

# Limits to Prison Reform

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*Central to prison reform is the idea that prisons can be humane. Abolitionist scholarship has raised one challenge to this idea, in the form of a structural critique. Prisons, on this account, are social institutions that reflect and reinforce inequality; reform does not disturb those broader injustices, and so cannot cure the problems with prisons. Yes, and prison reform has another problem: there are limits to how humane any prison can be. Prisons are, by definition, instruments of punishment that inflict extreme isolation and control, which are dehumanizing experiences. And reforming prisons is, in some ways, an aesthetic project that is more concerned with the sensibilities of the punishers than the experience of the punished. I develop this argument using Norwegian prisons as a case study—prisons that reformists consider models of humane punishment, but which I describe differently through interviews with people incarcerated there. Part I of this Article situates my argument in abolitionist scholarship. Part II develops a critique of prisons and reform using Norwegian prisons as a case study. Part III mobilizes this critique of prison reform to offer a new account of some limits to prison conditions law. And Part IV suggests a kind of prescription: enforcing the perspective of the punished, rather than the punisher.*

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\* Arthur Liman Fellow, Rights Behind Bars. I am first grateful to Monica C. Bell, whose insight and feedback gave this argument its shape, and who advised me through this process. I am also thankful to Hedda Giertsen for her comments on this article and for our many conversations about prisons and abolition. Victoria Baena, Jordan Brewington, Issa Kohler-Hausman, Jarle Kvile, Steffi Ostrowski, and the student editors of the *UC Irvine Law Review*, all provided valuable feedback on drafts. This research was supported by a Fulbright Scholarship. I am grateful for the contributions of people in Norwegian prisons, who very generously shared their knowledge about imprisonment.

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### INTRODUCTION

Central to prison reform is the idea of the humane prison—that is, the idea that prisons, if done right, can be humane. This idea is not new. Since the invention of the modern prison, reformists have insisted on the possibility of prisons to be rehabilitative and dignifying.<sup>1</sup> Reformists have accounted for prisons’ failures to live up to that promise as a problem with implementation, rather than with the prison itself.<sup>2</sup> The reformist argument has had consequences: the idea of the humane prison has sustained prisons through potential crises of legitimacy, like the current one, when the many indignities of imprisonment have come into public view and earned disapproval.<sup>3</sup> The function of prison reform in these moments is to reinforce the idea that prisons can be made humane (even if they are not yet) and so allow the public to square its punishments with its values without abandoning prisons.

Abolitionist legal scholarship has raised one challenge to this idea of prisons in the form of a structural critique, which explains the problem with prisons in terms

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1. See, e.g., David J. Rothman, *Perfecting the Prison: United States, 1789–1865*, in *THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY* 117, 119 (Norval Morris & David J. Rothman eds., 1998); DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 35 (2001); MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 91–92 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977).

2. For historical examples of reformist assessments of the problems with prisons, see generally JOHN HOWARD, *THE STATE OF THE PRISONS IN ENGLAND AND WALES* (London, T. Cadell, J. Johnson & C. Dilly 3d ed. 1784) (1777); WILLIAM CRAWFORD, *REPORT ON THE PENITENTIARIES OF THE UNITED STATES* (London, n. pub. 1835), <https://hdl.handle.net/2027/umn.31951002343340d> [<https://perma.cc/NUT6-RWNM>]; E.C. WINES & THEODORE W. DWIGHT, *PRISON ASS’N OF N.Y., REPORT ON THE PRISONS AND REFORMATORIES OF THE UNITED STATES AND CANADA* (Albany, Van Benthuysen & Sons’ Steam Printing House 1867); Sanford Bates, *Have Our Prisons Failed?*, 23 *J. CRIM. L. & CRIMINOLOGY* 562 (1932). For a contemporary example, see *Rethinking Rikers Island*, *CTR. FOR CT. INNOVATION*, <https://www.courtinnovation.org/rethinking-rikers-island> [<https://perma.cc/2PES-63QS>] (last visited Oct. 23, 2022).

3. See, e.g., Rothman, *supra* note 1, at 128–29; GARLAND, *supra* note 1.

of the broader patterns and hierarchies in which they are embedded. Prisons, on this account, are social institutions that reflect and reinforce conditions of racism, socioeconomic inequality, and other injustices. Prison reform does not disturb those broader injustices, the structural critique goes, and so cannot cure the problem with prisons.<sup>4</sup>

*Yes, and* prison reform has another problem. That is, there are limits to how humane any prison can be. By definition, prisons operate by removing people from society by force, and locking them up in a constrained place with many others whom they do not know and may not like, under the authority of a prison administration. Those definitional features of a prison create conditions of extreme isolation and control, maintained by constant threats of additional and more severe punishments; these conditions are dehumanizing in the sense that they deprive a person of both connection to society and autonomy over themselves.<sup>5</sup> Given those limits, the project of prison reform is, at least in some ways, more concerned with the sensibilities of the punishers than with the experiences of the punished. My case study for this argument is the Norwegian prison, which reformists consider a model of humane punishment, but which I describe differently through interviews with people incarcerated there.<sup>6</sup>

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4. See Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1786 (2020) (describing the project of abolitionist scholarship in legal academia as “developing an increasingly structural account” of state violence); see also Monica C. Bell, *Anti-Segregation Policing*, 95 N.Y.U. L. REV. 650, 656 (2020) (critiquing police reforms for failing to “address deeper structural problems in municipalities, even though those structural problems virtually guarantee the failure of transformation efforts”); Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1225 (2015) (describing a structural proposal for transferring resources); Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 778 (2021) (describing a structural approach for analyzing police reform); Dorothy E. Roberts, *The Supreme Court, 2018 Term—Foreward: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 7–8 (2019) (explaining the tenets of abolitionism as a structural analysis of the role of prisons in society). See generally RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* (2007).

5. This definition of “humane” is an amalgam of two common definitions. One definition of “humane” involves autonomy over oneself. See, e.g., R.A. DUFF, *TRIALS AND PUNISHMENTS* 50 (1986) (asserting a “moral demand that we should respect others as rational and autonomous agents”); IMMANUEL KANT, *GROUNDWORK FOR THE METAPHYSIC OF MORALS* 29 (Jonathan Bennett trans., 2017) (1785) (a person should not treat another “merely as a means”). Another definition of “humane” involves connection to others and to society. See, e.g., R.H. TAWNEY, *THE ACQUISITIVE SOCIETY* 20–21 (1920) (asserting the importance of fellowship to humanity). For purposes of this article, I use both definitions, which are complementary. One reason that I offer my own definition of “humane” is that law does not appear to have one, outside of the context of animal law. In that context, “humane” distinguishes acceptable from unacceptable methods of slaughter. See, e.g., *Animal Legal Def. Fund v. HVFG LLC*, 939 F. Supp. 2d 992, 1001–02 (N.D. Cal. 2013) (“Both the meaning and the import of the word ‘humane’ are hard to pin down . . . Congress has addressed the definition of ‘humane’ twice, both times in reference to the killing of animals. In the Humane Slaughter Act, Congress expressly defined ‘humane slaughter’ for various livestock. In the Marine Mammal Protection Act, Congress expressly defined how a ‘taking’ may be done humanely.” (first citing 7 U.S.C. § 1901; and then citing 16 U.S.C. § 1362(4))); see also *Humane Slaughter Act*, 7 U.S.C. §§ 1901–02 (defining humane methods of execution).

6. For a description of the methods for conducting interviews, see Part II, *infra* 1446 and note 23.

The primary contribution of my argument is to add another critique of prisons and prison reform to the growing literature on abolition. The argument also interacts with three other areas of scholarship. First, my argument continues in a long but often forgotten tradition of describing prisons according to their fundamental characteristics. That tradition begins with Gresham Sykes' 1958 study of a maximum-security prison, which catalogued a series of "pains of imprisonment" (or experiences of incarceration) that are common to all prisons.<sup>7</sup> In 1990, Thomas Mathiesen reprised Sykes' study, noting that, "[a]mong criminologists today, the pains of imprisonment are strangely forgotten,"<sup>8</sup> and continuing on: "Though there are certainly variations between the prisons of different countries, and certainly between different prisons, these basic and general deprivations are there to a greater or lesser extent."<sup>9</sup> This scholarship, in emphasizing similarities between prisons as opposed to differences (as prison reformists tend to do), grounds descriptions of the potentials of prison and reform in an understanding that all prisons are essentially the same.

Second, this Article engages scholarship about the constitutional regulation of prisons. The Constitution's limitation on punishment is notoriously inscrutable, and the Court's attempts to articulate those limits have been described as "ineffectual and incoherent."<sup>10</sup> I offer a descriptive account of law's limitations on punishment: that is, that law enforces society's aesthetic sensibilities, which is to say, it enforces the perspective of the punisher. This account extends David Garland's similar argument about the Court's jurisprudence on methods of executions into the area of prison conditions, and carries the same moral implications.<sup>11</sup> Namely, "tinker[ing] with the machinery" of imprisonment cannot make prisons just or humane.<sup>12</sup> My descriptive account of law's limits on imprisonment does not

7. See GRESHAM M. SYKES, *THE SOCIETY OF CAPTIVES: A STUDY OF A MAXIMUM SECURITY PRISON* 63 (1958). The five "pains of imprisonment" are the losses of liberty, desirable goods and services, heterosexual relationships, autonomy, and security. *Id.* at 63–83.

8. THOMAS MATHIESEN, *THE PRISON ON TRIAL* 132 (Waterside Press 3d ed. 2006) (1987).

9. *Id.* at 1334. For other examples of this kind of scholarship, see Johan Galtung, *The Social Functions of a Prison*, 6 *SOC. PROBS* 127 (1958); Victor Lund Shamma, *The Pains of Freedom: Assessing the Ambiguity of Scandinavian Penal Exceptionalism on Norway's Prison Island*, 16 *PUNISHMENT & SOC.* 104 (2014).

10. Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 *VA. L. REV.* 677, 684 (2005).

11. See DAVID GARLAND, *PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION* 271 (2010).

12. See *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting). For other scholars who have discussed the relationship of punishment and aesthetics, see ROBERT A. FERGUSON, *INFERNO: AN ANATOMY OF AMERICAN PUNISHMENT* 10 (2014) ("Law creates systematic anguish in the name of punishment, and instead of responding to the suffering involved, it must justify the deliberate infliction of it through highly structured rationales and definitions . . . . The schemes needed to convince a people to submit to chastisement require rhetorical sophistication and aesthetic appeal."); see also Pieter Spierenburg, *The Body and the State: Early Modern Europe*, in *THE OXFORD HISTORY OF THE PRISON*, *supra* note 1, at 44, 47 (attributing the shift from public punishment to imprisonment, in part, to "[g]rowing sensitivity to violence and an aversion to physical suffering").

necessarily conflict with the normative theories that scholars have offered.<sup>13</sup> But I do think those normative theories should contend with the dynamics of punishment that I describe here, especially my observation that law has developed to respond in many instances to the appearance, rather than experience, of punishment.

Third and finally, this Article engages abolitionist scholarship from Norway, where I conducted the majority of the research for this Article. An underappreciated and rather wonderful fact is that Norway is and has been for some decades home to a vibrant abolitionist movement. Many of the ways in which Norwegian prisons improve on prisons elsewhere are hard-won victories of abolitionists that have been misattributed to the general benevolence of the welfare state.<sup>14</sup> Norway's movement has been well-documented and theorized by Norwegian activists and scholars, and one of this Article's ambitions is to bring those texts into wider circulation in U.S. legal scholarship.<sup>15</sup> The argument in this Article is particularly indebted to one

13. See, e.g., Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U.L. REV. 881, 882–83 (2009); John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U.L. REV. 1739, 1749–51 (2008); Judith Resnik, *(Un)Constitutional Punishments: Eighth Amendment Silos, Penological Purposes, and People's "Ruin,"* 129 YALE L.J.F. 365, 365 (2020).

14. For a contemporary response from a Norwegian abolitionist to the idea that Scandinavian prisons are "exceptional," see Thomas Mathiesen, *Scandinavian Exceptionalism in Penal Matters: Reality or Wishful Thinking?*, in PENAL EXCEPTIONALISM?: NORDIC PRISON POLICY AND PRACTICE 13 (Thomas Ugelvik & Jane Dullum eds., 2012).

