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"Not for Human Consumption": Prison Food's Absent Regulatory Regime

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**“NOT FOR HUMAN CONSUMPTION”: PRISON FOOD’S
ABSENT REGULATORY REGIME**

Amanda Chan* and Anna Nathanson**

ABSTRACT

Prison food is poor quality. The regulations which govern prison food are subpar and unenforceable by prisoners, due in large part to *Sandin v. Conner* and the Prison Litigation Reform Act. This Article aims to draw attention to the dire food conditions in prisons, explain the lax federal administrative law that permits these conditions, highlight the role of *Sandin v. Conner* and the Prison Litigation Reform Act in curtailing prisoners’ rights, and criticize the role of the private entity American Correctional Association in enabling mass neglect of prison food. The authors recommend that the Prison Litigation Reform Act be repealed, that *Sandin v. Conner* be overturned, and that Food Service Manual standards be improved to provide prisoners with more calories, more options, and more variety. Prisoners will be better positioned to enforce food rights in the courts under the recommended regime.

INTRODUCTION	1010
I. LITERATURE REVIEW	1012
II. FOOD CONDITIONS IN PRISONS.	1015
III. FOOD AS POWER	1021
IV. CURRENT FEDERAL PRISON FOOD REGULATION	1025
A. <i>Food Sanitation</i>	1028
B. <i>Meal Frequency</i>	1029
C. <i>Calories/Energy</i>	1029
D. <i>Nutrition</i>	1031
E. <i>Religious Diets</i>	1031
V. THE ROLE OF THE AMERICAN CORRECTIONAL ASSOCIATION	1032

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** Alumni, Harvard Prison Divestment Campaign. JD, Harvard Law School. Thank you to Professor Jacob Gersen for your support of this Article. Thank you to Jailhouse Lawyers Speak and other incarcerated people for all your work to develop many of the intellectual frameworks underlying this Article. Thank you to my abolitionist community for teaching and sustaining me. Thank you to Alexandria Smith for your constant emotional and intellectual support. Thank you to Amanda for everything.

A.	<i>The History of ACA Accreditation of Prisons</i>	1033
B.	<i>BOP's Reliance on ACA Standards</i>	1036
C.	<i>ACA Standards in the Courts</i>	1039
VI.	PRISON FOOD AND THE PLRA	1041
VII.	POLICY RECOMMENDATIONS	1045
A.	<i>Repeal the PLRA</i>	1045
B.	<i>Overturn Sandin v. Conner</i>	1047
C.	<i>Require Higher Calorie Amounts, More Nutrition Options, and More Choices for Prisoners' Diets</i>	1049
	CONCLUSION	1050

INTRODUCTION

Across the United States, prisoners are hungry and nutrient-deprived. When prison officials fail to provide their inmates with enough sanitary food, prisoners face an uphill battle in court. Larry Dancy, for example, was a federal prisoner¹ in Indiana.² In 2020, Mr. Dancy filed a pro se petition in the Southern District Court of Indiana against the prison's warden and the federal Food Services Administrator (FSA).³ Mr. Dancy alleged that the prison's food service area was "infested with rodents and that food trays . . . [were] contaminated with rodent feces."⁴ Further, Mr. Dancy alleged that the warden and the FSA were aware of the problem but refused to correct it.⁵ As a result, "Mr. Dancy suffered a serious foodborne illness caused by the contaminated food," but the on-site medical staff "failed to provide him with adequate medical treatment."⁶ Although the court allowed Mr. Dancy's claim for injunctive relief to proceed, the court dismissed Mr. Dancy's *Bivens* claim for damages⁷:

The Bureau of Prisons is tasked with feeding approximately 150,000 inmates every day. The failure to maintain adequate sanitation in one of its facilities will rarely be the fault of one or even several federal officials. Instead, it suggests an imperfect

¹ The Authors of this Article have chosen to use language as used by the organization Jailhouse Lawyers Speak which denounces the terms "inmate" and "correctional facility" and instead finds "prisoner" and "prison" to be more accurate. Jailhouse Lawyers Speak (@JailLawSpeak), TWITTER (July 14, 2019, 8:35 AM), <https://twitter.com/JailLawSpeak/status/1150383389868023808> [<https://perma.cc/FS8A-VPGD>].

² *Dancy v. Watson*, No. 2:19-cv-00426-JRS-DLP, 2020 U.S. Dist. LEXIS 40268, at *1 (S.D. Ind. Mar. 9, 2020).

³ *Id.*

⁴ *Id.* at *2.

⁵ *See id.*

⁶ *Id.*

⁷ *Id.* at *1. *See generally* *Bivens v. Six Unknown Narcotics Agents*, 403 U.S. 388 (1971) (allowing civil actions against federal officials for Fourth Amendment violations).

balance of financial resources, facilities management, and employee training across the organization. A *Bivens* action is an inappropriate remedy for these complex, systematic issues.⁸

Surely, a judge or a good-hearted member of the public might think, the Federal Bureau of Prisons (BOP) has regulations which ensure that prisoners have access to enough food, nutrition, variety, and caloric content to maintain a healthy and satiating diet—or at the very least, prevent starvation. This Article seeks to explain why that is not the reality. Mr. Dancy is not alone. *The Atlantic* reported in 2017, “The food served in correctional institutions is generally not very good. Even though most Americans have never tasted a meal dished up in a correctional kitchen, occasional secondhand glimpses tend to reinforce a common belief that ‘prison food’ is scant, joyless, and unsavory—if not even worse.”⁹ As examples of the prison system’s failures, the article cited various reports of maggots in prison food, small food portions, and a prison kitchen employee being fired for refusing to serve rotten potatoes.¹⁰

A 2017 *American Journal of Public Health* study concluded that prisoners are six times more likely than the general population to endure foodborne illness.¹¹ A 2017 *Prison Voice Washington* report found that the Washington Department of Corrections failed to feed its prisoners the minimum requirements for fruits, vegetables, whole grains, lean protein, or dairy.¹² Sara Totonchi, a prisoners’ rights advocate at the Southern Center for Human Rights, explained to *The Atlantic* that people in prison frequently write to her to complain about the food.¹³ This Article argues that the administrative regulatory state, and, more specifically, the Department of Justice’s BOP, fails to provide federal prisoners with adequate food and nutrition.

Part I reviews the little available literature exploring the administrative regulation of federal prison food. Part II outlines the practical realities of prisoners and their experiences with prison food. Part III analyzes the BOP policies in the Food Service Manual (FSM). Part IV investigates the role of the American Correctional Association (ACA), a private non-profit organization, in the regulation of prison food. Part V

⁸ *Watson*, 2020 U.S. Dist. LEXIS 40268, at *9 (footnote omitted).

⁹ Joe Fassler & Claire Brown, *Prison Food Is Making U.S. Inmates Disproportionately Sick*, ATLANTIC (Dec. 27, 2017), <https://www.theatlantic.com/health/archive/2017/12/prison-food-sickness-america/549179/> [<https://perma.cc/D3DX-XSNM>].

¹⁰ *Id.*

¹¹ Mariel A. Marlow, Ruth E. Luna-Gierke, Patricia M. Griffin & Antonio R. Vieira, *Foodborne Disease Outbreaks in Correctional Institutions—United States, 1998–2014*, 107 AM. J. PUB. HEALTH 1150, 1153 (2017).

¹² PRISON VOICE WASH., CORRECTING FOOD POLICY IN WASHINGTON PRISONS: HOW THE DOC MAKES HEALTHY FOOD CHOICES IMPOSSIBLE FOR INCARCERATED PEOPLE & WHAT CAN BE DONE 12–17 (Oct. 25, 2016), https://static.prisonpolicy.org/scans/Correcting%20Food%20Policy%20in%20WA%20Prisons_Prison%20Voice%20WA.pdf [<https://perma.cc/56PM-3E9C>].

¹³ Fassler & Brown, *supra* note 9.

considers explanations for the lack of enforcement of food regulations. Part VI refutes the punishment rationale for a low-quality prison diet.

This Article's authors are prison abolitionists. The authors write with the understanding that the prison-industrial complex is a thriving network made possible by racial capitalism. The poor food conditions are particularly alarming once contextualized in the structural realities of the U.S. prison system—it is a tool and site of racial oppression, especially of Black people. Black and Latinx people make up fifty-six percent of the U.S. prison population, even though they only constitute thirty-two percent of the total U.S. population.¹⁴ Black Americans are incarcerated at over five times the rate whites are.¹⁵ In the opinion of the authors, after the abolition of slavery, the modern prison system grew out of Black Codes designed to put formerly enslaved people back in chains.¹⁶ Today, every level of the criminal legal system disproportionately targets Black people.¹⁷ For the authors, the issue of prison food law takes on added significance because prison food contributes to a racial caste system of access to proper nutrition.

Prison abolitionists often illuminate and critique how certain so-called “prison reforms” work to strengthen the power, scope, and endurance of the U.S. prison system.¹⁸ But when it comes to the basic necessity of food, poor food conditions are a form of control the U.S. prison system exerts over incarcerated people, and improving the food conditions would chip at this control. Furthermore, prison abolitionists also fight for the survival and well-being of all people currently held in cages, in the here and now. Incarcerated people, including those who are prison abolitionists, regularly demand and organize for improved food conditions, highlighting the immediate importance of this issue to their lives.¹⁹ Thus, the authors, from a place of awareness of the structural factors that make it nearly impossible to improve prison conditions, advocate for policies that would give prisoners legal avenues to enforce improved food standards. Readers who are skeptical of the fundamentals of prison abolition will find research in this Article that supports the systemic improvement of the quality of prison food.

I. LITERATURE REVIEW

There has been little previous scholarship on administrative law governing prison food. Most prior work has focused on Eighth Amendment challenges to food

¹⁴ *Criminal Justice Fact Sheet*, NAACP, <https://www.naacp.org/criminal-justice-fact-sheet/> [https://perma.cc/WX8P-J3SN] (last visited May 6, 2021).

¹⁵ *Id.*

¹⁶ ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 26–29 (2003).

¹⁷ *Id.* at 30–31.

¹⁸ ANGELA Y. DAVIS, FREEDOM IS A CONSTANT STRUGGLE 22 (2016).

¹⁹ *See Prison Strike 2018*, INCARCERATED WORKERS ORG. COMM., <https://incarceratedworkers.org/campaigns/prison-strike-2018> [https://perma.cc/K6MJ-8UD6] (last visited May 6, 2021).

conditions in prisons rather than the administrative body of law itself.²⁰ Overall, the previous literature has put forth ahistorical understandings of prisons and reinforced narratives about Black criminality and the lack of humanity of prisoners and, as a result, has failed to truly grasp the dynamics at play in prison food law.

There are a few sources which give now-outdated overviews of prison food law. In a 1996 student paper, Jonathan Wilan did not attempt to review all elements of prison food law, but instead tracked U.S. prison food conditions from the colonial era to the near past and focused on how prisoners’ religious dietary needs have been treated in the law.²¹ He noted that, despite some changes in the controlling law, for the last two hundred years, the low quality of prison food has been fairly consistent.²² However, his most interesting contribution was to draw attention to the administrative law around religious dietary needs in federal prisons.²³ Given the scarcity of administrative law around prison food, the existence of these provisions is notable.

His paper also had some limitations. Wilan’s understanding of why people are in prison and how they deserve to be treated is an illustrative example of a normative bias against prisoners that informs much of existing scholarship on prison food law. He began the paper by declaring that “[p]risons and jails are for those people in our society who have refused to live by the rules. They are for murderers and rapists; thieves and prostitutes; drug dealers and drug users. Why then should . . . the food that a prisoner eats bother the rest of us?”²⁴ He also rhetorically raised the argument that bad food as punishment might “act as a deterrent” and reduce recidivism.²⁵ This Article will challenge the ideas that prisoners are uniquely abhorrent individuals (who do not deserve autonomous control of their diets) and that punishment is worthwhile (and so that poor food conditions have a defensible punitive function). This Article will explain why race is a crucial factor to understanding prisons and by extension their poorly regulated dietary offerings.

In a 2005 student paper, Cyrus Naim presented a more comprehensive look at the issue, first contrasting the relatively strong protections for non-prison food law with the basically nonexistent protections for prison food law and then offering theories for the difference in the level and type of regulation.²⁶ His first theory was that mediocre food is part of a punishment function of prison that is necessary for

²⁰ See *infra* notes 26–44 and accompanying text.

²¹ See Jonathan Wilan, Regulation of Prison Food 3–5, 9 (Jan. 1996) (unpublished student paper) (on file with the authors).

²² *Id.* at 3, 8.

²³ *Id.* at 2 n.5, 10.

²⁴ *Id.* at 1.

