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How Prisoners' Rights Lawyers Do Vital Work Despite the Courts (Symposium Keynote)

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SYMPOSIUM KEYNOTE

HOW PRISONERS' RIGHTS LAWYERS DO VITAL WORK DESPITE THE COURTS

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Thanks to Professor Sisk and to the symposium organizers for inviting me to speak to you today. It is an honor to be here. I also want to thank Dean Vischer for his thoughtful remarks. As you'll see, Dean Vischer and I are very much on the same page about the appropriate treatment of people in custody and what this treatment says about American political society as a whole.

The topic of this gathering is Prisoner Rights and Prison Conditions, and our purpose is to celebrate the 10th anniversary of the University of St. Thomas Ninth Circuit Appellate Clinic. Under the guidance of Professor Gregory Sisk, this clinic has, for the past decade, represented people in prison on their civil rights claims. I have no doubt that this has been a personally meaningful experience for those students fortunate enough to have participated. Certainly, those who do this work full time find it to be so. For more than two decades, I've been closely connected with the national prisoners'[1] advocates community, watching, admiring, and learning from people who have dedicated their professional lives to representing people in custody. And it is obvious to me that those who work in this field are driven by a profound sense of personal mission and derive deep satis-

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1. In my remarks, I will at times refer to incarcerated people as "prisoners," a term that squarely acknowledges the "extraordinary and dehumanizing exercise of state power known as imprisonment," Justin Driver & Emma Kaufman, *The Incoherence of Prison Law*, 135 HARV. L. REV. 515, 525 (2021), and foregrounds the experience of being held against one's will with no power to shape one's own conditions of life. *See also* Paul Wright, *Language Matters: Why We Use the Words We Do*, 32 PRISON LEGAL NEWS 18 (2021), https://www.prisonlegalnews.org/news/2021/nov/1/language-matters-why-we-use-words-we-do/ ("[When people are incarcerated, they] are forced into cages at gun point and kept there upon pain of death should they try to leave. What are they if not prisoners? They did not somehow magically appear there and they stay there based on violence and fear of violence.").

faction from advocating on behalf of a group that society so often regards as undeserving of humane treatment. This sense of meaning and purpose helps explain why, on a personal level, many lawyers commit to doing prisoners' rights work professionally and why so many stick with it for decades.

Still, if we're being honest, there is ample reason to wonder whether, after all, this work even matters. In the prison law context, even when civil rights claims are strong on the merits, incarcerated litigants will lose most of the time. If they have lawyers, people bringing cases from prison certainly win more often than those who go pro se, but they still mostly lose.[2] And even when lawyers win on behalf of their incarcerated clients, things don't tend to change on the ground as much as they should. This being so, we shouldn't be surprised if those who advocate on behalf of people in custody sometimes wonder: what good, after all, am I doing?

In fact, prisoners' rights lawyers do an enormous amount of good, even when they lose and despite how unfriendly the federal courts are to claims brought from prison. What I want to do here is to begin to make this case—to argue for the indispensability of legal advocacy on behalf of people in custody notwithstanding the state of play in the courts. My main goal is to make clear just how vital this work is for incarcerated people and their families and loved ones; for society as a whole; and even, I will argue, for enhancing the promise of constitutional democracy itself.

Before I can make this case, I need first to say a little about the landscape of prison law and what makes it so hard in most instances for incarcerated plaintiffs to prevail. Simply put, prison law doctrine is stacked a mile high against plaintiffs. For one thing, there are innumerable procedural obstacles to bringing conditions claims, including many for which we have the PLRA (Prison Litigation Reform Act) to thank: the exhaustion requirement, the physical injury requirement, the three strikes provision for *in forma pauperis* petitions, the drastic limits on attorney's fees, and so on.[3] And then there are the doctrines governing the merits, which are extremely defendant friendly and which offer plaintiffs only the narrowest of pathways to success.[4] Between *Farmer v. Brennan*'s deliberate indifference

2. *See* Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1610 (2003) ("Among cases terminated in 2000, counseled cases were three times as likely as pro se cases to have recorded settlements, two-thirds more likely to go to trial, and two-and-a-half times as likely to end in a plaintiff's victory at trial.").

3. *See* 42 U.S.C. § 1997e(a) (exhaustion requirement); 42 U.S.C. § 1997e(e) (physical injury requirement); 28 U.S.C. § 1915(g) (three strikes provision); 42 U.S.C. § 1997e(d) (limitation on attorney fees).

4. *See, e.g.*, Sharon Dolovich, *The Coherence of Prison Law*, 135 HARV. L. REV. F. 301, 305–16 (2022) [hereinafter Dolovich, *Coherence*]; Sharon Dolovich, *Canons of Evasion in Constitutional Criminal Law*, *in* THE NEW CRIMINAL JUSTICE THINKING 111, 113–16 (Sharon Dolovich & Alexandra Natapoff eds., 2017); Sharon Dolovich, *Evading the Eighth Amendment: Prison Conditions and the Courts, in* THE EIGHTH AMENDMENT AND ITS FUTURE IN A NEW AGE OF PUNISHMENT 133, 148–54 (Meghan J. Ryan & William W. Berry III eds., 2020) [hereinafter Dolovich, *Evading the Eighth Amendment*].

standard for Eighth Amendment prison conditions claims,[5] *Whitley v. Albers*' "maliciously and sadistically" standard for Eighth Amendment excessive force claims,[6] and the almost comically deferential standard of review established by *Turner v. Safley*,[7] which governs almost every other constitutional claim that prisoners might bring, prison law's moral center of gravity tilts very strongly in favor of the state.[8] When you add all this up, it's a foregone conclusion that incarcerated plaintiffs will lose most of their claims most of the time.

It is not that incarcerated plaintiffs never prevail. It's just that the stars really need to align. When you have dedicated and adept lawyers, when the treatment being challenged is glaringly problematic, *and* when the state's justifications are thin or nonsensical, then incarcerated plaintiffs have a decent chance of success.[9] But even in cases of this sort, people bringing claims from custody might still lose, for a very simple reason: no matter how brutal or inhumane the conditions, incarcerated plaintiffs will never prevail unless the court is open to taking their arguments seriously and engaging fairly and evenhandedly on the merits. And unfortunately, when the plaintiffs are incarcerated, these basic conditions of good faith legal analysis and judicial impartiality cannot be taken for granted.[10]

To some extent, the problem is politics. It is well known that by the end of the Trump presidency, more than twenty percent of sitting federal judges were Trump appointees.[11] I don't mean to suggest that Trump judges will never find for incarcerated plaintiffs; to the contrary, the Federal Reporter already contains many examples of Trump-appointed judges doing

5. *See* Farmer v. Brennan, 511 U.S. 825, 839–40 (1994) (defining the requisite mens rea for Eighth Amendment prison conditions claims as the equivalent of criminal recklessness, on which defendants must have actually realized the risk of harm). For more on *Farmer* and deliberate indifference, see Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. Rev. 881, 895–97 (2009).