15. Thomas Mathiesen's *The Politics of Abolition*, published in 1974, was (in Angela Davis's words) a "germinal text" of the abolition movement. Angela Y. Davis & Dylan Rodriguez, *The Challenge of Prison Abolition: A Conversation*, 27 SOC. JUST., no. 3, Fall 2000, at 212, 215. In 1968, Mathiesen founded, with other activists, the abolition organization, KROM, which continues to operate in Norway today. See *Om KROM* [*About KROM*], NORSK FORENING FOR KRIMINALREFORM [KROM] [NORWEGIAN ASS'N FOR CRIM. REFORM] (Nor.), <https://krom.no/om> [<https://perma.cc/BU36-3QSC>] (last visited Oct. 13, 2022). A second edition of Mathiesen's book, *The Politics of Abolition Revisited*, was republished in 2014 and includes a history and reflection on the strategy, successes, and failures of KROM. See THOMAS MATHIESEN, *THE POLITICS OF ABOLITION REVISITED* 5–20 (2015). Mathiesen and another Norwegian scholar-activist, Johan Galtung, both provided critical accounts of the social environment of the prison. See generally MATHIESEN, *supra* note 8, at 132–35; Galtung, *supra* note 9. Galtung's account was based on six months that he spent incarcerated in a Norwegian prison as a conscientious objector. Galtung, *supra* note 9, at 127. Another Norwegian scholar-activist was Nils Christie, whose work Máximo Langer described in his excellent article *Penal Abolitionism and Criminal Law Minimalism*. See Máximo Langer, *Penal Abolitionism and Criminal Law Minimalism: Here and There, Now and Then*, 134 HARV. L. REV. F. 42, 48, (2020). Christie is probably best known for his theories of restorative justice. For examples of this work, see NILS CHRISTIE, *LIMITS TO PAIN* (1981); Nils Christie, *Conflicts as Property*, 17 BRIT. J. CRIMINOLOGY 1 (1977). Christie came to call himself a "prison minimalist," rather than an abolitionist. NILS CHRISTIE, *A SUITABLE AMOUNT OF CRIME* 70 (2004) ("*A*bolitionism, in its purified form, is not an attainable position. We cannot abolish the penal institution totally. But . . . we can go a long way in that direction . . . [*Minimalism*] is close to the abolitionist position, but accepts that in certain cases, punishment is unavoidable. Both abolitionists and minimalists take undesirable acts as their point of departure, not acts defined as crimes. And they ask how these acts can be dealt with. Can compensating the injured party help to handle the case, or establishing a truth commission, or helping the offender to ask for forgiveness? A minimalist position opens up choice . . . [P]unishment becomes one, but only one, among several options." (emphasis added)). For examples of other writing by abolitionists in Norway, see generally Ida Nafstad

Norwegian abolitionist, Hedda Giertsen, and her description of prisons as an issue of perspectives.<sup>16</sup>

The Article proceeds as follows. Part I situates my argument in contemporary abolitionist scholarship, which has to date emphasized a structural critique of prisons and prison reform. I develop a complementary critique of prisons and reform in Part II, using Norwegian prisons as a case study. Specifically, I argue that referring to the experiences of incarcerated people exposes additional limits to prison reform: prisons—including the “best” ones—are fundamentally inhumane and cannot be reformed to be otherwise. Reformists who judge these prisons to be humane are in some ways responding to their own aesthetic sensibilities. Part III mobilizes this account of prison reform to offer a new account of prison conditions law. Across various doctrines, judges, like reformers, employ an aesthetic mode of analysis to determine whether prison conditions are permissible or not. The result is a jurisprudence that responds to the sensibilities of the punishers rather than the punished, and so permits many of the features of imprisonment that are most painful while prohibiting others that are less so. Part IV suggests a kind of prescription. Prison reform from the perspective of the punished would, in the short term, guide us toward less oppressive prisons; taken to its natural conclusion, this perspective leads to abolition.

#### I. ABOLITIONISM’S STRUCTURAL CRITIQUES

Abolitionist scholarship has to date focused on developing structural critiques of prison and policing, as well it should: the structural critique of state violence, which explains the problem with prisons by reference to broader policies, trends, and power hierarchies, is an important contribution of the abolition movement. The prison abolition group Critical Resistance, for example, models this kind of critique by describing its target as the “prison-industrial complex,” an apparatus of “surveillance, policing, and imprisonment” that enforces hierarchies based on race and class, and arose out of an alignment of private and government interests in maintaining those hierarchies.<sup>17</sup> Ruth Wilson Gilmore also models this kind of critique when she describes prisons as a response to “surpluses” (of state capacity, land, population, and capital) generated by economic policies of the late-twentieth

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& Knut Papendorf, *Introduction*, in RESTORATIVE PROCESSES FROM OSLO TO HAVANA AND BACK: DISCUSSIONS ON IMPLEMENTING AND STRENGTHENING RESTORATIVE JUSTICE PROCESSES IN CUBA AND NORWAY 7, 7–22 (Ida Nafstad & Knut Papendorf, eds., 2017); Knut Papendorf, *‘The Unfinished’: Reflections on the Norwegian Prison Movement*, 49 ACTA SOCIOLOGICA 127 (2006).

16. See Hedda Giertsen, *Streams of Perspectives in Discussions on Prison Punishment and Abolition* (Apr. 21, 2019) (unpublished manuscript) (on file with the author). For more of Giertsen’s writing, see Hedda Giertsen, *The Peculiar Relations Between Crime and Punishment*, in RESTORATIVE PROCESSES FROM OSLO TO HAVANA AND BACK, *supra* note 15, at 143, 143–71.

17. *The Prison Industrial Complex*, CRITICAL RESISTANCE, <http://criticalresistance.org/about/not-so-common-language/> [<https://perma.cc/65CW-YCXD>] (last visited Oct. 13, 2022); see also Davis & Rodriguez, *supra* note 15.

century.<sup>18</sup> The structural critique, in addition to providing insight, has potential for practical application. As these examples illustrate, the structural critique can illuminate patterns of oppression, and in doing so, the critique can expose some proposed reforms as superficial and identify interventions that are more substantial.

A growing body of legal scholarship has embraced and developed this structural critique, deploying it to practical ends. (Scholars have focused more on policing than on prisons, but the two contexts are highly related and so the arguments are transferrable.) For instance, Monica Bell has used this kind of analysis to criticize some proposals for police reform that fail to address “deeper structural problems.”<sup>19</sup> Allegra McLeod’s proposal for “grounded justice”<sup>20</sup> and Jocelyn Simonson’s idea of “police reform through a power lens,”<sup>21</sup> also use structural analyses to describe the injustices of the status quo and propose ways to promote public safety that also counteract racial and economic hierarchies. As Amna Akbar summarized, the current project of abolitionist scholars is the “development of an increasingly structural account” of state violence.<sup>22</sup>

## II. A COMPLEMENTARY CRITIQUE: NORWAY AS A CASE STUDY

The structural critique does have some limits: for example, standing alone, the structural critique implies that prisons would be an acceptable kind of punishment in a just and equitable society. More importantly, there are even more reasons to oppose prisons than the ones the structural critique describes, so my contribution to this growing literature is of the “yes, and” variety. *Yes*, prisons participate in structural injustices that prison reform does not address. *And* prisons have still more problems. Namely, prisons are an inhumane technique of punishment that cannot be made otherwise. And reformists who reach a different conclusion are, at least in some ways, responding to their own aesthetic sensibilities.

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18. GILMORE, *supra* note 4, at 26. For other examples of abolitionists making structural critiques, see, for instance, ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 16 (2003) (“The prison therefore functions ideologically as an abstract site into which undesirables are deposited, relieving us of the responsibility of thinking about the real issues afflicting those communities from which prisoners are drawn in such disproportionate numbers. This is the ideological work that the prison performs—it relieves us of the responsibility of seriously engaging with the problems of our society, especially those produced by racism and, increasingly, global capitalism.”); see also Jeremy Scahill, *Hope is a Discipline: Mariame Kaba on Dismantling the Carceral State*, INTERCEPT (Mar. 17, 2021, 3:01 AM), <https://theintercept.com/2021/03/17/intercepted-mariame-kaba-abolitionist-organizing/> [https://perma.cc/AZU4-ULZ7] (“[P]olicing is derivative of a broader social injustice. So it’s really impossible for non-oppressive policing to exist in a fundamentally oppressive and unjust society.”).

19. Bell, *supra* note 4; see also Roberts, *supra* note 4.

20. See generally McLeod, *supra* note 4.

21. See generally Simonson, *supra* note 4.

22. Akbar, *supra* note 4.

In this Part, I use Norwegian prisons as a case study, and describe those prisons using interviews with incarcerated people.<sup>23</sup> I first explain my focus on Norway, and then critique Norwegian prisons and reformists' accounts of those prisons.

#### *A. Why Norway?*

Prison reform relies on the idea that prisons can be made humane. But a difficulty for reformists, at least in the United States, is that there is not much proof for that proposition. U.S. prisons are violent, degrading, and corrupt—a fact that reformists readily acknowledge.<sup>24</sup> So for proof that prisons are perfectible, reformists turn abroad. This move is not new.<sup>25</sup> As historian Randall McGowen writes, a feature of prison reform throughout history is “the idea that a proper prison regime already exist[s], only somewhere else.”<sup>26</sup>

Today, that “somewhere else” is Northern Europe, and in particular, Norway. Norway has become an object of study for U.S. reformists, who visit Norwegian prisons to learn about their policies and approaches, often with U.S. prison officials in tow. The Vera Institute of Justice, for example, organizes these kinds of trips,

23. I conducted those interviews in Norway in 2018, along with two Norwegian colleagues: Hedda Giertsen and Elisabeth Tostrup. Interviews were conducted in both Norwegian and English. I did not edit quotations from interviews conducted in English for grammar. We interviewed people at six different prisons across Norway and toured each of those sites. We presented our materials—including interviews and photographs—in a public exhibition at the Oslo School of Architecture and Design in August 2018, with the intention of making this research accessible to a wider, public audience. We later put the exhibition online. See Sophie Angelis, Hedda Giertsen, Elisabeth Tostrup & Zahra Memarianpour, *Six Norwegian Prisons: 1850 to 2020*, SIX NORWEGIAN PRISONS, <https://www.sixnorwegianprisons.com/> [<https://perma.cc/6M44-89N4>] (last visited Oct. 13, 2022). The purpose of this original research project was to answer the question: how do ideas about what prisons are for find their way into prison architecture? And how, in turn, is that architecture experienced? The exhibition and online catalogue orient our research materials toward answering that question. See *id.* But the material offers other kinds of insights, which I explore *infra*. The description of Norwegian prisons that I provide sometimes cites to our research team's collective analysis of this material and I cite to that analysis on the exhibition website where appropriate. Some of my arguments are based in new analysis of the same material. There, too, I cite to the material as posted on the exhibition website, for the convenience of readers.

24. See, e.g., Ruth Delaney, Ram Subramanian, Alison Shames & Nicholas Turner, *Introduction*, VERA: REIMAGINING PRISON WEB REP. (Sept. 2018), <https://www.vera.org/reimagining-prison-web-report/introduction>, [<https://perma.cc/A74D-ZU9F>] (describing the “cumulative result” of incarceration as “a pervasive and pernicious denigration of the humanity of those who live and work inside American prisons that ripples out to communities and across generations”).

25. See, e.g., HOWARD, *supra* note 2, at 11–12 (describing Pennsylvania prisons as exemplary); FRÉDÉRIC-AUGUSTE DEMETZ & GUILLAUME-ABEL BLOUET, *RAPPORTS SUR LES PENITENCIERS DES ÉTATS-UNIS [REPORT ON THE PENITENTIARIES OF THE UNITED STATES]* 7 (Paris, Imprimerie Royale 1837) (Fr.) (same); NAT'L PRISON ASS'N, *DECLARATION OF PRINCIPLES ADOPTED AND PROMULGATED BY THE 1870 CONGRESS OF THE NATIONAL PRISON ASSOCIATION*, at xviii (1870), [http://moglen.law.columbia.edu/twiki/pub/AmLegalHist/AndersPauleyWikiProject/Declaration\\_of\\_Principles\\_\(1870\).pdf](http://moglen.law.columbia.edu/twiki/pub/AmLegalHist/AndersPauleyWikiProject/Declaration_of_Principles_(1870).pdf) [<https://perma.cc/8NUL-DDJB>] (taking Ireland as a model).

26. Randall McGowen, *The Well-Ordered Prison: England, 1780–1865*, in *THE OXFORD HISTORY OF THE PRISON*, *supra* note 1, at 71, 79.

and so does the nonprofit, AMEND.<sup>27</sup> Similarly, the Prison Law Office in California has dedicated some attorneys' fees awarded for litigating prison conditions cases to send prison administrators on trips to Norway and Germany.<sup>28</sup> The goal of the trips is to change administrators' perspective on how prisons can work, and so inspire them to commit to making positive changes in their corrections systems back home.<sup>29</sup>

The idea that Norway is an example of a humane prison system makes its way into broader public discourse through the media. Reformists publish their impressions of these prisons, and so do journalists—in remarkable numbers. Norway's prisons, for example, have appeared in a cover story for *The New York Times*, two stories for *TIME Magazine*, and a documentary by Michael Moore.<sup>30</sup>

27. See Delaney, Subramanian, Shames & Turner, *supra* note 24; see also Janelle Guthrie, *Looking to Norway for Inspiration on Reducing the Use of Solitary Confinement*, VERA: ADDRESSING THE OVERUSE OF SEGREGATION IN U.S. PRISONS & JAILS (Mar. 11, 2020), <https://www.vera.org/blog/addressing-the-overuse-of-segregation-in-u-s-prisons-and-jails/looking-to-norway-for-inspiration-on-reducing-the-use-of-solitary-confinement> [https://perma.cc/UNV4-RHGX]; *Prison Culture Change Initiative*, AMEND, <https://amend.us/prison-culture-change-initiative/> [https://perma.cc/36RH-5RDG] (last visited Oct. 14, 2022) (“Amend’s Prison Culture Change Initiative . . . provid[es] multi-year immersive programs and technical assistance that draw[s] on dignity-driven and public health-oriented correctional practices from Norway and elsewhere to inspire immediate changes in prisons that improve the health and well-being of people who live and work there.”).

