards but also by promoting statist myths about prisons. Just as courts began to recognize that prisoners have constitutional rights, they started making factual assertions about prisons that blunted the force of those rights. Shortly after incorporating the Eighth Amendment and beginning to expound an Eighth Amendment jurisprudence, for example, courts started to describe violence in ways that justified harsh prison conditions. As soon as prisoners possessed First Amendment rights, violence required their restriction. Once prisoners were entitled to petition courts, their illiteracy necessitated a limited right of access. This pattern of rights creation and restriction goes on and on, and each time factual generalizations play a key role in circumscribing prisoners' relationship to the Constitution.

The contradictions in prison law are thus more than a case of imprecise logic. The muddled account of the prison in constitutional law is not just sloppy writing, nor is it an incidental byproduct of case-specific common law reasoning. The incoherence of prison law is a form of selective empiricism that serves a coherent end: it is a powerful, subtle method to keep rights in check. Rather than announcing that prisoners lack rights, courts have recognized prisoners' rights and then employed factual generalizations to diminish their content. This reinforcing relationship between facts and rights has dulled the impact of the prisoners' rights revolution.

### *B. Exceptionalism*

The claim in the previous section was that selective empiricism, like weak legal standards, works to limit prisoners' rights and enable imprisonment. But the real problem is not that prison myths and prison doctrines are both regressive; it is that the faulty empiricism in prison cases stems from the standards the Court has adopted. The doctrine *invites* the incoherence.

To appreciate this dynamic, recall the unusual legal standard the Court announced in *Turner v. Safley*. As Part I outlined, in the 1980s the Supreme Court moved away from traditional constitutional analysis in prison cases — First Amendment doctrines in First Amendment cases, equal protection doctrines in equal protection cases, and so on — in favor of an exceptionalist jurisprudence in which constitutional claims involving prisoners are subject to different, typically weaker legal



tests. Justice Marshall described an early iteration of this phenomenon as the “wholesale abandonment of traditional principles of [constitutional] analysis” in prison cases.<sup>394</sup> This transsubstantive turn reached its apex in *Turner v. Safley*, where the Court introduced a default standard for evaluating constitutional challenges to prison policies. As Justice O’Connor put it in that case, the *Safley* test governs “when a prison regulation impinges on inmates’ constitutional rights.”<sup>395</sup> Part I noted that later Courts have described *Safley* in similarly broad terms, as the “unitary . . . standard for reviewing prisoners’ constitutional claims.”<sup>396</sup>

As we explained above, this formulation is not entirely accurate. *Safley* governs huge swaths of constitutional prison law, but it does not apply to all constitutional claims. Eighth Amendment and procedural due process claims, for instance, are subject to distinct tests and play a significant role in prison reform litigation. But the Court’s tendency toward hyperbole about *Safley* reflects an important point about the standard’s centrality. Although *Safley* is not the only test in constitutional prison law, it is a central one — the baseline way to conceptualize rights claims arising under an array of constitutional provisions. The *Safley* standard is emblematic of the Supreme Court’s transsubstantive understanding of “prisoners’ rights.” As we explained in Part I, the case reflects the emergence of a field in which a person’s status as a prisoner overshadows the particular right he has chosen to assert.

This approach to prisoners’ rights encourages selective mythmaking. By shifting emphasis away from the contours of a constitutional right and toward the institution in which that right is claimed, the *Safley* standard prompts courts to make broad assertions about the “realities” of prison. And by underscoring the need for deference to prison officials, the *Safley* standard more or less ensures that those factual assertions will reflect the government’s version of reality. To be clear, the concern here is not simply that the *Safley* standard is deferential. Rational basis review always lets the government set the terms of a constitutional debate. But the *Safley* standard goes further by requiring courts to consider institutional dynamics, including the relationship between “guards and . . . inmates” and “the allocation of prison resources.”<sup>397</sup> The *Safley* test is an unusually domain-specific, forgiving version of rational basis review, which produces a body of law that is unusually dependent on the government’s depiction of prison life.

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<sup>394</sup> *Jones v. N.C. Prisoners’ Lab. Union, Inc.*, 433 U.S. 119, 141 (1977) (Marshall, J., dissenting). Justice Marshall was speaking here about First Amendment cases involving prisoners. Our claim, elaborated in section I.B, pp. 535–41, is that the same shift occurred across several lines of constitutional prison doctrine.

<sup>395</sup> *Turner v. Safley*, 482 U.S. 78, 89 (1987).

<sup>396</sup> *Shaw v. Murphy*, 532 U.S. 223, 229 (2001).

<sup>397</sup> *Safley*, 482 U.S. at 90.

Moreover, and even more problematically, the standard applies across distinct rights claims. Although *Safley* is exceptionally deferential, the real force of the test lies in its scope. In announcing a default standard for “all circumstances in which the needs of prison administration implicate constitutional rights,”<sup>398</sup> the Supreme Court conflated the many different rights implicated by prison policies. This conceptual move has unmoored the constitutional analysis in prison cases from traditional questions about the values underpinning rights and the stakes of rights infringement. To overstate the point slightly, in modern prison law, the First Amendment starts to look just like the Fourth, Fifth, or Sixth.

