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Prisoner Rights and Prison Conditions: Law Journal Symposium, Spring 2022

Gregory Sisk
gcsisk@stthomas.edu

Introduction

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Gregory Sisk*

"For I was in prison, and you visited me."
Sayings of Jesus, Matthew 25:36

Since ancient times and persisting to the modern day, those who languish in prison are society's outcasts. Modern prisons are usually located far away from population centers, isolating the incarcerated from their families and community. Prison secrecy, limited access to social services, and restricted communications impair the ability of prisoners to stay connected with the outside world. This segregation of prisoners too often fosters a sense of detachment, allowing us to mentally sequester the incarcerated from social concern. Out of sight, out of mind.

Through the Spring 2022 Symposium of the University of St. Thomas Law Journal, we sought to bring the prisoner fully into mind and shed light on the conditions of those who are incarcerated in America. We want to follow Jesus's admonition not only to visit but to identify with, be in solidarity with, and provide meaningful assistance to prisoners.

Prisoners are entirely dependent on the prison establishment for basic necessities of life, health care, and personal security. Accordingly, the prisoner's access to law and to lawyers is essential to their well-being and for accountability of corrections systems. With this in mind, our speakers addressed the representation of prisoners by lawyers in terms of both law and human relationships; the distressing lack of adequate health care in prisons

* Laghi Distinguished Chair in Law, University of St. Thomas School of Law (Minnesota) and Faculty Advisor to Spring Symposium 2022. In addition to the symposium participants, whose contributions are described here, I'd like to thank Angela Dzik for logistical planning; Xander Moser for technological support; Carrie Hilger for publicity and programs; Laurette Hankom for budgeting; Madison Fernandez and Megan Massie, the Editor-in-Chief and Symposium Editor when the symposium was held; Sean Smallwood, Robert Rohloff, and Anna Brekke, the Editor-in-Chief, Managing Editor, and Articles Editor when the publication was prepared; and Mark Osler and Rachel Palouse who served as moderators for symposium panels.

that has only become worse during the pandemic; the daily threats to the personal safety of prisoners and the difficulties of preventing and obtaining remedies for such violence; the distinctive impact of mass incarceration on people of color and sexual minorities; the place of prison conditions in debates about the politics of crime; correctional institution secrecy that hides from the public what is happening in carceral institutions; ongoing developments in the rights of prisoners along with the daunting procedural, doctrinal, and monetary obstacles to pursuing prison condition litigation; the use of prison labor as a modern form of slavery; and the first-hand experiences of those who have worked to address these issues from behind bars.

Our presenters came from across the United States and from a diversity of communities, backgrounds, and experiences, including lawyers in public interest organizations and law firms who have dedicated their practices to representing prisoners; scholars who have studied prison conditions and become experts in "prison law" along with the judicial process for prisoner litigation; the commissioner of the state department of corrections; and former prisoners who have actually lived that about which we are talking.

By highlighting prisoner rights and prison conditions, we hope to remind our society about the members of our human family who are incarcerated and to forthrightly challenge what Professor Sharon Dolovich describes as a field of law that "is predictably pro-defendant, highly deferential to prison officials, and largely indifferent to the impact of judicial decisions on the lived experience of people in custody."[1] At the same time, as Professors Justin Driver and Emma Kaufman wrote, prison law "matters a great deal."[2] These two scholars report that "the people inside prisons have repeatedly emphasized that legal rules have significant, concrete effects on their lives."[3] Through this symposium, we hope to advance the day in which prison law will matter even more.

I. Welcome and Keynote

Dean **Robert Vischer** of the University of St. Thomas School of Law (now President of the University) introduced the symposium by grounding it in the tradition of Catholic Social Thought that animates the mission of our law school.[4] Drawing on the admonition of Pope Francis that jurists have a mission to counter "the vengeful trend which permeates society," Vischer declared that it is truly "compulsory" for a Catholic law school to be engaged in the conversation about how we treat and our attitudes toward