28. The Prison Law Office, which litigates prison conditions cases in California, also runs the U.S.-European Criminal Justice Innovation Program, “a group that sponsors and funds tours of European prisons for U.S. prison officials, judges, legislators and other constituents of the carceral complex.” Christopher Zoukis, *Prison Administrators and Criminology Students Study Radical New Approach: Treat Prisoners like Human Beings*, 29 PRISON LEGAL NEWS, no. 4, Apr. 2018, at 18, 18, <https://www.prisonlegalnews.org/news/2018/apr/2/prison-administrators-and-criminology-students-study-radical-new-approach-treat-prisoners-human-beings/> [https://perma.cc/Z5LL-8ZKS] (claiming that Norwegian prisons do not have “punitive or harsh conditions of confinement”). As of 2018, the program has sponsored tours of Danish, German, and Norwegian prisons by “groups from Idaho, Pennsylvania, North Dakota, Colorado, Hawaii, Oregon, and Alaska.” *Id.*

29. *Id.*

30. See William Lee Adams, *Norway Builds the World’s Most Humane Prison*, TIME MAG. (May 10, 2010), <http://content.time.com/time/magazine/article/0,9171,1986002,00.html> [https://perma.cc/T8F4-ZQXN] (stating that the “guiding principle” of Norway’s prison system is “that treating prisoners humanely boosts their chances of reintegrating into society”); William Lee Adams, *Sentenced to Serving the Good Life in Norway*, TIME MAG. (July 12, 2010), <http://content.time.com/time/magazine/article/0,9171,2000920,00.html> [https://perma.cc/TGS2-LQ3T]; Jessica Benko, *The Radical Humaneness of Norway’s Halden Prison*, N.Y. TIMES (Mar. 26, 2015), <https://www.nytimes.com/2015/03/29/magazine/the-radical-humaneness-of-norways-halden-prison.html> [https://perma.cc/T9EB-T9ZX]; WHERE TO INVADE NEXT (Dog Eat Dog Films in association with IFC Films 2015). For other examples of reporting on Norwegian prisons, see Jennifer Bowen Hicks, *Prison Ecology*, 35 ORION MAG., no. 5, July/Aug. & Sept./Oct. 2016, at 7, <https://orionmagazine.org/article/prison-ecology/> [https://perma.cc/HWL3-H42A]; Emma De Carvalho, *What Norway Can Teach Us About Prison Abolition*, JUST. FOR ALL (June 3, 2021), <https://www.thejfa.com/read/what-norway-can-teach-us-about-prison-abolition> [https://perma.cc/53FT-MFLK]; Lorraine Mallinder, *Norway’s Prisons Without Bars: It’s a Trust Thing*, ALJAZEERA (Mar. 11, 2015), <https://www.aljazeera.com/indepth/features/2015/03/norway-prison-bars-trust-150303121441430.html> [https://perma.cc/4MQA-JGQ4]; Dashka Slater, *North Dakota’s Norway Experiment*, MOTHER JONES, July/Aug. 2017, <https://www.motherjones.com/crime-justice/2017/07/north-dakota-norway-prisons-experiment/>

Descriptions of Norwegian prisons are fairly consistent. Apparently, Norwegian prisons, unlike U.S. ones, replicate normal life as much as possible—allowing prisoners to, for instance, wear their own clothes, cook their own meals, and live in cells that look a lot like dorm rooms, with furniture that looks like it is from IKEA.<sup>31</sup> For these reasons, prisons in Norway are a less painful kind of punishment than prisons elsewhere and reflect more enlightened values of forgiveness and human dignity.<sup>32</sup> The Norwegian approach is also better instrumentally: because Norwegian prisons “treat people like people” (which is to say, with dignity and respect), prisoners are also less likely to reoffend.<sup>33</sup> In sum, Norwegian prisons are good for society and good for the prisoner. And the United States can have the same benefits if we make our prisons more like Norwegian ones.

### B. Characteristics of (Norwegian) Prisons

The problem is that these descriptions of Norwegian prisons are not very accurate. In particular, the descriptions overlook just how much Norwegian prisons are like prisons anywhere else. That is because prisons are, at bottom, instruments of punishment characterized by some basic, common features that are incompatible with values like dignity and humanity—a fact that criminologists have noted for decades.

One of those basic features is isolation from society. Prisons operate by removing people from society by force and then locking them up somewhere that they cannot leave, and society cannot enter. This feature of prisons is usually called the “deprivation of liberty,” but it entails more than the loss of control over one’s movements.<sup>34</sup> As Thomas Mathiesen writes:

Much more serious is the fact that the inmate is cut off from family, relatives and friends. The freedom to enter and maintain

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[<https://perma.cc/26BR-SGSL>]; see also CATHEDRALS OF CULTURE (Neue Road Movies 2014); BAZ DREISINGER, INCARCERATION NATIONS: A JOURNEY TO JUSTICE IN PRISONS AROUND THE WORLD 293 (2016).

31. Slater, *supra* note 30 (“Prisoners stay in private rooms with en suite bathrooms and can cook for themselves in kitchens equipped with stainless-steel flatware and porcelain dishes.”); Benko, *supra* note 30 (“In reality, the furniture is not dissimilar from what you might find in an American college dorm.”); Mallinder, *supra* note 30 (describing “housing inmates in airy rooms with en-suite bathrooms in a comforting, bubble-like environment, with enough education and leisure to keep them busy—and happy”).

32. Benko, *supra* note 30 (“Its modern, cheerful and well-appointed facilities, the relative freedom of movement it offers, its quiet and peaceful atmosphere—these qualities are . . . the physical expression of an entire national philosophy about the relative merits of punishment and forgiveness.”); Adams, *Norway Builds the World’s Most Humane Prison*, *supra* note 30 (quoting a Norwegian prison warden for the idea that “[i]n the Norwegian prison system, there’s a focus on human rights and respect”).

33. DREISINGER, *supra* note 30, (“As the Norwegian mantra goes, treat people like humans and they will be human.”); Zoukis, *supra* note 28 (“Norway’s recidivism rate is about 25 percent, much lower than the American rate, which is estimated at about 50 to 70 percent depending on how ‘recidivism’ is defined.”).

34. MATHIESEN, *supra* note 8.

such relationships is not always utilized when the inmate is on the outside. But that the freedom to do so is *there*, is the main point, and its absence “is painfully depriving or frustrating in terms of lost emotional relationships, of loneliness and boredom.”<sup>35</sup>

Given that relationships and social connection are part of what it is to be human, severing or at least straining those relationships is dehumanizing as well as painful.<sup>36</sup>

Norwegian prisons are prisons, and so they too are extremely isolating. Prisons in Norway separate prisoners from society through combinations of walls, fences, surveillance technologies, guards—and, of course, laws: criminal law and prison rules impose punishments on anyone who tries to leave or enter prison without authorization.<sup>37</sup> Regulation enforces isolation in finer ways, including, for instance, by restricting access to visits, phone calls, the internet, and so on. For example, Norway permits people to use the phone for no more than twenty minutes per week (or forty minutes for people with children), and to receive visits from friends and family for a total of one to 1.5 hours per week.<sup>38</sup> “I don’t like to have so much visit when I’m in prison,” said one prisoner. “Because then I just have to remind myself on what’s going on outside and then I start to think about that and it can get a little hard.”<sup>39</sup>

As prisons isolate people from society, they also force them into new and difficult kinds of relationships. Prisons, after all, lock people up in small spaces with many others whom they do not know and may not like. This feature of

35. *Id.* (quoting SYKES, *supra* note 7, at 65).

36. *See generally* TAWNEY, *supra* note 5.

37. *See* Sophie Angelis, Hedda Giertsen, Elisabeth Tostrup & Zahra Memarianpour, *Control and Punishment*, SIX NORWEGIAN PRISONS, <https://www.sixnorwegianprisons.com/spaces/control> [<https://perma.cc/27HP-PMMM>] (last visited Oct. 15, 2022) [hereinafter *Control and Punishment*]. For Norwegian law, see Lov 20. mai 2005 nr. 28 § 161 LOV OM STRAFF [STRL.] [PENAL CODE] (Nor.), <https://lovdata.no/NLE/lov/2005-05-20-28/§161> [<https://perma.cc/4PHP-GSRY>] (“Any person who assists another person on whom a custodial sentence or special sanction has been imposed in evading execution of the sanction shall be subject to a penalty of a fine or imprisonment for a term not exceeding three years. Any person who evades execution of an imposed custodial sentence shall be subject to a penalty of a fine or imprisonment for a term not exceeding six months. The same penalty applies to any person who unlawfully makes contact with a person who is imprisoned or unlawfully procures objects for him/her.”). For a discussion of law as force, see generally Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986). *See, e.g.*, Forskrift Om straffegjennomføring [Regulation to the Execution of Sentences Act] artikler av 22. februar 2002 nr. 183 § 3-28 (Nor.), <https://lovdata.no/SFE/forskrift/2002-02-22-183/§3-28> [<https://perma.cc/WX89-CHSE>]; *see also* JUSSBUSS, SERVING A SENTENCE: A BROCHURE FOR FOREIGNERS IN NORWEGIAN PRISONS 15 (2019), <https://foreninger.uio.no/jussbuss/saksomrader/fengselsrett/brosjyrer/brosjyreengelsk.pdf> [<https://perma.cc/9RKU-ZGHW>].

38. Sophie Angelis, Hedda Giertsen, Elisabeth Tostrup & Zahra Memarianpour, *Rehabilitation & Welfare*, SIX NORWEGIAN PRISONS, <https://www.sixnorwegianprisons.com/spaces/rehabilitation> [<https://perma.cc/77JY-SFTY>] [hereinafter *Rehabilitation & Welfare*].

39. *Id.*

imprisonment creates “prolonged intimacy” among strangers, which in turn provokes anxiety.<sup>40</sup>

These kinds of relationships are also a feature of prisons in Norway. Norwegian prisons range in size from eleven to 250 people (not including staff) and are subdivided into housing units of six to about twenty people.<sup>41</sup> Prisoners spend the majority of their days in these small areas: typically, sixteen hours per day on the weekdays and Saturdays, and then all day on Sundays.<sup>42</sup> Social anxiety is reflected in comments from a number of prisoners who said that the most important element of prison is who else is assigned to their unit. “It doesn’t really matter how your cell looks, if it’s small or if it’s big,” said one prisoner: “It’s about who they put you together with, in the *avdeling* [unit], actually. This is the main thing in prison.”<sup>43</sup> Some prisoners say that to keep the tension from reaching a breaking point, some prisoners must isolate themselves in their cells. One person explained: “You have people [who] just sit there, get their food and go into their cells. And these people make it work. If it were not for these people, it would be fucking chaos in this *avdeling* [unit].”<sup>44</sup> The anxiety of living in such close, forced proximity is also “reflected in the fact that a number of prisoners explicitly wish to live in isolation cells” rather than housing units.<sup>45</sup>

Perhaps Norwegian prisons are *less* isolating than prisons in other countries. A few facts support that argument. For one, Norwegian prisons use an “import model” (*importmodellen*) to provide social services to people inside prison. Per the import model, the agencies that are generally responsible for providing social services in society—including education, health care, and libraries—are also responsible for providing those services in prisons.<sup>46</sup> That means, for instance, that a library in a Norwegian prison is operated by the same agency that operates public libraries in Norway generally: the catalogue is the same, the policies are the same, and the librarian who staffs the library is employed by the public agency, and not the prison. Norway also traditionally holds a conference outside of prison every

40. SYKES, *supra* note 7, at 77.

41. Sophie Angelis, Hedda Giertsen, Elisabeth Tostrup & Zahra Memarianpour, *Housing, SIX NORWEGIAN PRISONS*, <https://www.sixnorwegianprisons.com/spaces/housing> [<https://perma.cc/AB26-DYFT>] (last visited Oct. 16, 2022) [hereinafter *Housing*]. Either extreme—units of six or twenty—has challenges. One person who was confined in a six-person unit said: “[I]t is easier to connect and we tried to make a community where we make food together, because it was fewer people.” *Id.* Another, who is confined in a bigger unit, said: “If you get only one asshole in six people, you’re going to fuck up the whole unit. Here, if you have a few assholes, you know, it doesn’t really matter, because you still have your people that you make your food with.” *Id.* But the larger units have their challenges, too. As one person described, in larger units, “You have people [who] just sit there, get their food and go into their cells”—that is, some prisoners who self-isolate. *Id.* And “these people make it work. If it were not for these people, it would be fucking chaos in the *avdeling* [unit].” *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. MATHIESEN, *supra* note 8, at 133.