The result is massively oversimplified constitutional analysis. We saw this phenomenon above in *McKune v. Lile*, the case in which the Court held that prison officials could require sex offenders to waive their Fifth Amendment rights.<sup>399</sup> As Part II explained, there are good reasons to think that the Fifth Amendment ought to be robust in prison. There are also salient distinctions between freedom from self-incrimination and other constitutional rights. We noted, for instance, that the Fifth Amendment is relatively inexpensive and easy to protect and concerns the legitimacy of incarceration in a way that rights to speech and association do not. When faced with a prison policy requiring the admission of guilt, the Supreme Court could have explored these distinctions and explained how a prison sentence affects a person’s right to invoke Fifth Amendment rights.<sup>400</sup> Instead, the Court relied on *Safley* to conclude that the right could be infringed.

The flimsy analysis in *Lile* exemplifies the broader problem with transsubstantive prison law. Rights like association, speech, freedom from self-incrimination, and privacy are different from one another. They are animated by specific values; they are shaped by legal histories; they serve particular functions in a democratic society; they play distinct roles in the criminal legal system; and there are different costs and practical realities to their implementation in a prison setting. Typically, these sorts of distinctions matter to constitutional analysis. But in prison law, they recede.

Attending to the differences between prisoners’ rights would force a more refined constitutional inquiry — which would, in turn, generate a

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<sup>398</sup> *Washington v. Harper*, 494 U.S. 210, 224 (1990) (citing *Safley*, 482 U.S. at 85) (“[The principles announced in *Safley*] apply in all cases in which a prisoner asserts that a prison regulation violates the Constitution, not just those in which the prisoner invokes the First Amendment.”).

<sup>399</sup> See *McKune v. Lile*, 536 U.S. 24, 29 (2002) (plurality opinion).

<sup>400</sup> As the invocation of “a right to have rights” suggests, the implicit question here is whether prisoners remain part of the nation-state or are in some important sense rendered stateless upon conviction. See HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 295–96 (Harcourt Brace Jovanovich 1968) (1951) (noting that the right to have rights distinguishes citizens from refugees). Questions about prisoners’ entitlement to rights also implicate classic legal debates about how to read the Bill of Rights. See, e.g., AMAR, *supra* note 374; Seidman, *supra* note 374, at 2281–82 (discussing “criminal procedure liberalism”).

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richer prison jurisprudence. Constitutional prison law raises a series of thorny first-order questions about how imprisonment alters a person's claim to rights. For example, courts must determine which rights survive incarceration and which (if any) are forfeited upon conviction. When prisoners retain rights, courts have to explain how those rights can be operationalized in a prison setting. As the previous section noted, courts also have to decide whether imprisonment creates new rights, such as affirmative rights to safety, housing, and healthcare.

Each of these inquiries requires a theory about the constitutional implications of criminality — that is, a view on whether the Bill of Rights is meant to shield guilty people from state abuses or merely to police the distinction between innocence and guilt.<sup>401</sup> Determining the proper scope of prisoners' rights also requires a basic understanding of how prisons work. For even if a person is in theory entitled to a right, there remains a practical question about whether the exercise of that right is *possible* in prison. The Supreme Court has called this the question of whether a right is “inconsistent” with incarceration.<sup>402</sup>

One would expect the answers to these questions to hinge on the right at issue — on its text, history, purpose, and the values it is meant to protect. And one would imagine that the result of such right-specific analysis would be a varied body of constitutional law in which some rights (like the right to travel or bear arms) are forfeited in prison, some (like liberty or privacy) are diminished, others (like freedom from self-incrimination) enjoy their full force, and still others (like a right to free healthcare) attach by virtue of incarceration. In other words, in a world where rights were sufficiently distinct, courts would have to develop a working theory about which rights belong in prison and a set of doctrines tailored to each right a prisoner claimed.

In practice, this sort of right-specific analysis would limit courts' reliance on prison myths. The selective empiricism in prison cases stems from the looseness and imperialism of the *Safley* standard, which obscures the right at issue. *Safley* creates a kind of legal void, which courts fill with blunt proclamations about prison life. Bringing the particularity of rights — their histories and functions and benefits and costs — back into prison law would curb this trend. Of course, it would still matter that the right was asserted inside a prison, where daily life inevitably looks different from nonprison settings. But in determining the contours of prisoners' rights, the fact of imprisonment would be evaluated alongside an account of that right's role in the American constitutional order, which would make selective generalizations about prison less distorting. Put differently, the regressive mythmaking that defines

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<sup>401</sup> See, e.g., AMAR, *supra* note 374, at 3; Seidman, *supra* note 374, at 2282.

<sup>402</sup> Pell v. Procunier, 417 U.S. 817, 822 (1974); see also Overton v. Bazzetta, 539 U.S. 126, 131 (2003) (in a similar formulation, asking if the right is “compatible with incarceration”).

modern prison cases is possible only because prison law is so disconnected from the particularity of constitutional rights.