²⁵ *Id.*

²⁶ See generally Cyrus Naim, *Prison Food Law*, PRISON LEGAL NEWS (July 5, 2007), https://www.prisonlegalnews.org/media/publications/prison_food_law_by_cyrus_naim_2005.pdf [<https://perma.cc/YDB9-HD6C>].

deterrence.²⁷ His second theory was that prisoners do not have the political power to bring about prison food regulations because prisoners, who tend to come mainly from poor communities, derive core voting support from these communities, which in turn have low voter turnout rates and prisoners are themselves disenfranchised.²⁸ While Naim overemphasized the vote as the best indication of political power, he notably brought class analysis to the prison issue. His third theory was that race may be influencing the issue.²⁹ But his understanding of racism was incomplete. Naim framed racism as a problem of individual white people believing that “black criminals” are “different” from them.³⁰ Instead, this Article focuses on the concept of structural racism: “A system in which public policies, institutional practices, cultural representations, and other norms work in various, often reinforcing ways to perpetuate racial group inequity.”³¹ Naim noted that regulation of prison food is minimal,³² and that Eighth Amendment lawsuits, now curtailed by the Prison Litigation Reform Act (PLRA), were the only real oversight of prison food law.³³

Other scholarship has delved further into why relying on these Eighth Amendment lawsuits is a poor method of oversight. Michael McKirgan cited four issues which render the judicial system an inadequate system to ensure prisoners with sufficient food: the PLRA, the reluctance of courts to grant prisoners’ injunctions, the lack of attorneys for prisoners, and the high requirement of proof for an Eighth Amendment claim.³⁴ Instead, he recommended turning to federal regulations as the only hope for ensuring prisoners adequate food.³⁵ He theorized that because the U.S. Department of Agriculture already regulates public school food, it could also do the same for prisons for little additional cost.³⁶ McKirgan acknowledged that the “widespread disenfranchisement of felons” as well as the “tough on crime” era of politics fails to incentivize legislators to write and pass bills to address the nutritional needs of prisoners, but he still surmised that prisoners’ food will likely only receive proper regulation under “strict, interventionist legislation.”³⁷ The authors admire the attention McKirgan paid to administrative law around prison food, but for reasons this Article will explore, the authors believe he was too optimistic about the potential of

²⁷ See *id.* at 12, 16.

²⁸ *Id.* at 15–16.

²⁹ *Id.* at 17–18.

³⁰ *Id.* at 18.

³¹ *11 Terms You Should Know to Better Understand Structural Racism*, ASPEN INST. (July 11, 2016), <https://www.aspeninstitute.org/blog-posts/structural-racism-definition/> [<https://perma.cc/DDA3-TNYR>].

³² See Naim, *supra* note 26, at 11.

³³ See *id.* at 11, 13–14, 26–27.

³⁴ Michael D. McKirgan, Comment, *Under-Regulation in the State Prison Food System: Consequences and a Proposal for Change*, 9 J. FOOD L. & POL’Y 275, 283–84 (2014).

³⁵ *Id.* at 277, 290–98.

³⁶ *Id.* at 290.

³⁷ *Id.* at 300, 305.

federal law to actually address the fundamental inequities of the U.S. prison system, and, by extension, its food.

Similarly, Professor Alfred Aman claimed that administrative law should be used to reign in human rights abuses in prisons that are heightened by privatization.³⁸ He advocated for a uniform Model Privatization Code that would deepen democracy by creating new forums for the public to assess what public-private prison hybrids should look like.³⁹ His arguments focused mostly on private prisons with only passing mention of the privatization of services within public prisons.⁴⁰ He did not reference existing administrative law around prison food and did not extend his analysis to consider specifically what it could mean for privatized food services.⁴¹ Professor Aman did pay at least cursory attention to race. Still, while he accurately noted that prisons were extended after the abolition of slavery to maintain control of the labor power of Black people⁴² and that Black people are both overrepresented in prisons and disenfranchised from civil society,⁴³ he did not analyze how race will impact the potential of administrative law to address human rights abuses. He did not consider that the essential racial function of prisons might be a barrier to the success of his suggested reforms, preventing them from being implemented in any meaningful way. The authors argue that any proposed changes must justify how they will overcome the anti-Blackness of most of the actors who would enforce them, as well as the profit interest in keeping marginalized populations in cages. Professor Aman did not prove that there are pathways through which more rigorous administrative law provisions could overcome the barriers to enforcement that he notes himself.

This Article will build on this previous scholarship, and attempt to correct its deficiencies, by specifically honing in on existing administrative law procedures around prison food and integrating an analysis of the racial dynamics of the criminal system into this examination.

II. FOOD CONDITIONS IN PRISONS

The oatmeal and fruit were infested with worms, the macaroni filled with bugs, the beans inhabited by weevils, and the corn meal supported a thriving population of meal-worms.

—Kate Richards O’Hare, 1923, quote from her memoir *In Prison: Sometime Federal Prisoner Number 21669*⁴⁴

³⁸ See Alfred C. Aman, Jr., *Privatization, Prisons, Democracy, and Human Rights: The Need to Extend the Province of Administrative Law*, 12 IND. J. GLOB. LEGAL STUD., 511, 511 (2005).

³⁹ *Id.* at 529, 540, 549.

⁴⁰ *See id.* at 513–14.

⁴¹ *See id.* at 511, 513–14.

⁴² *Id.* at 527.

⁴³ *Id.* at 532–33.

⁴⁴ KATE RICHARDS O’HARE, *IN PRISON: SOMETIME FEDERAL PRISONER NUMBER 21669*, at 87 (1923).

I couldn't have known beforehand that 'meatballs' in fluorescent gray sauce would be cause for excitement because they were the best thing rolling out of the kitchen.

—Stephen Katz, 2016, who wrote about his experience in a Michigan jail for *Vice*⁴⁵

Prison food is often unsanitary, inedible, and inadequate for consumption, especially where private food contractors are in play.⁴⁶ Prisons are often not transparent and unwilling to allow visitors and reporters into their facilities.⁴⁷ According to Professor Andrea Armstrong: “The public has little idea what happens behind prison walls. Prisons and jails are essentially ‘closed institutions holding an ever-growing disempowered population.’ . . . While we, as a society, may have participated in the reporting, investigation, or prosecution of the crime, society is practically barred from evaluating the punishment itself.”⁴⁸

For this reason, the data and research available on the lives of prisoners is limited. Much of the information available is inevitably anecdotal. But across ideology, prison food scholars largely agree that prison food is of poor quality, poor sanitation, and poor nutrition.⁴⁹ Erika Camplin, a food writer and scholar summarized:

Food in prison is at its best underwhelming, and cruel at its worst. It keeps prisoners in a place of overall malaise and dissatisfaction with regard to their mealtimes, so they turn to the commissary where they are up-charged for a small bit of taste pleasure—not a great return on investment ratio. Additionally, the current state of prison food often creates tension, breeds corruption, solidifies hierarchy, and itself *generates* a host of overall problems for these institutions.⁵⁰

⁴⁵ Stephen Katz, *What It's Like to Eat Some of the Worst Prison Food in America*, VICE (July 26, 2016, 4:00 PM), <https://www.vice.com/en/article/ezq59z/what-its-like-to-eat-some-of-the-worst-prison-food-in-america> [<https://perma.cc/J3XK-BRB9>].

⁴⁶ See Fassler & Brown, *supra* note 9; see also Randy Ludlow, *Meal Contractor Aramark Below State Standards at 7 Ohio Prisons*, COLUMBUS DISPATCH, <https://www.dispatch.com/article/20140908/NEWS/309089851> [<https://perma.cc/K3YZ-KT83>] (Sept. 8, 2014, 10:14 AM); Tom Perkins, *Empty Promises: Something Still Stinks in Michigan and Ohio's Prison Kitchens*, CLEVELAND SCENE (Feb. 17, 2016), <https://www.clevelandscene.com/cleveland/empty-promises-something-still-stinks-in-michigan-and-ohios-prison-kitchens/Content?oid=4705549> [<https://perma.cc/4CCB-K6DS>].

⁴⁷ Andrea C. Armstrong, *No Prisoner Left Behind? Enhancing Public Transparency of Penal Institutions*, 25 STAN. L. & POL'Y REV. 435, 462 (2014).

⁴⁸ *Id.* at 436–37.

⁴⁹ See sources cited *supra* note 46.

⁵⁰ ERIKA CAMPLIN, PRISON FOOD IN AMERICA 87 (2017).

Most of the bad prison food that makes the news is about private prison food contractors such as Aramark.⁵¹ Aramark contracts with states to provide prison food.⁵² Although a state is not bound by federal prison administrative regulation nor other states’ administrative regulations, states often model their own prison food policy after the federal ones.⁵³ Michigan repeatedly made headlines when it encountered systemic problems in prison food with Philadelphia-based private food vendor Aramark.⁵⁴ For example, one Aramark employee fed prisoners actual trash.⁵⁵ The Aramark employee had thrown out leftover food, but upon realizing that there were more prisoners to feed, the employee retrieved the food from the trash, reheated it, and served it to the prisoners.⁵⁶ Aramark also served Michigan prisoners cakes that had been partially eaten by rodents.⁵⁷ In Ohio, under contract with Aramark, inmates discovered maggots in four prisons, which prompted state officials to launch a statewide investigation.⁵⁸ In a federal lawsuit, sixteen prisoners from Kent County alleged that Aramark served rotten chicken tacos and poisoned about 250 prisoners.⁵⁹

Under Aramark reign, Stephen Katz was served breakfast at 4:30 AM, lunch at 10:30 AM, and dinner at 3:30 PM.⁶⁰ Although this followed Michigan Department of Corrections’ policy directive of no more than fourteen hours between breakfast and dinner time,⁶¹ Katz recalled “persistent hunger.”⁶²

Prisoners still go hungry even when Aramark and other private food contractors aren’t to blame. Many prisons do not provide enough calories to their prisoners.⁶³

⁵¹ See, e.g., Ludlow, *supra* note 46.

⁵² See, e.g., Perkins, *supra* note 46.

⁵³ Marlow et al., *supra* note 11, at 1154.

⁵⁴ See Katz, *supra* note 45.

⁵⁵ Bob Johnson, *Food in Trash Served to State Prisoner in Saginaw County: Aramark Worker Fired*, MLIVE, https://www.mlive.com/news/saginaw/2015/03/aramark_employee_served_sagina.html [<https://perma.cc/BNE7-FSC5>] (Jan. 20, 2019).

⁵⁶ *Id.*

⁵⁷ See Kyle Feldscher, *Aramark Worker Ordered Prisoner to Feed Inmates at Michigan Prison Cake Partially Eaten by Rodents*, MLIVE, https://www.mlive.com/lansing-news/2015/03/inmates_at_mid-michigan_prison.html [<https://perma.cc/J3DM-HGD4>] (Apr. 3, 2019).

⁵⁸ Jeremy Pelzer, *Maggots Found in Four Ohio Prison Kitchens; Officials Launch Statewide Investigation*, CLEVELAND.COM, https://www.cleveland.com/open/2014/07/maggots_found_in_three_ohio_pr.html [<https://perma.cc/4VC2-PPEN>] (Jan. 12, 2019).

⁵⁹ John Agar, *Inmates’ Rotten Chicken Taco Case Against Aramark, Kent County Heads to Federal Court*, MLIVE, https://www.mlive.com/news/grand-rapids/2015/04/inmates_rotten_chicken_taco_ca.html [<https://perma.cc/W4VP-P82B>] (Apr. 3, 2019).

⁶⁰ See Katz, *supra* note 45.

⁶¹ MICH. DEP’T OF CORR., POLICY DIRECTIVE: OFFENDER MEALS AND FOOD QUALITY ASSURANCE 1 (2019), https://www.michigan.gov/documents/corrections/04_07_100_Final_10-1-19_667504_7.pdf [<https://perma.cc/5HUP-J3NW>].

⁶² See Katz, *supra* note 45.

⁶³ See, e.g., *id.*

For example, prisoners of the Montgomery County, New York, jail filed a lawsuit in 2014, alleging that prisoners were receiving only 1,700 calories per day.⁶⁴ Calorie intake was allegedly so low that one prisoner plaintiff lost twenty-four pounds in five months and another lost ninety pounds in six months.⁶⁵ The suit also alleged “hair loss, bleeding gums and constant hunger.”⁶⁶

In fact, calories are so scarce in prisons, ramen noodles have surpassed tobacco as prison currency.⁶⁷ Michael Gibson-Light, a University of Arizona sociologist, interviewed almost sixty prisoners and staffers at a state prison and found that ramen noodles served as the basis for an “informal economy.”⁶⁸ Similarly, Gustavo “Goose” Alvarez, an author of *Prison Ramen: Recipes from Behind Bars*, told NPR that the noodles were “everybody’s staple in prison: No matter who you are, you’re cooking with ramen.”⁶⁹

Prisoners must rely on ramen available in commissaries to get their minimum calorie intake; prison food is so inedible or low-calorie that prisoners resort to other ways of tending to their hunger.⁷⁰ One prisoner who worked in the state prison’s kitchen told Gibson-Light that there were too many prisoners and the prison could not afford to feed everybody—instead, the prisons straddle the calorie guidelines.⁷¹

Courts often hear prisoners’ pro se complaints of subpar food. Sometimes, when the allegations are sufficiently stated and well-documented, the courts will deny motions to dismiss against food quality complaints.⁷² For example, Leonard Hudson, a federal prisoner, filed a complaint to the Western District Court of Pennsylvania alleging that the former FSA and Corrections Officer, Mr. Stauffer, fed insect-infested food to the prisoners⁷³:

⁶⁴ Steven Cook, *Lawsuit: Montgomery County Inmates Not Fed Enough*, DAILY GAZETTE (July 30, 2014), <https://dailygazette.com/2014/07/30/lawsuit-montgomery-county-inmates-not-fed-enough/> [<https://perma.cc/8R6C-N2G5>]; see also Jason Subik, *Lawsuit Against Montgomery County over Jail Food Now Class Action*, DAILY GAZETTE (Aug. 30, 2018), <https://dailygazette.com/2018/08/30/inmate-lawsuit-against-montgomery-county-named-class-action/> [<https://perma.cc/AL4Q-NM9Z>] (reporting that a ruling opened the door in the lawsuit to form a class).

⁶⁵ Cook, *supra* note 64.