1. Sharon Dolovich, *The Coherence of Prison Law*, 135 Harv. L. Rev. Forum 302, 341 (2022).

2. Justin Driver & Emma Kaufman, *The Incoherence of Prison Law*, 135 Harv. L. Rev. 515, 521 (2021).

3. *Id.*

4. Robert K. Vischer, *Welcome*, 19 U. St. Thomas L.J. 218, 218–19 (2023).

prisoners.[5] At the core of Catholic Social Thought lies respect for human dignity. Pope Benedict quoted the words of Jesus about visiting the prisoner to call on all of us to "fully welcome the prisoner" by "making space and time for them in," among other places, our "laws."[6]

Sharon Dolovich, Professor of Law and Faculty Director of the UCLA Prison Law & Policy Program, presented the symposium **Keynote**, which she titled, "**How Prisoners' Rights Lawyers Do Vital Work Despite the Courts**."[7] She asked the pointed question, why do advocates for the incarcerated do this legal work? Beyond a personal sense of mission and satisfaction, what is being accomplished by court advocacy, especially knowing that "incarcerated litigants will lose most of the time"?[8] She outlined how the legal "doctrine is stacked a mile high against plaintiffs," from procedural obstacles through "extremely defendant friendly" substantive doctrines.[9] Despite these daunting odds in litigation outcome, Dolovich contends that advocates for the incarcerated "do a lot of good."[10] By gaining access to otherwise closed institutions, lawyers are able to bear witness and draw attention to the daily experience of people in custody. They constantly call on society "to move our carceral system closer to consistency with the basic normative commitments of a constitutional democracy."[11]

Every society needs institutions, which act through individuals to whom we have delegated political authority. Political theorist Judith Shklar teaches that we thereby open the door to official cruelty.[12] Not only does public cruelty itself cause harm when it occurs, but the fear of public cruelty is an obstacle to personal freedom for all of us and with even greater intensity for those most vulnerable to abuse of official power. That fear thus "corrodes the moral foundations of liberal democracy."[13] To overcome that fear, we need individuals who manifest the stubbornness "to assert [oneself] effectively."[14] We become moral agents when we have "the fortitude to stand up to the acts of official cruelty."[15]

Lawyers for the incarcerated promote these values by "bringing light to the dark corners" by gaining access to prisons.[16] They provide information to the public about what is happening behind bars. They achieve some accountability by ensuring that correctional officials and officers know they

5. *Id.* at 218.
6. *Id.* at 219.
7. Sharon Dolovich, *How Prisoners' Rights Lawyers Do Vital Work Despite the Courts*, 19 U. ST. THOMAS L.J. 435, 435 (2023).
8. *Id.* at 436.
9. *Id.*
10. *Id.* at 439.
11. *Id.*
12. *Id.* at 441.
13. *Id.*
14. *Id.* at 442.
15. *Id.*
16. *Id.* at 443.

are being monitored. And "[t]hey assure people incarcerated in the facility that they have not been forgotten and that there are people who are paying attention and advocating on their behalf."[17]

II. Panel A: Health Care in Prison

Corene Kendrick, Deputy Director of the ACLU National Prison Project, warned that "**Winning the Case is Not the End: Making the Right to Prison Health Care a Reality**."[18] As she explained, "[w]hile incarcerated people have a legal right to minimally adequate health care," when a suit to enforce that right succeeds, "the case is by no means over."[19] Next is the remedial phase, which "requires ongoing involvement by the plaintiffs' attorneys and/or outside independent monitors to see if the correctional health care system as a whole actually improves."[20] Kendrick has been a lead lawyer in the lawsuit against the Arizona Department of Corrections (ADC) in *Parsons v. Ryan*, which she aptly called a "paradigmatic" case.[21]

After many years, going now to a fourth federal judge, on a third health care vendor, and with continuing horrific examples of inadequate health care, it was increasingly obvious that there has been "a complete failure of compliance by ADC with our settlement."[22] With thousands of remedial phase docket entries, two contempt citations of the ADC, and utter failure to provide minimally adequate health care, the district judge surprised everyone by vacating the settlement and setting the case for trial.[23] Stalwart, diligent, and unflagging work by prison litigators has been essential to carry forward the work.[24] (Subsequent to the symposium, a weeks-long trial ended with a ruling by the district judge that the Arizona prison health care system was unconstitutional and that injunctive relief would follow.)[25]

Rebecca Shlafer, Assistant Professor in the Department of Pediatrics at the University of Minnesota, spoke to "**Pregnancy and Planning in the Time of the COVID-19 Pandemic**." Her article will be included in the next issue of the Law Journal.

