DEFINING THE PUBLIC: ADMINISTRATIVE RULEMAKING REQUIREMENTS IN THE CARCERAL CONTEXT

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INTRODUCTION

Regulations govern almost all aspects of life for people who are incarcerated: what you can wear and how you do laundry;[1] the type of education you can pursue, the work you may be assigned, and how much—or how little—you may be paid for that work;[2] the quality and amount of food you eat, the extent to which your religious and other dietary needs will be met, and the extra food you may obtain if you are pregnant;[3] the health care you receive;[4] where you may be housed;[5] the punishment that may be meted out for any rule violations, including disciplinary detention;[6] the types of restraints that may be used on you, including if you are pregnant or in labor;[7] who may visit you, how often, for how long, what your visitors may wear, how thoroughly they will be searched, and whether you may have physical contact with them;[8] how you can file grievances for violations of these rules or your rights;[9] how you will be considered for parole, what the conditions of parole will be, and how it may be revoked;[10] and, if you die while in custody, how to report your death and what should be done with your body.[11]

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1. CAL. CODE REGS. tit. 15, §§ 3030–3031 (2022) ("Issuance and Possession of State Clothing and Linen" and "Neatness and Laundry Exchange"). This paragraph uses California regulations for examples.

2. *Id.* §§ 3040–3041.3, 3044 ("Work and Education" and "Inmate Work Groups and Privilege Groups"). Pay rates for people incarcerated in California start at $0.08 an hour. *Id.* § 3041.2 ("Inmate Pay Rates, Schedule and Exceptions").

3. *Id.* §§ 3050–3056 ("Food Services"). Pregnant people receive two extra servings each of milk, fruit, and vegetables per day. *Id.* § 3050(3).

4. *Id.* §§ 3999.98–99.432 ("Rules and Regulations of Health Care Services").

5. *Id.* §§ 3269–3269.1 ("Inmate Housing").

6. *Id.* §§ 3310–3326, 3330–3333 ("Inmate Discipline" and "Disciplinary Detention").

7. *Id.* § 3268.2 (explaining that restraints should be limited to handcuffs in front of the pregnant person's body and should not be used during labor, with exceptions).

8. *Id.* §§ 3170–3179 ("Visiting").

9. *Id.* §§ 3480–3486 ("Administrative Remedies for Inmates and Parolees" and "Staff Misconduct Complaints").

10. *Id.* §§ 3490–3497, 3500–3772 ("Parole Consideration for Determinately-Sentenced Nonviolent Offenders"; "Parole Consideration for Indeterminately-Sentenced Nonviolent Offenders"; and "Adult Parole").

11. *Id.* §§ 3999.417–.419 ("Inmate Deaths").

The existence of these rules gives the impression that prisons are rule-abiding and orderly places.[12] This vision of prisons as spaces where rules should govern may be appropriate, since rules function to constrain the arbitrary use of power, and state power and law's control over people is arguably at its height in prison.[13] The mediation of state power through rules and law is especially important in the context of incarceration, which reduces people's autonomy and increases their vulnerability.[14]

If prisons are the height of state power and law's control over people, the way these rules are created is surprising in how little it resembles typical rulemaking in our democracy.[15] Administrative law governs rulemaking procedures by agencies acting under the executive branch of government and provides important limits, including public input and judicial review, to ensure that public agencies' power is checked.[16] Although state departments of corrections (DOCs) are public agencies, they are often excluded from state rulemaking requirements, resulting in a "no-man's land" where prison regulations are created outside of public view and then given

12. *Cf. The Zo*, THE MARSHALL PROJECT (Feb. 27, 2020, 6:00 AM), https://www.themarshallproject.org/2020/02/27/welcome-to-the-zo [https://perma.cc/42M9-WS8U] (describing how people in prison struggle to maintain a sense of normalcy and routine amongst prisons' disconcerting rules and expectations); Patrick Doolittle, "The Zo": Disorientation and Retaliatory Disorientation in American Prisons (Apr. 25, 2017) (B.A. thesis, Yale University), https://s3.documentcloud.org/documents/6788675/The-Zo-Disorientation-and-Retaliatory.pdf [https://perma.cc/9WH3-DPR6] (arguing that prisons intentionally confuse incarcerated people as a control mechanism).

13. Sharon Dolovich, *Teaching Prison Law*, 62 J. LEGAL EDUC. 218, 218, 224 (2012) [hereinafter Dolovich, *Teaching Prison Law*]; Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 898–99 (2009) [hereinafter Dolovich, *Cruelty*].

14. Dolovich, *Cruelty*, *supra* note 13, at 891–92 (arguing that society's carceral bargain—allowing society to forget about incarcerated people—corresponds with the state's carceral burden, which increases the state's responsibility for incarcerated people's wellbeing because it has taken away their ability to care for themselves).

15. *See* Giovanna Shay, *Ad Law Incarcerated*, 14 BERKELEY J. CRIM. L. 329, 332 (2009) (explaining how administrative procedural protections largely do not apply to prison and jail regulations and arguing for increased transparency and public participation in rulemaking).

16. CHARLES H. KOCH, JR. & RICHARD MURPHY, ADMINISTRATIVE LAW AND PRACTICE § 4:10 (3d ed. 2022) ("Procedural Norms and the Concept of 'Legislative' Rules").

judicial deference when challenged.[17] If DOCs are free to create and change these rules at will, including the punishments meted out for violating them and the ways that prisoners can contest them, then the overwhelming mass of rules and policies in prisons begins to look less orderly and more like an arbitrary form of power anomalous in our democracy.

How state courts determine whether DOCs should be subject to rulemaking requirements is therefore a crucial question to address.[18] State Administrative Procedure Acts (APAs) often include an exception to rulemaking requirements for policies regarding the "internal management" of public agencies.[19] In considering whether this exception applies, courts must determine whether the people affected by the rule can be considered "internal" to the agency (e.g., employees).[20] This Note focuses on courts' legal reasoning to determine why state courts facing similar questions of whether the internal management exception applies to DOCs, and whether incarcerated people are "internal" to the agency or part of the public, have come to opposite conclusions. It argues that courts' attitudes towards incarcerated people dictate their decisions about who is within the bounds of the public and entitled to administrative rulemaking protections. Courts that conduct meaningful legal analysis and grapple with the question of who belongs to the public tend to apply these procedural protections to incarcerated people, and courts that assume that the legislature could not have intended to grant incarcerated people these protections shirk the judicial role by

17. Shay, *supra* note 15, at 331.

18. Giovanna Shay, a scholar on administrative law in prisons, has written an excellent account covering whether the internal management exception applies to the DOC in each state and to what extent. *Id.* at 344–61, app. at 376–94.

19. *Id.* at 347–51. The exception typically reads: "a rule concerning only the internal management of an agency which does not directly and substantially affect the procedural or substantive rights or duties of any segment of the public." MODEL STATE ADMIN. PROC. ACT § 3-116(1) (UNIF. L. COMM'N 1981). A second type of exemption, which is less common than the internal management exception, has also been used to exclude state correctional agencies from rulemaking requirements. The text varies but often specifically mentions that rules concerning "inmates" or "only inmates" should be excluded from APA requirements. Shay, *supra* note 15, at 347–48, app. at 376–94. This Note will focus on the internal management exception because it more clearly prompts courts to consider who constitutes the public and to whom rulemaking protections apply.

20. ARTHUR EARL BONFIELD, STATE ADMINISTRATIVE RULEMAKING 401 (1986). *See infra* text accompanying note 158.

stripping an unpopular political minority of protections from arbitrary state power.

Part I briefly summarizes current constitutional and administrative law in the prison context before sketching state courts' holdings regarding the applicability of the APA to prison systems. Part II analyzes and critiques the courts' legal reasoning by highlighting some common approaches to framing the issue and methods of analysis before examining theories of arbitrary state power and ideas of the public. Part III offers an example of notice-and-comment rulemaking for solitary confinement policies and concludes by suggesting various ways in which courts and legislatures can better protect rulemaking processes and the separation of powers.

I. Prison Law and State Administrative Rulemaking

This Part offers an overview of prison jurisprudence, focusing on constitutional and administrative law.

A. Defining Prison Law

Prison law encompasses a range of substantive areas, including aspects of constitutional, administrative, and family law, as well as civil procedure and federal courts.[21] Most aspiring lawyers do not have the opportunity to take courses on prison law, despite the fact that about two million people are currently incarcerated in the United States and "the state's criminal justice power is at its zenith" when punishing people.[22]

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21. Dolovich, *Teaching Prison Law*, *supra* note 13, at 221. Dolovich is the director of UCLA's Prison Law & Policy Program. *Sharon Dolovich Faculty Profile*, UCLA LAW, https://law.ucla.edu/faculty/faculty-profiles/sharon-dolovich [https://perma.cc/ML8Y-85F8]. As examples of the ways incarcerated people are treated differently under the law, Dolovich lists termination of parental rights (family law), summary judgment (civil procedure), the limitation on federal courts' authority by the Prison Litigation Reform Act (federal courts), and the limited First Amendment rights of incarcerated people and of media who attempt to access prisons (constitutional law). Dolovich, *Teaching Prison Law*, *supra* note 13, at 221.

22. Dolovich, *Teaching Prison Law*, *supra* note 13, at 218, 224; JACOB KANG-BROWN ET AL., VERA INST. JUST., PEOPLE IN JAIL AND PRISON IN 2020 1 (2021), https://www.vera.org/downloads/publications/people-in-jail-and-prison-in-2020.pdf [https://perma.cc/YM65-JPWL] (describing the "unprecedented drop" in

Scholarship and litigation on prison conditions often focus on constitutional law, particularly the First, Eighth, and Fourteenth Amendments.[23] But this jurisprudence offers a floor for constitutional prison conditions—and a low one at that.[24] Administrative law, however, can fill in the gap, consider different contexts, and act to prevent harm rather than react to it.[25] The effects of administrative law are particularly prevalent in prisons, where correctional agency policies affect the lives of incarcerated people and their families on a daily basis, including the methods and costs of communication, the frequency and length of visits, and the incarcerated person's lived experience in prison.[26]

This Section will explain the growth in regulations of life in prison and summarize the relevant constitutional law, which is the predominant focus of prison law scholarship and jurisprudence, before turning to state administrative law.

1. Constitutional Law in Prisons and the Return to the "Hands-Off Doctrine"

Before the 1960s, courts followed the "hands-off doctrine," refusing to intervene in the internal management of prisons.[27] Citing administrators' expertise and the need for security, courts instead deferred to prison administrators.[28] However, the Civil Rights Movement of the 1960s brought a rise in prison litigation that was accompanied by more favorable decisions from the Warren Court.[29] In 1961, the Supreme Court held that 42 U.S.C. § 1983 allowed people to

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incarceration due to the COVID-19 pandemic, down to 1.8 million in mid-2020 from 2.1 million in 2019).

23. Aaron Littman, *Free-World Law Behind Bars*, 131 YALE L.J. 1385, 1391 (2022) (arguing that what the author calls "free-world regulatory law" should apply behind bars rather than granting prisons exceptions from the regulations of other state agencies).

24. *Id.* at 1389 ("Maggots in macaroni, doctors who have been disciplined for sexual assault, phone calls that cost more than a dollar per minute—all of them pass constitutional muster.") (footnotes omitted).

25. *Id.* at 1392–93, 1452–54.

26. Shay, *supra* note 15, at 331; *see also supra* Introduction (discussing the pervasive impact that regulations can have on the lives of incarcerated people).

27. Shay, *supra* note 15, at 333–34.

28. *Id.*

29. *Id.* at 334.

sue state officers for violations of the Constitution or of federal law,[30] and in 1962, the Supreme Court incorporated the Eighth Amendment's Cruel and Unusual Punishment Clause against the states.[31] Section 1983 now serves as one of the main vehicles for people in state prisons, where most people are incarcerated, to bring lawsuits.[32] These successes enabled class action litigation that brought meaningful changes in prison conditions.[33] These victories also resulted in consent decrees, or settlement agreements enforced by the court, which increased bureaucracy in prisons.[34] Whereas prison systems had previously lacked formal policies, they now had policies governing all aspects of prison life.[35]

In the 1980s and 1990s, the Supreme Court issued decisions that were less favorable to incarcerated people, and in 1996, the Prison Litigation Reform Act (PLRA) greatly restricted prison litigation.[36] The PLRA initiated a "three-strikes" rule: after having three claims dismissed because the actions failed to state a claim or were deemed frivolous or malicious, plaintiffs no longer qualified to file lawsuits *in forma pauperis*, meaning they could no longer sue in federal courts if they were unable to pay filing fees that amounted to hundreds of dollars.[37] The PLRA also set a two-year maximum on

30. Monroe v. Pape, 365 U.S. 167, 172 (1961). Before this decision, courts held that if state officers' actions violated state law, there was no federal cause of action under § 1983 because the officers had not acted "under color of state law." Shay, *supra* note 15, at 334.

31. Robinson v. California, 370 U.S. 660, 667 (1962).

32. Shay, *supra* note 15, at 334.

33. *Id.* at 334. These changes included "eliminating reliance on inmate 'trusties' (prisoners entrusted with authority over other inmates), brutal corporal punishment, and inhumane living conditions." *Id.* (footnote omitted).

34. *Id.* at 335 (footnotes omitted) ("Professional standards became more important, both as the benchmark used by courts and advocates to evaluate prison conditions and as a guide for prison officials seeking to avoid lawsuits. 'Written policies and procedures could be offered in court proceedings as deserving of deference, because they were at least rational . . . .'" (quoting Margo Schlanger, *Operationalizing Deterrence: Claims Management (in Hospitals, a Large Retailer, and Jails and Prisons)*, 2 J. TORT L. 1, 46 (2008))).

35. Shay, *supra* note 15, at 370–71.

36. *Id.* at 336; *see id.* at 336 n.56 (citing Rhodes v. Chapman, 452 U.S. 337 (1981), and Wilson v. Seiter, 501 U.S. 294 (1991), which both limited the scope of the Eighth Amendment).