⁶⁶ *Id.*

⁶⁷ Maria Godoy, *Ramen Noodles Are Now the Prison Currency of Choice*, NPR (Aug. 26, 2016, 12:47 PM), <https://www.npr.org/sections/thesalt/2016/08/26/491236253/ramen-noodles-are-now-the-prison-currency-of-choice> [<https://perma.cc/UVG6-JVGJ>].

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *See id.*

⁷¹ *See id.*

⁷² *See, e.g.*, Hudson v. Kennedy, C.A. No. 12-12, 2013 U.S. Dist. LEXIS 126846, at *15–21 (W.D. Pa. July 26, 2013) (magistrate judge’s report, later adopted by Judge McVerry).

⁷³ *See id.* at *2–3.

One day . . . [Mr. Hudson] was unloading a truck when he noticed “bugs crawling around on bags of incoming foods,” consisting of “mostly 501b [sic] bags of cornmeal, pancake mix, farina and other dry goods.” Plaintiff notified [a guard] Soon, Defendant Stauffer appeared and instructed Plaintiff and his co-worker to “wipe the insects off, throw any of the bags that were open in the trash and stock the rest with the current inventory of food.” . . . After a few days, Plaintiff noticed insects in the oatmeal, farina, grits, and rice being prepared and served to the inmates.⁷⁴

Often, courts throw prisoners’ cases out.⁷⁵ For example, the Tenth Circuit granted summary judgment against Michael Strope, a prisoner who alleged that his kosher meals included wilted and rotten items.⁷⁶ Mr. Strope alleged that “he was served salad dressing that was not kosher,” salad that was visibly spoiled, rotten or moldy oranges, and a “‘nasty’ carrot/cabbage salad.”⁷⁷ The court ruled, “Whatever complaints Strope may have voiced regarding the content, variety, and preparation of the kosher menu, he has not shown that it failed to provide a nutritionally adequate diet.”⁷⁸ Even though Mr. Strope was a state prisoner, courts use the same analysis for constitutional rights of prisoners under either federal or state detention.⁷⁹

Karyn Turk, a former Mrs. Florida, made headlines when she pled guilty to stealing her mother’s Social Security checks and served thirty days in Miami’s Federal Detention Center in early 2020.⁸⁰ She told *The Daily Mail* that “[o]ne of the hardest things” about her prison stint “was the quality of the food, including the fact [that] some of [the] items were expired for more than a year.”⁸¹ Ms. Turk explained, “Canned fruit were ages old and some cheeses expired last year There was often mold visible on the bread and muffins. There’s no fresh fruits or vegetables outside of apples and bananas, and the occasional lettuce.”⁸² Apparently, a kitchen worker had told Turk that “she was forced to cook chicken marked ‘not for human consumption.’”⁸³

⁷⁴ *Id.* at *4–5 (citations omitted) (quoting from an affidavit).

⁷⁵ See Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153, 162–63 (2015).

⁷⁶ *Strope v. Cummings*, 381 F. App’x 878, 880, 884 (10th Cir. 2010).

⁷⁷ *Id.* at 881 (quoting from the record).

⁷⁸ *Id.* at 882.

⁷⁹ *Id.* at 882–83.

⁸⁰ Jose Lambiet, *EXCLUSIVE: Former Mrs. Florida, Who Was Sent to Prison for Stealing Her Dying Mother’s Social Security Checks, Dishes on Her 30-Day Stint, Revealing the Women’s Unique Mode of Gossip, Homemade Sex Toys and Cell Orgies*, DAILY MAIL, <https://www.dailymail.co.uk/news/article-8208809/Former-Mrs-Florida-dishes-30-day-stint-prison.html> [<https://perma.cc/SLJ4-FJF4>] (Apr. 16, 2020, 12:18 PM).

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

Ms. Turk “watched guards smuggle [in] . . . fruits, vegetables, particularly avocados, valued and rare because they are never served in meals, and candies.”⁸⁴ She stated, “Where you eat, you’ve got to cover your plate because dust is falling from the ceiling.”⁸⁵ Turk even heard rumors that the male inmates in the same prison had protested the food quality by “defecating on their food trays.”⁸⁶

Prison food lacks nutrition. “In many prisons across the US, inmates only rarely receive eggs, dairy or meat and fresh fruit and vegetables are sometimes banned altogether,” reported *The Guardian*’s Rupert Neate when he visited Ramsey County correctional facility in St. Paul, Minnesota.⁸⁷ “Instead nutritionists are called into figure out ways of achieving states’ minimum calorie counts and vitamin and nutrient intakes via tubs of margarine and fortified mineral powders and supplements.”⁸⁸

For example, Barbara Wakeen, the owner of Correctional Nutrition Consultants, specializes in this practice, helping prisons meet nutrient requirements without additional funding—ultimately recommending “margarine, beans and fortified baking powder.”⁸⁹ Nutrient-fortified products were originally developed for “hospital patients having difficulty eating solids but producers have found a lucrative secondary market in correctional facilities.”⁹⁰ Ms. Wakeen commented that she would “like to see everybody get all of the food groups,” but because that is a challenge in prison, “[w]e have all these wonderful fortified things.”⁹¹

And prison administrators stretch the fortified products far. Chandra Bozelko, a formerly incarcerated columnist at *The Guardian*, reported:

[Prisoners] will feel hungry, because the meals are the worst combination: high calorie and low satiety. For example, soups are thickened excessively with starch and hot cereals loaded with margarine to increase their caloric value. A half cup might provide 10% of an inmate’s daily intake, but it’s still only a half cup of soup or cereal. Even inmates who have consumed three prison meals want to supplement their daily intake with more food; it’s the reason why so many inmates (particularly women) gain weight rather than lose it. It’s also why a 25-cent package of [instant

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Rupert Neate, *Prison Food Politics: The Economics of an Industry Feeding 2.2 Million*, GUARDIAN, <https://www.theguardian.com/us-news/2016/sep/30/prison-food-spending-budget-cuts-minnesota> [<https://perma.cc/HD9G-W6A8>] (July 14, 2017, 2:37 PM).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

ramen] has risen to prominence and become coveted when it used to be low on the food chain.⁹²

Ramen noodles are high in fat and incredibly high in sodium—one packet contains over 1,500 milligrams of sodium, totaling about seventy percent of daily sodium intake.⁹³ Yet prisoners are forced to eat ramen or go hungry. As a result, even if prisoners do technically get their required calories, they still can remain in perpetual hunger with very little recourse.

III. FOOD AS POWER

Prison food is not just a matter of unsatisfied prisoners. Food is also a means for the carceral state and its actors to further control and exert power over the minutiae of prisoner life and identity. For example, in 2014, Maricopa County Sheriff Joe Arpaio made headlines when he used a “bread and water” diet to punish prisoners who rebelled against Arpaio’s new policy of mandatory American flags in the jail cells.⁹⁴ According to *NBC News*, “[t]he regimen actually is a baked loaf of ground-up fruits, vegetables, milk powder, dough and other ingredients and, though it fulfills nutritional requirements, is decidedly unappetizing.”⁹⁵ *BBC News* noted the ubiquity of the practice of using food as punishment for prisoners: “Nutraloaf. Disciplinary loaf. Prison loaf. Special management meal. The loaf. The blended and often baked block of food, served in some US prisons as a punishment for bad behaviour, comes in a number of guises.”⁹⁶ New York and Pennsylvania prisons and the Los Angeles county jail all variously combine anything from “margarine, potatoes and carrots” to “rice and oatmeal” or “vegetable protein [and] cabbage.”⁹⁷

⁹² Chandra Bozelko, *How Ramen Became the Unlikely New Symbol of Prison Neglect*, *GUARDIAN*, <https://www.theguardian.com/commentisfree/2016/aug/22/ramen-unlikely-new-symbol-of-prison-neglect> [<https://perma.cc/Z47D-WWFF>] (Aug. 2, 2018, 2:32 PM).

⁹³ Jake Wayne, *Ramen Noodle Nutrition Facts*, *LIVESTRONG.COM*, <https://www.livestrong.com/article/263692-ramen-noodle-nutrition-facts/> [<https://perma.cc/X27Z-RQ7P>] (last visited May 6, 2021).

⁹⁴ Tracy Connor, *Sheriff Joe Arpaio Puts Inmates on ‘Bread and Water’ for Flag Desecration*, *NBC NEWS* (Jan. 24, 2014, 1:05 PM), <https://www.nbcnews.com/news/us-news/sheriff-joe-arpaio-puts-inmates-bread-water-flag-desecration-flna2D11989863> [<https://perma.cc/AE98-5AJK>].

⁹⁵ *Id.*

⁹⁶ Vanessa Barford, *Is It Fair to Punish Prisoners with Horrible Food?*, *BBC NEWS* (Dec. 18, 2015), <https://www.bbc.com/news/magazine-35128124> [<https://perma.cc/EX29-X3AE>].

⁹⁷ *Id.*

In his book *Solitary*, Terry Allen Kupers told the story of Edward Walker, a prisoner at Montana State Prison.⁹⁸ Once Mr. Walker lost access to his lithium medication for his bipolar disorder, he misbehaved and the prison sent him to solitary confinement.⁹⁹ The prison put Mr. Walker on the Behavioral Management Plan, where “Mr. Walker . . . was stripped naked and fed cold sandwiches instead of regular hot prison food. . . . The water and sewer lines for his cell were turned off, and he had to ask officers to turn them on when he wanted to use the toilet.”¹⁰⁰ Mr. Walker descended deeper into his mental illness, and his disruptive behavior intensified, “screaming for days and nights on end, throwing food, smearing ketchup and mayonnaise on the walls of his cell, disobeying orders, purposely flooding his cell and the pod, and attempting suicide three times.”¹⁰¹

David Fathi, director of the American Civil Liberties Union National Prison Project, told the *BBC* that “interfering in prisoners’ diet can make them more disruptive, so it doesn’t make managerial sense.”¹⁰² Why, exactly, do prisons insist on punishing prisoners with bad food?

Rebecca Godderis, a leading scholar on the sociology of prison food as punishment, argued, “[i]nside of prison a person is an inmate, not an individual. Therefore, because food is such a central part of the daily prison routine and because it acts as a powerful symbol of identity, the consumption of food is an excellent means through which to express power in prison.”¹⁰³

For example, Professor Godderis interviewed Canadian prisoners, one of whom described how the prison’s guards would confiscate his sugar:

When I questioned him as to why [the prisoners] were apprehensive about the sugar, he stated that the guards recite institutional security concerns about the possibility of prisoners making brew with it. However, it became quite apparent, when the participant pointed out that anyone could buy bags of sugar from the institutional store, that the dumping of the sugar was more a symbolic exhibition of the guard’s power than a response to a valid security matter.¹⁰⁴

⁹⁸ TERRY ALLEN KUPERS, *SOLITARY: THE INSIDE STORY OF SUPERMAX ISOLATION AND HOW WE CAN ABOLISH IT* 45–47 (2017).

⁹⁹ *Id.* at 45.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 46.

¹⁰² Barford, *supra* note 96.

¹⁰³ Rebecca Godderis, *Food for Thought: An Analysis of Power and Identity in Prison Food Narratives*, 50 *BERKELEY J. SOCIO.* 61, 61–62 (2006).

¹⁰⁴ *Id.* at 66.

This example illustrates the process by which the prison and its guards alienate prisoners from their own physical bodies and their own identity as a person, not an inmate. Professor Godderis explained that

[the lifestyle] inside of a total institution does not provide the opportunity to make personal decisions about what and when to eat, how the meals are prepared, or where to consume the food. As a result, prisoners not only lose control over this personal, self-defining ritual, but also over their own bodies. This process of estrangement between self and body makes it difficult, if not impossible, to maintain one’s unique identity—a process that Goffman (1961) terms the “mortification of the civilian self.”¹⁰⁵

Another prisoner participant told the story of how the prison handles oranges in the prison:

You could buy a box of oranges but security is so big on that—they want to know where every fucking peel is, you know? Cause guys make brews out of them so they have a tendency to watch for them. . . . [T]he reason I’m laughing about it is it’s comical because it’s just so childish [pause]. It’s funny sometimes the things they come up with.¹⁰⁶

Food as terrain for retaliation is not uncommon. Barry Lamon, a state prisoner, alleged in a complaint to the Eastern District Court of California that prison guards “deliberately served him meals of only one third to one half of the regular daily portions and that such meals were pan-scrapings, crumbs, remnants, and scraps rather than full entrees and side dishes as served to the other inmates” as retaliation for exercising his constitutional rights, such as filing a “request for an order of protection and seeking relief from violations of his constitutional rights.”¹⁰⁷

As then-doctoral student Avi Brisman observed:

[S]pacing of meals allows prisons to use food as a source of domination in two ways—as something that inmates intensely crave (i.e., in the morning) and something that they might wish to reject (i.e., lunch, served only a few hours after breakfast, and

¹⁰⁵ *Id.* at 63.

¹⁰⁶ *Id.* at 67.