Rachel Kincaid, Assistant Professor of Law at the Sheila & Walter Umphrey Law Center at Baylor University, confronted "**Mass Incarcera-**

17. *Id.* at 444–45.

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

19. *Id.* at 476.

20. *Id.*

21. *Id.* at 477.

22. *Id.* at 484.

23. *Id.* at 485.

24. *Id.* at 478–85.

25. Jensen v. Shinn, No. 12-cv-00601, 2022 WL 2911496, at *99–100 (D. Ariz. June 30, 2022).

tion and Misinformation: The COVID-19 Infodemic Behind Bars."[26] During the COVID-19 pandemic, both political leaders and scientists were able to bring information—and misinformation—directly to people through technology and social media. Misinformation coming directly from the Trump White House caused the most damage to the United States' response to the pandemic by "downplay[ing] the severity of the disease," "deemphasiz[ing] the importance of wearing masks," and advocating "for unproven (and even hazardous) 'cures' and treatments."[27] This "infodemic" was grievously harmful to "one particularly vulnerable segment of the population—people incarcerated in prisons and jails."[28]

Kincaid explained "how the repeated dehumanization of incarcerated people in the United States . . . gives them myriad legitimate reasons to be suspicious of the medical treatment and advice they received while incarcerated, making them especially vulnerable to the infodemic surrounding COVID-19."[29] With overcrowding, close confinement, understaffing of correctional officers, poor hygiene, and poor-quality medical care, prisons and jails have been a tinderbox for disease. As a result, infection rates were five times higher and death rates three times higher for people in prison.[30]

On top of that, incarcerated persons have restricted access to information and contact with the outside world, which was further curtailed during the pandemic.[31] The stage for dangerous misinformation about COVID-19 was already set by mistrust of prison and medical staff, the constant trauma of a violent environment, high rates of mental illness, and disparities in incarceration rates for racial and sexual minorities.[32] On top of that, correctional officials actively promoted misinformation and disinformation, resulting in the use of ineffective treatments and discouragement of vaccination. Courts have failed to carefully examine these failures in the lawsuits brought about inadequate medical care during the pandemic.[33]

The solution, Kincaid writes, lies in, "[f]irst and foremost, decarceration."[34] In addition, official medical guidance must improve, including mandatory and enforceable directives for prisons and jails. Education programs should be instituted for incarcerated persons, building on peer education and other trusted sources.[35] And courts must listen to the stories of

26. Rachel Kincaid, *Mass Incarceration and Misinformation: The COVID-19 Infodemic Behind Bars*, 19 U. ST. THOMAS L.J. 323, 323 (2023).

27. *Id.* at 325–26.

28. *Id.* at 327.

29. *Id.*

30. *Id.* at 333.

31. *Id.* at 335.

32. *Id.* at 335–36.

33. *Id.* at 353–56.

34. *Id.* at 356.

35. *Id.* at 359–61.

incarcerated persons and demand actual evidence of proper treatment rather than simply accepting the assurances of correctional officials.[36]

Andrew Noel, Partner at Robins Kaplan, addressed "**The Constitutional Right to Medical and Mental Health Care in Correctional Facilities**."[37] Noel offered a "focus [on] a smaller slice of correctional institution litigation" through his ongoing work on county jail systems in Minnesota and North Dakota.[38] Noel and his colleagues have pursued better medical care for incarcerated persons through "a single-plaintiff lawsuit against either correctional officers or correctional medical care providers."[39] Through this litigation, including depositions of jail personnel, they work to "get to the core of . . . these cases," including uncovering "attitudinal issues that exist in corrections."[40] The litigation is pursued in federal court, where there are no damage caps and attorney's fees are recoverable.[41]

In particular, Noel criticized the use of for-profit medical providers for jails, in which unqualified medical personnel are practicing above the license, failing to consult a medical doctor, and deferring to untrained correctional officers.[42] The poignant problem is the "infected, jaded mindset that these people are prisoners and not your patients."[43]

III. Panel B: Personal Safety for Prisoners

Chinyere Ezie, Senior Staff Attorney at the Center for Constitutional Rights, presented "**Dismantling the Discrimination-to-Incarceration Pipeline for Trans People of Color**."[44] Coining the phrase "discrimination-to-incarceration pipeline," Ezie reflected on "narratives about how discrimination and societal exclusion thrust trans people of color into poverty and homelessness before funneling them into the system of mass incarceration for 'crimes' of survival."[45]

To understand the discriminatory environment faced by trans people, we must begin with the familial rejection of trans people, which continues into discriminatory treatment and harassment in schools, and then on to rampant discrimination when they seek employment opportunities.[46] Trans people face continued instability in housing due to discrimination and barri-

36. *Id.* at 361.