The *Safley* standard — and here we really mean the conceptual approach to prisoners' rights that the test represents — thus stunts prison law and ensures the field's incoherence. While constitutional prison law contains some right-specific doctrines,<sup>403</sup> the *Safley* standard means that courts all too rarely grapple with distinctions between rights and have yet to offer anything approaching a comprehensive theory of punishment to explain why prisoners must give up certain rights in order to be adequately sanctioned for committing a crime. Paradoxically, then, abandoning the “unitary”<sup>404</sup> standard for prisoners' rights would produce a much more unified prisoners' rights jurisprudence.

This proposal might seem unduly ambitious given how entrenched *Safley* has become over the last thirty-five years. There is a reason we describe the standard as a kind of judicial worldview, a basic way of conceptualizing “the problem” of prisoners' rights. But a right-specific approach to prison law is not especially radical. As a matter of history, we are simply calling for a return to prison law's roots, to the pre-*Safley* era when courts were beginning to develop a more nuanced body of prisoners' rights doctrine. And as a matter of current doctrine, prison law already admits of some particularity. Part I described *Johnson v. California*, the case in which the Court applied strict scrutiny to California's racially segregated prisons,<sup>405</sup> and Part II mentioned RLUIPA cases where the Court has been more protective of prisoners' religious rights.<sup>406</sup> A richer body of prison law would be filled with cases like these.

It may be difficult to imagine the doctrine taking a turn toward nuance in a field concerned with criminal convictions and custodial institutions. Prison law regulates the government's treatment of disfavored groups in unusual places, so it is hardly surprising that the Court has embraced an exceptionalist jurisprudence. But to gain a measure of optimism, one need look no further than preconviction criminal procedure. As Part I pointed out, the constitutional law of policing is highly detailed — filled with detailed analysis of just how long police can use a GPS device to track a suspect's car<sup>407</sup> or the precise point on a driveway where the “curtilage” of a home begins.<sup>408</sup> These policing doctrines

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<sup>403</sup> Eighth Amendment jurisprudence, for instance, generates many of the positive rights to safety and healthcare that prisoners possess.

<sup>404</sup> *Shaw v. Murphy*, 532 U.S. 223, 229 (2001).

<sup>405</sup> See *Johnson v. California*, 543 U.S. 499, 509 (2005).

<sup>406</sup> See cases cited *supra* note 361.

<sup>407</sup> See *United States v. Jones*, 565 U.S. 400, 412–13 (2012).

<sup>408</sup> *Collins v. Virginia*, 138 S. Ct. 1663, 1670–71 (2018).

do not offer sufficient protection from abuses of state power, but they do exemplify a more refined, provision-specific constitutional analysis.

So, too, does the constitutional law of schools. Like prisons, schools are places where unusual constitutional rules apply and courts worry about safety and institutional expertise.<sup>409</sup> But those concerns have not prevented the Supreme Court from developing an array of specific doctrines for students. In the Fourth Amendment context, students have limited but not completely meaningless protection from unreasonable searches.<sup>410</sup> In the First Amendment context, students have a weaker right to free speech than adults,<sup>411</sup> but heightened protection from Establishment Clause violations.<sup>412</sup> In schools, constitutional rights are distinct — sometimes weakened, sometimes amplified, but in each case altered based on a theory of the particular right at issue.

These examples suggest that courts are perfectly capable of refined, right-specific jurisprudence, even when dealing with constitutional criminal procedure and exceptional institutions. To be sure, courts may simply be unwilling to treat prisoners the way they do students and people who enjoy the presumption of innocence. But it is worth remembering that preconviction criminal procedure is built from “bad” cases in which, for example, defendants confessed or had incriminating evidence to suppress.<sup>413</sup> And in any event, the basic point here is not that the doctrine will be nicer to prisoners if courts distinguish rights. It is that prison law would be more defensible if it emanated from a right-sensitive theory about the constitutional implications of a criminal conviction.

To be clear, we are not calling for the end of prison law. Because the transsubstantive conception of prisoners’ civil rights in some sense unifies the field, it is easy to understand the critique of *Safley* as a critique of prison law’s very existence. Abandon *Safley*, the argument would go, and indeed abandon prison law altogether. Rights are rights, no matter where they arise.

But that argument takes the claim too far. The problem with prison law is not that prisoners’ constitutional rights are unusual. It would be fanatical to contend that rights must look exactly the same in prisons as

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<sup>409</sup> See Kaufman, *supra* note 160, at 210–11 (comparing prisons and schools).

<sup>410</sup> See *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985) (holding that school searches require “reasonable suspicion” of criminal activity rather than “probable cause”).

<sup>411</sup> See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969) (holding that student speech can be restricted if officials can “reasonably . . . forecast [that it will cause a] substantial disruption of or material interference with school activities”).

<sup>412</sup> Compare *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301 (2000) (invalidating student-led prayer before football games), and *Lee v. Weisman*, 505 U.S. 577, 586 (1992) (invalidating prayer before a graduation ceremony), with *Town of Greece v. Galloway*, 572 U.S. 565, 569–70 (2014) (upholding prayer before a town meeting), and *Marsh v. Chambers*, 463 U.S. 783, 786 (1983) (permitting prayer before state legislature sessions). See also DRIVER, *supra* note 52, at 362–63; James E. Ryan, *The Supreme Court and Public Schools*, 86 VA. L. REV. 1335, 1338–39 (2000).