¹⁰⁷ Lamon v. Tilton, No. 1:07-cv-00496-AWI-DLB (PO), 2008 U.S. Dist. LEXIS 119182, at *4, *17 (E.D. Cal. Jan. 25, 2008).

dinner, served only a few hours after lunch) but know they cannot. Inmates must thus endure the physical discomfort of eating or not eating when they would prefer the opposite, as well as the psychological pain of losing the ability to choose when to eat.¹⁰⁸

Food is always a field of control and power. For example, guards may promise extra food to prisoners who commit acts of violence on the guard's behalf, or prisoners can bribe the warden for extra food.¹⁰⁹ In contrast, prisoners at Alcatraz, the former federal prison in California, received unlimited loose tobacco and three packs of cigarettes a week, as well as 3,100 calories or more a day, far above the federal minimum caloric requirement.¹¹⁰ The Alcatraz prisoners were therefore relatively docile, and cigarettes did not have the bribing power that they usually enjoy in prisons.¹¹¹

Angela Davis famously contended that the prison-industrial system is the modern-day descendant of the institution of slavery.¹¹² Davis would likely agree that slaveholders used food as a means of control in similar ways that prisons today use food. Frederick Douglass wrote how slave owners would often starve their slaves but provide abundant alcohol and food once a year to distract enslaved people from planning how to escape.¹¹³ Douglass wrote in his first memoir, "Our food was coarse corn meal boiled. This was called mush. It was put into a large wooden tray or trough, and set down upon the ground."¹¹⁴ Rations consisted of spoiled or poor-quality pickled pork, fish, and corn.¹¹⁵ One cannot help but notice the eerie parallels between Mr. Douglass's description and the descriptions that contemporary prisoners give about their prison slop.

Some may believe that food as a means of punishment is a legitimate way to control the behavior of prisoners. However, while the legitimacy of punishment as a concept is beyond the scope of this Article, the authors urge readers to be careful about presuming the legitimacy of food as punishment without proper context. As Angela Davis argued, we must "disarticulate crime and punishment" by looking beyond "the prison system as an isolated institution":

¹⁰⁸ Avi Brisman, *Fair Fare?: Food as Contested Terrain in U.S. Prisons and Jails*, 15 GEO. J. ON POVERTY L. & POL'Y 49, 55 (2008).

¹⁰⁹ *Id.* at 65.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 65–66.

¹¹² See DAVIS, *supra* note 16, at 36–39.

¹¹³ Nina Martyris, *Frederick Douglass on How Slave Owners Used Food as a Weapon of Control*, NPR (Feb. 10, 2017, 11:42 AM), <https://www.npr.org/sections/thesalt/2017/02/10/514385071/frederick-douglass-on-how-slave-owners-used-food-as-a-weapon-of-control> [<https://perma.cc/8M53-B4LE>].

¹¹⁴ *Id.* (emphasis removed).

¹¹⁵ *Id.*

[A] more nuanced understanding of the social role of the punishment system requires us to give up our usual way of thinking about punishment as an inevitable consequence of crime. We would recognize that “punishment” does not follow from “crime” in the neat and logical sequence offered by discourses that insist on the justice of imprisonment, but rather punishment—primarily through imprisonment (and sometimes death)—is linked to the agendas of politicians, the profit drive of corporations, and media representations of crime. Imprisonment is associated with the racialization of those most likely to be punished. It is associated with their class and, as we have seen, gender structures the punishment system as well.¹¹⁶

Davis urges her audience to consider that punishment is not necessary and certainly, by extension, punishment through prison food is not necessary.¹¹⁷ While Sheriff Joe Arpaio may assert Nutraloaf as a way of forcing his prisoners to respect the mandatory American flag policy,¹¹⁸ scholars such as Angela Davis would likely identify it as a way of punishing people for being poor, Black, a victim of the larger political agendas, and unfortunately, at the whim of profit motives of the powers that be.

IV. CURRENT FEDERAL PRISON FOOD REGULATION

It is clear that prison food is poor quality. It often leaves prisoners hungry for more, at best, and poisons and injures and kills prisoners, at worst. This phenomenon begs the question: What are the regulations which govern prison food? This Part explores the intricacies of federal prison food policy in the BOP’s FSM.

We should first note that the FSM does not provide any new due process rights to prisoners.¹¹⁹ The Supreme Court ruled in 1995 that prison regulations do not give prisoners an affirmative right under the Constitution.¹²⁰ Chief Justice Rehnquist reasoned:

By shifting the focus of the liberty interest inquiry to one based on the language of a particular regulation, and not the nature of the deprivation, the Court encouraged prisoners to comb regulations

¹¹⁶ See DAVIS, *supra* note 16, at 112.

¹¹⁷ *Id.* at 111.

¹¹⁸ Connor, *supra* note 94.

¹¹⁹ See generally U.S. DEP’T OF JUST. FED. BUREAU OF PRISONS, FOOD SERVICE MANUAL (2011) [hereinafter FOOD SERVICE MANUAL] (explaining the BOP’s federal prison food policies without any mention of prisoners’ rights).

¹²⁰ See *Sandin v. Conner*, 515 U.S. 472, 483–84 (1995).

in search of mandatory language on which to base entitlements to various state-conferred privileges. . . .

. . . .

. . . [W]e believe that the search for a negative implication from mandatory language in prisoner regulations has strayed from the real concerns undergirding the liberty protected by the Due Process Clause.¹²¹

Prisoners can no longer sue for enforcement of prison policy and regulations.¹²²

Prior to *Sandin v. Conner*, courts interpreted prison regulations to instill affirmative rights to prisoners under the Due Process Clause, but *Sandin* ended this interpretation, opting to focus rather on whether the deprivation of rights “impose[d] ‘atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.’”¹²³ In other words, the Supreme Court directed lower courts not to look to violations of prison regulations but to “the *nature* of the deprivation” itself.¹²⁴ As a result, prisoners are only able to challenge the food quality of their prisons under the Constitution.¹²⁵ This means that the FSM, outlined below, does not provide positive rights to prisoners. Rather, it functions as a set of aspirational standards for prison officials, instead of a set of requirements enforceable by the courts.

In fact, it appears that the FSM has little administrative bite—the manual does not appear in the *Federal Register*.¹²⁶ The BOP never submitted the FSM for a notice and comment period and never formalized the FSM into a rule.¹²⁷ For the most part, courts defer to the discretion of administrative agencies under *Chevron*, which held that courts must defer to an agency’s reasonable interpretation of an ambiguous statute.¹²⁸ While some legal scholars have warned that Justice Neil Gorsuch’s appointment to

¹²¹ *Id.* at 481, 483.

¹²² *See id.* at 480–82.

¹²³ Michael Z. Goldman, Note, *Sandin v. Conner and Intraprison Confinement: Ten Years of Confusion and Harm in Prisoner Litigation*, 45 B.C. L. REV 423, 423–24 (2004) (quoting 515 U.S. 472, 483–84 (1995)).

¹²⁴ *Id.*

¹²⁵ *Cf. id.* at 424.

¹²⁶ *See Federal Register Document Search Results for ‘Food,’* FED. REG., <https://www.federalregister.gov/documents/search?conditions%5Bagencies%5D%5B%5D=prisons-bureau&conditions%5Bterm%5D=Food> [<https://perma.cc/EKT3-M5UC>] (last visited May 6, 2021).

¹²⁷ *See* FOOD SERVICE MANUAL, *supra* note 119, at 1 (indicating approval by Acting Director Kane with no other mention of a formal approval process). *See generally Notice and Comment*, JUSTIA, <https://www.justia.com/administrative-law/rulemaking-writing-agency-regulations/notice-and-comment> [<https://perma.cc/3H4R-BBSQ>] (Apr. 2018) (providing a high-level overview of the administrative rulemaking process).

¹²⁸ *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

the Supreme Court bench may signal the beginning of the end for *Chevron* deference,¹²⁹ most nevertheless agree that *Chevron*'s framework of statutory interpretation is extremely deferential towards administrative agencies.¹³⁰

The BOP, under the supervision of the Department of Justice (DOJ), sets forth its food safety guidelines in the FSM.¹³¹ Federal prisons must follow the guidelines in the FSM.¹³² State and local prisons are not required to follow these federal guidelines, though they often create their own regulations adapted from the BOP's FSM.¹³³ The current version of the FSM is dated September 13, 2011, and was approved by the Acting Director of the BOP, Thomas Kane.¹³⁴ The BOP's outlined objectives of the FSM are as follows:

- Inmates will be provided with nutritionally adequate meals, prepared and served in a manner that meets established Government health and safety codes.
- Essential resources will be planned, developed, and managed to meet the operational needs of the Food Service Program.
- Inmates assigned to the Food Service Department will be given opportunities to acquire skills and abilities that may assist in obtaining employment after release.
- Inmates will be provided with nutritional information that enables them to determine and establish healthy eating habits that may enhance their quality of life.¹³⁵

According to the FSM, the BOP's Assistant Director for Health Services supervises the Food Service Branch of the Health Services Division.¹³⁶ This Division “coordinates training, policy and program development for Food Service Programs.”¹³⁷

¹²⁹ *E.g.*, Eric Citron, *The Roots and Limits of Gorsuch's Views on Chevron Deference*, SCOTUSBLOG (Mar. 17, 2017, 11:26 AM), <https://www.scotusblog.com/2017/03/roots-limits-gorsuchs-views-chevron-deference/> [<https://perma.cc/D3ET-DJKL>] (articulating the roots of Justice Gorsuch's opposition to *Chevron* deference). *But see* Note, *The Rise of Purposivism and Fall of Chevron: Major Statutory Cases in the Supreme Court*, 130 HARV. L. REV. 1227, 1227, 1237, 1242–43 (2017) (arguing that Chief Justice Roberts spearheaded erosion of *Chevron* deference).

¹³⁰ *E.g.*, Nancy M. Modesitt, *The Hundred-Years War: The Ongoing Battle Between Courts and Agencies over the Right to Interpret Federal Law*, 74 MO. L. REV. 949, 952, 957 (2009).

¹³¹ *See* FOOD SERVICE MANUAL, *supra* note 119, at 7–9 (noting in the table of contents that “Food Safety” covers chapters seven through eleven, comprising over half of the substantive portions of the manual).

¹³² Marlow et al., *supra* note 11, at 1154.

¹³³ *Id.* at 1154–55.

¹³⁴ FOOD SERVICE MANUAL, *supra* note 119, at 1.

¹³⁵ *Id.* at 2.

¹³⁶ *Id.* at 10.

¹³⁷ *Id.*

The National Food and Farm Services Administrator (NFSA) directly supervises the Food Service Program at the Central Office level.¹³⁸ The Regional Food Service Administrator (RFSA) also directly supervises the Food Service Program at the Regional level.¹³⁹ The FSA supervises the Food Service Department at the Institution level.¹⁴⁰

A. Food Sanitation

According to a 2017 *American Journal of Public Health* study, prisoners suffer from a higher risk than the general population for infection correlated with prisons' features of "crowding, lack of sufficient hand-washing areas, poor hygiene practices, and lack of sufficient training in sanitation and disease prevention for inmates."¹⁴¹

To combat this phenomenon, the CDC recommends:

- (1) requiring food service employees to wash their hands, (2) prohibiting bare hand contact with ready-to-eat food, (3) excluding ill food service staff from working until at least 24 hours after symptoms such as vomiting and diarrhea have ended, and (4) requiring at least 1 employee in a food service establishment to be a certified food protection manager.¹⁴²

While the FSM requires handwashing and prohibits bare hand contact with ready-to-eat food, it does not require either mandatory employee sick leave or certified employees.¹⁴³

Section 5 of Chapter 7 of the FSM covers "Health and Hygiene."¹⁴⁴ The manual assigns the FSA, the Institution level's highest ranking Food Service Department employee,¹⁴⁵ the responsibility of observing Food Service staff for "symptoms that may indicate [the staff] should be precluded from Food Service work."¹⁴⁶ These symptoms include "open sores, skin irritations, cold or flu symptoms, yellow eyes or jaundiced skin, etc."¹⁴⁷

Chapter 7 declares that "[i]f inmates report, or are observed to have, [such] symptoms . . . they will be referred to Health Services for re-examination before being

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ Marlow et al., *supra* note 11, at 1150.

¹⁴² *Id.* at 1154.

¹⁴³ *Id.*

¹⁴⁴ FOOD SERVICE MANUAL, *supra* note 119, at 33–35.

¹⁴⁵ *Id.* at 10. "The FSA has oversight and direction of Food Service functions in the institution; ensures compliance with Bureau policies relating to Food Service; and performs duties in the Standardized Position Description for Food Service Administrator." *Id.*

¹⁴⁶ *Id.* at 33.

¹⁴⁷ *Id.*

assigned Food Service work.”¹⁴⁸ Further, “[t]he FSA ensures any inmate removed from Food Service for medical reasons is cleared to return to Food Service work.”¹⁴⁹ So the FSM does not mandate the CDC’s recommended twenty-four-hour rule regarding Food Service staff exhibiting diarrhea or vomiting.

The CDC also recommends that at least one of the Food Service staff be a certified food protection manager, but the FSM does not mandate the same.¹⁵⁰ Rather, the manual places generous and lax supervision authority onto the FSA. For example, the manual deems the FSA to be “responsible for food safety within the department” and obligated to “monitor and maintain food safety during all periods the department is in operation.”¹⁵¹ And while all Food Service employees must be “qualified” and “full-time,” the FSM only requires “a working knowledge of the Food Service Manual.”¹⁵²

B. Meal Frequency

The FSM mandates “three meals [must be] served each day, two of which [must be] hot.”¹⁵³ The manual does not dictate the specific times meals may be served; instead, it offers one simple rule: “No more than 14 hours may elapse between the evening and breakfast meals. Variations are allowed based on weekend and holiday Food Service demands, provided basic nutritional needs are met.”¹⁵⁴

The FSM allows for supplemental feedings as authorized by the Health Services staff; the manual outlines snacks for both diabetics and those in need of more calories.¹⁵⁵ A “Preferred Snack,” meaning the snack option that is prioritized, if practical, for diabetics is “1 cup [of] skim milk and 1 serving [of] non-sugar-coated dry cereal.”¹⁵⁶

C. Calories/Energy

The NFSAs, RFSAs, and FSAs collaboratively review the National Menu annually.¹⁵⁷ All of the federal prisons are required to use the National Menu, which is the “approved menu, recipes, and product specifications [to] be used for food procurement, preparation, and meal service.”¹⁵⁸ Every April, the NFSAs conduct a survey

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ Marlow et al., *supra* note 11, at 1154.