37. Andrew Noel, *The Constitutional Right to Medical and Mental Health Care in Correctional Facilities*, 19 U. St. Thomas L.J. 487, 487 (2023).

38. *Id.*

39. *Id.*

40. *Id.* at 488.

41. *Id.*

42. *Id.* at 488–89.

43. *Id.* at 491.

44. Chinyere Ezie, *Dismantling the Discrimination-to-Incarceration Pipeline for Trans People of Color*, 19 U. St. Thomas L.J. 276, 276 (2023).

45. *Id.* at 278.

46. *Id.* at 279–87.

ers to healthcare access.[47] In a worsening political climate, trans people experience disproportionate rates of violence and even murder, especially trans women of color.[48] Because of this marginalization and the resulting staggering rates of poverty and homelessness, trans people of color "are also forced into criminalized economies as a means of survival at significant rates, even though doing so can precipitate their entry into the system of mass incarceration and immigrant detention."[49] Trans people may be coerced into sex and drug trades or need to engage in petty theft to survive—what Ezie calls "The Criminalization of Survival."[50]

Once incarcerated, trans people "face horrific conditions of confinement, including unconscionable levels of sexual abuse and assault," at a rate ten times higher than the general population in prison or jail.[51] Notwithstanding this painful reality, prison officials remain "notoriously indifferent."[52] Along with the constant threat of violence, trans people also "face systemic challenges accessing transition-related healthcare," and yet the prospect of relief through legal remedies is low.[53]

To offer some hope, Ezie seeks as well to "provid[e] concrete guidance on how attorneys and legal advocates can work to dismantle the discrimination-to-incarceration pipeline and effectuate necessary course corrections," imagining "a world where, instead of fighting for basic survival, trans people of color simply thrive."[54] First, she urges efforts to decriminalize attempts by trans people to survive.[55] At the least, policing that aims at sex work should be dissolved.[56] And prosecution of drug possession fails to respond to the "trauma that is best addressed within a public health framework."[57] Investing in decarceration strategies must be combined with immediate work to improve prison conditions and fight cruel and unusual conditions of confinement.[58] In particular, trans people should be housed in facilities according to their "gender, rather than their sex assigned at birth, for purposes of safety."[59] Once released, formerly incarcerated trans people need help to reenter society, lest they be "permanently thrust[ ] into an underclass."[60] Finally, Ezie speaks to legal efforts to undo the discriminatory patterns in housing, education, employment, and healthcare that create the

47. *Id.* at 288–90.
48. *Id.* at 291.
49. *Id.* at 293.
50. *Id.* at 296.
51. *Id.* at 302.
52. *Id.* at 303.
53. *Id.* at 305–06.
54. *Id.* at 279.
55. *Id.* at 307–08.
56. *Id.*
57. *Id.* at 308.
58. *Id.* at 309–11.
59. *Id.* at 310.
60. *Id.* at 311.

problem in the first place.[61] This will be achieved only with efforts to build power through new strategies for political participation.[62]

Claire Barlow, attorney at Nelson Mullins Riley & Scarborough, and **Alexander Klein**, attorney at Bradford, Andresen, Norrie & Camarotto drew on their experiences as students at the University of St. Thomas School of Law in representing a transgender prisoner in the Appellate Clinic. They wrote an article titled "**Taking the Prison Rape Elimination Act Seriously: Setting Clear Standards for Identifying and Protecting Vulnerable Prisoners from Sexual Violence in Confinement**."[63] While the Supreme Court has stated that "[b]eing violently assaulted in prison is simply not 'part of the penalty that criminal offenders pay for their offenses against society,'"[64] Barlow and Klein report that prison rape remains "rampant in the U.S. prison system."[65] Four to five percent of inmates each year, and a much higher percentage of sexual minorities (nearly forty percent of transgender prisoners), have been victims of sexual assault.[66]