<sup>413</sup> See, e.g., *United States v. Jones*, 565 U.S. 400, 403 (2012).

they do in the outside world. Instead, the concern is that prisoners' rights are insufficiently distinct from one another and that prison law lacks a compelling (or really even a minimal) theory about why certain rights should change or stay the same behind bars. The plea, in other words, is for an *even more distinct* body of constitutional law built on domain-specific and right-specific analysis of how imprisonment alters constitutional guarantees. Constitutional prison law should be exceptional — but not because it is extrajudicial and chronically imprecise. The field exists and matters because punishment is an exceptional act of state power, one that limits, amplifies, and triggers new claims to rights.

### C. *Empiricism*

Finally, it almost goes without saying that courts know too little about American penal institutions. It is striking how many of the core assertions in the cases surveyed in Part II are empirical and testable. Are prisons violent? Can prisoners read? Does drug use increase when prisoners have visits or advance notice of cell searches? Do vocational programs lower recidivism?

There are entire bodies of scholarship dedicated to answering such questions.<sup>414</sup> That research yields detailed, sometimes surprising information about the institutional dynamics of prison life. Violence, for instance, varies across penal institutions<sup>415</sup> and tends to track factors like facility design<sup>416</sup> and prisoners' age<sup>417</sup> but not metrics one might predict — and courts sometimes cite — such as rates of crowding.<sup>418</sup> Rates of prison violence also change across time, and most studies suggest a steep

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<sup>414</sup> Serious sociological examination of prison violence dates back to (at least) 1940, when Donald Clemmer published *The Prison Community*. See, e.g., Richard C. McCorkle, Terance D. Miethe & Kriss A. Drass, *The Roots of Prison Violence: A Test of the Deprivation, Management, and "Not-So-Total" Institution Models*, 41 CRIME & DELINQ. 317, 319–321 (1995) (surveying empirical literature on the causes of prison violence); John Wooldredge, *Prison Culture, Management, and In-Prison Violence*, 3 ANN. REV. CRIMINOLOGY 165, 168–173 (2020) (reviewing empirical research on prison violence between 1937 and 2019).

<sup>415</sup> See SKLANSKY, *supra* note 208, at 187 (reviewing evidence that “both fatal and nonfatal” prison violence varies over time and between penal institutions).

<sup>416</sup> See John Wooldredge & Benjamin Steiner, *A Bi-level Framework for Understanding Prisoner Victimization*, 30 J. QUANTITATIVE CRIMINOLOGY 141, 155–56 (2014) (examining the effect of prison architectural design on violence).

<sup>417</sup> See Benjamin Steiner, H. Daniel Butler & Jared M. Ellison, *Causes and Correlates of Prison Inmate Misconduct: A Systematic Review of the Evidence*, 42 J. CRIM. JUST. 462, 465 (2014).

<sup>418</sup> See Lisa Gadon, Lorraine Johnstone & David Cooke, *Situational Variables and Institutional Violence: A Systematic Review of the Literature*, 26 CLINICAL PSYCH. REV. 515, 525–26 (2006); Benjamin Steiner, *Assessing Static and Dynamic Influences on Inmate Violence Levels*, 55 CRIME & DELINQ. 134, 153 (2009).

decline since the 1980s, when courts created many of the governing doctrines in prison law.<sup>419</sup> Meanwhile, the federal government collects statistics on prisoners' literacy,<sup>420</sup> and scholars have examined prison programs' effect on both recidivism and institutional order.<sup>421</sup>

This research barely dents constitutional prison law. Contrast this antiempiricism to more developed disciplines like antitrust, administrative law, or election law, where judges devote lengthy opinions to competing methods of data collection and technical debates over everything from seatbelt safety and vote dilution to the temperature requirements for properly cured whitefish.<sup>422</sup> Given the vast sociological literature on prisons and the half century that has passed since courts first ventured into penal institutions, one could expect a much more sophisticated field.

This problem is most pronounced in appellate court opinions. As Part I noted, there is a long tradition of district court engagement in the minutiae of prison life once a remedy has been ordered.<sup>423</sup> When lower courts impose and oversee consent decrees, they develop greater familiarity with prison management.<sup>424</sup> But as the previous section explained, the governing doctrine in constitutional prison law is remarkably crude.

One could imagine a prison jurisprudence in which — in addition to distinguishing constitutional rights — courts created legal standards

<sup>419</sup> See, e.g., SKLANSKY, *supra* note 208, at 187 (“The prison homicide rate thus appears to have roughly doubled in recent years, but it remains about 90 percent lower than it was a quarter century ago. Moreover, it is not dramatically different from the general homicide rate in the United States . . . .”); Robert Johnson, Ann Marie Rocheleau & Esther Matthews, *Prison Violence*, in ROUTLEDGE HANDBOOK ON AMERICAN PRISONS 161, 168 (Laurie A. Gould & John J. Brent eds., 2021); Bert Useem & Anne M. Piehl, *Prison Buildup and Disorder*, 8 PUNISHMENT & SOC’Y 87, 91–92, 95–97 (2006); CHRISTOPHER J. MUMOLA, U.S. DEP’T OF JUST., SUICIDE AND HOMICIDE IN STATE PRISONS AND LOCAL JAILS 1 (2005), <https://bjs.ojp.gov/content/pub/pdf/shsplj.pdf> [<https://perma.cc/A5ZQ-KS7S>].