6. Whitley v. Albers, 475 U.S. 312, 320–21 (1986) (finding that force used against prisoners to resolve a disturbance is unconstitutional only when it is applied "maliciously and sadistically for the very purpose of causing harm") (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973)). For more on the "maliciously and sadistically" standard, see Sharon Dolovich, Excessive Force in Prison (Jan. 5, 2023) (unpublished manuscript) (draft copy on file with author).

7. *See* Turner v. Safley, 482 U.S. 78, 89–91 (1987) (establishing a highly deferential four-factor standard for determining the constitutionality of prison regulations that impinge on the constitutional rights of incarcerated plaintiffs). For more on the *Turner* standard, see Dolovich, *Coherence*, *supra* note 4, at 311–14.

8. *See* Dolovich, *Coherence*, *supra* note 4, at 311–14.

9. That dedicated and adept lawyers can make a difference to case outcomes is just one reason why the work of prisoners' advocates is so vital.

10. *See* Dolovich, *Coherence*, *supra* note 4, at 325–39 (describing instances in which a seeming lack of judicial impartiality and good faith legal analysis led to unfavorable outcomes even when incarcerated plaintiffs had strong claims on the merits).

11. Russell Wheeler, *Judicial Appointments in Trump's First Three Years: Myths and Realities*, Brookings (Jan. 28, 2020), https://www.brookings.edu/blog/fixgov/2020/01/28/judicial-appointments-in-trumps-first-three-years-myths-and-realities/.

just this.[12] We would, however, be fooling ourselves to imagine that this political shift on the federal bench does not matter to prisoners' prospects.

Then there is the United States Supreme Court, which has the ultimate authority to set the terms for both prisoners' access to the courts and the potential for their success on the merits once they get there. Despite what I personally consider to be the wonderful addition of Justice Ketanji Brown Jackson, Justice Jackson is still very much in the minority. It is hardly a secret that there is on the Supreme Court right now a very young, very conservative majority. This means that, if there are going to be developments in prison law emerging from the Court in the coming decades, these developments are likely only to narrow still further the ability of people in custody to challenge their treatment by the state.[13]

We cannot, however, lay it all at the feet of the Trump Administration. It isn't as if, prior to 2016, all federal judges were highly sympathetic to the claims of incarcerated plaintiffs. To the contrary, the Supreme Court has long exhibited a pro-state bias in its prison law cases. This posture, which I have elsewhere labeled *dispositional favoritism*,[14] may best be described as a readiness to look upon prison officials and their evidence and arguments with favor and sympathy, while at the same time regarding incarcerated litigants and *their* evidence and arguments with skepticism and even hostility.[15] The product of this divergent normative orientation is judicial reasoning that, among other things, automatically presumes good faith and expertise on the part of defendant prison officials, views prisoners in general with suspicion, and scarcely considers the real-life impact of case outcomes for the actual human beings who live behind bars. Unsurprisingly, when the Court adopts this posture, defendants generally win. And when

12. *See, e.g.*, Morris v. Sheriff of Allen Cnty., No. 20-CV-34, 2022 WL 971098 at *2–18 (N.D. Ind. Mar. 31, 2022) (granting summary judgment and issuing injunctions against sheriff and commissioners due to an overcrowding problem at Indiana jail) (opinion by Judge Damon R. Leichty, nominated by President Trump in 2018); Thomas v. Tice, 948 F.3d 133, 142 (3d Cir. 2020) (denying summary judgment when defendant prison officials failed to provide any legitimate penological justification for plaintiff's continued confinement in a dry cell) (opinion by Judge David Porter, nominated by President Trump in 2018); J.K.J. v. Polk Cnty., 960 F.3d 367, 386 (7th Cir. 2020) (finding a county liable where the county made a "deliberate choice to stand idly by while the female inmates under its care were exposed to an unmistakable risk that they would be sexually assaulted") (opinion by Judge Michael Y. Scudder, nominated by President Trump in 2018); Hayes v. Dahlke, 976 F.3d 259, 270–71 (2d Cir. 2020) (finding plaintiff to have exhausted his claims under the PLRA when prison officials did not comply with internal deadlines and thus failed to respond to plaintiff's grievance within the allotted time) (opinion by Judge Richard J. Sullivan, nominated by President Trump in 2018). Thanks to Aaron Bentley, John Boston, Jim Davy, David Fathi, Natalia Friedlander, Sarah Grady, and David Shapiro for these examples.

13. *See* Dolovich, *Evading the Eighth Amendment*, *supra* note 4, at 154–60 (discussing Justice Gorsuch's majority opinion in the 2019 death penalty case of *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019), and its possible implications for limiting still further the success of Eighth Amendment prison conditions claims).

14. *See* Dolovich, *Coherence*, *supra* note 4, at 316–17.

15. Much of this paragraph is taken from Dolovich, *Coherence*, *supra* note 4, at 317.

other members of the federal judiciary follow the Court's lead, as they often do, incarcerated litigants face a steep uphill battle from the very outset of their claims.[16]

This brings us back to my earlier question. Given this deeply unfavorable judicial environment, a prisoners' rights lawyer might well wonder: what's the point? What good do lawyers for the incarcerated actually do for their clients, for the cause of making carceral conditions more humane, or for society as a whole? My position on this question, as I have indicated, is that lawyers for the incarcerated do a lot of good. In fact, my thesis is that, in the current legal and political environment, the work done by prisoners' legal advocates is vital. It is vital for the clients, who would otherwise be even more isolated and alone, and thus even more vulnerable to abuse and neglect, than they currently are. It is vital for society, for which lawyers provide a crucial channel of information about what is going on behind prison walls, thereby keeping the polity informed about what are, after all, public institutions.[17] And it is vital to what we might call, in somewhat grandiose terms, the prospect of forming a more perfect union. Although many stakeholders do crucial work in this space, lawyers make contributions that cannot be replicated by others. At this moment in the development of the carceral state, lawyering for the incarcerated is among the most impactful means we have to move our carceral system closer to consistency with the basic normative commitments of a constitutional democracy.

With these themes in mind, I was considering calling this paper, *The Indispensable Work Prisoners' Rights Lawyers Do in Forcing Transparency, Curtailing Abuse, and Ultimately Preserving Democracy*. I thought that might be a bit over the top, so I dialed it back. But that abandoned title does nicely capture my point.

Now, it is crucial to underscore—and I do so emphatically—that lawyers do not do this work alone. Every successful effort made on behalf of people living behind bars is always a collaborative effort among several crucial players, starting with the clients and other incarcerated people, and also centrally including the families and loved ones of people inside, along with activists, grassroots advocacy organizations, and other allies.

This point bears repeating: lawyers and other legal advocates—the litigation specialists, the investigators, the monitors—do not do this work alone. They couldn't do it alone even if they tried. If the work is to be meaningful, any action is going to require an understanding of the impact on those most directly affected, as well as a range of necessary skills only some of which are contributed by lawyers. In short, advocacy on behalf of the incarcerated takes a village.