In 2003, Congress unanimously enacted the Prison Rape Elimination Act (PREA).[67] Despite proclaiming a "zero-tolerance standard" for prison rape,[68] the PREA has "failed to address the humanitarian crisis that is still ravaging the U.S. prison system."[69] Department of Justice regulations to implement the PREA "paint with such a broad brush that they miss the canvas entirely."[70] Because these regulations "provide nearly unlimited discretion" to prison officials, prisoners harmed by sexual violence have no way to hold prison officials accountable or to obtain redress for their injuries through litigation.[71] The courts have held that neither the PREA nor the regulations provide a right to judicial relief or mandatory requirements that a court can enforce.[72]

After providing a history of the PREA and "explor[ing] the failure of the PREA as a judicial remedy in the status quo,"[73] Barlow and Klein explain that the regulations need to be tightened to be effective. The PREA

61. *Id.* at 313–17.

62. *Id.* at 318–20.

63. Claire C. Barlow & Alexander D. Klein, *Taking the Prison Rape Elimination Act Seriously: Setting Clear Standards for Identifying and Protecting Vulnerable Prisoners from Sexual Violence in Confinement*, 19 U. ST. THOMAS L.J. 255, 255 (2023).

64. Farmer v. Brennan, 511 U.S. 825, 834 (1994) (quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981)).

65. Barlow & Klein, *supra* note 63, at 255.

66. Barlow & Klein, *supra* note 63, at 256.

67. *See The Prison Rape Elimination Act*, JUST. DET. INT'L, https://justdetention.org/what-we-do/federal-policy/the-prison-rape-elimination-act/ (last visited Oct. 3, 2021); *see also* Implementing the Prison Rape Elimination Act, 77 Fed. Reg. 30,873 (May 23, 2012).

68. 34 U.S.C. § 30302(1).

69. Barlow & Klein, *supra* note 63, at 256.

70. Barlow & Klein, *supra* note 63, at 256.

71. Barlow & Klein, *supra* note 63, at 256.

72. Barlow & Klein, *supra* note 63, at 258.

73. Barlow & Klein, *supra* note 63, at 258.

should be amended to provide an independent cause of action for victims of prison rape.[74] Stronger guidance should be given through the Department of Justice implementing regulations.[75] For example, a genuine commitment to heightened protections for vulnerable inmates means that clear and mandatory standards must be set.[76]

Kenneth Ubong Udoibok, a Minneapolis lawyer who has represented prisoners and others who have been victims of official abuse, warned, "**Good Luck Holding the Government Liable When Its Employee Sexually Assaults Someone on the Job**." The video of his symposium presentation may be found at the link in the footnote.[77]

IV. Luncheon Address

Paul Schnell, Commissioner of the Minnesota Department of Corrections, presented the **Luncheon Address**.[78] He spoke to the subject of prisoner rights and prison conditions in the context of the "terrible impact of the pandemic on our prisons" and how "we create true community safety."[79] He openly acknowledged that "prison is most often a heartbreaking and relentlessly challenging place to be" and that "the system often fails those it intends to serve."[80]

Beyond the imposing physical structures of prisons, prisoners suffer a "compelled reduction in the social connection . . . with the outside world" and with "their loved ones."[81] The COVID-19 pandemic made that worse by further limiting connection to the outside world, limiting access to treatment, education, and programming, and destroying access to religious services and religious programming.[82] As we emerge from the pandemic, we need to focus again on the role that prisons can play in assisting people and making our communities safer.[83]

When it comes to "dealing with criminal wrongdoing," Schnell asks why are "we not doubling down on the practices that research tells us make a difference," such as "investing in community-based programs, systems, and structures that transcend the thought on crime rhetoric by focusing on the smart response to crime."[84]