¹⁵¹ FOOD SERVICE MANUAL, *supra* note 119, at 32.

¹⁵² *Id.*

¹⁵³ *Id.* at 18.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 27–28.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 17.

¹⁵⁸ *Id.* at 16.

of prisoners to determine eating preferences and requests input from prison wardens “to ensure all Food Service staff have the ability to provide input into the menu update process.”¹⁵⁹ To plan meals, the NFSA takes into consideration:

- Meals contain a variety of nutrient-dense foods among the basic food groups.
- Money, manpower, and materials required to produce the menu.
- Food flavor, texture, temperature, and appearance.
- Eating preferences of the population.¹⁶⁰

The NFSA must also get approval of the updated menu by a Registered Dietician, who must conduct a nutritional analysis “to ensure the menus consider the Dietary Reference Intakes (DRIs) for groups published by the Food and Nutrition Board of the National Academy of Sciences.”¹⁶¹ Notably, the Registered Dietician is required to consider the DRIs but not required to follow them.¹⁶²

The latest version of the Food and Nutrition Board’s DRI report is from 2006.¹⁶³ It provides equations to calculate the caloric needs of adults.¹⁶⁴ A male prisoner, aged 36, at 69 inches, at 197.8 pounds, with one hour of sedentary exercise per day has an Estimated Energy Requirement of about 2,816 calories per day, according to the DRI report calculations.¹⁶⁵

¹⁵⁹ *Id.* at 17.

¹⁶⁰ *Id.* at 18.

¹⁶¹ *Id.* at 17. *See generally* INST. MED. NAT’L ACADS., DIETARY REFERENCES INTAKES: THE ESSENTIAL GUIDE TO NUTRIENT REQUIREMENTS (Jennifer J. Otten, Jennifer Pitz Hellwig & Linda D. Meyers eds., 2006) (providing recommendations for daily nutrient intake goals). There is no “Food and Nutrition Board of the National Academy of Sciences.” There is a Food and Nutrition Board under the Health and Medicine Division of the “National Academies of Sciences, Engineering, and Medicine.” *About the Food and Nutrition Board*, NAT’L ACADS. SCIS., ENG’G, & MED., <https://www.nationalacademies.org/fnb/about> [<https://perma.cc/7Y59-QTZE>] (last visited May 6, 2021). According to its website, the National Academies are “private, nonprofit institutions that provide expert advice on some of the most pressing challenges facing the nation and the world. [Their] work helps shape sound policies, inform public opinion, and advance the pursuit of science, engineering, and medicine.” *About the National Academies Press*, NAT’L ACADS. PRESS, <https://www.nap.edu/content/about-the-national-academies-press> [<https://perma.cc/83Y6-JP2K>] (last visited May 6, 2021). The National Academy of Sciences was established in 1863 by Congress. *Academy History*, NAT’L ACAD. SCIS., <http://www.nas.online.org/about-nas/history/> [<https://perma.cc/RAE5-EVVM>] (last visited May 6, 2021).

¹⁶² FOOD SERVICE MANUAL, *supra* note 119, at 17.

¹⁶³ *See generally* INST. MED. NAT’L ACADS., *supra* note 161.

¹⁶⁴ *See id.* at 20–37.

¹⁶⁵ *Id.* at 82–84. According to the Centers for Disease Control’s 2018 National Health Statistics Report, the average man in the United States weighs 89.7 kilograms, about 197.8 pounds. Cheryl D. Fryar, Deanna Kruszon-Moran, Qiuping Gu & Cynthia Ogden, *Mean Body Weight, Height, Waist Circumference, and Body Mass Index Among Adults: United*

After approval, the NFSA updates the menu, recipes, and product specifications accordingly and uploads the updates into a database by July 20.¹⁶⁶ The updates go into effect in October and the NFSA opens a portal on the database to collect concerns from the staff regarding the National Menu.¹⁶⁷

D. Nutrition

The FSM mandates that each prison’s FSA makes the nutritional information of the food available to the prisoners.¹⁶⁸ This is to help prisoners establish “healthy eating habits.”¹⁶⁹ But there is nothing in the manual which dictates how the FSA must inform the prisoners of nutritional information.¹⁷⁰

E. Religious Diets

The FSM mandates the provision of a “Certified Food Menu” intended for prisoners who claim religious dietary needs.¹⁷¹ This menu must be certified by an Orthodox Kashrut supervision service but is intended not only for Jews who keep Kosher but also Muslims who observe a halal diet and for other religious diets.¹⁷² At every meal where meat is served, prisoners participating in the program are offered “a no-flesh protein option.”¹⁷³ Notably, this section of the FSM is implementing a BOP rule.¹⁷⁴ In 1995, the BOP “amend[ed] its regulations on Religious Beliefs and Practices,” proving for the creation of a “common fare” food menu that would fulfill all common religious dietary needs.¹⁷⁵ It is the exception to the BOP’s general regulatory silence on prison food.

States, 1999–2000 Through 2015–2016, NAT’L HEALTH STAT. REPT., Dec. 20, 2018, at 2. The average man is 69 inches, about 1.524 meters. *Id.* at 3. According to the BOP website, the mode of the federal prisoner population age distribution is 36 years old. *Statistics: Inmate Age*, FED. BUREAU PRISONS, https://www.bop.gov/about/statistics/statistics_inmate_age.jsp [<https://perma.cc/53HY-3RUE>] (Mar. 13, 2021). Assuming that a male prisoner is sedentary except for one hour of “Low Active” exercise in a day, the Physical Activity Coefficient is 1.11. INST. MED. NAT’L ACADS., *supra* note 161, at 84. Altogether: $662 - (9.53 \times 36) + 1.11 \times [(15.91 \times 89.7\text{kg}) + (539.6 \times 1.524\text{m})] = 2815.83991$.

¹⁶⁶ FOOD SERVICE MANUAL, *supra* note 119, at 17.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 18.

¹⁶⁹ *Id.*

¹⁷⁰ *See id.*

¹⁷¹ *Id.* at 23–24.

¹⁷² *Id.*

¹⁷³ *Id.* at 24.

¹⁷⁴ Wilan, *supra* note 21, at 15.

¹⁷⁵ *See* Religious Beliefs and Practices, 60 Fed. Reg. 46,485, 46,485 (Sept. 6, 1995) (to be codified at 28 C.F.R. pt. 548); *see also* Wilan, *supra* note 21, at 15.

Much of the prison food litigation that has been brought is focused on First Amendment religious freedom claims.¹⁷⁶ Prisoners have challenged whether their food adheres to halal rules under the Religious Land Use and Institutionalized Persons Act.¹⁷⁷ The Sixth Circuit ruled in 2015 that vegetarian meals satisfy the religious needs of prisoners who eat halal.¹⁷⁸ But prison food issues related to religious needs are beyond the scope of this Article, which instead focuses on internal prison regulation of prison food generally.

V. THE ROLE OF THE AMERICAN CORRECTIONAL ASSOCIATION

The FSM refers to multiple “ACA Standards” such as the *Standards for Adult Correctional Institutions*, *Performance Based Standards for Adult Local Detention Facilities*, and the *Standards for Administration of Correctional Agencies*.¹⁷⁹ The ACA is a “professional membership organization composed of individuals, agencies and organizations involved in all facets of the corrections field, including adult and juvenile services, community corrections, probation and parole and jails.”¹⁸⁰ ACA Executive Director James Gondles, Jr., explains precisely why this private organization is cited in a government agency’s standards of food service for federal prisoners:

Perhaps one of the American Correctional Association’s greatest contributions to the field of corrections has been the development of a national accreditation process. ACA performance-based standards and expected practices address services, programs, and operations essential to effective correctional management. Through accreditation, an agency is able to provide an environment that safeguards the life, health, and safety of the public, staff and offenders while at the same time providing the necessary education, work, religious, and rehabilitative opportunities that enable an offender to prepare for successful reintegration into the community. Performance-based standards and expected practices set by ACA reflect best practices and current relevant policies and procedures and function as a management tool for over 1,300 correctional agencies in the United States.

¹⁷⁶ See, e.g., *Robinson v. Jackson*, 615 F. App’x 310, 311–14 (6th Cir. 2015); *Robbins v. Robertson*, 782 F. App’x 794, 801–03 (11th Cir. 2019).

¹⁷⁷ Steve Siporin, *The Kosher Con Game: Who’s Keeping Kosher in Prison?*, 74 W. FOLKLORE 58, 64–65 (2015).

¹⁷⁸ *Robinson*, 615 F. App’x, at 311–15.

¹⁷⁹ FOOD SERVICE MANUAL, *supra* note 119, at 4–5.

¹⁸⁰ AM. CORR. ASS’N, MANUAL OF ACCREDITATION: POLICY AND PROCEDURE 6 (2020).

This Accreditation Policy Manual is offered as a foundation of policy and procedure that will enable correctional programs to achieve their goals of providing the highest levels of effectiveness and efficiency while accomplishing proven and meaningful positive outcomes. It will provide guidance to participating programs, field auditors, and other interested parties.¹⁸¹

By its own description, the ACA is producing standards that correctional institutions may follow.

The ACA’s book, *Standards for Adult Correctional Institutions*, describes its purpose:

Accreditation, a process that began in 1978, involves approximately 80 percent of all state departments of corrections and youth services as active participants. Also included are programs and facilities operated by the Federal Bureau of Prisons, the U.S. Parole Commission, and the District of Columbia. For these agencies, the accreditation program offers the opportunity to evaluate their operations against national standards, remedy deficiencies, and upgrade the quality of correctional programs and services. The recognized benefits from such a process include improved management, *a defense against lawsuits through documentation and the demonstration of a “good faith” effort to improve conditions of confinement*, increased accountability and enhanced public credibility for administrative and line staff, a safer and more humane environment for personnel and offenders, and the establishment of measurable criteria for upgrading programs, personnel, and the physical plant on a continuing basis.¹⁸²

By its own description, the ACA is a body which creates standards in order to fend off consequences and complaints of prison conditions by allowing a demonstration of “good faith” attempts to keep the facilities up to the ACA standards and to fend off lawsuits.¹⁸³

A. The History of ACA Accreditation of Prisons

While founded in 1870, the ACA’s current accreditation method came out of the 1970s.¹⁸⁴ At the time, the prisoners’ rights movement had had several victories in the

¹⁸¹ *Id.*

¹⁸² AM. CORR. ASS’N, *STANDARDS FOR ADULT CORRECTIONAL INSTITUTIONS*, at xvi (4th ed. 2003) (emphasis added).

¹⁸³ AM. CORR. ASS’N, *supra* note 180, at 9, 41–42, 50–54.

¹⁸⁴ *See id.* at 6, 10.

courts, increasing judicial and public scrutiny on prison conditions.¹⁸⁵ The ACA was one of several organizations which concurrently created standards for prison conditions in response to such victories.¹⁸⁶ Many of the ACA's standards promulgated during this period were derived directly from court judgments.¹⁸⁷ Prior to the 1970s, ACA standards had "lacked direction"; in 1974, the ACA created a companion organization, the Commission on Accreditation of Corrections (CAC), to rectify this.¹⁸⁸ The CAC revamped the ACA's outdated standards, with over twenty percent of the 465 standards released in 1978 derived from specific court decisions.¹⁸⁹ In 1978, ACA accredited its first correctional institution.¹⁹⁰

Specifically, around creating standards for prison food, ACA's most direct competitor was the American Public Health Association (APHA), which released the first version of a book of standards in 1976.¹⁹¹ The APHA openly admitted that, like the ACA, it was motivated by prisoners' rights litigation, stating: "Not coincidentally, in 1976 the United States Supreme Court ruled that 'deliberate indifference to the serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain . . . proscribed by the Eighth Amendment . . .'"¹⁹² Regarding prison conditions in general, the American Bar Association (ABA) and DOJ were also writing standards for correctional institutions in the mid-1970s.¹⁹³

Many scholars see these standards as serving to "help institutions avoid the embarrassment of judicial scrutiny and allow correctional institutions to have autonomy from outside intervention."¹⁹⁴ Some have even said it was possible for courts to rely fully on accreditation as evidence that the facilities are constitutional,¹⁹⁵ while others

¹⁸⁵ Jamie Harris, *Social Movement Lessons from the US Prisoners' Rights Movement*, SENTIENCE INST. (July 21, 2020), <https://www.sentenceinstitute.org/prisoners-rights> [<https://perma.cc/7M4H-CCQF>].

¹⁸⁶ *See id.*; AM. CORR. ASS'N, *supra* note 180, at 8.

¹⁸⁷ David Ronald Ralphs, *Evaluating American Correctional Association Accreditation of Adult Correctional Institutions 23* (May 2006) (M.A. thesis, University of Texas) (<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.627.7043&rep=rep1&type=pdf>) [<https://perma.cc/L8U9-8DWQ>].

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 24.

¹⁹¹ *Correctional Health Care Standards and Accreditation*, AM. PUB. HEALTH ASS'N (Nov. 9, 2004), <https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2014/07/02/12/07/correctional-health-care-standards-and-accreditation> [<https://perma.cc/FEN2-4Z9U>].