16. *See* Dolovich, *Coherence*, *supra* note 4, at 325–39 (discussing numerous examples of dispositional favoritism in federal court prison law decisions).

17. *See* Sharon Dolovich, *Mass Incarceration, Meet COVID-19*, U. CHI. L. REV. ONLINE (Nov. 16, 2020), https://lawreviewblog.uchicago.edu/2020/11/16/covid-dolovich/.

Still, in keeping with the theme of this gathering, and in honor of the Appellate Clinic we are here to celebrate, I focus in these remarks on the particular and considerable contributions made by legal advocates. All stakeholders do vital work in this fight. At the same time, in the United States, virtually all power and thus any real promise of change runs through courts and legislatures—in short, through the law. This means that, when it comes to advocating on behalf of society's most disadvantaged members, which very much includes the incarcerated, lawyers and legal advocates play an indispensable role. It is this role that I want to focus on here.

Before getting into the specifics of what prisoners' rights lawyers do and the significance of their work, I first need to lay some groundwork. Specifically, I need to say a little about the foundational values of any constitutional democracy and the paradoxical way that, despite these moral imperatives, the distribution of political authority necessary if society is to function will inevitably put vulnerable people at risk of abuse by state officials. To this end, I offer what I hope is a clear conceptual framework for understanding (1) the normative foundations of American political institutions; (2) why the exercise of state power in a liberal democracy always carries the threat of official abuse; and (3) the nature of the harm inflicted when this danger manifests.

Let's start with the normative foundations. Here, all I can really do is stipulate the moral commitments embodied in our founding documents and rhetorically invoked at key moments in our national life. I'm referring here to what I've elsewhere called the baseline liberal democratic values: limited government, the primacy and sovereignty of the individual, and individual liberty, dignity, and bodily integrity.[18] To this list, we could add basic constitutional commitments like equal protection, due process, and the prohibition on cruel and unusual punishment. It is, however, worth noting that to name these constitutional provisions alongside the baseline liberal democratic values may only be redundant, since these provisions simply represent the constitutional manifestations of the underlying values just listed. In other words, any society committed to the baseline liberal democratic values—and here I include the United States, even though our commitment to these basic values is more rhetorical than real[19]—would necessarily commit to some version of these basic constitutional provisions.

Having identified the baseline values, we now need to ask: how does a society committed to these values put them into practice? Plainly, in order

18. *See* Sharon Dolovich, *Legitimate Punishment in Liberal Democracy*, 7 BUFF. CRIM. L. REV. 307, 314 (2004).

19. *See id.* at 313–14, 312 n.11 (defining as liberal democracies those polities claiming a commitment to the "baseline liberal democratic values," including "individual liberty, dignity and bodily integrity, limited government, and the primacy and sovereignty of the individual" and arguing that "on this definition, the United States, the political life of which is routinely punctuated with the rhetorical invocation of these very values, qualifies as an aspiring liberal democracy").

to function, every polity needs public institutions. But right away, this need creates a problem. The state is not a natural person, which means the state cannot act on its own. It can only act through the individuals we authorize to act on the state's behalf. And this in turn means that any time we delegate political authority, we are delegating to inevitably flawed human beings power that can be readily abused. We are, in other words, opening the door to what the great political theorist Judith Shklar labeled "public cruelty,"[20] a posture that might also be called "official cruelty." As Shklar teaches, cruelty in this form "is made possible by differences in public power, and it is almost always built into the system of coercion upon which all governments have to rely to fulfill their essential functions."[21] In other words, the same institutional arrangements that make political society possible also create the conditions for official abuse of vulnerable individuals.

It goes without saying that preventing official cruelty is an urgent endeavor. Speaking for myself—and I know this will also be true of countless others—the constitutional prohibition on cruel and unusual punishment is the moral north star that guides my life's work. Unsurprisingly, Shklar too condemns acts of cruelty. Yet for her, the prevention of public cruelty is not only important for its own sake. Preventing official cruelty is also vital because, to Shklar, individual liberty is crucial to the liberal project. And as she sees it, the single biggest obstacle to personal freedom is not the exercise of public cruelty itself, but the *fear* of such cruelty.

In her canonical essay, *The Liberalism of Fear*, Shklar maintains that "[s]ystematic fear is the condition that makes freedom impossible, and it is aroused by the expectation of institutionalized cruelty as by nothing else."[22] As she recognizes, a minimal level of fear is implied in any system of law. But there is a particular sort of fear that for Shklar is most destructive of the moral foundations of a liberal democracy: the fear "created by arbitrary, unexpected, unnecessary, and unlicensed acts of force and by habitual and pervasive acts of cruelty and torture performed by military, paramilitary, and police agents."[23] This is the fear that arises from knowing oneself to be at the mercy of public officials who feel free to harass, intimidate, use violence and even kill with legal impunity because they know that no one with any power is going to stop them. In Shklar's view, it is fear in this form that, like nothing else, corrodes the moral foundations of liberal democracy.

For Shklar, as I've said, the paramount value is ensuring that people can live their lives according to their own lights. Yet she recognizes that, when it comes to the baseline values of constitutional democracy, it's not

20. *See* Judith N. Shklar, *The Liberalism of Fear*, *in* LIBERALISM AND THE MORAL LIFE 21, 29 (Nancy L. Rosenblum ed., 1989) (identifying as the highest imperative of liberal democracies the protection of citizens from fear of "public cruelty").

21. *Id.*

22. *Id.*

23. *Id.*

like pick 'n mix at a candy store, where you can just grab your favorites. (These are my words, not hers.) No, what I've called the baseline liberal democratic values cannot be sold separately. If we want limited government and individual freedom, citizens also require the conditions for individual dignity, self-respect, and what Shklar calls the "moral courage, self-reliance, and stubbornness [needed] to assert themselves effectively."[24] This is partly because these qualities are what we need if we are to manifest our own preferences and our own personal vision of the good life. But it is also partly because, unless citizens have these qualities, they will be unable to act individually and in association to protest and block any signs of governmental illegality and abuse.[25] In other words, we need these qualities to give us the fortitude to stand up to those state officials whose threatened acts of cruelty strip citizens of the power to function as moral actors.

In sum, Shklar's work highlights two profound threats to the possibility of a free and democratic society: the cruelty inherent in what she calls "extralegal, secret, and unauthorized act[s] by public agents or their deputies"[26]; and the way the fear instilled by these arrangements corrodes the dignity, self-respect, and sense of personal security that are the requisites of full moral agency.[27] At base, she argues that the preservation of liberal democracy, always a work in progress, requires that we strive to minimize as much as possible the ability of state officials to act cruelly or to instill the fear of cruelty in those over whom they wield power.