<sup>420</sup> See NAT’L CTR. FOR EDUC. STAT., U.S. DEP’T OF EDUC., LITERACY BEHIND PRISON WALLS (1994), <https://nces.ed.gov/pubs94/94102.pdf> [<https://perma.cc/R9N8-LRN8>].

<sup>421</sup> See, e.g., GRANT DUWE, NAT’L INST. OF JUST., U.S. DEP’T OF JUST., THE USE AND IMPACT OF CORRECTIONAL PROGRAMMING FOR INMATES ON PRE- AND POST-RELEASE OUTCOMES 22 (2017), <https://www.ojp.gov/pdffiles1/nij/250476.pdf> [<https://perma.cc/A2S9-4TSA>]; Cassandra A. Atkin-Plunk & Gaylene S. Armstrong, *Disentangling the Relationship Between Social Ties, Prison Visitation, and Recidivism*, 45 CRIM. JUST. & BEHAV. 1507, 1509–11 (2018) (reviewing empirical literature and using longitudinal data to examine the relationship between prison visits and recidivism).

<sup>422</sup> These are only a few of the better-known examples one might select. See *Dep’t of Com. v. New York*, 139 S. Ct. 2551, 2587–92 (2019) (Breyer, J., concurring in part and dissenting in part) (census data collection); *Thornburg v. Gingles*, 478 U.S. 30, 55–61 (1986) (vote dilution); *Motor Vehicle Mfrs. Ass’n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 46–57 (1983) (seatbelt safety); *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 250–51 (2d Cir. 1977) (whitefish).

<sup>423</sup> See, e.g., *Ruiz v. Estelle*, 503 F. Supp. 1265, 1277–1377 (S.D. Tex. 1980) (discussing findings of fact on overcrowding, security, healthcare, segregation, fire safety, sanitation, and work safety), *aff’d in part and rev’d in part*, 679 F.2d 1115 (5th Cir. 1982), *amended in part and vacated in part*, 688 F.2d 266 (5th Cir. 1982).

<sup>424</sup> See, e.g., *id.* at 1385–91.

sensitive to prison realities. Appellate courts could, for instance, develop standards pegged to prison security classifications, the rates of violence in penal institutions, prisoner-to-staff ratios, or trends in prisoner demography. Imagine if courts used different tests to evaluate policies in low-security prisons, or better yet, in particular prisons with records of safe custody. Judges could also tailor legal standards to prioritize rights that have the greatest effect on prison life (such as visitation) rather than employing the usual categories of constitutional law, which are insensitive to the distinctive dynamics of total institutions.<sup>425</sup> And courts could use data to revisit longstanding assumptions — for example, the belief that prisoners incarcerated for the most serious offenses are the most dangerous — and to offer a far more nuanced account of the way that penal policies affect prison violence and prisoners' lives after release. These are only a handful of the many innovations that a thicker understanding of prisons could generate.

Of course, federal judges are legal generalists, not prison sociologists. The Supreme Court often emphasizes this point to distance itself from prison policymaking. In *Procunier v. Martinez*,<sup>426</sup> Justice Powell disclaimed knowledge of penal institutions, writing that the “problems of prisons in America . . . require expertise” that lies “peculiarly within the province of the legislative and executive branches of government.”<sup>427</sup> Justice Thomas sounded an even bolder note in *Lewis v. Casey*, where he argued that judges lack the “institutional expertise” to make “*uniquely nonjudicial* decisions” about prison policy.<sup>428</sup> More recently, Justice Breyer underscored that courts owe “substantial deference to the professional judgment of prison administrators.”<sup>429</sup> In each of these examples, the Supreme Court suggests that prisons are foreign spaces best managed by either wardens or politicians.

There are several problems with this conceptual move. First, prisons are not foreign to federal courts. Particularly when cases reach the Supreme Court, constitutional prison litigation often involves extensive briefing on topics like violence, “racial subcultures,” and literacy rates.<sup>430</sup> The Supreme Court has this information when it evaluates

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<sup>425</sup> See ERVING GOFFMAN, *ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES* 4–5 (Aldine Publ'g Co. 1968) (1961) (popularizing the term “total institution”).

<sup>426</sup> 416 U.S. 396 (1974), *overruled by* *Thornburgh v. Abbott*, 490 U.S. 401 (1989).

<sup>427</sup> *Id.* at 404–05.

<sup>428</sup> *Lewis v. Casey*, 518 U.S. 343, 388 (1996) (Thomas, J., concurring) (emphasis added).

<sup>429</sup> *Beard v. Banks*, 548 U.S. 521, 525 (2006) (plurality opinion) (quoting *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003)).

<sup>430</sup> See, e.g., Brief of the States of Utah, Alabama, Alaska, Delaware, Idaho, Nevada, New Hampshire and North Dakota as Amici Curiae in Support of Respondent at 16–20, *Johnson v. California*, 543 U.S. 499 (2005) (No. 03-636) (surveying studies on race relations and violence in prison); Amicus Curiae Brief of the States of Colorado, Alabama, Florida, Georgia, Idaho, Etc. in



prisoners' rights, and where data is lacking, the judiciary is uniquely positioned to obtain it. As we pointed out in Part II, one of the primary barriers to prison research is that information on prisons can be prohibitively difficult to obtain — fiercely guarded by corrections officials, often in the name of privacy rights. This impediment diminishes when courts are at the helm.