¹⁹² Naim, *supra* note 26, at 23 (quoting AM. PUB. HEALTH ASS'N TASK FORCE ON CORR. HEALTH CARE STDS., *STANDARDS FOR HEALTH SERVICES IN CORRECTIONAL INSTITUTIONS*, at xvii (2003)).

¹⁹³ Ralphs, *supra* note 187, at 23.

¹⁹⁴ *Id.* at 32.

¹⁹⁵ *Id.* at 33.

have contested this;¹⁹⁶ this debate itself speaks to the fact that these private standards are seen as in relation to court case law on prison conditions.¹⁹⁷

The ACA bristled at organizations’ creation of competing standards and went as far as to oppose efforts from the ABA and DOJ.¹⁹⁸ However, the ACA was able to beat out its competitors and become “the most powerful and prolific standards organization in corrections” because of the funding and the institutional support of the Law Enforcement Assistance Administration (LEAA).¹⁹⁹

The LEAA was a federal agency within the DOJ that existed from 1968 to 1982.²⁰⁰ It was created as part of President Lyndon B. Johnson’s “war on crime” to fund local law enforcement agencies and crime initiatives.²⁰¹ The ACA first received an LEAA grant in 1974 to fund the creation of the ACA’s accreditation process.²⁰² By 1982, the ACA had received over two million dollars from the LEAA.²⁰³ The LEAA also effectively lobbied for different states to rely on the ACA’s prison standards; in 1978, LEAA gave one million dollars to twelve states so they could estimate what compliance with the ACA standards would cost.²⁰⁴ Instead of directly promulgating administrative law around prisons, the DOJ funded the ACA to create a semblance of such a code.²⁰⁵ It might at first seem counterintuitive that a federal program designed with a “tough on crime” ideology would fund a regulatory system meant in part to improve conditions in prisons. However, the ACA legitimized prisons to courts and legislatures, helping to cement the role of prisons in U.S. society at the beginning of a period when there would be a tremendous expansion in the scale of the U.S. carceral state.²⁰⁶ Of the agencies vying to set these standards, the ACA was the one that most directly positioned correctional facility officials as the first and foremost experts on prisons (instead of turning to prisoners, judges, lawyers, or the general citizenry).

¹⁹⁶ *Id.* at 35.

¹⁹⁷ The Supreme Court has ruled that ACA standards do not establish constitutional minima. *Id.*

¹⁹⁸ *Id.* at 23.

¹⁹⁹ *Id.* at 23–24.

²⁰⁰ See U.S. DEP’T JUST. NAT’L INST. JUST., LEAA 1970, at 1 (1970); Opinion, *What the L.E.A.A. Elephant Learned*, N.Y. TIMES (Apr. 21, 1982), <https://www.nytimes.com/1982/04/21/opinion/what-the-leaa-elephant-learned.html> [<https://perma.cc/KEB8-4HFF>].

²⁰¹ Jay N. Varon, Note, *Reexamination of the Law Enforcement Assistance Administration*, 27 STAN. L. REV. 1303, 1303–07 (1975).

²⁰² Ralphs, *supra* note 187, at 23.

²⁰³ *Id.* at 24.

²⁰⁴ *Id.*

²⁰⁵ See *id.* at 23–25.

²⁰⁶ See NAT’L ACADS. PRESS, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 39 (2014) (“In the first decade, 1972 to 1980, the state prison and jail populations each grew by about 60 percent. In the 1980s, the incarcerated population more than doubled in size . . .”).

A review of the current ACA Executive Committee biographies reveals that the executives are former directors of various states' departments of corrections or sheriff's offices.²⁰⁷ They hail from the same institutions that they are supposed to regulate,²⁰⁸ these executives create standards that are endorsed by the government. They have been effectively tasked with setting much of the administrative standards for prisons and correctional institutions, and yet, their professional careers are founded in operating such prisons and institutions. Prison industry officials are regulating themselves. The ACA is also rife with connections to the companies that profit from prisons; a critic of the ACA even described its annual meeting as seeming like a "gathering of major defense contractors."²⁰⁹ Another critic has claimed that "the ACA depends on corporations that exploit the expansion of the prison system and that ACA accreditation helps private prison firms market their services."²¹⁰ Indeed, the private prison firm Corrections Corporation of American (CCA) has been an early adopter and loyal customer of the ACA.²¹¹ In 2000, when the ACA performed accreditations on only 28.39% of all U.S. adult correctional facilities, it accredited nearly 75% of CCA's facilities.²¹² Overall, "only 10% of government-run facilities are accredited while 44% of privately-run facilities are accredited."²¹³

The ACA standards are "primarily processual and formulaic."²¹⁴ Audits are announced several weeks²¹⁵ or even months²¹⁶ in advance. Multiple scholars have written that this allows facilities to write policies consistent with ACA standards right before audits, without fully implementing them between ACA inspections; critics have called this the "one-day shine" and the "accreditation roller coaster."²¹⁷ Thus, the existence of an ACA standard for prison food does not necessarily mean there is an enforcement mechanism for that standard.

B. BOP's Reliance on ACA Standards

The principle which guides Section C: Food Service of *Standards for Adult Correctional Institutions* is that "[m]eals are nutritionally balanced, well-planned,

²⁰⁷ *Executive Committee*, AM. CORR. ASS'N, https://www.aca.org/ACA_Prod_IMIS/ACA_Member/About_Us/ACA_Leadership/Executive_Committee/ACA_Member/AboutUs/Executive_Committee.aspx [<https://perma.cc/A5CK-SHQT>] (last visited May 6, 2021) (click "Executive Committee Bios" to access biographies at <https://drive.google.com/file/d/1H72aT2bYsQP0rpLMK5yIFsVkl16rwXYC/view> [<https://perma.cc/KF6J-677V>]).

²⁰⁸ *See id.*

²⁰⁹ Ralphs, *supra* note 187, at 34.

²¹⁰ *Id.* at 37.

²¹¹ *See id.*

²¹² *Id.* at 26–27.

²¹³ *Id.* at 37.

²¹⁴ Aman, *supra* note 38, at 539.

²¹⁵ Naim, *supra* note 26, at 22.

²¹⁶ Ralphs, *supra* note 187, at 36.

²¹⁷ *Id.*

and prepared and served in a manner that meets established governmental health and safety codes.”²¹⁸

The FSM covers some of the standards in Section C, and Section C does offer some additional guidance. For example, while the FSM does state that no more than fourteen hours between the first meal of the day and the last meal of the day can pass,²¹⁹ standard 4-4328 of Section C states that “at least three meals (including two hot meals) are provided at regular meal times *during each 24-hour period*.”²²⁰

Standard 4-4316 of Section C requires:

[D]ocumentation that the institution’s dietary allowances are reviewed at least annually by a qualified nutritionist or dietician to ensure that they meet the nationally recommended allowances for basic nutrition. Menu evaluations are conducted at least quarterly by institution food service supervisory staff to verify adherence to the established basic daily servings.²²¹

Notably, this language slightly departs from the FSM’s language, which only states that a Registered Dietician “considers” the DRIs from the National Academy of Sciences Food and Nutrition Board.²²²

Because the FSM only lists Section C as a “Reference,”²²³ it is unclear to the public whether the ACA’s standards cited as references are mandatory or are cited as part of a bibliography. The “References” section includes both BOP policy guidance as well as Food and Drug Administration (FDA) code and ACA standards.²²⁴ Is this to imply that all are mandatory? The public citizen and reader cannot know.

Further, what is a reader to do when the cited ACA standards seem to be in contradiction to the BOP’s regulation? For example, Section C standard 4-4322, which is noted as “MANDATORY,” requires:

Where required by the laws and/or regulations applicable to food service employees in the community where the facility is located, all persons involved in the preparation of food receive a preassignment medical examination and periodic reexaminations to ensure freedom from diarrhea, skin infections, and other illnesses transmissible by food or utensils; all examinations are conducted in accordance with local requirements.²²⁵

²¹⁸ AM. CORR. ASS’N, *supra* note 182, at 87.

²¹⁹ FOOD SERVICE MANUAL, *supra* note 119, at 18.

²²⁰ AM. CORR. ASS’N, *supra* note 182, at 91 (emphasis added).

²²¹ *Id.* at 88.

²²² *See* FOOD SERVICE MANUAL, *supra* note 119, at 17.

²²³ *See id.* at 4.

²²⁴ *Id.* at 4–5.

²²⁵ AM. CORR. ASS’N, *supra* note 182, at 89.

But the FSM refers to different illnesses: “open sores, skin irritations, cold or flu symptoms, yellow eyes or jaundiced skin, etc.”²²⁶ Does this mean that Food Service workers need not be screened for diarrhea in federal prisons? And does this mean that federal prisons are required to follow regulations of its locality and such food regulations are not uniform among all federal prisons?

And what if the ACA standard states something in the “Comment” section of its standard and not in the actual standard itself? For example, ACA standard 4-4321, which is also noted as “MANDATORY,” notes in its Comment that

[f]ood service personnel should be trained in accident prevention, first aid, use of safety devices, floor care, knife storage, and use of fire extinguishers. They should attend regular meetings to discuss accident prevention and analyze major accidents to prevent recurrence.²²⁷

Yet, the FSM has no mention of accidents, first aid, or fire extinguishers.²²⁸ Rather, it lists as a “Reference” the Program Statement “P1600.09 Occupational Safety, Environmental Compliance, and Fire Protection (10/31/07),” which does not regulate food safety.²²⁹

This leaves open the question: To what “established governmental health and safety codes” does the *Standards for Adult Correctional Institutions* refer?²³⁰ To the FSM? To the National Academies? To the FDA? To the ACA itself, which is a *private non-profit* and not a governmental body? Nothing seems established except for a few scattered rules. Rather, the BOP rules imply and point to a body of “established . . . codes”²³¹ which does not exist. Those rules that regulate prisoner food, largely echoing the ACA handbooks, are vague and undefined. There is no clearly established body of food service code—at best, the FSM provides some basic guidelines but its boundaries with other bodies of law and its obligatoriness are ambiguous.

The FSM refers also to Section C of the *Standards for Administration of Correctional Agencies*, which is a form that both the institution seeking accreditation and the ACA accreditation officer use to evaluate the prison’s compliance with ACA standards.²³² Again, this form refers to the principle that “[m]eals are nutritionally balanced, well-planned, and prepared and served in a manner that meets established

²²⁶ FOOD SERVICE MANUAL, *supra* note 119, at 33.

²²⁷ AM. CORR. ASS’N, *supra* note 182, at 89.

²²⁸ See generally FOOD SERVICE MANUAL, *supra* note 119 (lacking any mention of accidents, first aid, or fire extinguishers).

²²⁹ *Id.* at 4.

²³⁰ AM. CORR. ASS’N, *supra* note 182, at 87.

²³¹ FOOD SERVICE MANUAL, *supra* note 119, at 2.

²³² AM. CORR. ASS’N, STANDARDS FOR ADMINISTRATION OF CORRECTIONAL AGENCIES 129, 142–43 (2d ed. 1993) (Appendix B provides the definition of a “Qualified Individual” for the purposes of “Safety and Sanitation Inspections.”).

governmental health and safety codes.”²³³ The form has minimal space to note deficiencies or noncompliance, though the form does require the agency to “[l]ist documentation” if it evaluates itself as in compliance and to provide a “plan of action” if it evaluates itself as non-compliant.²³⁴ This also allows the Visiting Committee, presumably from the ACA Commission on Accreditation for Corrections,²³⁵ to reject the agency’s plan of action.²³⁶

This form looks like it could speak to the ACA’s stated goal of providing documentation of “good faith” in maintaining prisoner quality of life.²³⁷ It allows so little space for agencies and the Visiting Committee to actually engage with the mass structural problems with prisoner food, and yet it gives the sheen of bureaucracy and process. It gives wardens something to point to when they are accused of mistreating prisoners. It is a piece of paper that implies that prisons are following their duty to meet the prisoner’s basic needs, but it is nothing more than a checklist provided by a private party that has no legally binding status on the government.

C. ACA Standards in the Courts

ACA standards do not hold formal sway in litigation.²³⁸ Even a Lexis Advance search for “American Correctional Association” only brings up 1,035 case results.²³⁹ The Supreme Court wrote in a footnote in *Bell v. Wolfish*:

Respondents’ reliance on other lower court decisions concerning minimum space requirements for different institutions and on correctional standards issued by various groups [such as the American Correctional Association] is misplaced. . . . [W]hile the recommendations of these various groups may be instructive in certain cases, they simply do not establish the constitutional minima; rather, they establish goals recommended by the organization in question.²⁴⁰

The ACA standards are thus norm-setting but not legally binding.

²³³ *Id.* at 129.

²³⁴ *See id.*

²³⁵ *See The Commission on Accreditation for Corrections*, AM. CORR. ASS’N, https://www.aca.org/ACA_Prod_IMIS/ACA_Member/Standards__Accreditation/About_Us/CAC/ACA_Member/Standards_and_Accreditation/SAC_Commission.aspx [<https://perma.cc/6EXB-ZHJV>] (last visited May 6, 2021).

²³⁶ *See* AM. CORR. ASS’N, *supra* note 232, at 129.

²³⁷ *See* AM. CORR. ASS’N, *supra* note 182, at xvi.

²³⁸ *See* *Bell v. Wolfish*, 441 U.S. 520, 543–44 n.27 (1979).

²³⁹ LEXIS, <https://advance.lexis.com/> (run a search for—including double quotes—“American Correctional Association”) (last visited May 6, 2021).

²⁴⁰ *See* 441 U.S. at 543–44 n.27 (citations omitted) (citing an earlier edition of AM. CORR. ASS’N, *supra* note 182).