I hope it is obvious why these ideas are relevant to the prison context. A well-designed government would recognize the urgency of constraining official cruelty against people in custody.[28] Among other things, it would create effective regulatory and oversight mechanisms to discipline abuses of carceral power, so that people in prison might live without fear and instead inhabit spaces that promote dignity and self-respect. Unfortunately, our political system has utterly failed to establish effective mechanisms for disciplining carceral power.[29] This brings us to the obvious question: what to do about it?

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24. *See id.* at 33 ("If citizens are to act individually and in associations, especially in a democracy, to protest and block any sign of governmental illegality and abuse, they must have a fair share of moral courage, self-reliance, and stubbornness to assert themselves effectively.").

25. *See id.* at 31 ("[I]t is the task of a liberal citizenry to see that not one official or unofficial agent can intimidate anyone, except through the use of well-understood and accepted legal procedures."); *id.* at 30 (noting that "[t]he importance of voluntary associations [is] . . . their ability to become significant units of social power and influence that can check, or at least alter, the assertions of other organized agents, both voluntary *and governmental*") (emphasis added).

26. *Id.* at 30.

27. *See id.* ("If the prohibition of cruelty can be universalized and recognized as a necessary condition of the dignity of persons, then it can become a principle of political morality.").

28. *See* Sharon Dolovich, *The Failed Regulation and Oversight of American Prisons*, 5 ANN. REV. CRIMINOLOGY 153, 155–56 (2022) [hereinafter Dolovich, *The Failed Regulation*].

29. *See id.* at 153 ("[I]n all branches of government, rather than policing prison officials, the relevant institutional actors instead align themselves with the officials they are supposed to regu-

Here, at last, is where the lawyers come in. I want to be careful not to overstate the extent to which lawyers and their allies can right this ship. I do though want to suggest that, despite the obstacles and the limits on the relief they can secure for their clients in court, lawyers for the incarcerated do vital work in helping to rebalance the moral orientation of the carceral system and promote the basic values that are in theory supposed to guide our political institutions. They do so in innumerable ways, but perhaps most centrally by bringing a measure of transparency to a compulsively secretive institutional environment, by insisting on the rights of the incarcerated, and by restoring to people in custody some measure of the dignity, self-respect, and moral courage that together defeat the fear of official cruelty—the fear that, as Shklar teaches, is so deeply debilitating of personal agency and freedom.

In the space remaining, I focus on just a few of the ways lawyers contribute in these respects and thereby strengthen the public values that ought to guide the carceral system. Specifically, I describe (1) how lawyers help to lift the veil of secrecy that otherwise shrouds much of what happens in prison; (2) the work lawyers do as watchdogs, calling out and challenging the abuse and exploitation of the incarcerated; and (3) the way that, through their work, lawyers validate the humanity—and thus the dignity and self-respect—of their clients, who more typically exist in an institutional environment that systematically dehumanizes and degrades them. This list is not meant to be comprehensive but only illustrative, intended merely as a starting point. The aim is to seed a conversation on the good prisoners' rights lawyers do that will expand to include a broader array of examples.

I start with what may be the most obvious contribution prisoners' rights lawyers make to the interests of a liberal democracy. By getting access to prisons, legal advocates serve a vital transparency function, puncturing the secrecy of the prison and thereby bringing light to the dark corners where, absent external scrutiny, correctional officers are afforded the impunity to commit the acts of public cruelty Shklar rightly condemns.

If prisons are sites of persistent official cruelty, it is in part because there is so little external scrutiny of what goes on inside.[30] As Andrea Armstrong details in her contribution to this symposium issue,[31] what happens in prisons and jails remains obscure thanks to the culture of secrecy that corrections administrators have been allowed to cultivate.[32] Carceral facili-

late, leaving people in custody unprotected and vulnerable to abuse by the very actors sworn to keep them safe.").

30. *See id.* at 161 ("[P]risons are largely free from effective regulatory pressure from outside actors, whether legislators or courts.").

31. *See* Andrea C. Armstrong, *Access Denied: Public Records and Incarcerated People*, 19 U. ST. THOMAS L.J. 220 (2023).

32. *See, e.g.*, Pell v. Procunier, 417 U.S. 817, 834–35 (1974) (finding that a prison regulation that limited prisoners' communication with the press did not unconstitutionally infringe on prisoners' first amendment rights, and that "newsmen have no constitutional right of access to prisons or

ties are public institutions. Yet even members of the media have no right of access to prisons and often have to struggle to get inside—despite the fact that, as Justice Powell recognized in *Saxbe v. Washington Post*, it is thanks to journalists that citizens "receive th[e] free flow of information and ideas essential to intelligent self-government."[33]

Lawyers constitute perhaps the only exception to what otherwise amounts to prison officials' virtually absolute power of secrecy and exclusion. When lawyers file complaints that state a cause of action, the right of discovery allows them, among other things, to get access to internal records and documents and to conduct interviews with prison residents. And when cases succeed on the merits—which, thanks to good lawyering, some still do despite judicial hostility to incarcerated plaintiffs[34]—lawyers have the right to monitor compliance with any court orders. This right gets them through the prison gates and into the facilities themselves.

There will always be limits to what legal advocates can see once inside, no matter how broad their efforts at discovery or how diligently they perform their monitoring function. Implementing court-ordered remedies is always a process and even a fight. But even if they can't fix everything, lawyers are getting inside the prisons and seeing and hearing about all kinds of things happening behind the walls that would otherwise have never been exposed. They can even take photos.[35] In this way, even apart from the improvements that they achieve for their clients—and they do achieve improvements—when prisoners' advocates puncture the prison's veil of secrecy, they serve at least four important ends: They provide a channel of accountability that would not otherwise exist. They serve a disciplining function for correctional staff, who will know their conduct is being monitored. They assure people incarcerated in the facility that they have not been forgotten, that there are people paying attention and advocating on their behalf. And they constitute a conduit for information to journalists and to the public at large about what happens in carceral facilities.

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their [prisoners] beyond that afforded the general public"); Houchins v. KQED, Inc., 438 U.S. 1, 16 (1978) (holding that news media has no constitutional right of access to a county jail different from or greater than the right of access enjoyed by the general public); Saxbe v. Wash. Post Co., 417 U.S. 843, 850 (1974) (applying *Pell* to federal prisons); *see also* Dolovich, *The Failed Regulation*, *supra* note 28, at 157.

33. *Saxbe*, 417 U.S. at 863 (Powell, J., dissenting).

34. *See* Dolovich, *Coherence*, *supra* note 4, at 304 (explaining that incarcerated plaintiffs may prevail in federal court with, among other things, the help of "dedicated and adept lawyers committed to pressing plaintiffs' claims"); *see, e.g.*, Brown v. Plata, 563 U.S. 493, 493 (2011); Greenhill v. Clarke, 944 F.3d 243, 245–46 (4th Cir. 2019); Gray v. Hardy, 826 F.3d 1000, 1000–01 (7th Cir. 2016); Prison Legal News v. Cook, 238 F.3d 1145, 1153 (9th Cir. 2001); Coleman v. Schwarzenegger, 922 F. Supp. 2d 882, 1003–04 (E.D. Cal. 2009).