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74. Barlow & Klein, *supra* note 63, at 270–71.
75. Barlow & Klein, *supra* note 63, at 271–73.
76. Barlow & Klein, *supra* note 63, at 273–74.
77. Univ. of St. Thomas, *St. Thomas Law Journal Symposium – Prisoner Rights and Prison Conditions*, YouTube (May 3, 2022), https://www.youtube.com/watch?v=E4bmuN2fgV4 (the panel on which Udoibok appears starts at 2:12:45).
78. Paul Schnell, *As if Prison Wasn't Bad Enough: COVID-19 and Intensified Interest in the Politics of Crime*, 19 U. St. Thomas L.J. 492, 492 (2023) (Luncheon Address).
79. *Id.*
80. *Id.* at 493.
81. *Id.*
82. *Id.*
83. *Id.* at 494.
84. *Id.*

For these reasons, Schnell criticized proposals to spend more money on mass incarceration, create "entirely new variants of crime with their own unique sentencing schemes," and extend the length of prison sentences.[85] We cannot let this "overshadow the objectives of rehabilitation and restoration."[86] The research clearly shows that "it's not about how much time a person spends in prison," but rather "it's about how that time is spent."[87] In sum, we need to fundamentally change the delivery of services and treatment of prisoners and give voice to people, so that we can develop a robust person-centered assessment.[88]

V. Panel C: Other Issues in Prison Rights

Andrea Armstrong, Law Visiting Committee Distinguished Professor of Law at Loyola University New Orleans College of Law, presented "**Access Denied: Public Records and Incarcerated People**."[89] Not only does the current system remove and exclude from the community, but it undermines informed accountability by limiting access to public records by people who are incarcerated. As a consequence, "[i]n a variety of ways, large and small, people in custody involuntarily reside in 'information deserts.'"[90] People in custody have many reasons to access public records: seeing disciplinary records to contest violations, obtaining their own medical records to ensure healthcare, finding information about laws impacting parole or good time calculation, and discovering information to be able to challenge their criminal convictions.[91]

Armstrong addresses the gap in the literature on carceral secrecy by providing a fifty-state overview of access by incarcerated persons to public records, categorizing the limitations on access, and discussing the implications of these laws.[92] States vary on whether incarcerated status is a basis for excluding or limiting public records access.[93] Those that restrict access justify the limitation based on preserving scarce public resources and the fear that incarcerated persons will abuse the open records process.[94] Even if incarcerated persons are eligible to request public records, states may limit the types of records available to those in custody.[95] Prisons also have broad discretion to control information flow based on threats to internal order or

85. *Id.* at 495.
86. *Id.*
87. *Id.* at 496.
88. *Id.* at 497.
89. Andrea Armstrong, *Access Denied: Public Records and Incarcerated People*, 19 U. St. Thomas L.J. 220, 220 (2023).
90. *Id.* at 222.
91. *Id.* at 222–23.
92. *Id.* at 224.
93. *Id.* at 234.
94. *Id.* at 231.
95. *Id.* at 236.

security.[96] And some states provide for additional review or special permission by another government body before information is released.[97]

As a practical matter, incarcerated persons encounter many obstacles to information. Modes of information, such as computers, periodical subscriptions, and televisions, are shared and thus prevent storing information.[98] Fees may be charged for public records.[99] One state requires in-person inspection, which obviously impairs access by those who are not free to come and go as they please.[100] And judicial remedies are frequently quite limited.[101]

Catherine Struve, David E. Kaufman & Leopold C. Glass Professor of Law at the University of Pennsylvania Carey Law School, advocates "**Allowing the Courts to Step in Where Needed: Applying the PLRA's 90-Day Limit on Preliminary Relief**."[102] Consider the example of an incarcerated client who is in crisis, where the lawyer succeeds in obtaining a preliminary injunction to transfer the client to an inpatient facility to prevent suicide.[103] Yet the Prison Litigation Reform Act limits the length of a preliminary injunction to 90 days,[104] despite the reality that completing the litigation to obtain a permanent injunction almost certainly cannot happen that quickly.[105] Thus, the client's very life may depend on the entry of a second preliminary injunction.[106] The question that Struve addresses is whether the statute allows the court authority to grant a successive preliminary injunction.

One circuit has suggested that the 90-day limitation on a preliminary injunction is insurmountable unless a permanent injunction is entered during that time frame to lift the 90-day limit.[107] Fortunately, Struve reports, "a widespread practice has developed" in the courts "of entering successive preliminary injunctions when warranted by the facts."[108] The text of the statute can be read to permit successive preliminary injunctions, and the legislative history supports that reading.[109]

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96. *Id.* at 233.