37. 28 U.S.C. § 1915(g) (2022); *see also* Lomax v. Ortiz-Marquez, 140 S. Ct. 1721, 1724–25 (2020) (holding that cases dismissed without prejudice for failure to state a claim counted towards the plaintiff's strikes). The plaintiff could not afford the $400 filing fee. *Id.* at 1723.

injunctive relief, meaning any relief won would be short-lived.[38] Most importantly for the purposes of this Note, the PLRA required plaintiffs to exhaust all available grievance and administrative appeals procedures before filing with the court.[39] Since the defendant in these cases—the state DOC—creates grievance and appeals procedures, the exhaustion requirement incentivizes prison systems to create drawn-out policies that will frustrate incarcerated people into giving up before they are eligible to bring a lawsuit in court.[40]

The current doctrine around prison litigation looks more similar to the hands-off doctrine than the jurisprudence of the 1960s.[41] In the 1987 case of *Turner v. Safley*, the Supreme Court set the current standard for evaluating prison regulations that infringe on the constitutional rights of incarcerated people.[42] The Court held that such a "regulation is valid if it is reasonably related to legitimate penological interests."[43] The Court reasoned that strict scrutiny would not provide sufficient flexibility to prison administrators in addressing security concerns and that it would improperly delegate such decisions to courts rather than to prison officials.[44] But Giovanna Shay, a scholar of administrative law in prisons, has pointed out that *Turner* fails to distinguish among prison policies that are created in different ways: courts apply the *Turner* test regardless of the level of formality in promulgating prison rules and do not account for whether the rulemaking process involved elements like public notice and comment or accountability to other branches of

38. Littman, *supra* note 23, at 1457–58 (explaining that to continue the injunction, courts must find that the violation is ongoing and each part of the injunctive relief remains necessary, resulting in a high bar where "even an injunction that remains necessary due to officials' failure to correct egregious problems will have to be trimmed").

39. Shay, *supra* note 15, at 342.

40. Sharon Dolovich, *Forms of Deference in Prison Law*, 24 FED. SENT'G REP. 245, 249 n.81 (2012) [hereinafter Dolovich, *Forms of Deference*] ("'[T]he PLRA's exhaustion rule actually provides an incentive to [prison and jail] administrators . . . to fashion ever higher procedural hurdles in their grievance processes. . . . Can anyone reasonably expect a governmental agency to resist this kind of incentive to avoid merits consideration of grievances?'" (quoting Margo Schlanger & Giovanna Shay, *Preserving the Rule of Law in America's Jails and Prisons: The Case for Amending the Prison Litigation Reform Act*, 11 U. PA. J. CONST. L. 139, 149–50 (2008))).

41. Shay, *supra* note 15, at 339.

42. Turner v. Safley, 482 U.S. 78 (1987).

43. *Id.* at 89.

44. *Id.*

government.[45] *Turner* is thus inconsistent with the rest of administrative law, in which the strength of deference given in judicial review declines with less democratic rulemaking.[46]

2. Rulemaking Requirements in Administrative Law

Different methods of rulemaking, from more rigorous notice-and-comment processes to promulgation by the agency without publication, are part of administrative law, which governs how different types of agency policies should be promulgated and reviewed. Although this Note focuses on state administrative law, the basic concepts of administrative law tend to be consistent across states and the federal system.[47] Legislation establishes the procedures by which executive agencies can create rules.[48] Rules made pursuant to these procedures must generally be made after public notice and comment. [49] However, "guidance documents," which can include policy interpretations, manuals, and other statements, are not required to undergo such formal rulemaking.[50] The type of judicial review in federal administrative law varies based on how rules were promulgated, with rules created without notice and comment given less deference.[51] As opposed to *Turner*, rules that infringe on constitutional rights receive no judicial deference.[52]

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45. Shay, *supra* note 15, at 341 (footnotes omitted) (noting that *Turner* is applied both to "regulations promulgated pursuant to notice-and-comment rulemaking and in cases involving far more informal policies or practices").

46. *Id.* at 368–69.

47. KOCH & MURPHY, *supra* note 16, at Introduction to pt. 1, ch. 4(G).

48. *Id.* § 4:70.

49. *Id.*

50. *Id.*

51. Shay, *supra* note 15, at 368–69; *see also* Dolovich, *Forms of Deference*, *supra* note 40, at 254 n.156 (noting that outside of the carceral context, courts "'should defer to agency interpretations that were issued after notice-and-comment rulemaking proceedings' [and in some other situations] . . . but otherwise 'judicial deference to agency interpretations [must] be earned by their persuasive power'" (quoting Daniel G. Gifford, *The Emerging Outlines of a Revised Chevron Doctrine: Congressional Intent, Judicial Judgment, and Administrative Autonomy*, 59 ADMIN. L. REV. 783, 804 (2007))).

52. Shay, *supra* note 15, at 368–69; *see also* Dolovich, *Forms of Deference*, *supra* note 40, at 254 n.155 (examining the scope of judicial deference to agencies in cases outside of the correctional context). For example, "administrative discretion almost exclusively determines the contours of prison visitation, unconstrained except at the margins by judicial oversight. The Supreme Court

Notice-and-comment rulemaking typically consists of publication of the proposed regulation or change as well as an opportunity for the public to submit comments, and, in some states, an oral hearing.[53] When agencies adopt the final rule, they must publish a statement justifying the rule and responding to comments.[54] Agencies are often prohibited from adopting a final version of the rule that is "substantially different" from the proposed version because the public may not have had adequate notice of the rule's effect and therefore an insufficient opportunity to comment.[55]

Notice-and-comment rulemaking allows for public participation, which offers both an opportunity to be heard and for agencies' rulemaking to be better informed by laypeople and experts alike.[56] It also provides accountability, in the forms of public transparency and agencies' responses to comments, and a check on agencies' power to create rules.[57] Finally, providing notice in rulemaking gives the public an opportunity to organize and to apply political pressure.[58]

Some state DOCs, however, are exempt in whole or in part from rulemaking requirements that apply to other state agencies.[59] In

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and other federal courts have been largely deferential to prison administrators, granting them wide latitude generally and in the realm of visitation regulations specifically." Chesa Boudin, Trevor Stutz, & Aaron Littman, *Prison Visitation Policies: A Fifty-State Survey*, 32 YALE L. & POL'Y REV. 149, 152–153 (2013).

53. KOCH & MURPHY, *supra* note 16, § 4:72.

54. *Id.* § 4:45 ("Statement Explaining and Justifying the Rule").

55. *Id.* § 4:73 ("Rulemaking Decisions"); *see also* Veterans Justice Grp., LLC v. Sec'y of Veterans Affairs, 818 F.3d 1336, 1344 (Fed. Cir. 2016) (holding that a rule modified pursuant to a notice-and-comment period may be finalized without additional notice and comment as long as the rule is a "logical outgrowth" of the proposed rule).

56. Shay, *supra* note 15, at 361–62.

57. *Id.*

58. *Id.* (citing Arthur Earl Bonfield, *The Quest for an Ideal State Administrative Rulemaking Procedure*, 18 FLA. ST. U. L. REV. 617, 618 (1991); Arthur E. Bonfield, *Mandating State Agency Lawmaking by Rule*, 2 B.Y.U. J. PUB. L. 161, 170 (1988)).

59. Shay, *supra* note 15, at 344–51. Even if the state APA applies to at least some of the DOC's regulations, there are a variety of informal rulemaking procedures available in different states that allow them to avoid notice-and-comment rulemaking, but these informal procedures are outside of the scope of this Note. *Id.* at 350 (footnotes omitted) (noting that "California permits 'local' rules affecting only a single institution to be promulgated outside of notice-and-comment rulemaking procedures," and Michigan and Ohio must promulgate

those instances, incarcerated people are unable to avail themselves of the same rulemaking protections afforded to the public at large.

B. APA Rulemaking in State Correctional Institutions

This Section provides background on the ways that incarcerated people are excluded from administrative procedure protections before Part II examines courts' determinations of whether the state APA applies and courts' legal reasoning about incarcerated people and the public. The extent to which state correctional departments are bound by the APA depends on two factors: the statutory text and the court's interpretation of it.

1. Legislative Text and the "Internal Management" Exception

State APAs often include a provision that exempts from administrative rulemaking statements that "concern[] only the internal management of an agency and which do[] not affect private rights or procedures available to the public."[60] While the exact text of the internal management exception varies from state to state, many provisions have similar wording since state legislatures often draw on the Model State Administrative Procedure Acts.[61] This Note will focus on the internal management exception because it prompts courts to consider whether incarcerated people are part of the public.[62]

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regulations under the state APA but can use a more informal procedure for policy directives, which "cover a wide range of critical areas").

60. REVISED MODEL STATE ADMIN. PROC. ACT § 102.30(A) (UNIF. L. COMM'N 2010).

61. The state APAs either exclude such statements from the definition of a "rule" itself (as in the 2010 Model State APA) or refer to these statements as "rules" but specifically exempt them from administrative rulemaking requirements (as in the 1981 Model State APA). *Id.*; MODEL STATE ADMIN. PROC. ACT § 3-116(1) (UNIF. L. COMM'N 1981).

62. As discussed in Section II.A.5, *infra*, some state APAs also contain an exception that specifically mentions "inmates," which the National Conference of Commissioners on Uniform State Laws added to the 1981 Model State APA but removed from the 2010 Model State APA. The full text excludes from rulemaking: "(1) a rule concerning only the internal management of an agency which does not directly and substantially affect the procedural or substantive rights or duties of any segment of the public; . . . [or] (6) a rule concerning only inmates of a correctional or detention facility . . . if adopted by that facility . . . ." MODEL STATE ADMIN. PROC. ACT § 3-116 (UNIF. L. COMM'N 1981).

Despite the often similar statutory text, courts' holdings have resulted in variations in the extent to which the state APA binds the state DOC and other agencies that govern incarceration and parole. The cases discussed in this Note, which are listed in the Appendix and summarized in the following Section, were selected because they illustrate both the range of rulemaking required of DOCs and broader trends in courts' reasoning and analysis.[63]

2. Statutory Interpretation and the Range of State APA Application to DOCs

Courts in some states, such as Connecticut, Rhode Island, and Tennessee, have concluded that the internal management provision exempts the DOC from formal rulemaking requirements for some or all of the DOC's rules.[64] These courts have done so in a variety of contexts, including disciplinary procedures, [65] classification procedures, [66] and policies regarding mail, [67] among others.[68] Courts

63. I began by reading the cases cited in Shay, *supra* note 15. I proceeded backwards and forwards, by reading previous cases cited in those cases as well as later cases that cited these decisions. I then supplemented this research with a WestLaw search (+"prison" +"internal management" +"administrative procedure act") for cases in all state jurisdictions after January 1, 2000. The cases included in this Note and listed in the Appendix are those that pertained to the internal management exception and that had similarities with other analyses.

64. The reasoning of these courts is discussed in depth in Section II.A, *infra*.

65. Leach v. Vose, 689 A.2d 393, 396 (R.I. 1997) (applying the internal management exception to the method used to calculate good-time credits, which affect the length of a person's sentence); Johnson v. State, Nos. KM 99-1007, KM 99-1009, KM 99-1010, 2002 WL 1803931, at *2 (R.I. Super. Ct. July 17, 2002) (citing *Leach*, 689 A.2d at 396) (applying the exception to a disciplinary board that revokes good-time credits that have already been granted); Mandela v. Campbell, 978 S.W.2d 531, 534 (Tenn. 1998) (applying the exception to disciplinary procedures at a private prison); Vega v. Rell, No. 3:09-CV-737, 2011 WL 2471295, at *23 (D. Conn. June 21, 2011) (applying the internal management exception to disciplinary hearings).

66. L'Heureux v. State Dep't of Corr., 708 A.2d 549, 553 (R.I. 1998) (applying the exception for disciplinary and classification proceedings); Holley v. Cook, No. 3:20CV170, 2020 WL 6532842, at *2 (D. Conn. Nov. 5, 2020) (applying the exception to policies regarding classification as a sex offender within prison).

67. Pierce v. Lantz, 965 A.2d 576, 581 (Conn. 2009) (applying the internal management exception to policies regarding commissary markups and the censorship of mail, CDs, and tapes).

68. Connecticut courts have exempted all administrative directives from the rulemaking requirements of the state's Uniform Administrative Procedure Act (UAPA). *See* discussion *infra* Section II.A.2 (analyzing whether the internal

have grounded their reasoning in deference to prison administrators, the impracticality of applying the APA in the carceral context, and the limitations placed on people's rights through incarceration.[69]

Courts that have held that the internal management exemption does *not* apply, and that the DOC must follow rulemaking requirements, have done so in two main contexts: disciplinary hearings and lethal injection protocols. Courts in states like New York, Michigan, and Maryland have reached this holding for disciplinary hearings by focusing on incarcerated people's liberty interests, the importance of public notice and comment, and/or the separation of powers.[70] Courts in Maryland, Kentucky, California, and Arkansas have rejected the internal management exception for lethal injection protocols for reasons including public input, the separation of powers, and the protocol's role in implementing the death penalty statute.[71] After these courts decided that lethal injection protocols were subject to the APA, Maryland[72] ultimately repealed the death penalty, but California[73] and Arkansas[74] legislated to exclude the protocols from APA requirements.

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management exception applies). This "internal management" exception has also been extended beyond the state's borders to people in the custody of the Connecticut Department of Correction but held in other states (Baltas v. Maiga, No. 3:20CV1177, 2021 WL 2206966, at *2 n.3, *5 (D. Conn. June 1, 2021)).

69. *See* discussion *infra* Section II.A.

70. Jones v. Smith, 478 N.E.2d 191, 192 (N.Y. 1985); Martin v. Dep't of Corr., 384 N.W.2d 392, 395–96 (Mich. 1986); Massey v. Sec'y, Dep't of Pub. Safety and Corr. Servs., 886 A.2d 585, 602 (Md. 2005). The District of the Northern Mariana Islands relied on *Massey* in holding that administrative rulemaking requirements applied to disciplinary procedures. Ray v. Attao, No. 1:18-CV-00017, 2018 WL 6837746 at *10 (D. N. Mar. I. Dec. 31, 2018). For the courts' reasoning, see discussion *infra* Section II.A.