35. *See* Corene Kendrick, *Winning a Case is Not the End: Making the Right to Prison Health Care a Reality*, 19 U. ST. THOMAS L.J. 474 (2023).

On this last point: Despite judicial hostility to prisoner suits,[36] it is beyond question that people in prison retain their status as legal subjects with basic rights. This recognition gives lawyers privileged access to people inside and thus to firsthand accounts of what is happening on the ground. This access enables lawyers to convey to society as a whole what at least some people are experiencing in prison.

In April of 2022, we were given a stark reminder of lawyers' power to expose the failures and abuses that lead to cruelty and abuse inside carceral facilities. I refer here to the remarkable report issued by the United States Department of Justice Civil Rights Division detailing the findings of its investigation into conditions at the Mississippi State Penitentiary, a.k.a. Parchman.[37] The report is not easy reading. The issues it raises are familiar to anyone with even a passing acquaintance with life in American prisons: widespread unchecked violence, grossly inadequate medical and mental health treatment, routine official failure to mitigate suicide risk, overuse of solitary confinement, excessive heat, and endemic institutional inaction in the face of these brutally harmful conditions.[38] But the power—and the horror—of the document is in its detailed accounting of incident after incident of official abuse and neglect. The DOJ investigation will not guarantee the transformation of Parchman into somewhere humane. But thanks to the lawyers and investigators who put in the work, and the access afforded them by the Civil Rights of Institutionalized Persons Act (CRIPA),[39] there is a clear public record of conditions in the prison, and no denying the facts detailed in the report.[40]

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36. *See* Dolovich, *Coherence*, *supra* note 4, at 323–25 (describing the tendency of many federal courts to approach the evidence and arguments offered by incarcerated plaintiffs with skepticism and hostility).

37. U.S. DEP'T OF JUST. C.R. DIV., INVESTIGATION OF THE MISSISSIPPI STATE PENITENTIARY (PARCHMAN) (2022), https://www.justice.gov/opa/press-release/file/1495796/download; Press Release, U.S. Dep't of Just., Justice Department Finds Conditions at Mississippi State Penitentiary Violate the Constitution (Apr. 20, 2022), https://www.justice.gov/opa/pr/justice-department-finds-conditions-mississippi-state-penitentiary-violate-constitution; *see also* DAVID OSHINSKY, "WORSE THAN SLAVERY": PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE (1996).

38. U.S. DEP'T OF JUST. C.R. DIV., *supra* note 37.

39. 42 U.S.C. § 1997.

40. The Mississippi report is one in a long series of findings letters issued by DOJ lawyers pursuant to their authority under CRIPA. *See, e.g.*, Press Release, U.S. Dep't of Just., Justice Department Finds that Conditions at the San Luis Obispo County Jail in California Violate the Constitution (Aug. 31, 2021), https://www.justice.gov/opa/pr/justice-department-finds-conditions-san-luis-obispo-county-jail-california-violate (reporting findings to the effect that California jail "violated the rights of prisoners by, among other things, failing to provide adequate medical care and subjecting some prisoners to excessive uses of force"); Press Release, U.S. Dep't of Just., Justice Department Alleges Conditions at Lowell Correctional Institution Violate the Constitution (Dec. 22, 2020), https://www.justice.gov/opa/pr/justice-department-alleges-conditions-lowell-correctional-institution-violate-constitution (reporting findings indicating "that Lowell [Correctional Institution in Ocala, Florida] fails to protect prisoners from sexual abuse by the facility's staff"); Press Release, U.S. Dep't of Just., Justice Department Alleges Conditions at Massachusetts Department of Corrections Violate the Constitution (Nov. 17, 2020), https://www.justice.gov/opa/pr/justice-department-alleges-conditions-massachusetts-department-

Prison lawyers' power of publicity extends well beyond DOJ Civil Rights. Every day, lawyers around the country provide a vital information channel merely by filing complaints containing detailed factual predicates for legal claims. It is true that, legally speaking, facts in complaints are only allegations. But once those facts appear in legal documents, their veracity attested to by the lawyers who filed the papers, they have sufficient credibility to be taken seriously by journalists and others in a position to disseminate plaintiffs' accounts. In this way, lawyers draw the public's attention to what is routinely happening in those carceral institutions—the very existence of which many citizens would prefer to pretend away.

At times, the route between lawyers' use of litigation to excavate and expose the realities of their clients' experience and the media's dissemination of their findings is even more direct. As noted, journalists have no recognized First Amendment right of entry into carceral facilities. Instead, thanks to a series of Supreme Court rulings, corrections administrators hold absolute authority to deny reporters access to the prisons, regardless of what is known or suspected to be going on behind the walls.[41] This power of exclusion can lead to situations that should be anathema in a free and democratic society—as in Arizona, where Jimmy Jenkins, the Criminal Justice Reporter for *The Arizona Republic*, the state's "largest daily-circulation newspaper,"[42] has repeatedly been barred by the Arizona Department of Corrections (AZ DOC) from entering its prisons.[43] But reporters can still attend trials. So in November 2021, Jenkins was in the courtroom as plaintiffs' lawyers, led by David Fathi and Corene Kendrick, made their case in

corrections-violate (finding cause to believe that "'the Massachusetts Department of Corrections fails to properly supervise and accommodate prisoners suffering from serious mental health issues,'" and that, as a result, "prisoners in mental health crisis have engaged in self-harm and have died or seriously injured themselves while on mental health watch") (quoting Assistant Attorney General Eric Dreiband for the Civil Rights Division); Press Release, U.S. Dep't of Just., Justice Department Alleges Excessive Force in Alabama's Prisons for Men Violates the Constitution (July 23, 2020), https://www.justice.gov/opa/pr/justice-department-alleges-excessive-force-alabama-s-prisons-men-violates-constitution (reporting findings indicating "that the conditions at Alabama's prisons for men violate the Eighth Amendment of the Constitution" and specifically that there is "a pattern or practice of using excessive force" against people in Alabama's prisons for men) (quoting Assistant Attorney General Eric Dreiband for the Civil Rights Division).

41. *See supra* note 32 and accompanying text.

42. Jimmy Jenkins, *Arizona Violates Journalists' Rights to Witness Executions, Attorney Says*, AZCENTRAL (May 23, 2022, 6:14 PM), https://www.azcentral.com/story/news/local/arizona/2022/05/23/attorney-arizona-violates-journalists-rights-witness-executions/9900645002/.