46. See *Rehabilitation & Welfare*, *supra* note 38.

year, attended by people who are imprisoned, prison authorities, activists, scholars, and members of the press, to discuss themes and problems in the prison system.<sup>47</sup> But these exceptions prove the broader rule: Norwegian prisons, like all prisons, are places of extreme isolation, only allowing brief and closely monitored connections to the outside world. And, at any rate, neither of these features were the work of the Norwegian state. Instead, both the import model and the annual conference are examples of hard-won victories of Norwegian abolitionists.<sup>48</sup>

Prisons are also, by definition, a kind of punishment that subjects a person to extreme control. In prison, virtually all aspects of a prisoner's existence are under the authority of the prison administration, which regulates everything from clothing to diet to routine.<sup>49</sup> As Mathiesen wrote: "It is true that self-determination is withheld in many areas of life. But regulation by a bureaucratic staff is felt far differently than regulation by custom. The loss of autonomy is total and imposed, and for these reasons less endurable."<sup>50</sup> Given that control over one's self is part of what it is to be human, such restrictions on autonomy are dehumanizing as well as painful.<sup>51</sup>

Here again, Norwegian prisons are not very different from prisons generally. Prison authorities in Norway control virtually everything about their prisoners' lives. For example, prison authorities dictate prisoners' routines, which is to say, what prisoners are doing, where, and when. The following is an example of a prisoner's routine:<sup>52</sup> their cell door is unlocked at 7:00am; at 8:00am, they are escorted to work; at 2:00pm, the workday ends, and they are escorted back to their unit; at 4:00pm, they are escorted outdoors for recreation; at 5:30pm, they are taken back to their unit; and at 8:00pm, they are locked into their cells. Prisoners' lack of control over their own time is reflected in comments about tedium and boredom. As one prisoner described: "It can be a lot of dead time here."<sup>53</sup> "The daily life here is boring," said another.<sup>54</sup>

47. Mathiesen, *supra* note 14, at 16.

48. See generally *id. passim*; Nils Christie, *Modeller for Fængselsorganisasjonen [Models for Prison Organization]*, in MURER OG MENNESKER: EN KROM-BOK OM FENGSEL OG KRIMINALPOLITIKK [WALLS AND PEOPLE: A KROM-BOOK ON PRISON AND CRIMINAL POLICY] 113–20 (Thomas Mathiesen & Arne Birger Heli eds., 1993) (Nor.).

49. As Sykes wrote, prisons subject the prisoner to "a vast body of rules and commands which are designed to control his behavior in minute detail." SYKES, *supra* note 7, at 73.

50. MATHIESEN, *supra* note 8, at 133 (quoting SYKES, *supra* note 7, at 75).

51. See generally TAWNEY, *supra* note 5.

52. For diagrams of some typical schedules for people in Norwegian prison, see Sophie Angelis, Hedda Giertsen, Elisabeth Tostrup & Zahra Memarianpour, *Spaces*, SIX NORWEGIAN PRISONS, <https://www.sixnorwegianprisons.com/spaces/spaces> [<https://perma.cc/R6LQ-UWBJ>] (last visited Oct. 16, 2022) [hereinafter *Spaces*].

53. Sophie Angelis, Hedda Giertsen, Elisabeth Tostrup & Zahra Memarianpour, *Experiences*, SIX NORWEGIAN PRISONS, <https://www.sixnorwegianprisons.com/experiences> [<https://perma.cc/3PH3-DBNN>] (last visited Oct. 16, 2022) [hereinafter *Experiences*].

54. *Id.* Other people describe filling expanses of time created by imprisonment with education and exercise. One said: "So, if you go to school here, you have the possibility to take two years in one

Norwegian prisons also dictate what prisoners wear (though they do not always require uniforms) and what prisoners eat (though prisoners usually may cook one meal for themselves a day).<sup>55</sup> They determine what property prisoners may possess, and enforce those rules with even more severe intrusions into prisoners' bodies.<sup>56</sup> For example, to enforce rules about drugs, prisoners are required to urinate into a "urinal surrounded by mirrors, while prison officers watch."<sup>57</sup> In some circumstances, authorities place prisoners in small rooms with only a mattress and a "pacto-toilet" (a machine that captures a prisoners' feces to test for the presence of drugs), and keep them there for up to three days.<sup>58</sup> To enforce rules about contraband generally, guards subject prisoners to strip searches, as a matter of routine (for instance, before and after a person receives a visit), or for other reasons. As one prisoner described: "And sometimes they just say: 'Okay, you come with me!' and then you have to go into a room and strip for them, and then you have to go down and do the squats and everything. And this is not so nice."<sup>59</sup> These methods turn prisoners' bodies into objects for inspection, which is dehumanizing.

So does the presence of cameras, which extend to most places in the prison, and guards, who are stationed at every unit. As one person said: "Now they have cameras several places in the unit. So you are watched now in the daytime as long as you are out of the cell."<sup>60</sup> Relations between prisoners and their guards vary, sometimes even from unit to unit. One person explained the relations between prisoners and guards in the unit as follows: "Nobody wants the guards in the living room. Normally we just tell them: 'Go back in your cage, we don't want you here.' There is zero tolerance. They are the enemy, so to speak."<sup>61</sup> Another person described a different kind of relationship: "The guards, they are supposed to sit

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year. So it's a lot of things like that, that is good here. So you can make something useful out of your time of course, if you want to." *Id.* As another said: "I don't mind sitting on my own, but I see here . . . what can I say, [two-thirds] of the inmates here, they like to be social, they like to be out in the *avdeling* [unit] in the day . . . For me it's more, school and programs, the training, the *lufting* [outdoor recreation time] here. That's where I can improve myself." *Id.* (ellipses in original). One person described that he took advantage of the resources that the prison offered him: "I don't have so much experience with prison, this is my first time. But when I'm here, I think this is the optimal way to serve a sentence, because I got everything, I got everything what I need. I got a big living room, I got a big TV, nice kitchen, I got a nice room to sleep in, I got my own bathroom, I got my own TV, my own digital box, my own DVD player, I got my library and shop . . . So I don't miss nothing, and I don't have time to complain about anything. I really have time to focus on what's important for me. And for me what's important is my family, my children, that I need to live another way if I want to have that. So for me, this is—I don't miss nothing. I've got everything." *Id.* (ellipses in original).

55. See, e.g., Forskrift Om straffegjennomføring [Regulation to the Execution of Sentences Act] artiklers av 22. februar 2002 nr. 183 §§ 3-19, 22, 23 (Nor.), <https://lovdata.no/dokument/SFE/forskrift/2002-02-22-183> [<https://perma.cc/GT3P-2NYL>] (discussing food and clothing).

56. *Id.* at §§ 3-19, 25 (discussing personal property and cell searches).

57. *Id.*

58. See *Control and Punishment*, *supra* note 37.

59. *Id.*

60. *Id.*

61. *Id.*

down when it is dinner and eat with us. I think that is good, because it, like, normalizes things. So we are then just like a bunch of people eating dinner together.”<sup>62</sup> Regardless of the dynamics between prisons and guards in each unit, prisoners in Norway understand control to be a fundamental part of their punishment. As one person explained: “You are in a prison, you have to follow what’s decided. That’s how it is. It’s a reason why we are here.”<sup>63</sup>

All prisons also, in the end, rely on even more severe punishments. Prisons lock up many people together in the same, small space, and require their compliance with an expansive and oppressive set of rules. This context provokes tension and frustration, which can ripen into disobedience or conflict. Prisons rely on additional punishments to deter or respond, but because prison is already a severe punishment, additional punishments must be even more severe. These conditions make prisons—to borrow a phrase from William Stuntz—a “one-way ratchet” toward even more severe punishments.<sup>64</sup> From this perspective, solitary confinement is an archetypical punishment of prison. It takes the defining features of prison—control and isolation—and ratchets them up.

Norwegian prisons are, again, no different. A typical Norwegian prison has four types of solitary confinement cells. The first is for people who are guilty of

62. *Id.*

63. *Experiences*, *supra* note 53. Certain prisons in Norway are *less* controlling than prisons elsewhere. These are the several “open” prisons, which allow people to leave prison during the day for work and school in an arrangement similar in some ways to work release. But even in these prisons, the prisoners’ autonomy can be greatly overstated. At any rate, whether people experience open prisons as less controlling, and not as just another type of control, is unclear. Victor Shammass’s study of an open prison in Norway (Bastøy prison) shows that people in these prisons experience “the pains of freedom”: a particular variation on the experience of imprisonment, in which people must live under prison strict rules that are not enforced in the usual ways (e.g., by guards), and so must internalize those rules, instead. *See generally* Shammass, *supra* note 9. Interviewees said different things about open prisons. Some preferred being in an open prison and applied to the prison system for transfer there. Others preferred to stay in a high-security prison. The following exchange between three people in prison illustrates some of the trade-offs people must make when they choose to apply for an open prison or remain in a high-security one:

Person 1: “But in my opinion, in high-security prison you always have something to do, so time goes faster. Because, in an open prison you have a lot of dead time . . . and then the time goes slow, in my opinion, of course.”

Person 2: “Yeah, I agree.”

Person 1: “And so the weeks are just flying, because you have a routine every day, and you follow that routine and you know, okay, one more hour here, and then I am out, and then I have one hour again, and then, you know, it is night. And so the time just goes . . . It is like working outside.”

Person 3: “But I am of the opposite opinion of them. Because if you made your own routine, you fill your time with what you want to do.”

*See Experiences*, *supra* note 53. And comparing gradients of control when that control is extreme by any baseline in normal social life, is to focus on differences where commonalities are more significant.

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

violating the law or prison rules.<sup>65</sup> The second type, the security cell (*sikkerhetscelle*), is for people who are “seen [as] a serious threat to the surroundings or risk of self-harm.”<sup>66</sup> This type of cell has no furnishings except a mattress pad, a toilet that is a hole in the floor, and a window near the ceiling through which guards can look in, but people inside cannot see out. The third type is a strap-down cell, which may be used for the same reasons.<sup>67</sup> This cell has the same design as the security cell, but instead of a mattress, has a bed with straps for restraining a person. Finally, there are cells for people in custody pre-trial. Norway does not have separate facilities for people who are on pre-trial detention, so people who are put in detention while awaiting trial are usually kept in separate isolation units in the prison.<sup>68</sup> Contrary to what reformists say, these isolation cells are indeed put to use, some types more frequently than others.<sup>69</sup> Isolation also happens in prisons informally, as a matter of prison routine (for example, in the event of a staff shortage), or for other reasons.<sup>70</sup> And, when it happens, solitary confinement is as torturous in Norway as it is anywhere else. One prisoner commented: “There are sitting people in isolation for many months. They have drug problems, ADHD. They are locked up for 23 hours a day. They go crazy. Everybody would do that. ‘If you treat me like a dog, I become a dog.’”<sup>71</sup>

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65. *Control and Punishment*, *supra* note 37.

66. *Id.*

67. *Id.*

68. *Id.*

69. For international evaluations of Norwegian prisons, see U.N. Hum. Rts. Treaty Bodies, *Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT)*, U.N. TREATY BODY DATABASE: REPORTING STATUS FOR NOR., [https://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=NOR&Lang=EN](https://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=NOR&Lang=EN) [<https://perma.cc/32KS-AAG8>] (last visited Oct. 16, 2022); and Eur. Comm. for the Prevention of Torture & Inhuman or Degrading Treatment or Punishment (CPT), *The CPT and Norway*, COUNCIL OF EUR., <https://www.coe.int/en/web/cpt/norway> [<https://perma.cc/7MLJ-KW4J>] (last visited Oct. 16, 2022). For reports on isolation in Norwegian prisons by the Norwegian ombudsman, see *Visits and Reports*, SIVILOMBUDDET [THE CIVIL OMBUDSMAN], [https://www.sivilombudet.no/en/visit-reports/?type\\_institusjon=prison&period=](https://www.sivilombudet.no/en/visit-reports/?type_institusjon=prison&period=) [<https://perma.cc/SR8B-FDXY>] (last visited Oct. 16, 2022); see, e.g., SIVILOMBUDSMANNEN [THE CIVIL OMBUDSMAN], VISIT REPORT: ULLERSMO PRISON 29–31 AUGUST 2017 (2018), <https://www.sivilombudet.no/wp-content/uploads/2018/03/Besoksrapport-summary-Ullersmo-endelig.pdf> [<https://perma.cc/L9V6-BAH2>]; SIVILOMBUDSMANNEN [THE CIVIL OMBUDSMAN], VISIT REPORT: ILA DETENTION AND SECURITY PRISON 6–9 MARCH 2017 (2019), <https://www.sivilombudet.no/wp-content/uploads/2017/03/Visit-report-2017-Ila-Detention-and-Security-Prison.pdf> [<https://perma.cc/4DQU-ENAA>].

70. For example, the prison may lock everyone into their cells all day if they believe there are too few guards (as might happen if a guard is sick). See *Housing*, *supra* note 41.

71. *Id.* Another person, in response to a question about whether the noise in a unit bothered him, said: “You get used to it . . . I spent in [prison] in *andeling* X three and a half year, I never saw one other prisoner, I didn’t hear one sound. I think this is worse [than noise]. And [all] by yourself.” *Control and Punishment*, *supra* note 37 (first and third alteration in original).