71. Evans v. State, 914 A.2d 25, 80 (Md. 2006); Bowling v. Ky. Dep't of Corr., 301 S.W.3d 478, 488 (Ky. 2009); Morales v. Cal. Dep't of Corr. & Rehab., 85 Cal. Rptr. 3d 724, 731–32 (Cal. Ct. App. 2008); Order Concerning Plaintiff's Cross-Motion for Summary Judgment, Williams v. Ark. Dep't of Corr., No. CV 2008-4891 (Cir. Ct. of Pulaski Cnty., Ark. Aug. 28, 2008) (on file with the *Columbia Human Rights Law Review*).

72. S.B. 276, 2013 Leg., Reg. Sess., 2013 Md. Laws 2298.

73. Briggs v. Brown, 400 P.3d 29, 34, 36 (Cal. 2017). *See* discussion *infra* Section II.A.

74. Williams v. Hobbs, 658 F.3d 842, 851 (8th Cir. 2011); H.B. 1706, 87th Gen. Assemb., Reg Sess., 2009 Ark. Acts. 1296, *codified at* ARK. CODE ANN. § 5-4-617(h) ("The procedures for carrying out the sentence of death and related matters are not subject to the Arkansas [APA], § 25-15-201 et seq.").

The landscape of administrative procedure required of state DOCs thus looks quite different depending on the state and the courts' interpretation of the state APA. In particular, the landscape depends on the internal management exception and whether courts determine that incarcerated people are part of the public or internal to the DOC.

II. How Courts Decide if Procedural Protections Apply

Part II explores why courts come to different conclusions when determining whether incarcerated people are part of the public. Section II.A focuses on a subset of cases that illustrate trends in legal reasoning and statutory interpretation,[75] while Section II.B provides a broader discussion of theories about state power and the bounds of the public.

A. Statutory Interpretation and Legal Reasoning

Courts that have addressed the internal management exemption as applied to state DOCs have reached opposite results, often because they frame the issue and approach their legal reasoning in starkly different ways. First, courts need to clearly identify the issue: does the internal management exemption apply? Answering this question requires addressing a corollary question: are incarcerated people part of the public or internal to the agency? Section II.A.1 examines cases that properly frame these issues, whereas Section II.A.2 analyzes opinions that fail to ask them. Second, courts must reason to the conclusion, which in these instances involves statutory interpretation of APA text. Section II.A.3 looks at cases where courts assume legislative intent to exclude incarcerated people from rulemaking protections, whereas Section II.A.4 observes what happens when courts refuse to impute legislative intent to exclude and prompt other branches of government to act if exclusion was the desired effect. Section II.A.5 examines courts' decisions about the extent of rulemaking requirements when interpreting APA provisions that specifically refer to "inmates." Section II.A.6 concludes with broader observations about the role of judicial deference in these decisions.

75. These cases are summarized in the Appendix.

1. Identifying the Issue: Framing the Internal Management Question as Whether Incarcerated People are Part of the Public

The following opinions properly and explicitly framed the issue of whether the internal management exception applied by asking whether incarcerated people were part of the public. Posing the question this way, rather than failing to identify the issue, allowed the courts to address the moral and political theory questions inherent in making such a determination. Notably, almost all of them concern disciplinary rules, perhaps because such rules also touch on due process and liberty interests.[76]

Courts in New York and Michigan that considered and rejected the internal management exception for rules regarding disciplinary proceedings immediately framed the inquiry as whether incarcerated people were members of the public.[77] The opinion of the Court of Appeals of New York in *Jones v. Smith* was brief, at only seven paragraphs, but established that incarcerated people were part of the greater New York polity and entitled to the same democratic protections: "[s]uch rules and regulations affect the entire prison population, that segment of the 'general public' over which the Department of Correctional Services exercises direct authority."[78] Similarly, the Supreme Court of Michigan in *Martin v. Department of Corrections* determined that incarcerated people were members of the public under the APA by looking to legislative intent, including the

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76. The remaining case concerns lethal injection.

77. Jones v. Smith, 478 N.E.2d 191, 192 (N.Y. 1985); Martin v. Dep't of Corr., 384 N.W.2d 392, 392 (Mich. 1986) (framing the issue as a "narrow question" of whether "prison inmates are members of the 'public' under the APA").

78. Jones v. Smith, 478 N.E.2d 191, 192 (N.Y. 1985) (citation omitted); 2 N.Y. JURIS. 2D ADMIN. L. § 160 (2022) (citing *Jones*); *see also* Grimes v. N.J. Dep't of Corr., 174 A.3d 1010, 1015–16 (N.J. Super. Ct. App. Div. 2017) (citation omitted) (holding that the calling policy at issue, in which inmates could only call landlines and not cell phones, covered a "large segment of the regulated or general public" that included inmates' family and friends). The Department of Corrections subsequently underwent notice-and-comment rulemaking to remove this restriction. N.J. ADMIN. CODE § 10A:18-8.2 (2022) (modified by 50 N.J. Reg. 2067(b) (Oct. 1, 2018)); Summary of Public Comment and Agency Response on Proposed Rule Regarding Inmate Telephone Calls (2018), 50 N.J. Reg. 2067(b) (Oct. 1, 2018). *Compare Grimes with* Boone v. N.J. Dep't of Corr., No. A-0585-08T3, 2009 WL 2901220, at *2 (N.J. Super. Ct. App. Div. Sept. 11, 2009) (concluding that the internal management exception applies without framing the issue or conducting an analysis).

fact that the legislature did not adopt the 1981 Model State APA's specific exemption for incarcerated people.[79]

The *Jones* court in New York proceeded by linking the liberty interests at stake in disciplinary proceedings to the Due Process Clause, thus drawing a connection between the determination of the bounds of the public and the public rights protected by the Constitution.[80] The court established that incarcerated people are still entitled to some constitutional protections, including the Due Process Clause, and held that "[r]ules and regulations of correctional institutions that affect a prisoner's 'liberty' interests, as here, may not properly be said to involve matters of 'organization or internal management' . . . ."[81]

These courts also emphasized the function of rulemaking requirements, including public notice and hearings. The *Jones* court noted that the filing requirements gave the public notice of the rules and identified this public notice as "fulfill[ing] the 'notice' component of due process."[82] Alternatively, the *Martin* court in Michigan stressed the role of rulemaking requirements in delegating power among the branches of government. The *Martin* court rejected the DOC's argument that the rulemaking requirements centered on public notice and comment and that these requirements would be minimally beneficial because disciplinary proceedings only affected incarcerated people.[83] The court noted that since the Michigan

79. Martin v. Dep't of Corr., 384 N.W.2d 392, 395 (Mich. 1986) ("[W]hen the Model State APA was revised to include a specific exemption from APA procedures for rules affecting prisoners, the Legislature did not similarly amend the Michigan APA.").

80. The Court of Appeals of Maryland relied on a similar analysis in *Massey v. Secretary, Department of Public Safety and Correctional Services*, noting that rulemaking procedures in the context of disciplinary rules "are required to protect the Constitutionally-based liberty interest of prisoners." Massey v. Sec'y, Dep't Pub. Safety & Corr. Servs., 886 A.2d 585, 597 (Md. 2005). The District of the Northern Mariana Islands later agreed with the *Massey* court's reasoning in concluding that the internal management exemption did not apply to disciplinary procedures. Ray v. Attao, No. 1:18-CV-00017, 2018 WL 6837746 at *8–10 (D. N. Mar. I. Dec. 31, 2018) ("Prisoners are a segment of the public. Procedures touching on their core due-process liberty rights do not comfortably fit within a common-sense definition of 'internal management.'").

81. *Jones*, 478 N.E.2d at 192.

82. *Id.*

83. *Martin*, 384 N.W.2d at 395–96 ("This belief seems to overlook the obvious public concern of humanitarian and civil rights groups. Furthermore, it completely overlooks the concern of the Legislature.").

legislature had to approve all rules, the requirements also concerned "the allocation of decisionmaking authority."[84] Similarly, the Supreme Court of Kentucky in *Bowling v. Kentucky Department of Corrections* protected the legislature's checks on judicial power. It rejected a lower court's conclusion that a bench trial held in a prior declaratory judgment action was a sufficient public hearing because the judiciary was not free to ignore the statutory requirements of the APA.[85] In both *Martin* and *Bowling*, the courts maintained the legislature's ability to check agency and judicial power and protected the segment of the public affected by that agency (here, incarcerated people).

The *Bowling* court concluded that Kentucky's lethal injection protocol had to be promulgated pursuant to the APA in part because the method of execution affected the "private rights" of those whom the Commonwealth executed.[86] The court's conclusion also relied on the protocol's purpose: to implement the death penalty statute.[87] The court noted that this factor was sufficient on its own to conclude that the protocol was a regulation.[88] In making these determinations, the court treated those affected by the rule as members of the public and declined to conduct its analysis differently merely because they were sentenced to death.

Justice Scott's dissent to the *Bowling* majority opinion is unique in its efforts to reason through why the right in question is not one that belongs to the public, rather than simply asserting this as a conclusion.[89] Justice Scott began by stating that there were only

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84. *Id.* at 396 (quoting Spruytte v. Walters, 753 F.2d 498, 503 (6th Cir. 1985)).

85. Bowling v. Ky. Dep't of Corr., 301 S.W.3d 478, 481 (Ky. 2009).

86. *Id.* at 481, 488. ("[S]ignificant portions of the protocol are . . . statements of general applicability and policy which affect private rights."). The court recognized that the DOC had regulatory authority because "[a]n execution . . . is one of the most serious official acts carried out by penitentiary officials and the most serious act of governance over a prisoner." *Id.* at 491. The court noted, however, that "there may well be minor issues pertinent to an execution which truly are matters of internal management," like "[t]he identities of the execution team, the storage location of the drugs and other security-related issues . . . ." *Id.* at 492.

87. *Bowling*, 301 S.W.3d at 488 (Ky. 2009). The court also mentioned a third factor: another policy concerning execution had been adopted as an administrative regulation. *Id.*

88. *Id.*

89. *Compare Bowling*, 301 S.W.3d at 493–97 (Scott, J. dissenting), *with* the cases in Section II.A.2, *infra*, *and* Bird v. Lampert, 479 P.3d 382, 386–87 (Wyo. 2021) (briefly citing dictionary definitions of "public" before concluding that

thirty-six people on death row out of a public of over 4.2 million people.[90] He then reasoned that since the trial court is never obligated to impose the death penalty, no one has a "right" to it—not the thirty-six people on death row and not the millions of Kentuckians more broadly.[91] Therefore, he concluded, "the death penalty is not a private right or procedure available to the public," and the lethal injection protocol should be a statement of internal management.[92] However, Justice Scott did not cite any authority to support the idea that the size of a minority group was relevant to the question of whether it was part of the public.[93] He also twisted the majority's argument by framing the right in question as a right to the death penalty held by a tiny group of people as opposed to a broader right to administrative procedural protections held by the general public, of whom people on death row are a part.

2. Identifying the Issue: Eliding the Question and Analysis of Whether the Internal Management Exception Applies

Unlike Justice Scott's dissent in *Bowling* and unlike the majority opinions discussed above in Section II.A.1, courts that hold that DOCs are exempt from administrative rulemaking procedures under the internal management exception often fail to frame the issue clearly and/or to analyze whether the internal management exception should apply. Skipping this step allows for assumptions about incarcerated people to influence the conclusion without explicitly naming and explaining those assumptions as part of the reasoning process.

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incarcerated people are not part of the public), *and* Searcy v. Idaho State Bd. of Corr., No. 41216, 2015 WL 160361, at *13 n.1, *15 n.7 (Idaho Ct. App. Jan. 14, 2015), *aff'd*, 376 P.3d 750 (Idaho 2016) (Gratton, J. concurring) (The majority held that the internal management exception within a rulemaking statute specific to the Board of Correction applied. Only the concurrence mentioned the "general public"—in footnotes—and explicitly drew a line between incarcerated people and the public, albeit without analysis or explanation.).

90. *Bowling*, 301 S.W.3d at 494 (Scott, J., dissenting).

91. *Id.*

92. *Id.* at 493–94.

93. *Cf.* BONFIELD, *supra* note 20, at 401–02 ("The interests of the few deserve protection for the same reasons that the interests of the many [do] . . . . [A]gency internal management directives may not be excluded [from rulemaking requirements] because their direct and substantial [effect] is only on the legal rights or duties of a few persons . . . .").

In contrast to the opinions in the previous Section, the Supreme Court of Rhode Island did not ask whether incarcerated people were members of the public in holding in *Leach v. Vose* that the internal management exemption "clearly" applied to good-time credits that affected the length of incarceration.[94] The court did not offer much explanation, although it noted that the DOC had discretion over how to calculate good-time credits; therefore, the court concluded that the method the DOC used to do so was a matter of internal management.[95] The court also considered and rejected an argument based on the Due Process Clause, holding that the method did not create a liberty interest because the decision to offer good-time credit was discretionary.[96]

Similarly, Connecticut courts have exempted all prison administrative directives from the rulemaking requirements of the state's Uniform Administrative Procedure Act (UAPA) without clearly framing the issue as whether the internal management exception should apply. In *Pierce v. Lantz*, the Appellate Court of Connecticut considered a plaintiff's challenge to mail and commissary rules.[97] The lower court had issued a four-paragraph opinion concluding that the Administrative Directives were not regulations without offering any reasoning or mentioning the term "internal management."[98] The Appellate Court affirmed the decision and filled in some of the analytical gaps by quoting the UAPA's internal management exception; however, the court did not pose the question of whether

94. Leach v. Vose, 689 A.2d 393, 396 (R.I. 1997) ("The computation method through which good time and industrial time credits are awarded is clearly a matter of internal management and, thus, is not subject to the requirements of the APA."). The *Leach* court used the word "public" once: in quoting the definition of internal management. *Id.*

95. *Id.*

96. *Id.* at 398. Four years later, the Rhode Island Superior Court considered a challenge to the disciplinary board's revocation of good-time credits that were already accrued. The court quickly dismissed the APA challenge, citing *Leach*, and held that inmates also did not have a liberty interest in already-accrued good-time credits because they were discretionary. Johnson v. State, No. KM 99-1007, 2002 WL 1803931 at *3 (R.I. Super. Ct. July 17, 2002).