43. According to Jenkins, for the past six years, the AZ DOC has repeatedly denied his requests for entry into their facilities. Phone call with Jimmy Jenkins, Journalist, *Arizona Republic* (Feb. 9, 2023). Jenkins has also been repeatedly refused media credentials to witness executions carried out by the AZ DOC. *See* Jenkins, *supra* note 42 (reporting that, when the *Arizona Republic* complained to the Governor's office following Jenkins' denial of media credentials to witness the execution of Clarence Dixon, they were told that "if The Republic did not print 'false information,' the news organization might be treated differently").

Jensen v. Shinn,[44] the sweeping class action against the AZ DOC alleging grossly unconstitutional medical care systemwide. Every day during the trial, Jenkins reported on the testimony presented, thereby bringing the plaintiffs' case—and their experiences inside—directly to the public's attention.[45]

And here's a more specific example of how lawyers' work at trial can enable media dissemination of prison conditions that would otherwise remain hidden from view. Among the evidence plaintiffs presented in *Jensen* was distressing video footage showing prison staff shooting pepper spray and pepper balls into the cell of Rahim Muhammad, a man diagnosed with schizoaffective disorder who responded to "voices that told him to harm himself" by repeatedly "slamm[ing] his head into the prison cell door."[46] Officers justified this use of force as necessary to prevent Muhammad's self-harming behavior, though their conduct hardly seems an appropriate way to respond to someone struggling with acute mental illness. Jenkins was only able to see the footage of the staff assault because the lawyers had received it in discovery. And having learned through this channel what had been going on, Jenkins was able to dig further into the story.[47] In doing so, he discovered a host of additional details he then included in his published accounts, including the fact that Muhammad "had been pepper-sprayed . . . more than 40 times over eight months from December 2020 to July 2021."[48] In addition, Jenkins was ultimately able to obtain Mr. Muhummad's consent to publish the footage itself. By sharing the video on his

44. *Jensen* began life as *Parsons v. Ryan*. It was originally brought in 2012 by a team of lawyers from the ACLU, Prison Law Office, Arizona Center for Disability Law, Perkins Coie, and Jones Day. Class Action Complaint for Injunctive and Declaratory Relief, Parsons v. Ryan, No. 12-cv-00601 (D. Ariz. Mar. 22, 2012).

45. *See, e.g.*, Jimmy Jenkins, *Arizona Prison Health Care Trial: Psychiatrist's Assessment of System at Odds with Prisoners' Testimony*, AZCENTRAL (Nov. 19, 2021, 5:44 PM), https://www.azcentral.com/story/news/local/phoenix-breaking/2021/11/01/arizona-prison-health-care-trial-jensen-v-shinn/6243559001/.

46. Jimmy Jenkins, *Arizona Officers Pepper Sprayed Mentally Ill Prisoner 40 Times*, AZCENTRAL (Dec. 27, 2021), https://www.azcentral.com/restricted/?return=https%3A%2F%2Fwww.azcentral.com%2Fstory%2Fnews%2Flocal%2Farizona%2F2021%2F12%2F07%2Farizona-officers-pepper-sprayed-mentally-ill-prisoner-40-times%2F6412282001%2F.

47. The work of lawyers enhances the media's ability to report on what happens inside prisons in a further respect: once they are made public through litigation, documents obtained through discovery can help journalists frame targeted public records requests, thus increasing their likelihood of success in obtaining the information they seek. In Arizona, Jenkins has capitalized in just this way on the public release of AZ DOC documents produced through the *Jensen* litigation. For example, Jenkins was able to craft effective public records requests concerning staff shortages in the state's prison medical clinics after seeing emails, produced in the *Jensen* litigation, describing staffing issues on the part of Centurion, the private, for-profit prison health care provider who held the contract to provide medical care in AZ DOC facilities. *See* Jimmy Jenkins, *Centurion VP Makes 'Damning Admission' on Last Day of Arizona Prison Health Care Trial*, AZCENTRAL (Dec. 14, 2021, 5:21 PM), https://www.azcentral.com/story/news/local/arizona/2021/12/14/damning-admission-last-day-arizona-prison-health-care-trial/8898911002/.

48. Jenkins, *supra* note 46. In addition, as Jenkins also reported, "In one two-week period, Muhammad was pepper sprayed 15 times. Sometimes officers gassed him twice a day. Other

newspaper's website—a video that, again, he only learned about in the first place thanks to the work of the *Jensen* lawyers—Jenkins was able to put before his readers certain realities of carceral life they could not otherwise have accessed.[49] And by presenting the footage in context, Jenkins made it possible for members of the public to gain a better understanding of what they were seeing and a deeper appreciation of the way power exercised in secret may be readily abused.[50]

Ideally, people in prison would be able to convey their own firsthand accounts of what goes on inside directly to the media and the public without needing to have those experiences filtered through their lawyers. Happily, there are now many efforts underway to allow people who are incarcerated to tell their stories directly, as for example with the podcast *Ear Hustle* or the Marshall Project's landmark *Life Inside* series. Still, these channels are limited. And even as more people directly impacted by the carceral system come to provide firsthand accounts, lawyers will remain an especially effective conduit for information about what is happening inside prisons and jails.

This is so for at least two reasons. First, in a polity that largely regulates carceral facilities through litigation,[51] lawyers are accorded an officially recognized role in the process of holding prisons to account—a role that, despite broad public indifference and even animus towards their clients, still lends considerable weight to lawyers' accounts of carceral conditions. Second, there is the undeniable fact that, while many segments of society persist in regarding people in custody with distrust and hostility, lawyers—even those advocating on behalf of the incarcerated—continue to occupy positions of cultural privilege. However unfair this situation may

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times, prison security staff shot him at close range with a pepper ball gun, a weapon normally used to control riots." Jenkins, *supra* note 46.

49. Jenkins, *supra* note 46.

50. As Jenkins explained in his published account of Muhammad's experience:

> Upon viewing the videos showing the officers' use of force against Muhammad, medical expert Dr. Pablo Stewart testified that "It's hard to express how wrong that is. . . . So you have a psychotic person who is experiencing any number of psychotic symptoms that's now being sprayed with this very caustic irritant that will only exacerbate their underlying mental illness." . . . Stewart said chemical agents should only be used in "extreme circumstances." . . . "It's abundantly clear that the use of OC spray is not an appropriate psychiatric intervention for an acutely mentally ill individual."

Jenkins, *supra* note 46.