97. *Id.* at 241.

98. *Id.* at 233.

99. *Id.* at 240.

100. *Id.* at 239–40.

101. *Id.*

102. Catherine T. Struve, *Allowing the Courts to Step in Where Needed: Applying the PLRA's 90-Day Limit on Preliminary Relief*, 19 U. ST. THOMAS L.J. 407, 407 (2023).

103. *Id.*

104. *See* 18 U.S.C. § 3626(a)(2).

105. Struve, *supra* note 102, at 408, 409.

106. Struve, *supra* note 102, at 408.

107. Struve, *supra* note 102, at 409.

108. Struve, *supra* note 102, at 425.

109. Struve, *supra* note 102, at 425.

By setting the 90-day limit, the statute "builds a framework for periodic review of preliminary relief."[110] And the availability of successive preliminary injunctions, upon expiration of a 90-day period, "provide[s] a needed safety valve in situations where the risk of harm to the plaintiff requires that preliminary relief continues past the initial 90-day period."[111]

Alexandra Gannon, attorney at Veritage Law Group (formerly known as Erickson & Wessman), and **Nicole Stangl**, attorney at Ruder Ware, in a paper in which I was the lead author, identify the problem of "**Abusing Taxation of Court Costs by Government Lawyers to Chill Pro Se Civil Rights Claimants**."[112] Government lawyers regularly employ the threat of court imposition of costs on pro se plaintiffs, including prisoners, to convince them to abandon federal civil rights litigation.[113] For a prisoner, with very limited resources and facing a difficult reintroduction to society after incarceration, the prospect of thousands of dollars of court costs is daunting.

Yet, awarding of court costs is reserved for the discretion of the federal court.[114] As we report in this article, "[s]everal federal appellate courts have articulated public interest factors for reducing or eliminating court costs against pro se parties for various reasons, including the poverty of the [pro se] litigant and the public importance of a civil rights claim."[115]

In light of the established law of discretionary court costs, government law officers "should never present a direct and unqualified threat of thousands of dollars in court costs against a civil rights plaintiff, especially one that is not represented by counsel."[116] The professional ethics duty of honesty demands that government lawyers inform civil rights litigants that awards of court costs are discretionary and may be reduced or excused for public policy reasons.[117] In sum, "[a] government lawyer should not falsely assert the inevitability of potentially crippling financial costs in an attempt to bludgeon a civil rights plaintiff into abandoning a claim."[118]

Megan Massie, a recent graduate of the University of St. Thomas School of Law and Symposium Editor for this program, presented a paper called "**Locked Up and Trafficked Out: Prison Labor and the Thirteenth Amendment**."[119] While the Thirteenth Amendment to the United States Constitution ended chattel slavery in America, "[a] modern form of

110. Struve, *supra* note 102, at 417.
111. Struve, *supra* note 102, at 428.
112. Gregory Sisk, Alexandra Gannon & Nicole L. Stangl, *Abusing Taxation of Court Costs by Government Lawyers to Chill Pro Se Civil Rights Claimants*, 19 U. ST. THOMAS L.J. 391, 391 (2023).
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.* at 395.
117. *Id.*
118. *Id.* at 406.
119. Megan Massie, Note, *Locked Up and Trafficked Out: Prison Labor and the Thirteenth Amendment*, 19 U. ST. THOMAS L.J. 498, 498 (2023).

slavery has emerged: the American penal system."[120] The Thirteenth Amendment prohibits "slavery" and "involuntary servitude," but with an exception for "punishment for a crime." This Punishment Clause has been relied on to require prisoners to work and to limit the wages of incarcerated laborers.[121]

Prisoners may be required to work in regular prison jobs, in state-owned industries, in work release programs, or in jobs for private businesses.[122] A refusal to work subjects the person to moderately serious sanctions.[123] While some prisons pay inmates nothing, the average pay is $0.14 to $0.63 per hour, far below the minimum wage.[124] During the present era of mass incarceration, African Americans are imprisoned and forced to work at a disparate rate.[125]