97. Pierce v. Lantz, 965 A.2d 576, 581 (Conn. 2009). The rules at issue governed censorship of mail, CDs, and tapes, as well as a 30% commissary markup on CDs and tapes. *Id.*

98. Pierce v. Lantz, No. CV074028871S, 2007 WL 2743085 (Conn. Super. Ct. Sept. 6, 2007).

this exception should apply before concluding that it did.[99] The court cited the "necessary withdrawal or limitation of many privileges and rights" that incarceration entails, the need to consider internal security, and courts' "wide-ranging deference to the decisions of prison administrators" to support the holding that the commissioner had the authority to restrict materials without following rulemaking procedures.[100]

This lack of analysis is especially dangerous in a legal system based on precedent. Later courts did not pose the question or re-analyze for themselves whether policies were properly classified as "administrative directives" rather than regulations. Instead, Connecticut courts applied the *Pierce* holding to reject UAPA rulemaking for directives governing religious mail, outgoing mail, religious dress, parole, and the forfeiture of bail bonds.[101] Federal courts extended the *Pierce* holding to directives concerning disciplinary hearings, administrative segregation, and classification, as well as extending this "internal management" exemption beyond the state's borders to people in the custody of the Connecticut DOC but held in other states.[102]

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99. *Pierce*, 965 A.2d at 578, 581 (excluding "statements concerning only the internal management of any agency and not affecting private rights or procedures available to the public" (citing CONN. GEN. STAT. § 4-166(13) (2009))); *see also* Fuller v. Campbell, 109 S.W.3d 737, 739 (Tenn. Ct. App. 2003) (affirming the lower court's decision that the internal management exception applied with a brief citation to Mandela v. Campbell, 978 S.W.2d 531 (Tenn. 1998), and no further explanation).

100. *Pierce*, 965 A.2d at 580 (quoting State v. Walker, 646 A.2d 209, *cert. denied*, 648 A.2d 159 (1994)).

101. Gawlik v. Semple, 231 A.3d 326 (Conn. 2020), *cert. denied*, 238 A.3d 730 (2020), *and cert. denied*, 141 S. Ct. 1713 (2021) (petitioning to challenge the rejection of incoming religious books, newspapers, and prayer cards); Harris v. Armstrong, No. CV030825678S, 2009 WL 5342484 (Conn. Super. Ct. Dec. 7, 2009) (challenging stamps on outgoing mail that identified it as coming from an inmate); Gawlik v. Molloy, No. CV185043126, 2019 WL 3021829 (Conn. Super. Ct. May 31, 2019) (regarding restrictions on religious dress); Oppel v. Giles, No. NNHCV165036426, 2019 WL 413582 (Conn. Super. Ct. Jan. 3, 2019) (finding that the Board of Pardons and Parole is an agency under the UAPA, but the internal management exception applies because rights of prisoners would be affected, not those of the general public); Aces Bail, LLC v. Kane, No. HHDCV186089070S, 2021 WL 2182927 (Conn. Super. Ct. May 11, 2021) (regarding policies for forfeiting bail bonds).

102. Vega v. Rell, No. 3:09-CV-737, 2011 WL 2471295 (D. Conn. June 21, 2011) (regarding disciplinary hearings); Baltas v. Erfe, No. 3:19CV1820, 2021 WL 3887591 (D. Conn. Aug. 31, 2021) (challenging rules governing administrative

3. Interpreting Ambiguous Text: Assuming Legislative Intent to Exclude Because Rulemaking Requirements Would be "Inappropriate"

When interpreting ambiguous statutory text, some courts implicitly or explicitly relied upon an assumption that the state legislature could not have intended to include incarcerated people as beneficiaries of administrative rulemaking requirements. Among other reasons, courts deemed rulemaking requirements "inappropriate" or "too cumbersome" for correctional facilities and drew distinctions between inmates and the general public.[103] In doing so, they shaped the law to remove procedural protections from a group of people.

In *L'Heureux v. State Department of Corrections*, the Rhode Island Supreme Court held that the APA did not apply to disciplinary and classification proceedings, agreeing with a federal judge that "the APA procedures were too cumbersome" and "that it is not necessary to give inmates the full panoply of those procedural rights" in creating grievance procedures.[104] The court came to this conclusion despite noting at the outset that, unlike other agencies, the DOC was not specifically excluded in the text of the APA,[105] which would be the clearest expression of legislative intent. However, the court framed its inquiry into legislative intent as one backed by the separation of powers and deference.[106] The language of the court's holding, which set up private and public rights in opposition to incarceration,

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segregation and requiring him to wear a jumpsuit that identified him as a security risk); Holley v. Cook, No. 3:20CV170, 2020 WL 6532842 (D. Conn. Nov. 5, 2020) (challenging the plaintiff's classification as a sex offender within prison); Baltas v. Maiga, No. 3:20CV1177, 2021 WL 2206966, at *2 n.3, *5 (D. Conn. June 1, 2021) (challenging the decision to transfer him to Virginia).

103. L'Heureux v. State Dep't of Corr., 708 A.2d 549, 553 (R.I. 1998) (finding that APA procedures were "too cumbersome," "not necessary," and "inappropriate" for the DOC); Mandela v. Campbell, 978 S.W.2d 531, 534 (Tenn. 1998) (finding that APA procedures were "simply not realistic" for DOC).

104. *L'Heureux*, 708 A.2d at 553.

105. *Id.* at 551.

106. *Id.* at 553 ("[I]n interpreting our APA we are mindful of our responsibility not to interpret a statute in such a manner as to achieve an inappropriate or an unintended result."). The court's separation-of-powers argument is weakened by the fact that reworking a statute under the guise of legislative intent would violate the separation of powers. *See* discussion *infra* Section II.A.4.

implicitly assumed that incarcerated people were not members of the public.[107] Despite the language of deference, the court's assumption that the legislature could not have meant to include incarcerated people in administrative procedure shaped the holding and gave the judiciary an active role in removing these procedures from the scope of the APA.

Justice Cavanagh's dissent from the *Martin* opinion in Michigan similarly concluded that public participation was inappropriate in creating disciplinary procedures.[108] However, he grounded his dissent in agreeing with the majority that incarcerated people "are obviously members of the public in a general sense."[109] This perhaps explains why he offered the most detailed reasoning of the cases in this Section in determining that the legislative intent was to exclude incarcerated people.[110] He reasoned that, because the rights of incarcerated people are already restricted, the APA rulemaking requirements should not apply to disciplinary proceedings.[111] He concluded that "the 'public participation' envisioned by the Michigan APA was that of the public at large, or in this case, the non-inmate population" and that the APA's purpose—to ensure democratic rule-making and the rejection of "politically unacceptable" rules—was "clearly inappropriate in a prison setting."[112] But even the language of "clearly inappropriate" relies on assumptions about the types of protections that incarcerated people

107. The court determined that the legislature had intended that "this statute should be applied in the determination of private and public rights *as opposed to* the circumstances and conditions of a correctional institution." *Id.* at 553 (emphasis added). This court assumed that incarcerated people were not part of the public without thoroughly analyzing the question, like the cases discussed in Section II.A.2.

108. Martin v. Dep't of Corr., 384 N.W.2d 392, 397 (Mich. 1986) (Cavanagh, J., dissenting). The *Martin* opinion is discussed in Section II.A.1.

109. *Id.* at 397. He also concedes that DOC rules that "affect the non-inmate public" should be promulgated under the APA, which places him much closer to the *Martin* majority than many other state courts. *Id.* at 399.

110. *Id.* at 397.

111. *Id.*

112. *Id.* at 398. He based this political exclusion in part on the disenfranchisement of incarcerated people. *Id.* at 399. In determining the APA's purpose, he looked at the "overall goals of the APA," including "increas[ing] public access," "facilitat[ing] public participation", and "ensur[ing] accountability of agencies to the public." *Id.* at 397 (citation omitted).

deserve, as do his conclusions that the APA's goals of public access, participation, and accountability are too costly.[113]

Finally, the Supreme Court of Tennessee concluded in *Mandela v. Campbell* that applying rulemaking requirements to disciplinary procedures at a private prison would be inappropriate, although the court relied on deference to reach this conclusion. The court explained that this conclusion was not clear from the plain language of the statute but from legislative intent determined by the broad deference and discretion granted by the legislature to the Tennessee DOC, as demonstrated by related statutes:

> This broad grant of legislative discretion necessarily includes the power to establish policies and procedures for handling disciplinary matters. This broad grant of discretion also envisions that those persons intimately involved with the intricacies of the prison system and not the voting public are best equipped to establish policies and procedures for inmate discipline.
>
> The promulgation requirements of public notice, public hearing, attorney general approval, and filing with the state are *simply not realistic* requirements for implementing procedures that concern the intricacies and complexities of a prison environment.[114]

Courts typically prioritize the text of the statute itself in interpretation, rather than looking to related statutes.[115] The phrase "simply not realistic" reflects an unwillingness to engage with the

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113. *Id.* at 397–99.

114. Mandela v. Campbell, 978 S.W.2d 531, 534 (Tenn. 1998) (emphasis added). The court then referenced L'Heureux v. Dep't of Corr., 708 A.2d 549 (R.I. 1998). The Supreme Court of Tennessee later noted that its conclusion in *Mandela* that promulgation requirements were "simply not realistic" for prison disciplinary procedures was "equally appropriate" in the context of the lethal injection protocol. Abdur'Rahman v. Bredesen, 181 S.W.3d 292, 312 (Tenn. 2005) (quoting *Mandela*). The *Abdur'Rahman* court was unique in explicitly holding that the lethal injection protocol was exempt from the state's APA under both the internal management and the inmate exception to the definition of a "rule." *Id.* at 311–12.

115. *See also* Hill v. Owens, 738 S.E.2d 56, 62 (Ga. 2013) (arguing, in a long passage noticeably devoid of citations, that the Board of Corrections is sufficiently unique and different from "typical agencies" that rulemaking requirements should not apply).

possibility that rulemaking requirements might apply, especially where the legislature has not explicitly stated otherwise.

Conversely, the Maryland Supreme Court in *Massey* expressly considered and rejected the above quote from the *Mandela* court's opinion as irrelevant.[116] Instead, the court held that "[t]he question is simply whether inmate discipline procedures adopted by the Secretary that can directly or indirectly affect an inmate's actual length of incarceration qualify as merely internal management guidelines, and, to us, they do not."[117] Like the decisions regarding disciplinary proceedings discussed in Section II.A.1, the court rested its reasoning on due process and liberty interests.[118] However, the court noted that the issue and the holding were narrow and focused on disciplinary hearings that could impact the length of incarceration, not "the myriad of rules governing the details of prison life."[119]

This narrow holding, however, laid the foundation for a closer examination of how Maryland executed people, ultimately leading to the abolition of the death penalty in that state. One year later, in 2006, the Maryland Supreme Court held in *Evans* that the internal management exemption also did not apply to the state's lethal injection protocols, relying on the role of the separation of powers and ideas of the public.[120] The court framed the internal management test more broadly as compared to *Massey* and grounded it in the separation of powers: "whether, given the nature and impact of the Directive, the Legislature intended that the agency be free to adopt,

116. Massey v. Sec'y, Dep't of Pub. Safety and Corr. Servs., 886 A.2d 585, 601–02 (Md. 2005) ("With due respect to the Tennessee court, [the practicality of implementing procedural requirements in prison] is not the issue.").

117. *Id.* at 602.

118. *Id.* at 597; *see also* discussion *supra* note 80 (determining that rulemaking procedures in the context of disciplinary rules apply to prisoners). The court also conducted a lengthy exploration of the internal management exception, examining Arthur Earl Bonfield's writing on the exception as well as Jones v. Smith, 478 N.E.2d 191 (N.Y. 1985), Martin v. Dep't of Corr., 384 N.W.2d 392 (Mich. 1986), L'Heureux v. State Dep't of Corr., 708 A.2d 549 (R.I. 1998), and Mandela v. Campbell, 978 S.W.2d 531 (Tenn. 1998). *Id.* at 598–601. The *Massey* court was not persuaded by *L'Heureux* and *Mandela*, which held that APA rulemaking requirements did not apply to disciplinary proceedings. *Id.* at 600–02.

119. *Massey*, 886 A.2d at 602.

120. Evans v. State, 914 A.2d 25, 80 (Md. 2006) (explaining that decisions about how to execute people "do not constitute routine internal management"). The court held that portions of the Execution Operations Manual that governed how the execution would be carried out were regulations and subject to the state's APA. *Id.*

change, or abrogate the Directive at will, without any public input or legislative review."[121] The court declined to assume legislative intent to delegate such broad power to the agency and noted that decisions about methods of execution "affect not only the inmates and the correctional personnel, but the witnesses allowed to observe the execution and the public generally, through its perception of the process."[122]

When the Maryland legislature repealed the death penalty in 2013,[123] the Revised Fiscal and Policy Note that accompanied the bill noted that the Maryland legislature had restricted the use of the death penalty in 2009 and explained that executions had been halted since the *Evans* decision in 2006.[124] The Department of Public Safety and Correctional Services proposed new execution regulations in 2009 and 2010 but withdrew them both times after criticism from the Administrative, Executive, and Legislative Review Committee.[125]

In Maryland, administrative rulemaking requirements served their purpose: they promoted public notice and accountability, which, in this case, resulted in legislative abolition of the death penalty. The next Section explores two other examples of court decisions about administrative rulemaking requirements resulting in legislative change, although with the opposite result.

4. Interpreting Ambiguous Text: Prompting Political Debates About APA Application

Decisions in Maryland, Arkansas, and California offer examples where courts faced statutory text that was ambiguous or did not address the issue as to whether DOCs had to comply with rulemaking requirements and, rather than assuming broad legislative deference to DOCs, forced the legislature to be explicit

121. *Id*. at 79.

122. *Id*. at 80.