51. Given the high bar incarcerated plaintiffs face in succeeding even on meritorious constitutional claims and the difficulties of enforcing equitable remedies even when plaintiffs prevail, the fact that in the United States litigation is the primary channel for forcing institutional change in carceral facilities offers some indication of the scale of the regulatory failure in this context. For an extended discussion of this regulatory failure, see Dolovich, *The Failed Regulation*, *supra* note 28.

be, it still means that lawyers' accounts are more likely than those of their clients to be heard and taken seriously.[52]

Sometimes the contribution lawyers make in this regard is as simple as serving as a trusted information source for people with the power to make a difference. We saw this dynamic in action in New York City during the ice-cold polar vortex of 2019, when the boiler broke at a federal jail in Brooklyn, leaving the people inside freezing and in darkness.[53] When this happened, reporters at the *New York Times* got a tip about the situation and reached out to the Federal Bureau of Prisons (BOP) officials running the jail. But all they heard through that route was that the housing units were not being affected,[54] a claim about which the reporters were rightly skeptical—not least because, despite the arctic conditions, the jail had become the site of daily protests, with loved ones of people inside the jail braving the cold for hours to support and engage with those locked inside, who answered protestors' calls by yelling and banging on the bars of their windows.[55] Having gotten the runaround from the BOP and unable to locate the tipster, *Times* reporters reached out to Betsy Ginsberg,[56] a long-time prisoners' rights lawyer in New York, who now runs a civil rights and prisoners' rights clinic at Cardozo Law School. And Ginsberg, who was on top of what was going on, was able to give the reporters a more accurate account of the situation. She was also able to connect them to another lawyer—Deirdre von Dornum, the chief federal defender of the Eastern District—who at the time had hundreds of clients in the jail, enabling von Dornum in turn to connect the *Times* directly to some of the people who were freezing inside.

This example illustrates the privileged position that lawyers for the incarcerated can occupy. Their status and social and cultural capital lend weight to their testimony and enable them to shine a spotlight on a hidden world. It bears noting that lawyers are able to perform this role only by remaining connected to and trusted by their clients. This means that even when the practical payoff of such publicity is limited, the efforts of lawyers

52. Many lawyers for the incarcerated make considerable efforts to share the stage with their clients, in order that those most directly impacted have the opportunity to speak about their own experiences and to be heard.

53. *See* Annie Correal & Joseph Goldstein, *'It's Cold as Hell': Inside a Brooklyn Jail's Weeklong Collapse*, N.Y. TIMES (Feb. 9, 2019), https://www.nytimes.com/2019/02/09/nyregion/brooklyn-jail-no-heat-inmates.html.

54. *See* Annie Correal, *No Heat for Days at a Jail in Brooklyn Where Hundreds of Inmates Are Sick and 'Frantic'*, N.Y. TIMES (Feb. 1, 2019), https://www.nytimes.com/2019/02/01/nyregion/mdc-brooklyn-jail-heat-html.

55. *See* Andy Newman, Christina Goldbaum & Annie Correal, *Inmates at Freezing Federal Jail in Brooklyn Pounded Out a Message*, N.Y. TIMES (Feb. 3, 2019), https://www.nytimes.com/2019/02/03/nyregion/brooklyn-federal-jail-banging.html.

56. *See* Annie Correal, *How We Learned About The Freezing Federal Jail in New York*, N.Y. TIMES (Feb. 9, 2019), https://www.nytimes.com/2019/02/09/reader-center/metropolitan-detention-center-cold-jail.html.

to call attention to the experience of their clients has a dignitary effect. It tells people inside locked facilities that they have not been abandoned, and that there are people with access to power who are prepared to speak up for them, to fight for them, and to call prison officials to account.

I now turn to a second vital dimension of what prisoners' rights lawyers do: they play a watchdog role. By their presence, they remind corrections officials that there are people who are paying attention and standing ready to challenge abuses. Admittedly, as we've seen, constitutional litigation does not always succeed. It is, however, hard to imagine that the threat of lawsuits does not check abuses that might occur if prison administrators and custody staff believed no one was watching.

Importantly, this watchdog role extends beyond constitutional violations. In today's carceral ecosystem, a key function that lawyers perform, which helps to rebalance the moral orientation of the system, is that of preventing the economic exploitation of people in custody. As is well known, the lure of private profit brings into the carceral space all kinds of players whose motivations are purely financial and not humanitarian.[57] Fortunately, there are many dedicated advocates (including, among many others, Paul Wright and his colleagues at Prison Legal News and the Human Rights Defense Center), who work hard to prevent the commodification of people in custody. The fight against price gouging, first by phone companies and now by e-mail and video call providers, is just one example of these efforts.[58] The eventual regulations adopted by the Federal Communications Commission capping phone rates was a victory shared by many stakeholders and advocates.[59]

In some cases, however, lawyers must take the lead. Here is just one example.[60] For years, the Florida Department of Corrections (FLDOC) op-

57. *See* Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 474–80 (2005) (explaining the way for-profit private prisons create built-in economic incentives that lead to inhumane conditions of confinement).

58. *See, e.g.*, Zachary Fuchs, *Behind Bars: The Urgency and Simplicity of Prison Phone Reform*, 14 HARV. L. & POL'Y REV. 205, 208–12 (2019) (summarizing the exploitative nature of excessive prison call services rates, video visitation, and related communication technologies); Cheryl Leanza, *Theory Applied: Walking the Halls of Power and the Streets in the Successful Campaign to End Predatory Long Distance Prison Phone Rates*, 28 J. C.R. & ECON. DEV. 185, 190–211 (2015) (detailing efforts to prevent predatory prison phone rates through the Federal Communications Commission (FCC), courts, state legislature, and other forms of advocacy); Aaron Littman, *Free-World Law Behind Bars*, 131 YALE L.J. 1385, 1417–20 (2022) (describing the "two-decades-long story of efforts to impel the Federal Communications Commission (FCC) to regulate prison phone rates" and other telecommunications); Emily Riley, *FCC Needs More 'Courage' in Curbing Prison Phone Costs: Advocates*, CRIME REP. (May 4, 2021), https://thecrimereport.org/2021/05/04/fcc-needs-more-courage-in-curbing-prison-phone-costs-advocates/ (describing efforts of nonprofit organizations to encourage the FCC to extend the breadth of the phone cap regulations and provide other meaningful avenues for people in custody to connect with their loved ones).

59. 47 C.F.R. § 64.6030 (limiting the amount phone providers can charge for various types of calls from jails and prisons).

60. Thanks to Dave Boyer for pointing me to this case.

erated a program allowing people in that state's prisons to buy digital music they could listen to on MP3 players, with the FLDOC taking a cut for each song sold. The program was extremely popular—over the years, people incarcerated by the state of Florida bought and paid for almost four million songs. Then, out of the blue, the FLDOC canceled the original contract and entered into a new contract with another provider, whereupon all the music, the four million songs that had already been purchased, simply *disappeared*. When customers complained, they were told that if they wanted those songs, they would have to buy them again.

In response, lawyers at the Florida Justice Institute, led by Dante Trevisani and Ray Taseff, filed a lawsuit titled *Demler v. Inch*.[61] The plaintiff class in *Demler* comprised all those who had purchased more than seventy-five songs through the previous FLDOC MP3 program. According to the settlement agreement, that amounted to roughly 11,000 people, almost twelve percent of the state's prison population.[62] There were millions of dollars at stake, and unsurprisingly, the FLDOC fought hard against the suit. But ultimately, the plaintiffs prevailed. As a remedy, the court ordered the state to provide close to four million song credits for the plaintiff class, plus twenty-five song credits each for every person who had originally bought music through the program, whether or not they qualified as a class member.[63]

This case, as I hope is clear, was not just about the music. It was about whether corrections officials are to be allowed to treat people in prison as profit sources, with zero regard for their humanity or their right to be treated fairly. In other words, it's just a short step from Beyoncé to Judith Shklar.