Looking at the original understanding of the Thirteenth Amendment, the drafters in the post-Civil War Congress intended to obliterate all lingering vestiges of the slave system.[126] Thus, when the prison population exploded with racial disparities, the Thirteenth Amendment was directly implicated. Even if the Thirteenth Amendment is not amended to remove the Punishment Clause, its principles should be advanced by revising federal statutes to include prisoners in anti-labor trafficking laws and to extend the wage and hour protections of the Fair Labor Standards Act to prisoners.[127] In sum, Massie writes, "[i]t is time to end labor trafficking behind this nation's prison walls."[128]

For this panel, I authored an article describing "**How Qualified Immunity Condones Rogue Behavior by Government Officers**."[129] Qualified immunity is a special defense afforded to individual government officers to protect them from personal liability in a civil rights suit if they reasonably but mistakenly engaged in official acts that are later determined to have been wrongful. But qualified immunity has been afforded even when the officer has violated the criminal law, disregarded state law limitations, or transgressed official policies. "Unless the source of the wrongdoing is both constitutional in nature and clearly established in the law through an appellate precedent in a case with nearly identical facts, the of-

120. *Id.*

121. *Id.* at 500–01.

122. *Id.* at 502.

123. *Id.*

124. *Id.*

125. *Id.* at 507.

126. *Id.* at 509.

127. *Id.* at 511–14.

128. *Id.* at 514.

129. Gregory Sisk, *How Qualified Immunity Condones Rogue Behavior by Government Officers*, 19 U. ST. THOMAS L.J. 364, 364 (2023).

ficer engaging in rogue behavior may indeed avoid liability through qualified immunity."[130]

In this article, I contend that the officer who violates specific prescriptions about official conduct set forth by state law should be regarded as forfeiting qualified immunity. As I write, "[w]hen the government officer is a law-breaker rather than a law-enforcer, the very reason for qualified immunity evaporates."[131] An officer who crosses such a clear line is not someone who has made an innocent mistake. And "[b]y granting special solicitude to lawless government officers, the courts encourage further rogue behavior."[132]

VI. Panel D: The Perspective of Incarcerated Persons

In a panel discussion, which I moderated, three formerly incarcerated persons—**Paul Wright**, who is founder and director of the Human Rights Defense Center, **Oray Fifer** of Spokane, Washington, and **Rudy Martinez**, former federal commuted prisoner—opened the doors to prison to show us the realities of life behind bars.[133]

Asked about a typical day in prison, all three agreed with what Wright said, that things are pretty boring—until they're not. They also explained that the experience varies greatly by not only the type of prison but the location and culture. Prisoners tend to self-segregate by race, which reflects continued racial tension. Many prisoners feel obliged to carry a knife for protection, even at the risk of being punished if caught by correctional officers. As Martinez said, the adage was, "I'd rather be caught with it than without it."[134]

Each of the three made choices to change their lives to eventually escape from this situation. Wright has worked to bring light into prisons through his publication, *Prison Legal News*, which has been regularly blocked by prisons through rampant censorship in prison. He began the publication while in prison and now has expanded to publication of books as well to assist those engaged in prison litigation. After witnessing a race riot, Fifer began spending as much time as possible in the law library, working on his case and other people's cases. He decided he had to stay positive and affect a tunnel vision to stay out of trouble. Martinez took stock of his life and found pleasure in the smallest of things, such as a jar of peanut butter, which correctional officers had missed when seizing everything from his cell in retaliation against him. And he began to read everything he could find.

130. *Id.* at 365.
131. *Id.* at 364.
132. *Id.* at 366.
133. Oray Fifer, Rudy Martinez & Paul Wright, *The Perspective of Incarcerated Persons*, 19 U. St. Thomas L.J. 455, 455 (2023).
134. *Id.* at 461.

Their most positive experiences centered around people, whether good friends who were incarcerated with them or family and friends that maintained support. Wright focused on his writing. Martinez found himself reading constantly and learning more and more about legal rights and how to write persuasively. Fifer saw his legal work pay off when he helped a friend reduce his sentence, indeed to gain immediate release, based on new legislation. The brief that Fifer had written for him was adopted verbatim by a lawyer. As Fifer recalls, he got "to see his face change from no hope to where he's just stunned"—so that "was one of the happiest days that I had in prison."[135]

135. *Id.* at 470.