123. S.B. 276, 2013 Leg., Reg. Sess., 2013 Md. Laws 2298 (repealing the death penalty).

124. MD. GEN. ASSEMBLY, DEP'T LEGIS. SERVS., FISCAL AND POLICY NOTE (REVISED), S.B. 276, 2013 Sess., 2, 3 (restricting to cases with biological or DNA evidence, videotaped voluntary interrogation and confession, and/or video recording of the murder).

125. *Id*. at 3–5.

about any intent to strip a group of people of administrative protections.[126]

In 2008, a trial court in Arkansas held that the directive governing execution procedures was subject to the APA and therefore invalid, because it had not been properly promulgated.[127] One year later, the Arkansas legislature passed an act that specifically excluded the method of execution from the state's APA.[128] In 2011, the Eighth Circuit considered and rejected an ex post facto challenge to the act.[129] The incarcerated individuals argued the notice-and-comment requirements of the APA would have resulted in "a more humane protocol"; however, the court found this argument speculative and concluded that they had not pled specific facts showing a "'significant risk' of increased punishment" violating the Ex Post Facto Clause.[130]

A California decision that the lethal injection protocol was subject to the state APA has sparked an ongoing colloquy about the death penalty there. In *Morales v. California Department of Corrections & Rehabilitation* (CDCR), the Court of Appeal for the First Division agreed with the *Evans* court that lethal injection protocols qualify as a regulation, because "the protocol 'declares how a

126. Evans v. State, 914 A.2d 25 (Md. 2006); Order Concerning Plaintiff's Cross-Motion for Summary Judgment, Williams v. Ark. Dep't of Corr., No. CV 2008-4891 (Cir. Ct. of Pulaski Cnty., Ark. Aug. 28, 2008) (on file with the *Columbia Human Rights Law Review*); Morales v. Cal. Dep't of Corr. & Rehab., 85 Cal. Rptr. 3d 724 (Cal. Ct. App. 2008).

127. Order Concerning Plaintiff's Cross-Motion for Summary Judgment, Williams v. Ark. Dep't of Corr., No. CV 2008-4891 (Cir. Ct. of Pulaski Cnty., Ark. Aug. 28, 2008) (on file with the *Columbia Human Rights Law Review*) (finding that the execution procedure constituted a "rule"). The trial court's order was brief, but it rejected the Arkansas DOC's argument that the protocol should be excluded as internal management because it did not "govern the rights or actions of the public." Defendant's Reply in Support of Motion for Summary Judgment and Response to Plaintiff's Cross-Motion for Summary Judgment, Williams v. Ark. Dep't of Corr., No. CV 2008-4891-6, at 8 (Cir. Ct. of Pulaski Cty., Ark. Aug. 7, 2008) (on file with the *Columbia Human Rights Law Review*).

128. H.B. 1706, 87th Gen. Assemb. Reg Sess., 2009 Ark. Acts. 1296, *codified at* ARK. CODE ANN. § 5-4-617(h) (2021) ("The procedures for carrying out the sentence of death and related matters are not subject to the Arkansas Administrative Procedure Act, § 25-15-201 *et seq.*"); Ark. Dep't of Corr. v. Williams, 357 S.W.3d 867, 869 (Ark. 2009) (holding that the 2009 law had rendered the trial court's order moot).

129. Williams v. Hobbs, 658 F.3d 842, 851 (8th Cir. 2011).

130. *Id.* (citing Garner v. Jones, 529 U.S. 244, 255 (2000)).

certain class' of inmates, those whose execution dates have been set, will be treated . . . even if it does not apply to all inmates, or even to all inmates sentenced to death."[131] The court rejected the CDCR's argument that the internal management exception applied for technical reasons—that the CDCR raised it for the first time on appeal—but went on to address its merits by noting that the execution team might include outside specialists.[132] The court held that the lethal injection protocols were thus invalid because they were not created in accordance with the APA.[133] Five years later, in 2013, a court rejected the CDCR's regulations on the lethal injection protocol because they still did not "substantially comply" with procedural requirements of the state's APA.[134]

California voters then approved Proposition 66, the Death Penalty Reform and Savings Act of 2016.[135] Among many other provisions, the Act provided an explicit exemption from the APA for the administration of the death penalty.[136] California enacted a new lethal injection protocol in 2018, but a challenge to its constitutionality resulted in a stay of execution.[137]

131. Morales v. Cal. Dep't of Corr. & Rehab., 85 Cal. Rptr. 3d 724, 731–32 (Cal. Ct. App. 2008) (quoting Morning Star Co. v. State Bd. of Equalization, 132 P.3d 249, 255 (Cal. 2006)). The court rejected the DOC's argument that the lethal injection protocol did not apply generally and therefore should not be subject to the APA. *Morales*, 85 Cal. Rptr. 3d at 739.

132. *Morales*, 85 Cal. Rptr. at 740–41.

133. *Id.* at 741.

134. Sims v. Dep't of Corr. & Rehab., 157 Cal. Rptr. 3d 409, 411 (Cal. Ct. App. 2013).

135. Briggs v. Brown, 400 P.3d 29, 34 (Cal. 2017).

136. *Briggs*, 400 P.3d. at 36. Some of the Act's provisions appeared unconstitutional as written; *Briggs v. Brown* limited the scope of the Act by finding that its five-year limit on habeas review was directive, rather than mandatory, to avoid violations of the separation of powers. *Id.* at 34.

137. Hart v. Broomfield, No. CV 05-03633, 2020 WL 4505792 at *108 (C.D. Cal. Aug. 5, 2020) (referring to Morales v. Kernan, No. 06-CV-0219, 2017 WL 8785130, at *3 (N.D. Cal. Dec. 4, 2017)). In March 2020, Governor Gavin Newsom issued a moratorium on executions, which shut down efforts to amend the protocol. *California Governor Gavin Newsom Orders Dismantling of State's Death Row*, DEATH PENALTY INFO. CTR. (Feb. 1, 2022), https://deathpenaltyinfo.org/news/california-governor-gavin-newsom-orders-dismantling-of-californias-death-row [https://perma.cc/JTP4-2U5B]. No executions have occurred in California since 2006 and California is currently dismantling its death row. *Id.*

Although these court decisions resulted in explicit exemption from the APA, at least they prompted public conversation and a democratic decision rather than reflecting a judge's assumptions.

5. Textualism and the Inmate Exception

Similar to the legislation discussed in the previous Section, state legislatures have occasionally decided to include specific language about inmates in the text of their state APAs in addition to the general internal management exception.[138] Even these specific "inmate exceptions" can face scrutiny in state courts.[139] While this Note focuses on the internal management exception, courts analyzing the application of the inmate exception face similar questions of whether incarcerated people should be excluded from the public right of administrative rulemaking.

The inmate exception was added in the 1981 Model State APA, for which Arthur Earl Bonfield, an expert on state administrative rulemaking, was one of two reporter-draftsmen.[140] Bonfield made clear that, like the other exceptions to rulemaking requirements, this one should be construed strictly.[141] The exception applied to rules that

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138. MODEL STATE ADMIN. PROC. ACT § 3-116(6) (UNIF. L. COMM'N 1981). The full text reads: "a rule concerning only inmates of a correctional or detention facility, students enrolled in an educational institution, or patients admitted to a hospital, if adopted by that facility, institution, or hospital." *Id.* The language of this type of exception varies more widely among the states than the internal management exemption. Some state APAs also exempt particular named agencies, including the DOC, from the rulemaking requirements.

139. This Note will use the term "inmate exemption" to refer to exceptions that specifically mention "inmates" or people in the custody of the state department of corrections.

140. BONFIELD, *supra* note 20, at xxiii. The inmate exception was removed from the 2010 Model State APA. REVISED MODEL STATE ADMIN. PROC. ACT (UNIF. L. COMM'N 2010).

141. BONFIELD, *supra* note 20, at xxiii. Bonfield did, however, draw a distinction between state-run prisons, educational institutions, and hospitals, and the rest of state agencies. Due to practical considerations and cost, and because "[m]embers of the public are not directly affected by these rules," he reasoned that "procedures designed to elicit broad-scale public participation are not as important in the making of agency policies of this kind as they are in the making of other kinds of agency policies." *Id.* at 416. He concluded that the costs of forcing prisons to rely only on the internal management exception outweighed the public interest in rules that affect inmates' rights and the vulnerability of inmates who might be unable to protect their interests "without the help of outside public

> concern '*only* inmates . . . students . . . or patients.' That is, if the rule is not addressed to inmates, students, or patients, or if it is addressed to inmates, students, or patients, and also to others, it is not exempted under this provision. For example, *rules prescribing visiting hours at the state prison would not be exempt*.[142]

Bonfield noted a further limitation to the exception: that these rules should come from each individual institution, not from the agency as whole.[143] This latter limitation, however, is not present in the state APAs discussed below, although the text of the 1981 Model State APA includes it.[144] Regardless, the former limitation—"only inmates"—remains in some, but not all, of the state APAs that included this exception.[145]

The dissents in *Middleton v. Missouri Department of Corrections* echoed Bonfield's textual reasoning without citing him. The Supreme Court of Missouri found that the lethal injection protocol was exempt under the state APA's version of an inmate

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pressure." *Id.* at 417 (addressing concerns raised by Carl. A. Auerbach, *Administrative Rulemaking in Minnesota*, 63 MINN. L. REV. 151, 244–45 (1979)).

142. BONFIELD, *supra* note 20, at 414 (second emphasis added). Conversely, "statements prescribing the mealtimes and daily routine of inmates are exempt." Arthur Earl Bonfield, *The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, the Rulemaking Process*, 60 IOWA L. REV. 731, 843 (1975).

143. BONFIELD, *supra* note 20, at 415 ("the rules of the type referred to must originate from the particular institution in which . . . the inmates are in custody . . . . This is to ensure that the statements exempted are in fact truly internal to the particular agency involved.").

144. The provision excludes "a rule concerning only inmates of a correctional or detention facility, students enrolled in an educational institution, or patients admitted to a hospital, *if adopted by that facility*, institution, or hospital." MODEL STATE ADMIN. PROC. ACT § 3-116(6) (UNIF. L. COMM'N 1981) (emphasis added). However, Missouri's statute broadens this to cover rules issued by the relevant agency (MO. REV. STAT. § 536.010(6)(k) (2022)); Arizona's statute similarly covers agencies and facilities under their jurisdiction (ARIZ. REV. STAT. ANN. § 41-1005(A)(7) (2022)); and Virginia's statute broadly exempts agency action relating to "inmates of prisons or other such facilities or parolees therefrom" (VA. CODE ANN. § 2.2-4002(B)(9) (2022)).

145. Missouri's statute uses the term "only inmates." MO. REV. STAT. § 536.010(6)(k) (2022). Arizona's statute contained this language in 1992, at the time of the case discussed below, but the word "only" was removed in 1995. S.B. 1274, 42nd Leg., Reg. Sess., 1995 Ariz. Sess. Laws 251.

exception.[146] The majority held that the inmate exemption "clearly" applied to the execution protocol because the legislative intent indicated that the exception applied to inmates as the "direct subject" of a statement; therefore, the role of medical professionals in an execution did not change the conclusion, because "in some sense, nearly every aspect of prison life involves people from outside the prison system."[147] Two judges dissented separately, each finding that the text of the exception ("concerning only inmates") made clear that it did not apply here because medical professionals have a central role in executions.[148] In addition, Justice Wolff dissented from the majority's use of legislative intent.[149] He concluded that the legislature most likely failed to consider the execution protocol when drafting the APA.[150] Rather than doing the legislature's job for them, he wrote, the court should use the plain meaning of the statute and the legislators could revise the statute if they disagreed.[151]

Similarly, the Court of Appeals of Arizona considered and rejected the inmate exception in a case concerning DOC religious visitation policies,[152] reasoning that because these policies also applied to religious leaders who visited people, the exception did not apply.[153] The court did not explicitly address the state APA's internal

146. Middleton v. Mo. Dep't of Corr., 278 S.W.3d 193, 195 (Mo. 2009) (quoting MO. ANN. STAT. § 536.010(6)(k)) (excluding from the definition of "rule" statements that "concern[ed] only inmates of an institution under the control of the department of corrections"). The court affirmed the lower court's decision without addressing the internal management exception, although the lower court had found that both exceptions applied. *Id.* at 195. In a case of first impression, the Supreme Court of North Carolina later relied on *Middleton* as well as other state court decisions to determine that the inmate exception in North Carolina's APA applied to the lethal injection protocol. Conner v. N.C. Council of State, 716 S.E.2d 836, 843, 848 (N.C. 2011).

147. *Middleton*, 278 S.W.3d at 195–96.

148. *Id.* at 198 (Teitelman, J., dissenting) ("Without the participation of medical professionals performing their duties pursuant to the dictates of the execution protocol, there would be no execution."); *id.* at 200 (Wolff, J., dissenting) (agreeing with J. Teitelman's reading of the text of the statute).

149. *Id.* at 199 (Wolff, J., dissenting).

150. *Id.* at 200 (Wolff, J., dissenting) ("[T]he principal opinion seems to take the position that the legislature could not really have meant to include the execution protocol in the definition of a rule, and so, therefore, the legislature did not so include it.").

151. *Id.*

152. Wilkinson v. State, 838 P.2d 1358, 1360 (Ariz. 1992).

153. *Id.* at 1359–60 (citing ARIZ. REV. STAT. ANN. § 41-1005(A)(7)) (holding that the plain meaning of the statute excluded rules that "concern[ed] only

management exemption, but the DOC had named its rule "Internal Management Policy No. 207," which was not enough to save it from rulemaking requirements.[154] The court noted that it had "steadfastly indicated the necessity for the DOC to file its rules and regulations" in accordance with APA requirements.[155] The decision did not make broad normative statements about incarcerated people being part of the public, but it did hold the legislature to the statutory text.