Another prisoner described their experience in solitary confinement: “This isolation block in [specific prison]—yeah, well, it is hard to explain. It has got to be experienced, I think. This is not a place you want to be.”<sup>72</sup>

### C. Prison Reform Aesthetics

Why do reformists dwell on differences between Norwegian and U.S. prisons, and overlook the many similarities? One reason is that reformists analyze prison conditions according to their affective response to a limited set of visual and sensory triggers—that is, to use Jasmine Harris’s definition of the term, according to aesthetics.<sup>73</sup>

For an example of this aesthetic approach, take a *The New York Times* profile of one Norwegian prison:

Smooth, featureless concrete rose on the horizon like the wall of a dam . . . This was the outer wall of Halden Fengsel, which is often called the world’s most humane maximum-security prison . . . There were no coils of razor wire in sight, no lethal electric fences, no towers manned by snipers—nothing violent, threatening or dangerous. And yet no prisoner has ever tried to escape . . . In the choice of materials, the architects were inspired by the sober palette of the trees, mosses and bedrock all around; the primary building element is kiln-fired brick, blackened with some of the original red showing through. The architects used silvery galvanized-steel panels as a “hard” material to represent detention, and untreated larch wood, a low-maintenance species that weathers from taupe to soft gray, as a “soft” material associated with rehabilitation and growth . . . Inmates can be monitored via surveillance cameras on the prison grounds, but they often move unaccompanied by guards, requiring a modest level of trust, which the administrators believe is crucial to their progress . . . [T]he furniture is not dissimilar from what you might find in an American college dorm.<sup>74</sup>

The facility, the reporter concludes, is a “physical expression of an entire national philosophy about the relative merits of punishment and forgiveness.”<sup>75</sup>

These passages are an example of an aesthetic mode of analysis. For one, the reporter has a positive affective response to certain visual or sensory triggers—for example, the texture of the concrete, the absence of barbed wire or guard towers, the colors and materials of the physical plant, the lack of guards (in favor of the

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72. *Id.*

73. See Jasmine E. Harris, *The Aesthetics of Disability*, 119 COLUM. L. REV. 895, 897 (2019).

74. Benko, *supra* note 30.

75. *Id.*

less-visible surveillance camera), and the familiar design of the furniture. And two, based on their response to those triggers, the reporter draws a conclusion about the quality of imprisonment: not so punitive, and much more restorative.

Accounts of Norwegian prisons are full of examples of this kind of analysis.<sup>76</sup> Collectively, these accounts furnish a kind of catalogue of the sensory triggers that tend to provoke a response from reformists. Those triggers include the material conditions of the prison, like the newness and quality of the building and its furnishings. They also include the presence of objects associated with everyday life, like books, magazines, artwork, clothing, and kitchen utensils<sup>77</sup>—as well as the absence of some objects associated only with prisons, like bars on windows or barbed wire on the walls.<sup>78</sup> Triggers also include color (blues and greens on the

76. See, e.g., Slater, *supra* note 30 (“Halden is situated in a remote forest of birch, pine, and spruce with an understory of blueberry shrubs. The prison is surrounded by a single wall. It has no barbed wire, guard towers, or electric fences. Prisoners stay in private rooms with en suite bathrooms and can cook for themselves in kitchens equipped with stainless-steel flatware and porcelain dishes. Guards and inmates mingle freely, eating and playing games and sports together.”); Hicks, *supra* note 30 (“But Bastøy’s physical design—lush, unfenced, and escapable—suggests that a man who is invited to work with his feet on the earth and his eyes to the sky, and who functions as an integral part of a community, will learn interdependency better than a man whose movements are choreographed by others, and then only when he’s not locked in a cell.”); Mallinder, *supra* note 30 (“The Norwegian prison system as a whole rejects punishment, but Halden pushes the humane ethos to its limits, housing inmates in airy rooms with en-suite bathrooms in a comforting, bubble-like environment, with enough education and leisure to keep them busy—and happy.”); Adams, *Sentenced to Serving the Good Life in Norway*, *supra* note 30 (“Security guards use a system of underground tunnels to get around the prison, and a 20-ft. (6 m) concrete-and-steel wall surrounds the perimeter. But, following guidance from the ruling Labour Party, the harsh signs of incarceration end there . . . .” To avoid an institutional feel, exteriors are made not of concrete but brick, galvanized steel and larch. Trees obscure the wall, which is rounded at the top . . . so it isn’t too hostile.” Inside, the cells rival well-appointed college dorm rooms, with their flat-screen TVs and minifridges. Designers chose long vertical windows for the rooms because they let in more sunlight. And every ten to twelve cells share a living room and kitchen, which resemble Ikea showrooms.”); DREISINGER, *supra* note 30, at 293 (describing the “absence of prison uniforms and bars, . . . the gorgeous shared housing units, with their stainless-steel countertops, wraparound sofas, chic coffee tables, and long vertical windows designed to admit optimum sunlight . . . the stylish prison yard, adorned with funky graffiti-style murals courtesy of local artist Dolk Lundgren; the immaculate gym with its climbing wall; the friendly prison choir, practicing Woody Guthrie’s ‘Peace’; the knitted art on the wall, featuring poems by Pablo Neruda and W.H. Auden. And the magnificent health unit, home to a thriving medical staff and a plethora of drug treatment options, and the well-stocked library where the book club is deep in conversation about a Norwegian novel.”).

77. Zoukis, *supra* note 28 (“[P]risoners live in a sylvan setting with access to a kitchen equipped with glass and metal flatware, a living room with an Xbox and even a recording studio . . . .”); Slater, *supra* note 30 (“Prisoners . . . can cook for themselves in kitchens equipped with stainless-steel flatware and porcelain dishes.”).

78. DREISINGER, *supra* note 30, at 276 (“I spy sheep and cows but no fence or barbed wire . . . .”). Some visitors to one Norwegian prison perceive its wall as less wall-like because it is rounded at the top. Adams, *Norway Builds the World’s Most Humane Prison*, *supra* note 30 (“And while there is an obvious symbol of incarceration—a 20-ft. (6 m) concrete security wall along the prison’s perimeter—trees obscure it, and its top has been rounded off . . . so it isn’t too hostile.”); Slater, *supra* note 30 (“The prison is surrounded by a single wall. It has no barbed wire, guard towers, or electric fences.”); Benko, *supra* note 30 (“There were no coils of razor wire in sight, no lethal electric fences, no towers manned by snipers — nothing violent, threatening or dangerous.”).

walls), material (concrete, wood),<sup>79</sup> and nature (natural landscaping among buildings).<sup>80</sup> They also include the absence of visible hostility between guards and prisoners.<sup>81</sup> Together, these markers constitute the aesthetics of U.S. prison reform.

This aesthetic approach to analyzing prison conditions has its potentials. Some problems with prisons, like poor sanitation and hygiene, have visual or sensory markers that alert, offend, and motivate reformists to intervene. But the approach also has its limits. Many features of prison—including the oppressive regime of prison regulations, the disconnection from friends and family, and the power dynamics between prisoners and guards—have much more subtle outward markers, or none at all. Attentiveness to the visual and sensory can cause reformists to overlook features of imprisonment that are less visible but more fundamental. It can even lead reformists to draw the wrong conclusions about the conditions of a prison, because the visual and sensory features can indicate a level of autonomy, social connection, warmth, and peacefulness in a prison that simply is not there.

Norway's prison cells provide a good case study for the limits of the aesthetic approach. Norway's cells are almost always single-occupancy and, in many prisons, are also en-suite. In the maximum-security prison that reformists usually visit, the cells also, famously, look like something out of an IKEA catalogue, with large, curtained windows, wooden furniture, and a solid wood door that prisoners can close when they want.<sup>82</sup>

Reformists interpret these markers to mean that prisoners enjoy privacy and respite in their cells.<sup>83</sup> But that is not what people in prison report. For one, guards can, and do, enter the cells at any time. As one prisoner said in response to the question, “Do you feel like you have privacy in the cell?”: “No, not much, because the officers open the door when they want, and search the cell when they want. No, we don't have privacy, but you can't expect anything else.”<sup>84</sup> For another, the very same features of the cell that make it look like a dorm or hotel room (e.g., the en-suite bathroom, the single-occupancy status), also make the cell easier

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79. Adams, *Norway Builds the World's Most Humane Prison*, *supra* note 30; Benko, *supra* note 30 (“[T]he primary building element is kiln-fired brick, blackened with some of the original red showing through. The architects used silvery galvanized-steel panels as a ‘hard’ material to represent detention, and untreated larch wood, a low-maintenance species that weathers from taupe to soft gray, as a ‘soft’ material associated with rehabilitation and growth.”).

80. Hicks, *supra* note 30 (describing Bastøy prison as “lush”); Benko, *supra* note 30 (remarking on the “blue-black spruce, slender Scotch pine with red-tinged trunks and silver-skinned birches over a dense understory of blueberry bushes, ferns and mosses in deep shade”).

81. Adams, *Norway Builds the World's Most Humane Prison*, *supra* note 30 (“Prison guards don't carry guns—that creates unnecessary intimidation and social distance—and they routinely eat meals and play sports with the inmates.”).

82. See, e.g., Adams, *Sentenced to Serving the Good Life in Norway*, *supra* note 30. For images of cells in different Norwegian prisons, see *Spaces*, *supra* note 52.

83. Jeremy Kofman, *In Norway, A Prison Built on Second Chances*, NPR (May 31, 2015, 5:46 AM), <https://www.npr.org/sections/parallels/2015/05/31/410532066/in-norway-a-prison-built-on-second-chances> [<https://perma.cc/WXG4-MPZU>].

84. *Housing*, *supra* note 41.

for the prison to use for isolation. Norway frequently isolates people in their own cells, as a matter of prison routine, or during exigencies like a shortage of staff. Single-occupancy and bathrooms inside the cell make isolation easier. Speaking about a new prison designed in Norway which has cells with showers inside them, a person explained: “It makes it easier for the guards, because when you have everything in your cell, they can feed you through the hole in the door. So that’s why they make these new, nice big cells. Not because of us. It’s more convenient for them.”<sup>85</sup> In other words, people experience their cells as a space that serves their own interests at times, but in the end (like everything else in prison), their cells serve the interests of prison authorities.

Another case study for the limits of the aesthetic approach are the presence of nature and view from the cells. Reformists take note of these features of Norway’s maximum-security prison, which is built in the woods and retains much of the original landscape of trees, bushes, and boulders. Reformists interpret those markers to mean that the punishment is somehow milder. But some prisoners describe the relevance of views and nature very differently: not as features of the prison that ease the pain, but rather as features that illustrate and underscore the prison’s control. As one prisoner said in response to a question about whether they cared about their view: “You can’t choose your view . . . So I don’t spend that much time thinking about [it].”<sup>86</sup> As another prisoner (whom I did not interview) wrote of their time in Norway’s maximum-security prison:

I served several years of a long sentence in Halden Prison. These were difficult years for me and I look back on them with pain and bitterness. Halden Prison is Norway’s newest, and possibly one of the most talked about prisons in the world. That at least is what we inmates were told. “Welcome to Europe’s most humane prison.” . . .

. . . .

So, here I sit in Halden Prison. Beautiful nature! Trees outside my window! A peace and quiet I simply was not used to. I am an Oslo lad, a “townie”, and will remain so until this lonely body gasps its last breath. The fact that so-called experts have decided that Norwegian nature, trees and silence will be good for me makes me more angry than you can imagine. I wasn’t aware of my surroundings at first. How could I be? My mind bubbled, my

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85. *Id.* Bathrooms in cells are an example of the ambivalent scenarios that many people in prison find themselves in when it comes to reforms. Of having no bathroom inside the cell, one prisoner explained: “Sometimes, when you have to go to the toilet, you call the officers, and they maybe use an hour, or an hour and a half, and that ends with having to use a trashcan or a bottle.” *Id.* But having a toilet inside the cell makes isolation easier. As one person said: “But the flip-side to having a toilet in the cell is that if they want, they just lock you in, and you don’t have to go outside.” *Id.*

86. *Spaces, supra* note 52.

brain was working overtime, my emotions tore my heart into pieces and I missed those I loved. This caused me so much internal *noise* that I could not find comfort in those bloody trees outside my window. The silence was more of a torment than a consolation. If noises were to influence my mental state, what I needed was what was normal for me: the sound of traffic, stress, people, the noise of the city and the smell of asphalt and exhaust! Peace and quiet may sound inviting to a researcher . . . but for me it was totally meaningless.<sup>87</sup>

In sum, the dependence on aesthetics to analyze prisons means that reformists overlook and misunderstand some of the ways that prisons punish and dehumanize. Because that dehumanization is caused by definitional features of prisons, prison reform aesthetics also cause reformists to overestimate the extent to which the experience of imprisonment can be improved, without getting rid of the prison itself.

### III. IMPLICATIONS FOR PRISON CONDITIONS LAW

This case study of Norwegian prisons offers a new way to understand prison conditions law. Judges inquire into the quality of prison conditions under a variety of legal doctrines, and across those doctrines, the mode of analysis that courts use looks a lot like the one used by reformists who visit Norway. That is, there is a strain of aestheticism in the legal analysis that courts employ to determine whether prison conditions are permissible or not. The problem in law, as in the Norwegian case study, is that this approach has its limits, because an epistemology of aesthetics fixates on a small number of features of imprisonment and ignores some of the features that are the most painful. The result is a jurisprudence of prison conditions that does the same. In this Part, I explain where judicial inquiries into prison conditions arise, and then describe and critique how judges analyze them, using examples from case law.