To be sure, prison officials themselves sometimes lack information on imprisonment. Corrections stands out from other domains of criminal law enforcement — think large police departments that rely on tools like Compstat<sup>431</sup> — for its relatively thin approach to data. Though the field has professionalized and taken a decidedly managerial turn in the last thirty years,<sup>432</sup> it remains the case that prison managers rely less on data than their counterparts in the preconviction criminal legal system. This resistance to empiricism may in some sense be a virtue — the critique of managerialism in policing is pointed<sup>433</sup> — but, when it comes to transparency, it translates to a field in which prison managers can claim expertise without generating or sharing information about the institutions they run. This dynamic makes courts' reflexive deference to prison officials more problematic. Indeed, it suggests that deference to experts may be thwarting the development of expertise.

When courts defer to the experts, moreover, it is not as if they then say *nothing* about prison life. After disclaiming knowledge of prisons, too many Supreme Court opinions import salacious ideas about prisoners from popular culture. In *Brown v. Plata*,<sup>434</sup> to offer one vivid example, Justice Scalia described California's prisoners as "fine physical specimens who have developed intimidating muscles pumping iron in the prison gym."<sup>435</sup> Invocation of this stereotype was especially ironic because California had recently done "away with weights," a development that incarcerated writer Kenneth Hartman called "an unimaginable deprivation" more psychologically destructive than "the loss of conjugal

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Support of Petitioners at 14–17, *Bazzetta*, 539 U.S. 126 (2003) (No. 02-94) (discussing the "complexity" of illiteracy, *id.* at 15 (quoting U.S. DEP'T OF EDUC., LITERACY BEHIND PRISON WALLS, NCES 1994-102, xvii (1994)), and describing studies on prisoners' writing capacities).

<sup>431</sup> Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 631 (2014) (noting that the term "CompStat" describes a suite of "organizational and managerial tools to gather [crime data]," which are "in turn used to restructure police administration"). For a searing critique of CompStat, see *The Wire, Season Three* (HBO television broadcast Sept. 19–Dec. 19, 2004).

<sup>432</sup> See Feeley & Simon, *supra* note 381, at 449, 452–53 (describing a "new penology" premised on classification and other actuarial management techniques).

<sup>433</sup> See, e.g., Kohler-Hausmann, *supra* note 431, at 689–90 (noting that managerialism is a tool of racialized social control).

<sup>434</sup> 563 U.S. 493 (2011).

<sup>435</sup> *Id.* at 554 (Scalia, J., dissenting).

visits.”<sup>436</sup> In his memoir *Mother California*, Hartman explains that California prison officials removed “the iron pile” to prevent prisoners from “paroling too big,” a fear driven by “more than a bit of the barbarian myth.”<sup>437</sup> Piper Kerman, whose memoir inspired the television show *Orange Is the New Black*, argues that language like Justice Scalia’s legitimates imprisonment. The “popular image of prison, *Oz* and *Cops*, is very narrow — and intended to justify the strengths of the prison system and its out-of-control growth,” Kerman contends.<sup>438</sup> “If everyone in prison is an uncontrollable and irredeemably violent person, then it’s totally justified to have a massive . . . prison system because, you know, public safety at any cost.”<sup>439</sup>

The other, deeper problem with courts’ claims to ignorance is that prisons are not a standard case for anxiety about the separation of powers. At its core, the antiempiricism of prison law is an argument about the impropriety of judicial policymaking. But prisons are unlike other domains that courts regulate because they are institutions that *judges themselves* fill with people. Prisons are distinct from corporations or cities or even public schools — which is to say, from other well-known sites of judicial intervention — because they are part of the criminal legal system, made possible only because judges impose prison sentences. Given the judiciary’s role in the creation of the prison population, it is odd that courts seem to know so little about the inner workings of American penal institutions. Eugene Debs, the Socialist candidate for President who served time for organizing the Pullman Strike,<sup>440</sup> made a similar observation in his prison memoir. In 1927, Debs wrote: “It is a pity indeed that the judge who puts a man in the penitentiary does not know what a penitentiary is.”<sup>441</sup> Nearly one century later, the critique still stings.

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<sup>436</sup> KENNETH E. HARTMAN, *MOTHER CALIFORNIA: A STORY OF REDEMPTION BEHIND BARS* 163 (2009). Many prisoners have attested to the great importance that weightlifting assumes behind bars. See, e.g., SMITH, *supra* note 339, at 152 (“The weight pile at Manchester [federal prison in Kentucky], as at other prisons, was revered above any other prison activity.”); *id.* at 173–74 (connecting weightlifting to improving prisoners’ self-esteem); Sharon Dolovich, *Two Models of the Prison: Accidental Humanity and Hypermasculinity in the L.A. County Jail*, 102 J. CRIM. L. & CRIMINOLOGY 965, 999 n.142 (2012) (citing Hartman’s memoir and discussing masculinity norms in a California jail).