An opinion by the Supreme Court of Virginia, on the other hand, illustrates the opposite end of the spectrum from Bonfield's strict construction of the text of the state's APA. The court considered a challenge to execution methods in *Porter v. Commonwealth* and concluded broadly that the correctional agency as a whole was exempt from the APA, even though the APA did not exempt the DOC by name.[156] The court reached this conclusion by reasoning that the APA exempted agency action related to prison inmates and the DOC's "sole purpose" was related to prison inmates.[157]

6. Deferring to Prison Administrators

In sum, it is notable how much courts' reasoning resembles the earlier and renewed hands-off doctrine around internal management in prisons, like in *Turner v. Safley*, rather than the original vision for the internal management exception in administrative law, which applies to *all* public agencies.

As discussed in Section I.A.1, the Supreme Court's prisoners' rights jurisprudence resembles the earlier "hands-off" doctrine before the 1960s, where courts gave wide deference to the expertise of prison officials in the internal management of carceral institutions. This same term—internal management—is used in administrative law, but it applies to all public agencies.

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inmates of a correctional or detention facility"). However, the word "only" was removed in 1995. S.B. 1274, 42nd Leg., Reg. Sess., 1995 Ariz. Sess. Laws 251.

154. *Wilkinson*, 838 P.2d at 1359; *see also* ARIZ. REV. STAT. ANN. § 41-1005(A)(4) (2022) (outlining the internal management exemption).

155. *Wilkinson*, 838 P.2d at 1359. Since the policy was not promulgated lawfully under the APA, it was invalid. *Id.*

156. Porter v. Commonwealth, 661 S.E.2d 415, 433 (Va. 2008).

157. *Id.* at 432–33 (arguing that the DOC "is an agency whose sole purpose is related to inmates of prisons" and the APA contained an exception for agency action "relating to '[i]nmates of prisons or other such facilities or parolees therefrom'" (quoting VA. CODE ANN. § 2.2-4002(B)(9) (2008))).

Bonfield explained that all of the exceptions were "very narrowly and precisely drafted" and should be "held inapplicable" in close cases because of the importance of rulemaking requirements in "assuring institutional responsibility and democratic governance."[158] In particular, he described the internal management exception as "a very narrowly drawn provision" related to "internal housekeeping":[159]

> [T]he rule must be directed at agency employees rather than at members of the public—that is, it must be directed '*only*' at persons inside the agency rather than at persons outside the agency. It must also deal exclusively with matters involving the operations of the agency staff, such as its administration, financing, and the like.[160]

But courts that give wide deference to prison officials sound more like a renewed form of the hands-off doctrine than like Bonfield's initial intentions. *Turner v. Safley* did establish a deferential standard for reviewing prison regulations that infringe on constitutional rights, but its test applies to specific prison regulations, not the rule-making process itself.[161] The idea that rulemaking requirements are "too cumbersome" or "simply not realistic" harkens back to the hands-off era, when courts refused to intervene in administrators' decisions.[162] So does the *Mandela* court's finding of "a legislative intent to grant considerable deference to those best suited and most familiar with the prison setting" and the *Pierce*

158. BONFIELD, *supra* note 20, at 399.

159. *Id.* at 400, 402.

160. *Id.* at 401. He listed examples of "internal agency personnel practices and standards," including "employee vacation policies, work schedules, work performance criteria, promotion policies and criteria, grievance rights and procedures, and staff benefits" but not policies regarding job applicants. *Id.* at 402–03. The word "grievance" should not be confused as belonging to the prison context—employees can walk away if they are dissatisfied but incarcerated people cannot.

161. Shay, *supra* note 15, at 340–41 (citing Turner v. Safley, 482 U.S. 78 (1987), which held that courts should defer to prison officials even where regulations impinge on constitutional rights).

162. L'Heureux v. State Dep't of Corr., 708 A.2d 549, 553 (R.I. 1998) ("too cumbersome"); Mandela v. Campbell, 978 S.W.2d 531, 534 (Tenn. 1998) ("simply not realistic"); Abdur'Rahman v. Bredesen, 181 S.W.3d 292, 312 (Tenn. 2005) (quoting *Mandela*); Boles v. Tenn. Dep't of Corr., No. M2000-00893-COA-R3-CV, 2001 WL 840283, at *4 (Tenn. Ct. App. July 26, 2001) (quoting *Mandela* and purporting to extend it, although applying an inmate exception that had been added after *Mandela*).

court's citing of courts' "wide-ranging deference" to prison officials in the areas of discipline and security.[163]

This language is particularly striking in contrast to the language that courts use in administrative law cases when the people affected by regulation are not incarcerated. For example, in *Rapanos v. United States*, Justice Scalia described the Clean Water Act as leading to an "immense expansion of federal regulation" through the U.S. Army Corps of Engineers, which "exercises the discretion of an enlightened despot."[164] He derided the dissent's "total deference to the Corps' ecological judgments" and sympathized with the plaintiff who faced criminal and civil liability for "backfilling his own wet fields."[165] In the above cases, however, courts granted broad deference to public agencies with complete control over the people in their custody, allowing agencies to operate in secret and make and change rules at will. The arbitrary power granted to state departments of correction looks far more like "despot[ism]" than the *Rapanos* case.[166] While incarcerated people are perhaps less sympathetic than the plaintiff in *Rapanos*,[167] they may require more protection from state power because the state has removed their ability to protect themselves.[168]

Courts should remember their role in the separation of powers. There are two layers of deference in statutory interpretation related to prison law: courts' deference to prison administrators and the legislature's deference to prison administrators. In the cases cited above, these two types of deference seem to be conflated: courts give force to judicial deference by assuming legislative deference in statutory interpretation. Courts may be confusing the pre-1960s hands-off doctrine (in which courts deferred to prison administrators in the internal management of prisons) with the "internal management" exception in administrative law (which applies to all executive agencies). These opinions are more reminiscent of the

163. *Mandela*, 978 S.W.2d at 535; Pierce v. Lantz, 965 A.2d 576, 580 (Conn. 2009).

164. Rapanos v. United States, 547 U.S. 715, 721–22 (2006) (plurality opinion).

165. *Id.* at 721, 749 (plurality opinion).

166. *Id.* at 721 (plurality opinion).

167. The dissent noted that the plaintiff intended to build a shopping center and "threatened to 'destroy'" a wetlands consultant who warned him that his land contained acres of wetlands; he then paid roughly one million dollars to drain and fill wetlands without a permit, despite knowing he needed one and after receiving orders to stop. *Id.* at 789 (Stevens, J., dissenting).

168. *See supra* notes 13–14 and accompanying text.

hands-off doctrine than administrative law involving other agencies (like *Rapanos*) or Bonfield's original conception of the narrow internal management exception.

B. Prisons and the Public

The discussion above analyzed cases in which courts had to determine the bounds of the public. After this discussion, it is useful to take a step back and consider what is at stake in these decisions by examining theories of state power and the relationship between incarcerated people and the public.

1. Procedural Protections from State Power

Incarceration is only possible with state power. State punishment is the expression of state power wielded by state officials,[169] and state officials have an extraordinary amount of power inside prisons.[170] American democracy is designed to limit state power, through features like federalism, the separation of powers, the Suspension Clause, and the Bill of Rights. The absence of some of these constraining forces in prisons—including the Eighth Amendment's high bar for cruel and unusual punishment, the wide scope of qualified immunity, and, as this Note explores, judicial deference to prison administrators and the lack of administrative rulemaking—creates a vacuum of democratic governance in the place where state power is at its fullest expression. This is particularly troubling where courts themselves create or enable this pocket of lawlessness, as discussed in Section II.A.

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169. Dolovich, *Cruelty*, *supra* note 13, at 898 (describing state punishment as "the result of a collective process undertaken by a series of state officials who derive their power from the set of linked institutions—the legislature, police, prosecutors, courts, and prisons—that together comprise 'the system of coercion upon which all governments have to rely to fulfill their essential functions'" (quoting Judith N. Shklar, *The Liberalism of Fear*, *in* LIBERALISM & THE MORAL LIFE 21, 29 (Nancy L. Rosenblum ed., 1989))).

170. Dolovich discusses *Monroe v. Pape*, 365 U.S. 167 (1961), which extended 42 U.S.C. § 1983 claims to state officials acting under the color of state law and in which the Supreme Court recognized the potential for the abuse of power by state officials. Dolovich, *Cruelty*, *supra* note 13, at 902. Dolovich notes how much more power correctional officers have than police officers because incarcerated people are removed from their communities and prison officials have power over all of their movements, as well as the ability to use force against them. *Id.* at 904.

Philip Pettit's ideas about republicanism and freedom as non-domination are useful here.[171] He defines domination as one party's ability to arbitrarily interfere in another party's choices; freedom, on the other hand, is security against this possibility.[172] He offers two strategies to constrain arbitrariness: preconditions that filter out the possibility of arbitrary interference, like government procedures (here, administrative rulemaking); and the threat of penalties or sanctions for transgressions (in this context, constitutional protections).[173] Pettit does carve out an exception for public officials who act under the law and are restrained by the possibility of sanctions, because their acts are not arbitrary.[174] However, he acknowledges that this requires a "suitably constraining, constitutional arrangement," which includes review for officials who act with discretion.[175]

Arguably, neither of these conditions is present in the American prison system. First, the Eighth Amendment protects only against the most egregious harms, and, along with qualified immunity, does little to constrain public officials.[176] Second, judicial deference in prisoners' rights cases looks entirely different from deference in other types of cases.[177] The Supreme Court's prisoners' rights jurisprudence arguably has no principled basis for the

171. *See* PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT 51 (2002) (discussing the concept of freedom as the absence of domination by another).

172. *Id.* at 52, 69.

173. *Id.* at 57–58.

174. *Id.* at 65. He defines non-arbitrary state power as power that is "exercised in a way that tracks . . . the welfare and world-view of the public," rather than that of the power-holder (here, the DOC), and says that the state action must be guided by "public discussion in which people may speak for themselves and for the groups to which they belong." *Id.* at 56. In the specific context of this Note, then, rulemaking that does not require public notice or comment would be an arbitrary use of state power.

175. *Id.* at 65.

176. Littman, *supra* note 23, at 1388–90; Jamison v. McClendon, 476 F. Supp. 3d 386, 407 (S.D. Miss. 2020) (citations omitted) (describing the breadth of the qualified immunity doctrine, including officers who kept a plaintiff naked in feces-covered cells covered in feces for six days but were granted qualified immunity because "it 'wasn't clearly established' that 'only six days' of living in a cesspool of human waste was unconstitutional"). It does not matter that not all officials choose to act this egregiously—what Pettit emphasizes is the common knowledge between the dominant and vulnerable parties that the dominant party could choose to act in an arbitrary manner at any point. PETTIT, *supra* note 172, at 69.

177. Dolovich, *Forms of Deference*, *supra* note 40, at 254.

deployment of deference; without this, the jurisprudence lacks legitimacy.[178] This level of judicial deference is especially cruel for an unpopular minority group for whom political avenues tend to fail.[179]

Without these restraints, therefore, incarcerated people are subject to domination as defined by Pettit.[180] While prisons may represent the absence of freedom in our society, the important point is that this is a pocket of arbitrary state domination that is anomalous in our democracy because of how few checks there are on the exercise of its power. As discussed in Section I.A, administrative law is supposed to constrain executive power, and rulemaking procedures are one way that people are protected from state power. State legislatures and courts that exclude incarcerated people from administrative rulemaking exclude them from some of the protections that our democracy is based on, even though incarcerated people are the most vulnerable to state power. And, by excluding incarcerated people from the public right to administrative procedure, courts mark them as outside of the public.

2. Excluding Groups of People from the Public

The reduced procedural protection afforded to incarcerated people sets them apart as not mattering as much as other members of the public. It is troubling both because it resembles the way that another group of people—non-citizens—are excluded from procedural protections afforded to the rest of the public, and because it is yet

178. *Id.* at 245 ("[T]he cases in this area reveal no principled basis for determining when deference is justified, what forms it may legitimately take, or the proper limits on its use."). Dolovich examined both PLRA and non-PLRA cases and found wider deference in the latter, perhaps because the statute is already so deferential to prison officials. *Id.* at 252. "[A]bsent a principled basis for deploying deference, the law governing prisons and prisoners cannot be regarded as legitimate by those it most affects—nor, arguably, does it deserve to be." *Id.* at 255.

179. Dolovich, *Cruelty*, *supra* note 13, at 974–75 (noting that incarcerated people tend to have little political power as a group, in part due to voter disenfranchisement, and that "[i]f powerful political constituencies notice prisoners at all, the result is usually a worsening of the conditions of confinement"). The two states that allow currently incarcerated people to vote are also the two whitest states in the United States. Jeffery Robinson, *The Racist Roots of Denying Incarcerated People Their Rights to Vote*, ACLU (May 3, 2019, 10:45 AM), https://www.aclu.org/blog/voting-rights/racist-roots-denying-incarcerated-people-their-right-vote [https://perma.cc/9528-XGKP].

180. PETTIT, *supra* note 171, at 52.

another example of the many ways in which incarcerated people are excluded from society.

As with incarcerated individuals, the lack of procedural protections and high levels of deference to administrative immigration court decisions mark non-citizens as outside of the public.[181] Non-citizens facing proceedings in immigration courts are denied of many of the procedural protections that apply to people facing detention and a deprivation of their liberty.[182] Because immigration proceedings are defined as civil rather than criminal, non-citizens do not have a right to court-appointed counsel or a speedy trial, even though they may be held in detention indefinitely during the proceedings.[183] Asylum seekers are often detained uniformly, without any discretion or determination of risk—unlike bail hearings for criminal cases.[184] Further, on appeal, non-citizens face extraordinarily high levels of deference to immigration judges' determinations that arguably equate to a lack of meaningful judicial review.[185]

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181. Carrie Rosenbaum, *Immigration Law's Due Process Deficit and the Persistence of Plenary Power*, 28 BERKELEY LA RAZA L.J. 118, 119 (2018) (discussing how the Supreme Court's "exceptional deference" to the political branches on immigration policies results in non-citizens having less due process protection than those who are criminally or civilly detained); Michael Kagan, *Dubious Deference: Reassessing Appellate Standards of Review in Immigration Appeals*, 5 DREXEL L. REV. 101, 104–06 (2012) (discussing how deference is an inappropriate standard of review in the immigration context).