Shklar, as we have seen, underscores the urgent need in a constitutional democracy to constrain both public cruelty and the fear it instills in those vulnerable to official abuse. Achieving this aim demands efforts to ensure that people in custody retain some measure of dignity and self-respect, along with the moral courage to insist that their humanity be recognized. By bringing this litigation, the *Demler* advocates did not only fight back against flagrant economic exploitation. They also helped to affirm that the people in the plaintiff class were at once legal subjects with rights and moral beings who deserved to be treated fairly and with respect. In their turn, the plaintiffs joined the fight to help vindicate their own legal and moral rights. It is no exaggeration to construe the *Demler* litigation as powerfully democracy-enhancing.

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61. Class Action Complaint for Injunctive and Declaratory Relief at 5–16, Demler v. Inch, No. 19-CV-00094 (N.D. Fla. Feb. 19, 2019).

62. Order on the Approval of the Class Settlement, *Demler*, No. 19-CV-00094 (N.D. Fla. Dec. 10, 2020), 2020 WL 8182121, at *1.

63. *See* Final Approval Order at 3, *Delmer*, No. 19-CV-00094 (N.D. Fla. Dec. 10, 2020).

This brings me to a third contribution lawyers make to strengthening the public values that ought to guide the carceral system: They validate the dignity and self-respect of their clients against the prison's systematic dehumanization of those in custody. The *Demler* class ultimately prevailed. But the moral recognition lawsuits can provide does not depend on winning. The mere act of bringing cases, regardless of outcomes, can affirm the dignity and self-respect of people living behind bars. Following Jules Lobel, we might think of this as a species of winning by losing.[64]

Alan Mills, the legendary Illinois prisoners' rights lawyer, recently shared a story to this effect. He told me that he once brought an excessive force claim he was sure was a slam dunk. At trial, Alan put on what he thought was a bulletproof case—and it took the jury all of 30 minutes to find against his client. Alan was outraged. But to his surprise, his client was delighted.

Alan couldn't understand it. How could his client be happy? They just lost a case they should have won! As he tells it—and here I'm obviously paraphrasing the paraphrase—the client basically said, "Look, you don't get it, I've been in this system for decades and I know the drill, I know there is no justice or fairness in prison." "But in court," he said, "I got to see you cross examine the officers, question them, poke holes in their stories in a way I could never do myself. And I got to tell my own story, in my own way, in front of a judge and a jury in this beautiful courtroom. And the judge was listening to me, and the jury was listening to me, and the other side had to listen to me whether they liked it or not." For Alan's client, this *was* the win.

Now, as Alan himself acknowledges, it is not as if this one experience evens the playing field. The power imbalance is still enormous. But in court, that balance is so much more equalized than it is in prison, which means that just being a party to litigation can make people feel seen and heard and affirmed in a way that rarely happens in prison.

I heard something similar from Mercedes Montagnes, the founding Director of the Promise of Justice Initiative, which represents people incarcerated on Louisiana's death row. Mercedes shared with me something she had heard from several of her clients (or from her clients' loved ones, speaking on their behalf)—that their involvement in the litigation challenging the conditions on Louisiana's death row was the thing they were most proud of in their lives. It is significant to note that during this litigation, as happens in prisons all over the country, many of Mercedes' clients experienced retaliation from staff for participating in the lawsuits. Yet in acts of great courage, they were not deterred. In fact, their resolve only strengthened.

64. *See* JULES LOBEL, SUCCESS WITHOUT VICTORY: LOST LEGAL BATTLES AND THE LONG ROAD TO JUSTICE IN AMERICA (2003).

These accounts only reinforce my point, which is that just by bringing cases, legal advocates afford their clients a measure of the moral recognition[65] that, Shklar teaches, is a powerful antidote to the fear of official abuse that inhibits a person's sense of agency and self-respect.

Obviously, by virtue of their incarceration, the personal agency of people in prison is necessarily drastically curtailed. But it is also true that people make meaning in custody. Within the constraints of their incarceration, people can be, to a greater or lesser degree, agents of their own situation. And the more a person feels the sense of dignity and self-respect that lends moral courage, the more empowered and less fearful they will be and the broader the scope for personal agency they will experience despite being locked up.

There are many other things lawyers do that promote these effects, too many to provide a comprehensive list. Here are just a few examples: Legal advocates create self-help legal manuals, so people inside can advocate for themselves. Like Professor Sisk here at the University of St. Thomas School of Law, they supervise students in clinical settings, a venture that has the wonderful cumulative effect of expanding the number of people inside receiving legal representation, training the next generation of advocates for the incarcerated, and exposing young people to the realities of the carceral system and to the humanity of the people trapped inside. At the micro level, legal advocates can hold prison officials to account through direct advocacy on behalf of individual clients who otherwise cannot get the institution to listen to their valid concerns. And at the macro level, they can force the polity to reckon with the continued existence of those in prison—as when, in 2020, the lawyers at Lieff Cabraser, along with Equal Justice Society, successfully sued the IRS and the Treasury Department[66] for unlawfully withholding CARES Act stimulus payments[67] to 1.5 million people in prison. This list, I emphasize, is only partial.

I do not mean to paint too rosy a picture. There is no denying that, for all the good done by all the lawyers and all the other advocates and stakeholders who work so tirelessly on behalf of people in prison, it is not even close to enough to bring contemporary carceral practice in line with the baseline values reflected in our founding documents.

But each of us can only do what we can do. And my message is that, by advocating on behalf of the incarcerated, legal advocates increase the ability of people in custody to live free from fear. By filing the cases, by

65. *Cf.* Alexandra Natapoff, *The Penal Pyramid*, *in* THE NEW CRIMINAL JUSTICE THINKING 71, 91–92 (Sharon Dolovich & Alexandra Natapoff eds., 2017) (describing an instance when, while working as a public defender, the author's client expressed a sense of personal gratification at the author's having raised a constitutional issue at trial, despite the motion being unsuccessful).

66. Scholl v. Mnuchin, 494 F. Supp. 3d 661 (N.D. Cal. 2020).

67. 26 U.S.C. § 6428 (specifying which individuals were eligible for stimulus payments and the amounts of those payments).

giving voice to those inside, and just by being present—demanding access, bearing witness, broadcasting what they see, and calling the system to account—prisoners' rights lawyers expand the space in which the core values of a constitutional democracy are able, if not to flourish, then at least to take root. When the space in question is the often-brutal environment of the modern American prison, this accomplishment is no small thing. And for this, legal advocates for the incarcerated should be celebrated and rightfully proud.