<sup>437</sup> HARTMAN, *supra* note 436, at 163–64.

<sup>438</sup> PIPER KERMAN, *ORANGE IS THE NEW BLACK: MY YEAR IN A WOMEN’S PRISON* 319 (2010).

<sup>439</sup> *Id.*

<sup>440</sup> That well-known strike brought rail transportation in the West to a halt for more than a month. See Jill Lepore, *Eugene V. Debs and the Endurance of Socialism*, NEW YORKER (Feb. 11, 2019), <https://www.newyorker.com/magazine/2019/02/18/eugene-v-debs-and-the-endurance-of-socialism> [<https://perma.cc/Z833-UQZP>].

<sup>441</sup> DEBS, *supra* note 1, at 242.

Some judges have recognized these concerns. In the 1970s, Chief Justice Burger became a staunch proponent of prison visits (though he remained skeptical of judicial intervention into prison management).<sup>442</sup> In February 1970, Chief Justice Burger called on judges and lawyers to go into prisons, noting that “[a] visit to most prisons will make you a zealot for prison reform.”<sup>443</sup> Former New York Chief Judge Sol Wachtler echoed that argument twenty-five years later, after he was released from a fifteen-month prison sentence. “My colleagues and I should have done more to learn just what being placed in solitary confinement really means,” Wachtler wrote in his memoir.<sup>444</sup> “I am not saying that judges should have to suffer imprisonment to properly understand the dimension and effect of punishment, but they would all do well to make an effort to learn more about that which they are writing and deciding.”<sup>445</sup> Justice Kennedy has also expressed dismay that “[p]risoners are shut away — out of sight, out of mind.”<sup>446</sup> Toward the end of his tenure on the Supreme Court, Justice Kennedy complained that there is “no accepted mechanism” for judges to take prison conditions into account at sentencing and that courts focus too much on adjudicating guilt and too little on “what comes next.”<sup>447</sup> Such public self-reflection among jurists is, however, all too rare. For the most part, appellate judges remain underinformed about penal institutions and wedded to dated myths about prisoners. This shortcoming extends to the executive branch — President Obama was the first sitting President to visit a prison<sup>448</sup> — and to Congress, where federal legislation on prison conditions is highly unusual.<sup>449</sup>

<sup>442</sup> See Burger, *supra* note 238, at 21.

<sup>443</sup> *Id.*

<sup>444</sup> WACHTLER, *supra* note 291, at 31.

<sup>445</sup> *Id.*

<sup>446</sup> *Davis v. Ayala*, 576 U.S. 257, 288 (2015) (Kennedy, J., concurring). Justice Kennedy has condemned solitary confinement in particular. See, e.g., The Editorial Board, *Justice Kennedy on Solitary Confinement*, N.Y. TIMES (June 19, 2015), <https://www.nytimes.com/2015/06/20/opinion/justice-kennedy-on-solitary-confinement.html> [<https://perma.cc/4GRD-9HF3>]; Daniel Epps, *Justice Kennedy's Extraordinary Solo Opinion on Solitary Confinement*, CASETEXT (June 20, 2015), <https://casetext.com/analysis/justice-kennedys-extraordinary-solo-opinion-on-solitary-confinement> [<https://perma.cc/Q2QS-Y7ER>]; *Justice Kennedy Condemns Solitary Confinement*, EQUAL JUST. INITIATIVE (June 26, 2015), <https://eji.org/news/justice-kennedy-condemns-solitary-confinement> [<https://perma.cc/T43V-VSS8>].

<sup>447</sup> *Davis*, 576 U.S. at 288.

<sup>448</sup> See Scott Horsley, *Obama Visits Federal Prison, A First for a Sitting President*, NPR (July 16, 2015, 5:27 PM), <https://www.npr.org/sections/itsallpolitics/2015/07/16/423612441/obama-visits-federal-prison-a-first-for-a-sitting-president> [<https://perma.cc/8MS8-R5L5>].

<sup>449</sup> The First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (codified in scattered sections of 18 U.S.C. and 34 U.S.C.), which effected modest sentencing reforms, has been called the “most substantial criminal justice reform legislation in a generation.” Tim Lau, *Historic Criminal Justice Reforms Begin to Take Effect*, BRENNAN CTR. FOR JUST. (July 25, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/historic-criminal-justice-reforms-begin-take-effect> [<https://perma.cc/E43C-G29N>]. The most significant prison conditions legislation in the last several

Prisons are also largely absent from American law school curricula.<sup>450</sup> While substantive criminal law is a standard first-year course, few doctrinal classes address prisons, and when they do — for example in courses on constitutional law or federal courts — the fact of imprisonment is often ancillary to the lesson. Criminal procedure, meanwhile, is understood as the body of constitutional law that governs policing and criminal trials, not prisoners' rights or postconviction remedies.<sup>451</sup> When prisons do surface in the law school classroom, it is most often in discussions of structural trends rather than specific doctrines or the granular rules of prison life.<sup>452</sup> The cumulative result of these pedagogical choices is that thousands of students go to law school to learn about the criminal justice system and graduate without an education in constitutional prison law. As Justice Kennedy put the point: "In law school, I never heard about corrections . . . . Doctors and psychiatrists know more about the corrections system than [lawyers] do."<sup>453</sup> This concern persists six decades after Justice Kennedy graduated from Harvard Law School.