182. Rosenbaum, *supra* note 181, at 119.

183. Shoba Sivaprasad Wadhia & Christopher J. Walker, *The Case Against* Chevron *Deference in Immigration Adjudication*, 70 DUKE L.J. 1197, 1206–07 (2021); Maureen A. Sweeney, *Enforcing/Protection: The Danger of* Chevron *in Refugee Act Cases*, 71 ADMIN. L. REV. 127, 168 (2019) (describing the punitive results of immigration proceedings, including indefinite imprisonment during the proceedings and deportation). Indefinite detention is allowed for non-citizens who have mental illness and have committed a violent crime, even if they have completed their prison term. Andrew Bramante, Note, *Ending Indefinite Detention of Non-Citizens*, 61 CASE W. RSRV. L. REV. 933, 934 (2011).

184. Rosenbaum, *supra* note 181, at 123–24, 135–36 (citations omitted) (describing Justice Breyer's dissent in Jennings v. Rodriguez, 138 S. Ct. 830, 859–76 (2018), as "challeng[ing] the appropriateness of the legal fiction that asylum seekers should be afforded less rights, including denial of a bond hearing, because they [have physically but not legally] entered the United States" and "remind[ing] the majority that since the time of slavery, the Court has never held that persons can be held totally without constitutional protection").

185. Kagan, *supra* note 181, at 104 ("The deference doctrine asks appellate judges to affirm factual findings by executive agencies even when the judges

Excluding incarcerated people from the public also raises larger questions about the purpose of incarceration. Punishment is justified by the traditional theories of retribution, incapacitation, deterrence, and rehabilitation.[186] In practice, however, these justifications—particularly rehabilitation—do not fit the reality of prisons.[187] Sharon Dolovich, Director of UCLA's Prison Law & Policy Program, has described the broader purpose of the prison system as exclusion and control.[188] The system itself perpetuates exclusion—by not rehabilitating people but rather and indeed by exacerbating or creating "antisocial tendencies"—and therefore guarantees that people will keep returning for longer periods of exclusion.[189] The

believe the agency is likely to be wrong, and even when the human costs of allowing a factual error to stand would be extreme.").

186. Historically, states followed the common law tradition of civil death, or exclusion from civil rights and access to the legal system, for people convicted of crimes. Judith Resnik, *The Puzzles of Prisoners and Rights: An Essay in Honor of Frank Johnson*, 71 ALA. L. REV. 665, 668 (2020); *see also* Ruffin v. Commonwealth, 62 Va. 790, 795–96 (1871) ("A convicted felon . . . has . . . forfeited his liberty . . . [and] all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the State. He is *civiliter mortuus* . . . ."). Today, this language is less common, and in 2022, the Rhode Island Supreme Court struck down the state's civil death law, believed to be the last such law being enforced, for violating the state constitution. Katie Mulvaney, *RI Supreme Court Says People Serving Life in Prison Can No Longer Be Considered 'Civilly Dead'*, PROVIDENCE J. (Mar. 2, 2022, 5:41 PM), https://www.providencejournal.com/story/news/courts/2022/03/02/ri-supreme-court-civil-death-law-people-serving-life-aci-struck-down/9342576002/ [https://perma.cc/6ENY-2JWL]. However, prisoners are still physically separated from the rest of society and lose many of the rights that non-incarcerated people have, like the right to vote, due to collateral consequences of convictions. Judith Resnik, *(Un)Constitutional Punishments: Eighth Amendment Silos, Penological Purposes, and People's "Ruin"*, 129 YALE L.J. F. 365, 373 (2020).

187. Sharon Dolovich, Exclusion and Control in the Carceral State, 16 BERKELEY J. CRIM. L. 259, 261 (2011) [hereinafter Dolovich, Exclusion]; Robert Blecker, Haven or Hell? Inside Lorton Central Prison: Experiences of Punishment Justified, 42 STAN. L. REV. 1149, 1163–98 (1990).

188. Dolovich, *Exclusion*, *supra* note 187, at 261 ("[T]oday, the primary function of the American penal system is to exclude and control those people officially labeled as criminals."). Her article focuses on two major policy changes of the 1990s, life without the possibility of parole sentences and supermax confinement.

189. *Id.* at 261–62. By way of example, she notes that state prisons inevitably exacerbate the disorderly behavior of people with mental illness; in response, state prisons transfer them to supermax prisons with "conditions that guarantee their continued 'acting out' and thus the extension of their time in punitive isolation." *Id.* at 326 (footnotes omitted). In addition, Dolovich notes that the effect

exclusion and dehumanization of incarceration are even more disturbing when considering the racist foundations of the current criminal legal system and the enduring disproportionate numbers of Black people incarcerated today.[190]

This exclusion extends morally as well as physically. Framing crimes as a willful choice made by the criminal enables the public to separate themselves, as law-abiding citizens, from people who deserve to be deprived of their rights and of procedural protections; it helps to ignore the most troubling and inhumane aspects of the prison system; and it helps to deny the societal choices that have fueled the growth of mass incarceration.[191] The rest of society has enabled the state power that allows this incarceration, but simultaneously is allowed to ignore it.[192]

Aaron Littman, a scholar on the law of incarceration, has extended this critique of the exclusion of incarcerated people to regulatory law in arguing that prisons should be subject to, rather than excluded from, "free-world regulatory law."[193] Applying free-world regulatory law, which is created for society at large, to

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of collateral consequences is to make this a process of permanent exclusion, rather than temporary exclusion, where people released from prisons are expected to return imminently instead of "being welcomed back to society as moral and political equals." *Id.* at 283.

190. *Id.* at 311 (footnote omitted) ("Once one factors in the dramatic overrepresentation in the American prison population of people of color, African Americans in particular, what may have at first seemed merely like ill-conceived policy starts to look like something more insidious.").

191. *Id.* at 265–66, 273–75, 286. Dolovich notes that the media has largely driven the depiction of criminals as "moral monsters" and "out of control." *Id.* at 288 n.89, 299. As examples of the puzzling features of the U.S. prison system, Dolovich lists: "why sentences are so often grossly disproportionate to the offense; why, given the multiple complex causes of crime, the state persists in . . . locking up the actors; why prison conditions are so harsh; why recidivism is so high; . . . and even why the people we incarcerate are disproportionately African-American." *Id.* at 265 (footnote omitted).

192. Dolovich, *Cruelty*, *supra* note 13, at 891–92 (describing society's carceral bargain—that incarceration allows society to forget about convicted people—but arguing that in exchange, the state must bear its carceral burden: by deciding to incarcerate and render people defenseless in a dangerous setting, the state incurs a responsibility to provide for the basic needs of incarcerated people); *id.* at 922 ("If, for the public at large, an offender's prison sentence means his or her disappearance from the public consciousness and from society itself for the length of the sentence, it means just the opposite for the state.").

193. Littman, *supra* note 23, at 1390–91.

incarcerated people helps to push back against dehumanization and "reconceptualize incarcerated people as members of the public":[194]

> What makes a person deprived of freedom nonetheless a part of society? What are the markers of their civic personhood? At base, the administrative state delineates the bounds of society through de jure or de facto inclusion and exclusion from the protective regulatory umbrella. Who is a patient? Whose health is part of public health? Who is a consumer to be protected from corporate avarice? Whose food supply should be inspected, and whose neglected? Bluntly, who must be fed like a human, and who can be fed like livestock? Law's coverage makes an "us," a bounded society; law's exclusion makes an "other."[195]

In addition to the normative justifications for treating incarcerated people as members of the public, Littman argues that subjecting prisons to free-world regulation would "shift[] institutional power [in the carceral system] to welfarist institutions," like public health agencies; fill in the gaps left by constitutional law and the Eighth Amendment, which protects only against extreme abuses, with specific regulations that offer far more protection; and shift the responsibility for the harm done to incarcerated people from individual officials to societal choices.[196]

In sum, applying administrative rulemaking procedures to incarcerated people would help normatively by reinforcing that prisoners remain part of the public, as well as substantively, since these procedures are an important public right that protect people from state power in the form of agency power.

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194. *Id.* at 1391, 1435–36. Regarding dehumanization, Littman gives an example of a sign in a jail reading, "INMATES ARE TO REMAIN SILENT DURING FEEDING," making incarcerated people sound like animals. *Id.* at 1473 (citation omitted). Similarly, the rooms in the Bronx Criminal Court where defense lawyers meet their clients before arraignments are marked as "pens."

195. *Id.* at 1473 (footnote omitted). Littman points out that this argument is analogous to that for the use of "people-first" language but matters more. *Id.* at 1473–74 (citation omitted).

196. *Id.* at 1393, 1389–91, 1476. For example, a proposed ordinance in Allegheny County, Pennsylvania would raise the minimum wage for non-salaried county workers to $15 and expressly include incarcerated people, eliminating the "forced subsidization of the County's budget" by incarcerated people and "decreas[ing] the fiscal incentive to incarcerate people in the first place." *Id.* at 1437–38 (citation omitted).

III. Upholding Procedural Protections for Incarcerated People

This Part offers an example of administrative rulemaking in the context of a correctional agency to demonstrate that public input is not only possible but can also shape the process and the outcome. It concludes with suggestions for courts and legislatures in applying rulemaking requirements to DOCs.

A. The Impact of Rulemaking Requirements and Public Input

Administrative rulemaking requirements can and do have an impact on agency rules and the information shared with the public when DOCs must use these processes to propose or change rules. A recent and ongoing debate over solitary confinement in New York City offers an example of why administrative procedure matters.[197]

In 2019, New York City's Board of Correction (Board) proposed new rules regarding restrictive housing in the New York City jail system.[198] The Board planned to continue ongoing reforms regarding punitive segregation, also known as solitary confinement.[199] The Board issued public notice about the rule changes, opportunities to comment, and public hearings, in line with the City Administrative Procedure Act.[200]

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197. Reuven Blau, *At the Last Minute, City Officials Put Brakes on Alternative to Solitary Confinement at Rikers*, THE CITY (June 30, 2022, 4:40 PM), https://www.thecity.nyc/2022/6/30/23190193/rikers-changing-solitary-to-rmas [https://perma.cc/YQJ5-MP62] (describing the public debate over the controversial new system, which was supposed to launch in November 2021 but has been repeatedly delayed as of July 2022).

198. N.Y.C. Bd. of Corr., Notice of Rulemaking Concerning Restrictive Housing in Correctional Facilities (Oct. 29, 2019), https://www1.nyc.gov/assets/boc/downloads/pdf/Jail-Regulations/Rulemaking/2017-Restrictive-Housing/2019.10.29%20-%20Rule%20and%20Certifications.pdf [https://perma.cc/D58K-4RFE].

199. *Id.* at 4. The proposed rules also changed the references to people confined in a DOC facility to "people in custody" to use "person-first language." *Id.* at 9.

200. City Administrative Procedure Act, New York City Charter, Chapter 45, §§ 1041–47 (CAPA). The CAPA includes the "internal management" exception. *Id.* § 1041(5)(b) ("'Rule' shall not include any (i) statement or communication which relates only to the internal management or personnel of an agency which does not materially affect the rights of or procedures available to the public . . . .").

Fifty-four people wrote comments, and fifty-nine people testified at two public hearings.[201] Most commenters, including people who had been incarcerated, their family members, and public defenders, rejected the proposed reforms and called for an immediate and complete end to solitary confinement.[202] They spoke powerfully about their own experiences surviving the torture of solitary confinement.[203] Multiple commenters invoked Layleen Polanco, who had just died of a seizure on June 7, 2019, while in solitary confinement at Rikers,[204] as well as Kalief Browder, who committed suicide after spending two years in solitary confinement there as a teenager.[205] Both Polanco and Browder had been awaiting trial.[206] After considering the public comments and testimony, the Board decided to rewrite the rules to eliminate punitive segregation and restart the public hearing process with the new draft.[207]

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201. N.Y.C. Bd. of Corr., Notice of Adoption of Rules 4 (June 4, 2021), https://www1.nyc.gov/assets/boc/downloads/pdf/RULE-AND-SBP-6-4-21-Legal-11833206.pdf [https://perma.cc/C86V-TC6N] [hereinafter 2021 Notice of Adoption].

202. *Id.*

203. Candi, Testimony at the CAPA Hearing on Restrictive Housing Proposal Rule 138–42 (Dec. 2, 2019), https://www1.nyc.gov/assets/boc/downloads/pdf/Meetings/2019/December/NYC-Board-of-Correction-CAPA-Hearing-re-Restrictive-Housing-Proposal-Rule-2019-12-02.pdf [https://perma.cc/JT6R-VYYW] ("[W]hen I was in solitary confinement, it was absolute torture. . . . I was dehumanized. I'll never be the same.").

204. 2021 Notice of Adoption, *supra* note 201, at 4–5, 33–34.

205. CAPA Hearing on Restrictive Housing Proposal Rule 21, 35, 79, 89, 106–07, 120, 122, 127, 142 (Dec. 2, 2019), https://www1.nyc.gov/assets/boc/downloads/pdf/Meetings/2019/December/NYC-Board-of-Correction-CAPA-Hearing-re-Restrictive-Housing-Proposal-Rule-2019-12-02.pdf [https://perma.cc/JT6R-VYYW]; CAPA Hearing Re Restrictive Housing Proposed Rule 19, 34, 86, 130, 140 (Dec. 16, 2019), https://www1.nyc.gov/assets/boc/downloads/pdf/Meetings/2019/December/BOC-Capa-Hearing-Re-Restrictive-Housing-Proposal-Rule-2019-12-16.pdf [https://perma.cc/N4TN-9D95]; Jennifer Gonnerman, *Kalief Browder, 1993–2015*, THE NEW YORKER (June 7, 2015), https://www.newyorker.com/news/news-desk/kalief-browder-1993-2015 [https://perma.cc/RQV8-RBAJ].