#### *A. Inquiries into Prison Conditions*

Judges, like reformists, evaluate and interpret prison conditions. Judicial inquiries into prison conditions arise under different legal hooks. Some of those hooks are in the federal constitution, the most obvious being the Eighth Amendment's prohibition on "cruel and unusual punishments."<sup>88</sup> Courts have interpreted that Amendment to prohibit certain conditions inside prison.<sup>89</sup> Under

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87. John K., *Humanity Rather than Materialism—A Short Essay About the Prison Environment*, in *PRISON, ARCHITECTURE AND HUMANS* (Elisabeth Fransson, Francesca Giofrè & Berit Johnsen eds., 2018), <https://press.nordicopenaccess.no/index.php/noasp/catalog/download/31/126/991> [<https://perma.cc/UCP3-BP44>].

88. U.S. CONST. AMEND. VIII.

89. *See, e.g., Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (interpreting the Eighth Amendment to prohibit "inhuman techniques of punishment," including imprisonment under certain conditions

one doctrine, courts prohibit prisons from being “deliberately indifferent” to a serious harm or a substantial risk of serious harm to an incarcerated person.<sup>90</sup> This doctrine governs prison conditions including overcrowding, provision of medical care, food and nutrition, clothing, and shelter.<sup>91</sup>

Inquiries into the quality of prison conditions also arise under the Fifth and Fourteenth Amendments, which governs the conditions of people in pretrial detention, so usually the conditions in jails.<sup>92</sup> The same Amendments also govern when the government must provide a person in prison with due process before subjecting them to certain hardships. Under this doctrine, courts require that prisons provide people with due process before imposing on them an “atypical and significant hardship.”<sup>93</sup> The central inquiry under this doctrine is whether conditions are sufficiently harsh as to implicate a liberty interest and so trigger the protections of due process,<sup>94</sup> and governs, for instance, whether a prison must provide a person with a hearing before placing them in solitary confinement or transferring them to higher security prisons.<sup>95</sup>

(citing *Wilkerson v. Utah*, 99 U.S. 130, 136 (1879)); *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (“[I]t is now settled that ‘the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment.’” (quoting *Helling v. McKinney*, 509 U.S. 25, 31 (1993))).

90. *Farmer*, 511 U.S. at 828 (“A prison official’s ‘deliberate indifference’ to a substantial risk of serious harm to an inmate violates the Eighth Amendment.” (first citing *Helling*, 509 U.S. at 25; then citing *Wilson v. Seiter*, 501 U.S. 294 (1991); and then citing *Estelle v. Gamble*, 429 U.S. 97 (1976))).

91. *Id.* at 832 (quoting *Hudson v. Palmer*, 468 U.S. 517, 526–27 (1984)) (“The Amendment also imposes duties on these [prison] officials, who must provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must ‘take reasonable measures to guarantee the safety of the inmates.’”); *see also* *Brown v. Plata*, 563 U.S. 493 (2011) (overcrowding); *Estelle*, 429 U.S. 97 (medical care); *Foster v. Runnels*, 554 F.3d 807, 812 (9th Cir. 2009) (food); *Reed v. McBride*, 178 F.3d 849, 853 (7th Cir. 1999) (food); *Shrader v. White*, 761 F.2d 975 (4th Cir. 1985) (food); *Townsend v. Fuchs*, 522 F.3d 765, 773 (7th Cir. 2008) (clothing); *Williams v. Griffin*, 952 F.2d 820, 825 (4th Cir. 1991) (clothing); *Palmer v. Johnson*, 193 F.3d 346, 351 (5th Cir. 1999) (shelter); *Dixon v. Godinez*, 114 F.3d 640, 642 (7th Cir. 1997); *Ramos v. Lamm*, 639 F.2d 559, 568 (10th Cir. 1980) (shelter). The Court has elsewhere described the guarantees of the Eighth Amendment as the right to the “minimal civilized measure of life’s necessities” while in prison. *See* *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981).

92. *See, e.g.*, *Bell v. Wolfish*, 441 U.S. 520, 535 (1979).

93. *See* *Sandin v. Connor*, 515 U.S. 472, 483 (1995) (explaining that, for purposes of the Due Process Clause, a person’s “interests will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life” (citations omitted) (first citing *Vitek v. Jones*, 445 U.S. 480, 493 (1980) (transfer to mental hospital); and then citing *Washington v. Harper*, 494 U.S. 210, 221–22 (1990) (involuntary administration of psychotropic drugs))); *see also* *Wilkinson v. Austin*, 545 U.S. 209, 223–24 (2005).

94. *Id.*

95. *See, e.g., id.* (placement in solitary confinement); *Wilkinson*, 545 U.S. at 213 (transfer to a state supermax facility); *see also* *Rezaq v. Nalley*, 677 F.3d 1001 (10th Cir. 2012) (transfer to a federal supermax prison); *Sealey v. Giltner*, 116 F.3d 47 (2d Cir. 1997) (solitary confinement); *Joseph v. Curtin*, 410 F. App’x 865 (6th Cir. 2010) (solitary confinement); *Skinner v. Cunningham*, 430 F.3d 483 (1st Cir. 2005) (solitary confinement).

Other legal hooks prompt inquiries into the quality of prison conditions. For example, almost all state constitutions have some version of the prohibition on “cruel and unusual punishment,” which often applies to conditions in prison.<sup>96</sup> Statutes can also prompt these inquiries. The Federal Tort Claims Act requires that the federal Bureau of Prisons “provide suitable quarters and provide for the safekeeping, care, and subsistence” of people in federal prison.<sup>97</sup> State torts—including common and statutory law—also require courts to analyze the quality of prison conditions.<sup>98</sup>

Courts undertake inquiries into prison conditions at a massive scale: each year, people in prison file about 7,000 civil cases in district courts.<sup>99</sup> The vast majority—around 95%—of these cases are *pro se*,<sup>100</sup> so judges almost always undertake the task of interpreting and evaluating prison conditions without the guidance of counsel.

### B. Analyzing Prison Conditions

Much like reformists who visit Norwegian prisons, judges inquire into the quality of prison conditions by applying an aesthetic mode of analysis. Judges use this mode of analysis across many doctrinal areas.

Consider, as a first example, prison overcrowding cases. Two cases about prison overcrowding at the Supreme Court—*Rhodes v. Chapman* and *Brown v. Plata*—illustrate the aesthetic mode of analysis well. The inquiry under both cases arose under the Eighth Amendment and turned on whether the conditions in overcrowded prisons constituted a serious harm, or substantial risk of serious harm; in other words, the inquiry arose under the “objective” prong of the deliberate indifference test.<sup>101</sup> The Court reached opposite conclusions in these two cases but deployed the same mode of analysis.

*Rhodes*, decided in 1981, challenged conditions at Southern Ohio Correctional Facility, a supermax prison.<sup>102</sup> In 1975, the prison started double-celling, meaning

96. William W. Berry III, *Cruel State Punishments*, 98 N.C. L. REV. 1201, 1205 (2020) (“[A]lmost all states have an analogue to the Eighth Amendment.”).

97. 18 U.S.C. § 4042(a).

98. See, e.g., *Walters v. Frakes*, 953 N.W.2d 831, 841–42 (Neb. App. 2021), *review denied* (July 6, 2021), *opinion modified on denial of reb’g*, 957 N.W.2d 203; *Giraldo v. Cal. Dep’t of Corr. & Rehabilitation*, 168 Cal.App.4th 231, 246–53 (2008) (citing cases and treatises); *Callaway v. N.M. Dep’t of Corr.*, 875 P.2d 393, 398–99 (N.M. Ct. App. 1994); see also CTR. FOR CONST. RTS., *THE JAILHOUSE LAWYER’S HANDBOOK: HOW TO BRING A FEDERAL LAWSUIT TO CHALLENGE VIOLATIONS OF YOUR RIGHTS IN PRISON* 10–11 (Rachel Meeropol, Ian Head & Chinyere Ezic, eds., 6th ed. 2021) (describing negligence claims as a means of litigating, for example, inadequate medical care or failure to protect, and intentional torts as a means of litigating guard assaults).

99. *Our Approach*, RTS. BEHIND BARS, <https://www.rightsbehindbars.org/our-approach> [<https://perma.cc/8SJQ-VZ5P>] (last visited Oct. 16, 2022).

100. *Id.*

101. See *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981); *Brown v. Plata*, 563 U.S. 493, 566 (2011).

102. *Rhodes*, 452 U.S. at 340–41.

that it started housing two people into cells designed to hold one.<sup>103</sup> Because of double-celling, the prison was 38% over its design capacity.<sup>104</sup> People in prison sued the state, alleging that the conditions in the overcrowded prison caused them serious harms, and also put them at substantial risk of others. Those harms included increased violence, inadequate food, reduced access to court, poor temperature regulation, strained medical services, and fewer opportunities for jobs and programming.<sup>105</sup>

The Court's analysis of the prison conditions at the supermax facility placed very little weight on those consequences of overcrowding. Instead, the Court emphasized the quality of the physical infrastructure, which, it noted, had been recently built and was "unquestionably a top-flight, first-class facility."<sup>106</sup> The Court described the facility as follows:

[Southern Ohio Correctional Facility] was built in the early 1970's. In addition to 1,620 cells, it has gymnasiums, workshops, schoolrooms, "dayrooms," two chapels, a hospital ward, commissary, barbershop, and library. Outdoors, SOCF has a recreation field, visitation area, and garden . . . Each cell at SOCF measures approximately 63 square feet. Each contains a bed measuring 36 by 80 inches, a cabinet-type night stand, a wall-mounted sink with hot and cold running water, and a toilet that the inmate can flush from inside the cell.<sup>107</sup>

Given these "generally favorable findings," the Court held that the conditions at the Ohio supermax facility were constitutional.<sup>108</sup>

The Court's analysis in *Rhodes* is aesthetic because it turns on certain visual markers on which the viewer places significant importance: namely, material conditions in the prison. The problem with this mode of analysis—like in the context of prison reformists—is that there are limits to how much these markers determine the experiences of people who are locked up. That is, material conditions do not impact all of the underlying qualities of imprisonment that make it so painful: limited privacy; close proximity to others, and the social tension that comes with that; isolation from the outside world; and no control over how people use their time. Overcrowding—which pushes even more people into the same small space and oversubscribes the same limited opportunities for participation in programming—exacerbates those experiences.<sup>109</sup> The result of applying the

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103. *Id.* at 341.

104. *Id.* at 343.

105. *Chapman v. Rhodes*, 434 F. Supp. 1007, 1009 (S.D. Ohio 1977), *aff'd*, 624 F.2d 1099 (6th Cir. 1980), *rev'd*, 452 U.S. 337 (1981).

106. *Rhodes*, 452, U.S. at 341 (internal quotations omitted).

107. *Id.* at 340–41.

108. *Id.* at 344.

109. For discussions of problems related to prison overcrowding, see generally Emily Widra, *Since You Asked: Just How Overcrowded Were Prisons Before the Pandemic, and at this time of Social*

aesthetic mode of analysis to this case is that the Court attended to only some qualities of imprisonment, and ignored others entirely.

The Court used a similar kind of analysis in *Brown v. Plata*, a second overcrowding case, though it reached the opposite result. *Plata* challenged the constitutionality of conditions in California’s prisons, systemwide.<sup>110</sup> At the time of the lawsuit, California’s prisons were at about 200% of design capacity, and had been so for more than a decade.<sup>111</sup> People in prison, again, explained that overcrowding caused them serious harms, and also put them at substantial risk of other harms. Responding to the standard in the Prison Litigation Reform Act (PLRA) for prison release orders,<sup>112</sup> plaintiffs in *Plata* framed the harms in terms of the strain on medical care.<sup>113</sup>

But the Court’s analysis, even applied to the narrow question of medical care, again emphasized the quality of the material conditions, and the decrepitude of the prisons. The Court placed a good deal of weight, for example, on the fact that people in California prisons were housed in spaces that were not designed as housing, and that there was a shortage of toilets.<sup>114</sup> Even the analysis of the adequacy of medical care in the prisons emphasized certain visual markers, like human waste, material decrepitude, and an atmosphere of disorderliness. The Court explained:

[S]uicidal inmates may be held for prolonged periods in telephone-booth-sized cages without toilets. A psychiatric expert

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*Distancing, How Overcrowded Are They Now?*, PRISON POL’Y INITIATIVE (Dec. 21, 2020), <https://www.prisonpolicy.org/blog/2020/12/21/overcrowding/> [https://perma.cc/UC57-PYZR] (“Prison overcrowding has always been a serious problem, correlated with increased violence, lack of adequate health care, limited programming and educational opportunities, and reduced visitation.”); *Overcrowding*, PENAL REFORM INT’L, <https://www.penalreform.org/issues/prison-conditions/key-facts/overcrowding/> [https://perma.cc/H52K-94QL] (last visited Oct. 16, 2022) (“Overcrowding . . . undermines the ability of prison systems to meet basic human needs, such as healthcare, food, and accommodation. It also compromises the provision and effectiveness of rehabilitation programs, educational and vocational training, and recreational activities . . . . Overcrowding, as well as related problems such as lack of privacy, can also cause or exacerbate mental health problems, and increase rates of violence, self-harm, and suicide.”)