The cure for these problems is exposure to American penal institutions. Our claim is not that better empiricism will necessarily produce more humane prison law. Given the critique we laid out above, it is fair to wonder whether better-informed courts would simply employ more facts to the same, statist ends.

There is some reason to believe that this fear is overstated. Although prison law is filled with selective empiricism, prison cases have occasionally demonstrated the possibility that a richer understanding of the facts of prison life could redound to the benefit of prisoners' rights. In *Hudson v. Palmer*, for example, Justice Stevens rejected Chief Justice Burger's conclusion — "the Fourth Amendment has no applicability to a prison cell"<sup>454</sup> — on the ground that prisons are neither uniformly nor unusually violent.<sup>455</sup> "To justify its [holding]," Justice Stevens wrote, "the Court recites statistics concerning the number of crimes that occur within prisons."<sup>456</sup> But after doing the math, Justice Stevens explained, "the prison homicide rate [turns out to be] significantly lower than that in many of our major cities."<sup>457</sup> Justice Stevens went on to critique the

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decades was probably the Prison Rape Elimination Act of 2003, 42 U.S.C. §§ 15601–15609. And in 2000, Congress enacted RLUIPA, which protects prisoners' religious practices. 42 U.S.C. § 2000cc-1.

<sup>450</sup> See Sharon Dolovich, *Teaching Prison Law*, 62 J. LEGAL EDUC. 218, 218 (2012).

<sup>451</sup> See *id.*

<sup>452</sup> See, e.g., *id.* at 226.

<sup>453</sup> MONTROSS, *supra* note 338, at 13.

<sup>454</sup> 468 U.S. 517, 536 (1984).

<sup>455</sup> See *id.* at 553–54 (Stevens, J., concurring in part and dissenting in part).

<sup>456</sup> *Id.* at 552.

<sup>457</sup> *Id.* at 553.

“Court’s hypothesis that all prisoners fit into a violent, incorrigible stereotype,” noting “thousands upon thousands of former prisoners” do not recidivate.<sup>458</sup> This critique did not sway Chief Justice Burger, and opinions like these are too rare. But Justice Stevens’s approach to data in *Palmer* suggests that empiricism could curb statism if the Court took the project seriously.

The real point, though, is that courts should care about the facts of imprisonment. Even if a turn toward empiricism is unlikely, it is worth imagining what an informed prison law would look like. On some level, legal scholars invariably believe that the Supreme Court misunderstands — or just plain misses — the intricacies of their chosen field. But the antiempiricism of prison law is especially pronounced, and indefensible given that courts sentence people to prison time. Refusing to understand prisons while populating them is more than strange. It is an act of willful ignorance that stunts the law, mythologizes the prison, and encourages our collective reliance on penal institutions.

#### CONCLUSION

The preceding pages have catalogued many problems with prison cases. Yet in the end, one might ask whether it is worth fixing prison law. A call to clarify constitutional doctrines may feel dated in an era when many legal academics are skeptical about the value of constitutional rights and courts’ ability to protect disfavored groups.<sup>459</sup> And an article focused on law might seem too narrow for a moment of profound social unrest, when the country is talking seriously about how to end mass incarceration.

We believe neither that courts are omnipotent nor that judges are best positioned to lead efforts to transform American prisons. Law produced by courts is seldom the ideal method of producing social change. We are certain, though, that law matters inside prisons. Over the past half century, courts have reformed American penal institutions — not alone, and not fast enough, but in concrete and significant ways.<sup>460</sup> Today, legal doctrines influence the most intimate parts of prisoners’ lives, from whether they can see their children’s faces to how often they must reveal their naked bodies to prison staff. As prisoners have emphasized, doctrines make a real difference to the millions of people subjected to prison law.<sup>461</sup>

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<sup>458</sup> *Id.*

<sup>459</sup> See Driver, *supra* note 380, at 2621 (discussing rights skepticism); Kaufman, *supra* note 160, at 187–88 (same).

<sup>460</sup> See generally FEELEY & RUBIN, *supra* note 53; RIDEAU, *supra* note 41.

<sup>461</sup> See, e.g., RIDEAU, *supra* note 41, at 227; WOODFOX, *supra* note 42, at 122–25.

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And the deficiencies of prison law are a reflection of the society that tolerates them. In 1970, at the dawn of judicial intervention into prisons, Chief Justice Burger stated: “[W]hen a sheriff or a marshal[] takes a man from the courthouse in a prison van and transports him to confinement for two or three or ten years, *this is our act*. We have tolled the bell for him. And whether we like it or not, we have made him our collective responsibility.”<sup>462</sup> Or as Jack Henry Abbott wrote in *In the Belly of the Beast*: “[W]e assert our rights the only way we can. . . . [I]n the end I greatly fear we as prisoners will lose — but the loss will be society’s loss. We are only a few steps removed from society. After us, comes you.”<sup>463</sup>

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<sup>462</sup> Burger, *supra* note 238, at 17.

<sup>463</sup> ABBOTT, *supra* note 325, at 21.