The courts usually use ACA standards for informative context for Eighth Amendment claims. ACA standards seem to hold no definitive Eighth Amendment value. In *Lareau v. Manson*, the Second Circuit explained that the trial court

considered correctional guidelines and standards from a number of organizations . . . to inform itself of contemporary standards. . . . For instance, the standards of the American Correctional Association require that 60 square feet of cell space be accorded prisoners spending no more than 10 hours per day in their cells and that 80 square feet be accorded prisoners spending more than 10 hours a day in their cells.²⁴¹

In this Connecticut case, the Second Circuit found that with respect to the prison in question, “[T]he various guidelines [including the ACA standards] illustrate the glaring disparity on even the most rudimentary square footage level between the conditions in the [prison] and the conditions widely thought by knowledgeable bodies to be essential.”²⁴²

The dissent wrote, “[T]he American Correctional Association’s Manual of Standards for Adult Correctional Institutions (1977), which is cited by the majority, is clearly aspirational; the Manual expressly states that ‘[t]he standards reflect new heights to reach, new programs to achieve, and a higher sense of humanity and decency.’”²⁴³ So the majority and the dissent disagree on the exact degree to which the ACA sets norms—does the ACA delineate the bare minimum or does the ACA speak to largely ambitious goals?

In *Byrd v. Maricopa County Sheriff’s Department*, prisoner Charles Edward Byrd brought a challenge under the Fourth Amendment from a humiliating cross-gender strip search.²⁴⁴ The Ninth Circuit ruled that Mr. Byrd was subjected to an unreasonable search, reasoning that a report’s conclusions that cross-gender strip searches heighten the potential for abuse and are extraordinarily intrusive in nature were consistent with the ACA’s adopted standards.²⁴⁵

But violation of ACA standards does not always mean courts rule in favor of the prisoner. In *Casey v. Lewis*, the Arizona Department of Corrections successfully convinced the Ninth Circuit to reverse a lower court’s order that was in favor of plaintiff state prisoners.²⁴⁶ The *Casey* dissent argued in a footnote, “I would be especially reluctant to defer in this case to defendants’ ‘expertise’ because defendants’ practice of prohibiting contact visits to prisoners based solely on their housing assignment

²⁴¹ 651 F.2d 96, 106 (2d Cir. 1981) (footnote omitted).

²⁴² *Id.* at 107.

²⁴³ *Id.* at 113 (Friendly, J., concurring and dissenting) (quoting an earlier edition of AM. CORR. ASS’N, *supra* note 182).

²⁴⁴ 629 F.3d 1135, 1136 (9th Cir. 2011) (en banc).

²⁴⁵ *Id.* at 1142.

²⁴⁶ 4 F.3d 1516, 1518 (9th Cir. 1993).

violates the Standards for Adult Correctional Institutions issued by an association of corrections experts.”²⁴⁷

It seems that ACA standards have even less sway with the Supreme Court. In *Hudson v. Palmer*, the well-known Supreme Court ruling about a prisoner’s ripped pillowcase, Justice Stevens footnoted ACA standards in his dissent, stating:

[I]t appears to be the near-universal view of correctional officials that guards should neither seize nor destroy noncontraband property. . . . I am aware of no prison system with a different practice; the standards for prison administration which have been promulgated for correctional institutions invariably require prison officials to respect prisoners’ possessory rights in noncontraband personal property.²⁴⁸

Justice Marshall expressed discomfort with the total disregard of ACA standards in his *Kentucky Department of Corrections v. Thompson* dissent, arguing that the prison’s own policies reference the ACA visitation standards and “[w]hen these mandatory commands are read in conjunction with the detailed rules set forth in the Commonwealth Procedures, it is inconceivable that prisoners in the [prison] would not ‘reasonably form an objective expectation that a visit would necessarily be allowed absent the occurrence of one of the listed conditions.’”²⁴⁹ But there is little evidence that the Court will embrace Justice Marshall’s reasoning.

In short, courts may mention the ACA standards, especially if the court wants to rule in favor of the prisoner and the prison is violating the ACA standards. But the ACA standards have no legal bind and mainly serve to inform the courts of what is presumed to be industry standard. This of course also means prisoners have no recourse to challenge the ACA standards in court.

VI. PRISON FOOD AND THE PLRA

Prisoners’ litigation used to be a valuable tool for enforcing prison standards, but this changed with the PLRA. The PLRA was passed and signed into law by Bill Clinton in 1996.²⁵⁰ It decreases prisoner-brought litigation by requiring prisoners to exhaust

²⁴⁷ *Id.* at 1536 n.10 (Pregerson, J., concurring in part and dissenting in part).

²⁴⁸ *Hudson v. Palmer*, 468 U.S. 517, 551–52, 551 n.24 (1984) (Stevens, J., dissenting).

²⁴⁹ 490 U.S. 454, 473–74 (1989) (Marshall, J., dissenting) (footnote omitted) (quoting *id.* at 465 (majority opinion)).

²⁵⁰ Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1559 (2003); see also *No Equal Justice: The Prison Litigation Reform Act in the United States*, HUM. RTS. WATCH 9 (2009), <https://www.hrw.org/sites/default/files/reports/us0609web.pdf> [<https://perma.cc/V25R-D5ST>].

prisons' administrative grievance procedures before filing litigation and to pay filing fees even if they are indigent.²⁵¹ It also limits potential damages and attorney's fees.²⁵²

The history of the PLRA's passage illustrates how U.S. legislatures, by their structural design, tend to undermine prisoners' rights, including regarding food. It was passed as an amendment to the appropriations bill that ended the 1996 government federal standoff.²⁵³ It received bipartisan support, and most disturbingly, little congressional scrutiny.²⁵⁴ It was pushed through easily as a tort reform measure.²⁵⁵ Multiple scholars have drawn attention to how "tort reform" is a dog-whistle politics used to mask a racially discriminatory agenda.²⁵⁶ Much like the "welfare queen" myth, the tort reform trend stoked the fear of lazy, mooching (read: Black) people hurting hardworking, successful (read: white) Americans.²⁵⁷ With a prison population that is disproportionately Black, as well as the important role the "Black criminal" plays in the white racial imagination, the tort reform craze was easily turned on prisoners.²⁵⁸ The PRLA pinpoints how little political power poor and racialized communities have, and, resultantly, how the legislature is quick to cause such communities harm.

Stories about prison food played a key role in the PRLA's passage. The National Association of Attorneys General, which lobbied heavily for the PRLA, released a distorted list of "egregious" prisoner litigation.²⁵⁹ Two of the stories that circulated heavily were about a prisoner "suing for the right to chunky peanut butter" and a prisoner demanding a salad bar.²⁶⁰

The peanut butter case in particular became something of an urban legend, with critics of frivolous prisoner litigation being vague about whether "there were many peanut butter cases or whether all of the reports refer to a single episode."²⁶¹ Politics made it seem ridiculous to ask for salad when access to fresh produce and adequate

²⁵¹ Schlanger, *supra* note 250, at 1559.

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *No Equal Justice: The Prison Litigation Reform Act in the United States*, *supra* note 250, at 9.

²⁵⁵ See KITTIE CALAVITA & VALERIE JENNESS, *APPEALING TO JUSTICE: PRISONER GRIEVANCES, RIGHTS, AND CARCERAL LOGIC* 25 (2015).

²⁵⁶ See, e.g., Emily Gottlieb, Geoff Boehm & Joanne Doroshow, "Tort Reform" and Racial Prejudice: A Troublesome Connection, *CTR. FOR JUST. & DEMOCRACY* 2 (2004); Joanne Doroshow & Amy Widman, *The Racial Implications of Tort Reform*, 25 *WASH. U. J.L. & POL'Y* 161, 161 (2007) (arguing that racial prejudice "lurks" behind the tort reform movement).

²⁵⁷ See Doroshow & Widman, *supra* note 256, at 164; Gottlieb et al., *supra* note 256, at 3–4.

²⁵⁸ See Doroshow & Widman, *supra* note 256, at 164; Gottlieb et al., *supra* note 256, at 3–4.

²⁵⁹ CALAVITA & JENNESS, *supra* note 255, at 26. Note that in this instance, attorneys general, who might be another set of institutional actors called upon to intervene to improve prison food conditions, led the push against prisoners' rights.

²⁶⁰ *Id.*

²⁶¹ Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 *DUKE L.J.* 1, 19 n. 119 (1997).

nutrition is a central crisis of prison food conditions. Jennifer Puplava wrote in the *Indiana Law Journal* in 1997:

In a roundabout way, the debate over crunchy-versus-smooth peanut butter helped bring about the Prison Litigation Reform Act of 1995. The increasing concern with institutional reform has caused an uproar over frivolous civil rights lawsuits brought by inmates, coming to a head with inmates suing for “rights” such as the enforcement of a preference for creamy instead of chunky peanut butter.²⁶²

Proponents of the PLRA asserted other legends of prison food lawsuits, such as an inmate who sued for one million dollars “because his ice cream had melted” and an inmate who sued because his cake was “hacked up.”²⁶³ Political pundits harnessed the persuasive power of these anecdotes and relied on the assumption that it is obvious that prisoners do not deserve control over what they consume and especially that they are not entitled to pleasure from their food.

Prisoners, however, pushed back against their complete dehumanization. For example, the real peanut butter case was brought by Kenneth Parker after he was denied a refund or exchange when his canteen order for peanut butter was filled incorrectly.²⁶⁴ In his own words, the lawsuit was more about self-autonomy than condiments: “It was just the idea of them taking something from me If I didn’t file the suit, I would have felt like I was punked out. Like you could take anything from me and get away with it.”²⁶⁵ Minor changes in prisoners’ access to food have major psychological impacts on them, because prisoners’ domain of control over their own lives has already been so reduced.²⁶⁶

Proponents of the PLRA also emphasized that it was necessary to maintain the “[d]elicate [b]alance of [f]ederalism.”²⁶⁷ As Congressman Daniel Lungren argued in a 2007 statement at a hearing reviewing what a decade of the PLRA has meant:

There is another underlying aspect of the PLRA which, in my estimation, deserves our attention. The actions of the Congress

²⁶² Jennifer A. Puplava, Note, *Peanut Butter and Politics: An Evaluation of the Separation-of-Powers Issues in Section 802 of the Prison Litigation Reform Act*, 73 IND. L.J. 329, 329 (1997).

²⁶³ *Id.* at 330 (quoting 141 CONG. REC. S14629 (daily ed. Sept. 29, 1995)).

²⁶⁴ Schlanger, *supra* note 250, at 1568–69, 1577–78.

²⁶⁵ *Id.* at 1578.

²⁶⁶ See Godderis, *supra* note 103, at 61–62.

²⁶⁷ *Private Prison Information Act of 2007, and Review of the Prison Litigation Reform Act: A Decade of Reform or an Increase in Prison and Abuses?: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 110th Cong. 75 (2008) (statement of Rep. Lungren, Member, Subcomm. on Crime, Terrorism, and Homeland Sec.).

in crafting the parameters of prisoner civil litigation have a direct impact on the states and the operation of their prison systems. This relationship of dual sovereigns entailed by our nation's system of federalism should be reflected in legislation affecting state run penal institutions. Such deference is of particular importance in light of the fact that about 95 percent of criminal prosecutions occur at the state and local levels of government. The punishment of those convicted of committing crimes within the jurisdiction of the states is an integral aspect of the exercise of the responsibility borne by them to protect the safety of their citizens. A proper understanding of federalism entails a respect for this aspect of the exercise of the police power.²⁶⁸

Rep. Lungren sees federal court oversight as infringing on states' control of their prisoners, claiming that "[i]n the period prior to the enactment of the PLRA, Congressional acquiescence to the use of the federal courts by prisoners as a means of disrupting the operation of their prison systems reflected a disregard for the constitutional role of state governance."²⁶⁹ There are a couple of clear issues with casting the PLRA as being a federalist act. It blocks federal prisoners from seeking federal court oversight and state prisoners from seeking state court oversight; neither of these would threaten dual sovereignty.

It is notable that the specter of federalism is raised to defend the PLRA, especially because its actual connections to the principles of federalism are questionable. Of course, much of the origins of federalist ideology were built around states' rights to allow slavery.²⁷⁰ This is significant because the prison abolition movement frames U.S. prisons as being the successor of chattel slavery due to prisons' structural corollaries to the institution of slavery and prisons' central role in the current oppression of Black people in the United States.

The passage and continuation of the PLRA has also been aided by the prison industries. The ACA continues to support the PLRA, which it has affirmed in resolutions by its membership in 2007 and again in 2016.²⁷¹ The architect of the PLRA, Sarah V. Hart, also has deep ties to the ACA.²⁷² In 1998, just a few years after helping

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ See generally Earl M. Maltz, *Slavery, Federalism, and the Structure of the Constitution*, 36 AM. J. LEGAL HIST. 466 (1992).

²⁷¹ AM. CORR. ASS'N, RESOLUTIONS 6 (Jan. 25, 2017) ("THEREFORE BE IT RESOLVED that the American Correctional Association continues to support the Prison Litigation Reform Act . . .").

²⁷² Rachel Poser, *Why It's Nearly Impossible for Prisoners to Sue Prisons*, NEW YORKER (May 30, 2016), <https://www.newyorker.com/news/news-desk/why-its-nearly-impossible-for-prisoners-to-sue-prisons> [<https://perma.cc/J2DM-DXY9>]; Email from Executive Office Team, ACA, to Anna Nathanson (Feb. 10, 2020, 10: 52 AM) (on file with author).

write the PLRA, Hart became a Vice Chair of the ACA Legal Issues Committee.²⁷³ This suggests a mutual relationship of support and intellectual influence between at least some of the politicians behind the PLRA and the prison industries.