110. *Brown v. Plata*, 563 U.S. 493, 499 (2011).

111. *Plata*, 563 U.S. at 502 (“California’s prisons [were] designed to house a population just under 80,000, but . . . the population was almost double that.”).

112. The PLRA defines a “prisoner release order” as “any order, including a temporary restraining order or preliminary injunctive relief, that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison.” 18 U.S.C. § 3626(g)(4). The PLRA requires, among other things, that release orders be issued only where crowding is a primary cause for the constitutional injury, and there is no other relief. *Id.* at § 3626(a)(3)(E).

113. The class in *Plata* was state prisoners with serious medical conditions. *Plata*, 563 U.S. at 508.

114. *Id.* at 502 (“Prisoners are crammed into spaces neither designed nor intended to house inmates, [like gymnasiums or converted dayrooms].”); *see also id.* (“As many as fifty-four prisoners may share a single toilet.”); *Id.* at 519 (“[L]arge numbers of prisoners may share just a few toilets and showers . . .”).

reported observing an inmate who had been held in such a cage for nearly 24 hours, standing in a pool of his own urine, unresponsive and nearly catatonic. Prison officials explained they had “no place to put him.”<sup>115</sup>

The *Plata* Court supported its decision with a series of pictures of the inside of the California prisons, which it attached to the opinion. Two photographs were of crowds of people in a gymnasium stuffed with bunkbeds. The third was of cages where people were locked up while they waited for a mental health treatment bed.<sup>116</sup> The photographs conveyed a general environment of decrepitude, griminess, and disarray.

The *Plata* Court, in other words, like the Court in *Rhodes*, relied on a limited set of visual markers to determine the quality of conditions inside a prison. Those markers included old and decrepit buildings, human waste, and disorderliness. The *Plata* Court, of course, held that the conditions in California prisons were unconstitutional, and affirmed the release order issued by the three-judge panel at the district court.<sup>117</sup> But the mode of analysis is nonetheless a limited one: it draws the Court’s attention to only some facts and causes it to overlook other important ones.

Courts apply the aesthetic mode of analysis across different doctrinal areas, and so replicate the limitations of this method in many areas of prison conditions law. Take, as a second example, a pair of cases in the Tenth Circuit Court of Appeals that challenged conditions in solitary confinement. The first case is *DeSpain v. Upboff*, brought by a person in a Wyoming state prison.<sup>118</sup> The person alleged that, while they were in solitary, a number of people who were also in that unit “plugged their toilets with styrofoam cups and then flushed, resulting in water overflows that left the unit standing in approximately four inches of water.”<sup>119</sup> The unit stayed flooded for thirty-six hours, and the toilets were unusable for most of the time.<sup>120</sup>

The Court of Appeal’s analysis of the person’s claim was attentive to those same markers as the Supreme Court in its overcrowding cases: namely, decrepitude and human waste. The court wrote:

Mr. DeSpain was exposed to the stench of sitting urine in his toilet and attempted to cover the toilet with a plastic bag, which provided little remedy. Wishing to avoid the same problem, many prisoners eschewed the toilets altogether and urinated through the bars of their cells into the standing water in the walkways.

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115. *Id.* at 503–04 (internal citation omitted); *see also id.* at 504 (“[U]p to fifty sick inmates may be held together in a 12-by-20-foot cage for up to five hours waiting treatment.”).

116. *Id.* at 549.

117. *Id.* at 502.

118. 264 F.3d 965, 972 (10th Cir. 2001).

119. *Id.*

120. *Id.*

Mr. DeSpain describes hearing prisoners urinate into the water and seeing feces floating amidst other debris in the water near his cell.

The prisoners were served breakfast on the morning of March 29, with officers rolling the food cart through the urine-mixed water. The cart's ground clearance was roughly the same as the water depth, making it difficult to avoid contact between the food and the contaminated water. Food trays were not picked up after lunch service, and at future meals the officers merely kicked the trays out of their way, adding uneaten and partially eaten food to the standing water.<sup>121</sup>

Based on this analysis, the Court of Appeals concluded that these allegations stated a claim under the Eighth Amendment—i.e., that the allegations described conditions that were unconstitutional *per se*.<sup>122</sup>

The conditions in *DeSpain* were undoubtedly horrific. But the mode of analysis is limited, as a second case, *Rezaq v. Nalley*, illustrates.<sup>123</sup> The plaintiffs in *Rezaq* were incarcerated at ADX Florence, the federal supermax prison in Colorado.<sup>124</sup> Their claim was that they were entitled to a hearing before being transferred there.<sup>125</sup> At issue in the case was whether the conditions at ADX Florence were so harsh that they imposed an “atypical and significant hardship” on people imprisoned there, and so implicated a liberty interest protected by due process.<sup>126</sup> In other words, the plaintiffs were seeking under the Fifth Amendment a right to a hearing before being transferred.<sup>127</sup>

The Tenth Circuit concluded that ADX Florence confined people in near-total social isolation. People spent twenty-three hours per day inside their cells. They ate alone in their cells, and also showered inside their cells.<sup>128</sup> And the only time that they left was for recreation, which was also isolated, and also was “frequently cancelled due to staff shortages, mass shakedowns, or adverse weather.”<sup>129</sup> Visits and phone calls were rare.<sup>130</sup>

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121. *Id.*

122. *Id.* at 974, 977 (“Because the flooding conditions described by Mr. DeSpain lasted only thirty-six hours, he must allege significant deprivations in order to state a successful conditions of confinement claim. Accepting his portrayal of the flooding conditions [as is appropriate for reviewing a district court’s grant of summary judgment], we hold that he has done so.”).

123. 677 F.3d 1001 (2012).

124. *Id.* at 1004.

125. *Id.*

126. *Id.* at 1010.

127. *Id.* at 1011.

128. *Id.* at 1014–15; *see also* *Rezaq v. Nalley*, No. 07-cv-02483, 2010 WL 5157317, at \*2 (D.Colo. Sept. 13, 2012).

129. *Rezaq*, 677 F.3d at 1005.

130. *Id.*

But the court in *Rezaq* nonetheless held that the conditions were not so harsh as to implicate a liberty interest,<sup>131</sup> let alone violate the Eighth Amendment, holding that the conditions were similar to those routinely imposed in segregated confinement.<sup>132</sup> The conditions, of course, *are* different from other instances of segregation: people confined in ADX Florence are released from their cells less often, have fewer opportunities for contact with people inside or outside prison, and are in isolation for longer, often for many years.<sup>133</sup> And the conditions are, at any rate, extremely harsh by any other baseline. The problem is that those hardships are not *visible* to judges: employing a mode of analysis that is highly responsive to a limited set of markers, the court in *Rezaq* inferred no constitutional violation where it saw none of those signals.

Take one more example, this time from the Third Circuit. In a case called *Keller v. County of Bucks*, two people in pretrial detention argued that they had been incarcerated in unconstitutional conditions.<sup>134</sup> The detainees alleged that the detention center had “filthy water pooled in the showers, water seeped into the cells, clean laundry was not always readily available, the mattresses were stained, and mildew grew on walls covered in peeling paint.”<sup>135</sup> They also alleged that they were denied canteen privileges, phone access, recreational privileges, and possession of personal effects.<sup>136</sup> The court agreed with them as to the first set of claims—that the Constitution prohibits filth, stains, and mildew—but disagreed with the second. There was no constitutional problem cutting off a person’s contact with the outside world or stripping them of the small modicum of control they retain inside jail, including where they exercise or what they eat, even though these are more painful features of detention for many people.

This description of the aesthetic mode of analysis offers a new account of what prison law is and does. Prison conditions law, and punishment law in general, is a notoriously difficult area of jurisprudence to pin down.<sup>137</sup> Scholars, focusing mostly

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131. *Id.* at 1015 (holding that the conditions “at ADX [Florence] are not extreme as a matter of law”). In this case, as in most cases about solitary confinement, the inquiry arises under the Fourteenth Amendment, rather than the Eighth. *See id.* This is because people who are disciplined in prison have procedural protections only where the disciplinary sanction would implicate a liberty interest. *Id.* So, as a threshold matter, courts analyze whether a particular sanction—usually solitary confinement—is so severe that prisoners have a liberty interest in avoiding it. The doctrinal test that courts use is “atypical and significant hardship.” *See Sandin v. Connor*, 515 U.S. 472, 484 (1995).

132. *Rezaq*, 677 F.3d at 1015.

133. For information about the conditions at ADX Florence, see generally Laura Rovner, *On Litigating Constitutional Challenges to the Federal Supermax: Improving Conditions and Shining a Light*, 95 DENV. L. REV. 457 (2018).

134. *Keller v. County of Bucks*, 209 F. App’x 201, 206 (3d Cir. 2006).

135. *Id.*

136. *Id.*

137. *See, e.g.*, Bryan A. Stevenson & John F. Stinneford, *Interpretation & Debate: The Eighth Amendment*, NAT’L CONST. CTR., <https://constitutioncenter.org/the-constitution/amendments/amendment-viii/clauses/103> [<https://perma.cc/V47U-K7KM>] (last visited Oct. 16, 2022) (“The Cruel and Unusual Punishments Clause is the most important and controversial part of the Eighth

on where these issues arise under the Eighth Amendment, have proposed different ways to draw the line between permissible punishments and impermissible ones. For example, Sharon Dolovich has proposed drawing a line by reference to moral philosophy.<sup>138</sup> John Stinneford has suggested a line drawn according to the Eighth Amendment's original meaning.<sup>139</sup> And Judith Resnik has proposed that courts use the same principles that undergird constitutional limits on fines to regulate the limits of other punishments, including prisons.<sup>140</sup>

My descriptive account does not necessarily conflict with these normative theories, but I do think normative theories should contend with the dynamics of punishment that I describe here, especially my observation that law has developed to respond to the appearance, rather than the experience, of punishment. Prison conditions law is full of aesthetic principles, both implicit and explicit, that are incorporated into case law by judges employing an aesthetic mode of analysis. Aesthetics operate implicitly by furnishing the constitutional indicia—e.g., filth, waste, disorderliness, blood—that demarcate the boundary between permissible and impermissible conditions in prison law.<sup>141</sup> And sometimes, courts surface those

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Amendment. In some ways, the Clause is shrouded in mystery. What does it mean for a punishment to be ‘cruel and unusual’? How do we measure a punishment’s cruelty? And if a punishment is cruel, why should we care whether it is ‘unusual?’); *see also* William W. Berry III & Meghan J. Ryan, *Eighth Amendment Values*, in *THE EIGHTH AMENDMENT AND ITS FUTURE IN A NEW AGE OF PUNISHMENT* 61, 61–63 (Meghan J. Ryan & William W. Berry III eds., 2020) (“Because the language of the Constitution does not provide any additional descriptive information concerning what might make bail or fines excessive, or punishments cruel and unusual, courts must look beyond the text itself to ascertain the meaning of the Eighth Amendment . . . . Despite the Court’s emphasis that dignity is the backdrop of the Eighth Amendment, the Court has never clearly explained what dignity means in this context.”).

138. Dolovich, *supra* note 13.

139. Stinneford, *supra* note 13.

140. Resnik, *supra* note 13.

141. *See, e.g.*, *Gates v. Cook*, 376 F.3d 323, 333–34 (5th Cir. 2004) (finding conditions on death row at Parchman prison were unconstitutional where, among other things, prisoners “have been subjected to cells that were extremely filthy with chipped, peeling paint, dried fecal matter and food encrusted on the walls, ceilings, and bars, as well as water from flooded toilets and rain leaks,” and “[f]ecal and other matter flushed by a toilet in one cell will bubble up in the adjoining cell unless the toilets are flushed simultaneously”). There are also examples of judicial concern with sanitation beyond in-prison punishments. *See, e.g.*, *Gaston v. Coughlin*, 249 F.3d 156, 165–66 (2d Cir. 2001) (declining to “adopt as a matter of law the principle that it is not cruel and unusual punishment for prison officers knowingly to allow an area to remain filled with sewage and excrement for days on end”); *LaReau v. MacDougall*, 473 F.2d 974, 978 (2d Cir. 1972) (“Causing a man to live, eat and perhaps sleep in close confines with his own human waste is too debasing and degrading to be permitted.”); *McCord v. Maggio*, 927 F.2d 844, 846–47 (5th Cir. 1991) (holding that prisoner’s Eighth Amendment rights were violated where “rain water and backed-up sewage leaked” into his cell for two months and he slept on the floor for some of those months); *Wright v. McMann*, 387 F.2d 519, 522, 526 (2d Cir. 1967) (finding a violation of the Eighth Amendment where a prisoner was placed in a cell for 33 days that was “fetid and reeking from the stench of the bodily wastes of previous occupants which . . . covered the floor, the sink, and the toilet,” in combination with other conditions). *But see* *Little v. Municipal Corp.*, 51 F. Supp. 3d 473, 482–91 (S.D.N.Y. 2014) (holding that prisoners’ allegations that they were kept in cells “flooded with sewage . . . from 11:30 a.m. until 8:00 p.m.” failed to state a constitutional violation, because the “exposure to [human] waste is intermittent or limited to

indicia into doctrine, making aesthetics explicit principles in prison conditions law.<sup>142</sup> The consequence of a jurisprudence based on aesthetics, rather than experience, is that many features of imprisonment that cause the most pain are permissible, while less painful ones are prohibited. ADX Florence, for example, has been described as a “clean version of hell”;<sup>143</sup> the problem with an aesthetic jurisprudence of punishment (to put a finer point on it) is that a person’s claim that they are in hell fails because it is clean.

#### IV. SHIFTING THE PERSPECTIVE ON PRISONS

I have argued so far that prisons are instruments of punishment that are dehumanizing. I have also argued that there is a strain of aestheticism in the way that reformers and judges evaluate prisons, which causes them to miss many of the dehumanizing features of prisons. The purpose of this final Part is to reflect more broadly on the limits of prison reform and law, and then to venture a kind of prescription.

##### *A. The Perspective of the Punisher*

Reformists (and some judges, too) intend to change prisons for the better, making prisons more humane and less painful for people who are locked up. Sometimes, their intentions produce good results. For example, prison reformists have succeeded in reducing solitary confinement in some places and implementing oversight of prison administrations in others. Abolitionists have sometimes joined these efforts and share some of these goals.<sup>144</sup>

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a matter of hours”); *Florio v. Canty*, 954 F. Supp. 2d 227, 228 (S.D.N.Y. 2013) (finding no constitutional violation where a prisoner spent ten to twenty minutes ankle-deep in human waste in his cell after a toilet overflowed); *Oliver v. Powell*, 250 F. Supp. 2d 593, 605 (E.D. Va. 2002) (finding no violation where a prisoner was kept in a cell infested with roaches and with a leaky toilet because “less than pristine cell conditions are ordinary incidents of prison life”).

142. The Tenth Circuit, for instance, has held that “exposure to human waste carries particular weight in the conditions calculus.” *See DeSpain v. Uphoff*, 264 F.3d 965, 974 (10th Cir. 2001); *see also McBride v. Deer*, 240 F.3d 1287, 1292 (10th Cir. 2001) (“human waste” is so offensive that “courts have been especially cautious about condoning conditions that include an inmate’s proximity to [it]” (alteration in original) (first citing *Fruit v. Norris*, 905 F.2d 1147, 1151 (8th Cir. 1990); and then citing *LaRean*, 473 F.2d at 978)).

143. *See, e.g., Supermax: A Clean Version of Hell*, CBS NEWS (June 19, 2009), <https://www.cbsnews.com/news/supermax-a-clean-version-of-hell/> [<https://perma.cc/8ZH8-44M2>].

144. *See, e.g.,* Press Release, Off. Governor Ned Lamont, Governor Ned Lamont Signs Legislation Limiting the Use of Solitary Confinement (May 10, 2022), <https://portal.ct.gov/Office-of-the-Governor/News/Press-Releases/2022/05-2022/Governor-Lamont-Signs-Legislation-Limiting-the-Use-of-Isolated-Confinement> [<https://perma.cc/5GBV-NXGQ>] (limiting solitary confinement and installing an ombudsman); Press Release, N.Y. State Senate, *Senate Passes the ‘HALT’ Solitary Confinement Act* (Mar. 18, 2021), <https://www.nysenate.gov/newsroom/press-releases/senate-passes-halt-solitary-confinement-act> [<https://perma.cc/T9D8-J7A6>] (limiting use of solitary confinement).

The problem with reform, as opposed to abolition, is that it leaves a great deal of pain and degradation on the table, because it does not contest the prison qua prison as a method of punishment. By accepting the prison, reformists also accept, for example, that people will be separated from their families; that their entire existence will be under the jurisdiction of a bureaucracy; and that people will not be able to democratically participate in the authority that controls them. Reformists accept the anxiety of prolonged intimacy and constant surveillance. And reformists also accept the additional kind of punishments that prisons will inevitably invent to maintain discipline and control. Reformists accept these dimensions of punishment because they accept prisons, and we cannot get rid of those dimensions of imprisonment without getting rid of the prison.

Reformists' attachment to the prison, in spite of its degrading features, suggests that reform is, at least at times, more about the sensibilities of reformers and judges than it is about the experiences of prisoners. In other words, those projects are more about the punisher than they are about the punished. This quality limits both projects another way. That is, reform and law can only improve the lives of prisoners when the sensibilities of punishers and the suffering of the punished align.<sup>145</sup>

### B. *The Perspective of the Punished*

If one problem with prison reform and prison conditions law is that it enforces the perspective of the punisher, then perhaps a prescription is to flip the perspective: to make prison reform and law responsive to the perspective of the

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145. This point resonates with Derrick Bell's idea of interest-convergence. *See generally* Derrick A. Bell, Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980). This is especially true because, as the structural critique tells us that the punished are, in uncommon proportions, poor, disabled, Black, and Brown. *See, e.g.*, ASHLEY NELLIS, SENT'G PROJECT, *THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS* 5 (2021), <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/> [<https://perma.cc/44W2-SCSS>] (“Black Americans are incarcerated in state prisons at nearly 5 times the rate of white Americans . . . Latinx individuals are incarcerated in state prisons at a rate that is 1.3 times the incarceration rate of whites.”); Press Release, Bernadette Rabuy & Daniel Kopf, Prison Pol’y Initiative, *Prisons of Poverty: Uncovering the Pre-Incarceration Incomes of the Imprisoned* (July 9, 2015), <https://www.prisonpolicy.org/reports/income.html> [<https://perma.cc/HE8H-BF2Z>] (“The American prison system is bursting at the seams with people who have been shut out of the economy and who had neither a quality education nor access to good jobs. We found that, in 2014 dollars, incarcerated people had a median annual income of \$19,185 prior to their incarceration, which is 41% less than non-incarcerated people of similar ages. The gap in income is not solely the product of the well-documented disproportionate incarceration of Blacks and Hispanics, who generally earn less than Whites.” (citations and emphasis omitted)); LAURA M. MARUSCHAK, JENNIFER BRONSON & MARIEL ALPER, BUREAU OF JUST. STAT., *DISABILITIES REPORTED BY PRISONERS: SURVEY OF PRISON INMATES, 2016* (2021), <https://bjs.ojp.gov/library/publications/disabilities-reported-prisoners-survey-prison-inmates-2016> [<https://perma.cc/8MKB-BFF5>] (“Nearly 2 in 5 (38%) of state and federal prisoners had at least one disability in 2016 . . . State and federal prisoners (38%) were about two and a half times more likely to report a disability than adults in the U.S. general population (15%).”).

punished, not the punisher.<sup>146</sup> In the short term, this perspective guides us toward less oppressive prisons; in the long term, and taken to its natural conclusion, this perspective leads to abolition.

First, the short term. Prison reform and prison conditions law from the perspective of the punished would focus on eliminating or reducing features of prisons that degrade and dehumanize. Those features include, as I describe in Section II.A, control and isolation. Reform and law would focus on changing prisons to exercise less control over the people inside and isolate them less from the rest of society. Reform and law would cognize a need or a right to have prisons open to society—for example, with more frequent and longer visits from friends and family, more programs and services offered inside the prison by the community, and more opportunities for people in prison to participate in political life. Reform and law would also recognize a need or right for people in prison to exercise autonomy—for example, by having more agency in determining their schedules, more choice over where they live and whom with (if anyone at all), and more freedom to say what they think.

These are a few examples that, to my mind, would make prisons less prison-like.<sup>147</sup> But there are also limits to how un-prison-like a prison can be. The trouble for reformists is that they overemphasize the differences between prisons and ignore the many ways in which all prisons are similar. But the experience of a person in prison puts these differences and commonalities in proper perspective: however

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146. One kind of objection to this proposal is epistemological. Punishment, as Nils Christie says, is pain intended as pain. CHRISTIE, LIMITS TO PAIN, *supra* note 15, at 1. And one's own pain is unknowable to others, just as the pain of others is unknowable to oneself. As Elaine Scarry writes, "Whatever pain achieves, it achieves in part through its unsharability, . . . [t]o have pain is to have *certainty*; to hear about pain is to have *doubt*." ELAINE SCARRY, THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD 4, 13 (1985) (emphasis in original). The fact that another's pain is impenetrable means that inquiries into the quality of punishment is, in one sense, a futile exercise, and aesthetics are a tool, a proxy, for getting at something that cannot be known. Prison compounds the epistemological problem. In other contexts, law and society have recourse to social norms to evaluate pain, meaning that, even when, whether, and how much a person experienced pain is unknowable, transgression of a "community norm" is. See, e.g., Robert C. Post, *The Social Foundations of Privacy: Community and the Self in Common Law Tort*, 77 CALIF. L. REV. 957, 960–61 (1998). But prisons are not regulated by the same social norms that apply elsewhere. After all, prisons lock people up, strip them naked, or surveil them while they sleep, eat, bathe, and so on—all things that social norms usually prohibit. Prisons are heterotopias; the whole point is that norms do not apply. See Michel Foucault, *Of Other Spaces: Utopias and Heterotopias*, ARCHITECTURE, MOUVEMENT, CONTINUITÉ, no. 5, 1984, at 46–49 (Jay Miskowicz, trans.) (1967). But I think that "experience" can inform the limits to punishment in the sense that Joan Scott uses the word: not as "uncontestable evidence," but rather as something that is "at once always already an interpretation and something that needs to be interpreted." See Joan W. Scott, *The Evidence of Experience*, 17 CRITICAL INQUIRY 773, 777, 797 (1991).

147. Another way of describing these changes is "non-reformist reforms." "Non-reformist reforms" are, per abolitionism, reforms that shrink the power of the carceral state, rather than entrench it. For a discussion of reformist versus non-reformist reforms, see Davis & Rodríguez, *supra* note 15; MATHIESEN, THE POLITICS OF ABOLITION REVISITED, *supra* note 15 (reflecting on the debate in KROM about reformist and non-reformist reforms). For a theory of how reforms entrench prisons, see generally FOUCAULT, *supra* note 1.

much prisons might appear to differ in the eyes of an outsider, perspectives on imprisonment by people in prison underscore just how much is the same.

My argument has a close analogy in the death penalty and carries the same moral implications. Advocates and activists who oppose the death penalty pay some attention to (and sometimes litigate around) methods of execution—for example, whether a person is executed by lethal injection or the firing squad.<sup>148</sup> But improving how the death penalty is implemented is hardly the focus of the movement: abolition is.<sup>149</sup> Motivating that focus must be, I think, some understanding that however preferable it may be to be executed by firing squad rather than lethal injection, those experiences have far more in common than they have differences, and that in either implementation, execution is lightyears away from the principles of dignity and humanity.<sup>150</sup> Dwelling on differences in the light of vast commonalities is odd, and maybe even perverse.

The same attitude should guide advocates and activists who oppose prisons. Prisons have much more in common with each other than they do differences. All prisons isolate and control, and the premises of prison push constantly toward more punishments. These features are incompatible with the values of dignity and humanity, and to the extent that reform movements, law, and society in general value those things, they should find prisons unacceptable.

#### CONCLUSION

One purpose of this Article has been to offer, in alignment with the U.S. abolition movement, another account of prison reform's limitations. Prisons—all prisons—are inhumane, because the definitional features of prisons create conditions that dehumanize. Prisons are methods of punishment that inflict extreme isolation and control and manage the tension that they themselves create with threats of further punishment. These conditions are degrading, and people in prison experience them that way.

Prison reformists and judges who evaluate prison conditions tend to rely on aesthetic modes of analysis. The problem is that the aesthetic mode of analysis places too much focus on certain elements of prisons and ignores others. The result is a reform movement and a jurisprudence that prohibits certain features of

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148. For cases litigating death penalty reforms, see, for example, *Baze v. Rees*, 553 U.S. 35 (2008); and *Glossip v. Gross*, 576 U.S. 863 (2015).

149. See, e.g., *Death Penalty*, EQUAL JUST. INITIATIVE, <https://eji.org/issues/death-penalty/> [<https://perma.cc/76QF-4K2U>] (last visited Oct. 16, 2022) (giving reasons for why the U.S. should abolish the death penalty); *Death Penalty*, S. CTR. FOR HUM. RTS., <https://www.schr.org/death-penalty/> [<https://perma.cc/X4PJ-BCRN>] (last visited Oct. 16, 2022) (describing one goal of the organization as “abolish the death penalty”).

150. Sociologist David Garland has argued that the Court's jurisprudence on methods of execution is also motivated by aesthetics. “In contemporary America, a constitutionally permissible death penalty has to satisfy aesthetic . . . standards.” GARLAND, PECULIAR INSTITUTION, *supra* note 11, at 269.

imprisonment—including decrepitude, disorder, and decay—while permitting many of the features of imprisonment that are most degrading and painful. To the extent that prison reformists and judges rely on aesthetics to evaluate the quality of prison conditions, they turn themselves—not people in prison—into the subject of concern for both the reform movement and law.