Altogether, the passage of the PLRA is a great example of how a confluence of ideologies and institutional actors, each shaped at some level by anti-Blackness, results in a facially race-neutral law that actually harms poor, Black, and Brown communities. The impact has been to decrease prisoner litigation by an estimated sixty percent.²⁷⁴ Prisoners lost one of their tools for seeking humane food conditions, and they continue to suffer the consequences. Recognizing this, prison activists have continued to advocate for the repeal of the PLRA; the third demand of the 2018 National Prisoners Strike was that “[t]he Prison Litigation Reform Act must be rescinded, allowing imprisoned humans a proper channel to address grievances and violations of their rights.”²⁷⁵ As prisoners know, the PLRA is a barrier to improving prison food conditions.

VII. POLICY RECOMMENDATIONS

This Article recommends a three-step solution to the lack of administrative law enforceable by prisoners: *first*, repeal the PLRA; *second*, overturn *Sandin v. Conner*, either judicially or legislatively; and *third*, increase the nutrition, variety, and quality of food standards.

A. Repeal the PLRA

The PLRA severely curtails prisoners’ ability to maintain any level of dietary standards. It limits their ability to enforce both their existing Eighth Amendment rights and the potential future protections they could gain from legislation. The PLRA should be repealed; litigation used to be one of prisoners’ greatest tools for improving the conditions they live under, and it could be again if the PLRA is rescinded. Organized prisoners themselves make this a central demand in their resistance.²⁷⁶

Senator Bob Dole himself admitted that the PLRA would help to “restrain liberal Federal judges who see violations of constitutional rights in every prisoner complaint and who have used these complaints to micromanage State and local prison systems.”²⁷⁷ In other words, the PRLA was intended to stifle the voice that prisoners have over the conditions of their own confinement.

²⁷³ See Email from Executive Office Team, ACA, to Anna Nathanson, *supra* note 272.

²⁷⁴ Poser, *supra* note 272.

²⁷⁵ *Prison Strike 2018*, *supra* note 19.

²⁷⁶ *Id.*

²⁷⁷ Andrew W. Amend, Note, *Giving Precise Content to the Eighth Amendment: An Assessment of the Remedial Provisions of the Prison Litigation Reform Act*, 108 COLUM. L. REV. 143, 156 (2008) (quoting 141 CONG. REC. S14414 (daily ed. Sept. 27, 1995) (statement of Sen. Dole)).

The congressional sponsors of the PLRA engaged in some questionable tactics in advocating for their anti-prisoners bill:

[They] abused professional rhetoric. They offered misleading statistics. They told stories that combined into a woven narrative of inmate abuse of the legal system, in which inmates purportedly file frivolous grievances. They told only one side of stories, ignoring any prisoner's legitimate facts behind the court filings. They repeatedly labeled federal judges as "liberals" who were willing to grant any inmate any frivolous request. They insisted that tax dollars were thrown away on inmate filings costs. To top all that off, they insisted that their audience, the other Senators, should fear thousands of violent inmates, court-freed and roaming the streets.²⁷⁸

According to Terri LeClercq, the congressional sponsors garnered support for their bad bill using rhetorical performances instead of good policy:

The senators obviously felt the need to step outside the professional standards of ethical speech, because the PLRA introduced harsh restrictions for inmate petitions. Among other requirements, it limited injunctive relief; it added an exhaustion requirement of administrative remedies (yielding access through the local requirements); it reduced or eliminated attorney's fees; it offered state judges the ability to screen, dismiss, and waive reply pleadings; and it required filing fees even of indigent inmates.²⁷⁹

Some may argue that Senator Dole attempted simply to correct the problem of frivolous inmate petitions. LeClercq addresses this counteroffer:

Was a review of inmate petitions "micromanaging"? . . . [Senator Dole's] worry actually centered on the injunctions and judicial oversight of appalling prison conditions that were revealed by those petitions The Senate will save the nation and its criminal-justice system by taking away its proper role in prison oversight; and thus it came to pass.²⁸⁰

²⁷⁸ Terri LeClercq, *Rhetorical Evil and the Prison Litigation Reform Act*, 15 LEGAL COMM'N & RHETORIC: JALWD 47, 48 (2018).

²⁷⁹ *Id.* at 49.

²⁸⁰ *Id.* at 53.

Others have noted that the PLRA has made the boundaries of the Eighth Amendment more flexible for prison officials—in other words, the PLRA lets prison administrators play fast and loose with prisoners’ constitutional rights. Through the prism of the PLRA, the Eighth Amendment may well look “something like a speed limit which [prison officials] are entitled to push up against as closely as [they] can and in regard to which there might even be a margin of toleration. . . . Repealing the PLRA would neutralize [this] concern[.]”²⁸¹

“The PLRA is an extraordinary piece of legislation, both in U.S. legal history and in the global context. It appears that no other country in the world has established a separate and unequal system of court access that applies only to prisoners,” wrote David Fathi, the Director of the National Prison Project of the ACLU Foundation.²⁸² Fathi’s argument supports the idea that the PLRA likely leads to massive and systemic violations of prisoners’ various constitutional rights, even beyond the Eighth Amendment: “The PLRA has had a devastating effect on prisoners’ access to the courts, and on the ability of the courts to enforce minimal standards of health, safety, and human dignity for the 2.3 million prisoners in the United States.”²⁸³ Fathi warned that if Congress can get away with the PLRA, there is little to stop Congress from passing similar legislation for other politically unpopular groups.²⁸⁴

B. *Overturn Sandin v. Conner*

Prior to *Sandin v. Conner*,²⁸⁵ prisoners were able to sue over a violation of prison regulations, such as those in the FSM.²⁸⁶ Philip Sbaratta argued that *Sandin*’s

narrowed approach to positivist law as an independent creator of protected liberty interests, combined with its general refusal to read the Due Process Clause directly, reduces prisoners’ due process rights to an unacceptable level. [*Sandin*]’s holding renders prisoners susceptible to virtually unlimited prison official discretion over substantial interests that should invoke the Due Process Clause on their own weight.²⁸⁷

²⁸¹ Amend, *supra* note 277, at 144, 169.

²⁸² David C. Fathi, *The Prison Litigation Reform Act: A Threat to Civil Rights*, 24 FED. SENT’G REP. 260, 260 (2012).

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ 515 U.S. 472 (1995).

²⁸⁶ See Philip W. Sbaratta, Note, *Sandin v. Conner: The Supreme Court’s Narrowing of Prisoners’ Due Process and the Missed Opportunity to Discover True Liberty*, 81 CORNELL L. REV. 744, 753 (1996).

²⁸⁷ *Id.* at 773.

Sbaratta instead urged the Court to use a balancing test, like in *Mathews v. Eldridge*,²⁸⁸ to balance the interests of the prisoners and of the administration against each other.²⁸⁹ *Sandin v. Conner* has

negatively affected the ability of prisoners to make liberty interest claims arising from intraprisson sentences to more restrictive confinement, usually involving long-term segregation. . . . Based on the case's vague language and its explicitly stated policy of deference to prison officials, however, the lower courts have applied *Sandin* in a manner that very much ignores the nature of a prisoner's deprivation as compared to the average prisoner's experience and overlooks the severe harms segregatory confinements cause.²⁹⁰

Michael Goldman tested this argument against an analysis of lower court interpretations of *Sandin*, finding:

[T]hese cases reveal findings of fact supporting the critics' prediction that *Sandin* would lead to situations in which prison officials could send prisoners to confinement for no justifiable reason without any judicial oversight.

It is noteworthy and perhaps a little ironic that such consistently harsh results arose out of a decision that failed to direct how courts should analyze prisoner liberty interest claims.²⁹¹

As a result, lower courts give the benefit of the doubt to prison officials and cite to *Sandin*'s deference principle for the prisons.²⁹²

This is because *Sandin v. Conner* did not provide courts a test to measure atypicality, significance, or ambiguity:

The new standard set forth by the Court for determining whether a liberty interest exists in a prison setting is fraught with ambiguity. Lower courts will struggle with the definitions of "significant" and "atypical," as well as "ordinary incidents of prison life." As a result, the *Sandin* Court's objective of reducing the

²⁸⁸ 424 U.S. 319 (1976).

²⁸⁹ Sbaratta, *supra* note 286, at 782–85.

²⁹⁰ Goldman, *supra* note 123, at 424.

²⁹¹ *Id.* at 454–55.

²⁹² *Id.* at 455.

amount of prisoners’ rights litigation within the federal courts will not likely be met.²⁹³

While these scholars speak of *Sandin v. Conner* generally, their conclusions apply equally to systemic problems with prison food. Prisoners cannot sue to enforce the quality and sanitation regulations which theoretically govern the prisons, and courts seem to strongly defer to prison administrators when prisoners do file such challenges. Should *Sandin v. Conner* be legislatively or judicially overturned, prisoners could more easily point out the improper behavior and rampant policy violations of the prisons to the courts.

C. Require Higher Calorie Amounts, More Nutrition Options, and More Choices for Prisoners’ Diets

Prisoners’ most common complaints about diet quality are hunger from insufficient calorie allotment, health consequences from a low nutrition diet, and boredom from the narrow dietary variety.²⁹⁴ Higher standards are needed in each of these areas. These could be promulgated for federal penitentiaries by BOP internal policies and for state prisons by state prison bureau internal regulations or by state-level legislation. As a side benefit, these strengthened federal regulations would overshadow the ACA’s ineffective, pseudo-regulation of prison food.

This could also possibly be brought about by a federal law that sets administrative standards for both federal and state prisons. While usually it would be states’ purview to regulate their law enforcement under the constitutional scheme of federalism, arguably the federal government could use its commerce power to intervene here. Since there are both private and state-run prisons, we should look at prisons as commercial entities that are sometimes owned by states instead of by corporations. Additionally, even public prisons often use private food service providers, so prison food is even more clearly a site of commerce.

In *Reno v. Condon*, the Supreme Court upheld a federal law regulating the sale of data by South Carolina’s Department of Motor Vehicles as a constitutional use of the commerce power, holding that the federal law regulated the states as the owner of databases instead of as states.²⁹⁵ Chief Justice Rehnquist’s opinion held that “[t]he [federal law in question] regulates the universe of entities that participate as suppliers to the market for motor vehicle information.”²⁹⁶ Similarly, here, federal legislation could regulate states as the owner of prisons and not as states.

²⁹³ Robert A. Surrante, Note, *Drawing the Iron Curtain: Prisoners’ Rights from Morrissey v. Brewer to Sandin v. Conner*, 72 CHI.-KENT L. REV. 923, 946 (1997).

²⁹⁴ See generally *supra* Part II.

²⁹⁵ See 528 U.S. 141, 143, 148 (2000).

²⁹⁶ *Id.* at 151.

Without the PRLA and without *Sandin v. Conner*, such improvements to prison policy could allow prisoners to sue the BOP to meet better dietary standards. Even before the passage of the PLRA, courts have not found Eighth Amendment standards for prison food conditions to be as broad as would be necessary to end starvation and nutritional deficiencies for prisoners, so creating new statutory grounds for prisoners to legally enforce their interests is crucial to actually improving prison food conditions.²⁹⁷

CONCLUSION

One would certainly think that such things as nutritional standards, cooking conditions, and sanitation rules would be handed down from on high with strict enforcement that they were being carried out and that safe food preparation conditions were in practice at correctional facilities. The reality is that none of that is the case.

—Erika Camplin, 2017, quote from *Prison Food in America*²⁹⁸

This Article has drawn attention to the dire food conditions in prisons, explained the lax federal administrative law that permits the conditions, highlighted the role of *Sandin v. Conner* and the PLRA in curtailing prisoners' rights, and criticized the role of the private entity, ACA, in enabling mass neglect of prison food.

This Article recommends that the PLRA be repealed, that *Sandin v. Conner* be overturned, and that FSM standards be improved to provide prisoners with more

²⁹⁷ Adjacent to the pragmatic goal of enforcement is the value-driven objective of democratic process. Professor Aman noted that the real potential of administrative law around prison food is to deepen democracy:

[T]he role I envision for administrative law is not connected to regulation per se, but to democracy. It is important to emphasize that what is at stake are the values of public law—transparency, participation, fairness, and accountability, as well as the kind of democracy that can flow from all of these things. Various procedural approaches may be necessary to ensure the realization of these values. It is the democracy-creating values of the APA, . . . not necessarily the precise procedural devices it currently employs [that are so essential]

Aman, *supra* note 38, at 525. “This will depend on the creation of the political spaces necessary to raise important policy issues in a timely manner.” *Id.* at 520. He does not emphasize creating these political spaces particularly for prisoners, but this is a necessary addition to carry out his goals because prisoners are the only actors that can be depended on to reliably raise the prison food issue. Additionally, prisoners are currently excluded from participation in most of the democratic elements of our society, so putting them at the center of the new democratic measures is uniquely fitting. The authors' proposed reforms would accomplish Professor Aman's goals.

²⁹⁸ CAMPLIN, *supra* note 50, at 49.

calories, more options, and more variety. Prisoners will be better positioned to enforce food rights in the courts under our recommended regime.

However, prisoners do not currently have enough political power to repeal the PLRA or to convince the Supreme Court or Congress to reconsider *Sandin v. Conner*. The authors hope that future academic projects and grassroots organizing will explore different possibilities with the goal of pushing judges and legislators to provide prisoners better food and accompanying enforcement rights.