206. Polanco was unable to pay $501 bail, and Browder was held without bail. Mihir Zaveri, *N.Y.C. to Pay $5.9 Million in Death of Transgender Woman at Rikers*, N.Y. TIMES (Aug. 31, 2020), https://www.nytimes.com/2020/08/31/nyregion/layleen-polanco-settlement-rikers-transgender.html [https://perma.cc/S6HV-5WY2]; Jennifer Gonnerman, *Before the Law*, THE NEW YORKER (Sept. 29, 2014), https://www.newyorker.com/magazine/2014/10/06/before-the-law [https://perma.cc/29QG-ZKXS].

207. 2021 Notice of Adoption, *supra* note 201, at 6.

In 2021, the Board published notice of the new proposed rules and gave the public the opportunity to comment by virtual hearings, due to the COVID-19 pandemic.[208] The Board declared that the new rules would "eliminate punitive segregation."[209] However, the Board replaced punitive segregation with what it called the Risk Management Accountability System (RMAS).[210] The text of the new rule seemed promising, requiring people in RMAS to be allowed at least ten hours outside of their cells each day.[211] But commenters pushed back on the "exceedingly vague description" of what RMAS spaces would look like.[212] In response to public pressure, on April 14, 2021, the Board released an example rendering of an RMAS space:[213]

208. N.Y.C. Bd. of Corr., Notice of Rulemaking Concerning Restrictive Housing in Correctional Facilities 1 (Mar. 5, 2021), https://www1.nyc.gov/assets/boc/downloads/pdf/Jail-Regulations/Rulemaking/2021-Restrictive-Housing/2021.03.05-Proposed-Rule.pdf [https://perma.cc/TU4U-CDVR].

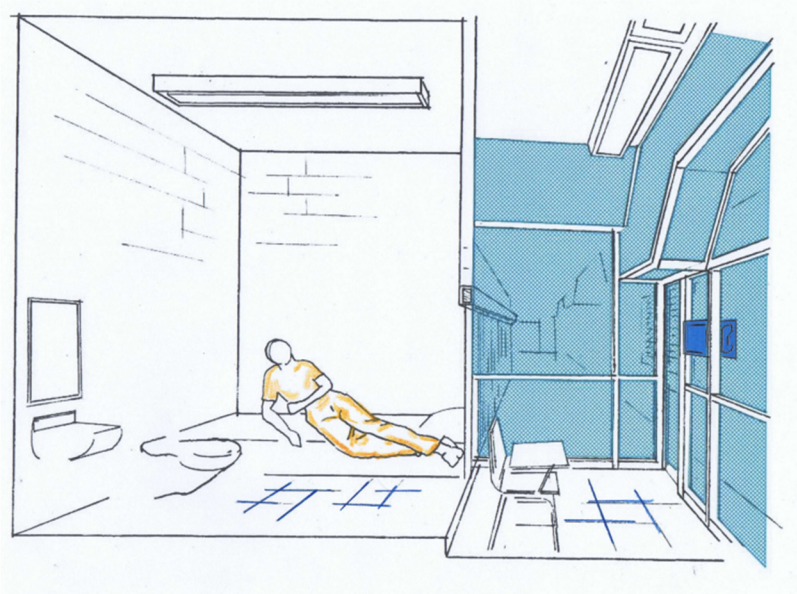
209. 2021 Notice of Adoption, *supra* note 201, at 6. The new text read: "Punitive segregation . . . imposes significant risks of psychological and physical harm on people in custody [particularly youth and people with mental illness]. . . . The hallmarks of solitary confinement—social deprivation and enforced idleness—create these serious health risks and are antithetical to the goals of social integration and positive behavioral change." *Id.* at 83 (to be codified at 40 Rules of the City of New York § 6-07).

210. 2021 Notice of Adoption, *supra* note 201, at 6.

211. *Id.* at 1, 6 (to be codified at 40 Rules of the City of New York § 6-16).

212. Legal Aid Society, Comments on the Proposed Rules Governing Restrictive Housing in New York City Jails 4 (Apr. 21, 2021), https://www1.nyc.gov/assets/boc/downloads/pdf/Jail-Regulations/Rulemaking/2021-Restrictive-Housing/04-21-21-las-comments-on-boc-proposed-rules-concerning-restrictive-housing-with-appendix-a.pdf [https://perma.cc/86HD-9H4L] [hereinafter Legal Aid Society Comment].

213. *DOC RMAS Level 1 Rendering* (illustration), *in* NYC BD. OF CORR., *Rulemaking*, NYC.GOV (Apr. 14, 2021), https://www1.nyc.gov/assets/boc/downloads/pdf/Jail-Regulations/Rulemaking/2021-Restrictive-Housing/(2021-4-13)%20Rendering-Model-142.pdf [https://perma.cc/2KSY-7C4X].



An illustration of RMAS issued by New York City's Board of Correction.

Commenters determined that time "outside" of the cell meant that people would be released into an enclosed space immediately outside their cell.[214] The Legal Aid Society denounced RMAS as "merely a smaller cage outside a larger cage," which "certainly cannot be celebrated as an 'end of solitary confinement.'"[215]

The rules were adopted, although their current status is in flux.[216] Mayor DeBlasio issued an emergency executive order in November 2021 delaying their implementation amid the crisis at Rikers,[217] and Mayor Adams has promised to bring solitary confinement back to Rikers.[218]

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214. Legal Aid Society Comment, *supra* note 212, at 5.

215. *Id.*

216. Blau, *supra* note 197 (explaining that the launch of the program, planned for November 2021, has been repeatedly delayed by Mayors de Blasio and Adams via emergency executive orders).

217. Office of Mayor Bill de Blasio, Emergency Exec. Order No. 279, § 2 (Nov. 1, 2021), https://www1.nyc.gov/office-of-the-mayor/news/279-001/emergency-executive-order-279 [https://perma.cc/V4KA-LES6].

218. Matt Katz, *Adams Will Keep Solitary Confinement at Rikers Island, Despite Humanitarian Concerns*, GOTHAMIST (Dec. 16, 2021),

Despite the concern that RMAS is solitary confinement by another name, and despite the uncertain status of the new rules, administrative processes resulted in some successes here. The public notice prompted political conversation and public pressure on the Board. The public succeeded in getting the Board to condemn solitary confinement, even if the Board aimed to "end[] solitary in name only."[219] When the proposed rules were vague, the public pressured the Board to describe what the new system would really look like. The public has been able to maintain pressure and outrage because it is informed and can comment, even if the ultimate goal of abolishing solitary confinement has not been achieved. Some power has shifted from the agency to the people because the Board does not have the power to make changes unilaterally behind closed doors.

Shay has identified additional examples of rulemaking successes. The federal Prison Rape Elimination Act created the National Prison Rape Elimination Commission, whose standards were influenced by public comment.[220] In particular, the Commission made it easier for people reporting sexual abuse to meet PLRA exhaustion requirements.[221] LGBTQ+ advocates also submitted comments that influenced the standards by making segregation of LGBTQ+ incarcerated people a last resort, rather than automatic, and by adding questions about sexual orientation at intake.[222] Littman has also highlighted the ways that notice-and-comment rulemaking can benefit incarcerated people in free-world regulatory law when the DOC is not the agency in question.[223]

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https://gothamist.com/news/adams-will-keep-solitary-confinement-rikers-island-despite-humanitarian-concerns [https://perma.cc/ZYG8-ATL5].

219. Reuven Blau, *De Blasio Plan to Eliminate Solitary Confinement Falls Short for Inmate Advocates*, THE CITY (Mar. 8, 2021, 11:09 PM), https://www.thecity.nyc/2021/3/8/22320755/de-blasio-plan-to-eliminate-solitary-confinement-falls-short-for-inmate-advocates [https://perma.cc/UVW9-2KGJ] (quoting Jennifer Parish of the Urban Justice Center Mental Health Project). Layleen Polanco's sister, Melania Brown, said, "I'm in a rage that they keep using my sister's name in vain with no real change. . . . All they did was change the name." *Id.*

220. Shay, *supra* note 15, at 363–65.

221. *Id.* at 364–65.

222. *Id.* at 365–66. Other comments were not implemented, like providing condoms for consensual sex among incarcerated people, but still educated the prison administration about the community's needs. *Id.* at 366–67.

223. Incarcerated people and their families submitted a petition for rulemaking and pressured the Federal Communications Commission to adopt rate caps to curb excessive prison telephone charges, although the D.C. Circuit then

Most importantly, these examples demonstrate that rather than being "simply not realistic,"[224] notice-and-comment rulemaking for corrections policies is feasible and worthwhile.

B. Protecting Rulemaking Requirements and Restraints on Agency Power

State courts facing the question of whether APA rulemaking requirements apply to DOCs are determining whether incarcerated people are part of the public or internal to the DOC. The courts' holdings depend on the judges' determinations of who constitutes the public, but these holdings also shape the bounds of the public by determining who is entitled to the public right of administrative rulemaking. In these cases, courts should be clear and thorough in identifying the issues and conducting their analyses. They should also enforce the separation of powers rather than assuming legislatures' intent to exclude incarcerated people from rulemaking protections. Legislatures, in turn, should protect administrative rulemaking processes for all as a crucial method of checking executive power.

As a first step in protecting administrative controls over prison decision-making, courts should focus on their unique role in our democracy: legal reasoning. Courts should be clear about naming the questions and issues that require addressing in a case. They should not make assumptions or skip over questions, especially when those questions are as important as whether a group of people can be considered part of the public and therefore entitled to certain public rights. After doing so, courts should be clear about the steps in their analysis and reasoning that lead to the conclusion.[225] They should give explanations rather than making conclusory statements.

Second, courts should carry out another one of their essential roles: enforcing the separation of powers. Courts should hold legislatures accountable in performing their role effectively and

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found that the rate caps were beyond the FCC's statutory authority. Littman, *supra* note 23, at 1417–19, 1462. In addition, "when the Census Bureau was considering a regulatory change that would end prison gerrymandering, about 78,000 people submitted comments, virtually all of them in support." *Id.* at 1462 (citation omitted).

224. Mandela v. Campbell, 978 S.W.2d 531, 534 (Tenn. 1998).

225. *Cf.* Pierce v. Lantz, 965 A.2d 576 (Conn. App. Ct. 2009) (skipping the steps of framing and analyzing the issue, and in doing so, setting lasting precedent that dictated the outcomes for later cases in Connecticut); *see* cases cited *supra* note 101 and accompanying text.

writing clear laws. Courts should not overstep their own role by making assumptions about legislative intent. If the text of the statute is not clear, courts should not assume that the legislature intended to deprive particular groups of people from the protections of administrative rulemaking procedure.[226] Rather, courts should prompt the legislature to amend the statute and provide clearer language if their intent was to exclude DOCs from the state APA. At least one opinion, *Middleton*, suggests the opposite of this—that the court should assume the legislative intent was to exclude the DOC and force the legislature to amend the APA to explicitly include the DOC—but this changes the default option and effectively rewrites the statute for the legislature.[227] Courts' default should be to assume that people have public rights and force the legislature to be clear about taking away those rights, rather than assuming exclusion and forcing the legislature to step in to protect a minority.[228]

Third, courts should be particularly wary when they are determining legislative intent based on deference: courts should remember that legislatures do not have to defer to correctional officials and thereby allow legislatures their full power.[229] Courts that look to legislative intent and use legislative deference to correctional agencies to determine the application of the APA conflate judicial deference and legislative deference. This is an area especially ripe for confusion, and judges should err on the side of prompting legislatures to be textually clear about the decision to expand prison administrators' power at the expense of incarcerated people's rights, rather than blurring the lines and reading deference into legislative

226. BONFIELD, *supra* note 20, at 399 ("[T]hese exemptions from the rule-making and rule-effectiveness requirements will be construed very narrowly, and in close or unclear cases they will be held inapplicable.").

227. Middleton v. Mo. Dep't of Corr., 278 S.W.3d 193, 198 n.7 (Mo. 2009) (determining in the majority that the legislature intended to exclude rules concerning inmates from rulemaking procedures, and responding to the dissent's criticism by writing, "[i]f the legislature intended to make the lethal injection protocol subject to notice and public comment . . . it can do so").

228. Even if this results in legislatures or polities acting to exclude DOCs, as has sometimes happened, it is better to have this democratic debate in the open than to have a court opinion assume this outcome and heighten the exclusion of incarceration.

229. Littman, *supra* note 23, at 1477. For example, whether rulemaking requirements are "too cumbersome" or "simply not realistic" is for the legislature, not the courts, to decide. *See* cases cited *supra* note 103.

intent.[230] Doing so would help move the doctrine towards narrow restrictions on the right to administrative procedure, as Bonfield had envisioned with the narrow internal management exception, and as applies for other state agencies.

Fourth, state legislatures should protect administrative rulemaking processes as a public right for all. Legislatures should use the power of the APA to hold public agencies accountable and to constrain arbitrary power. This includes the state DOCs. The legislature should shift power to incarcerated people, their families, and other members of the public, rather than allowing the DOC the power to operate in secret.[231] States have a "carceral burden" and responsibility to incarcerated people, who are rendered more vulnerable and less able to protect themselves because they are incarcerated.[232] Maintaining or expanding administrative rulemaking requirements would increase transparency and societal responsibility for incarcerated people, counteracting the exclusion of society's carceral bargain that allows people to ignore the existence of incarcerated people.[233] If necessary due to state case law, the state legislature should amend the text of the APA to make clear that its protections extend to DOCs as well.

Finally, to aid state legislatures, the next version of the Model State APA should include language that makes clear that exceptions should be narrowly construed by the courts.[234] The Model State APA

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230. Ideally, legislatures will choose not to exclude incarcerated people from rights like administrative procedure, and, if legislatures treat incarcerated people differently, will do so to protect them or treat them more favorably. Littman, *supra* note 23, at 1477.

231. BONFIELD, *supra* note 20, at 4 ("If we have, to a large extent, substituted law made by administrative agencies for law made by legislatures in our society . . . [w]e should . . . ensure that the process by which agencies formulate and adopt that law is an adequate surrogate for the legislative process it replaces.").

232. See *supra* note 14 and accompanying text.

233. "[W]hen someone is sent to prison, free-world citizens are able, entitled, and even invited to proceed as if that person *no longer exists*," which is possible "only because the state has built, financed, and continuously operates a vast shadow system of carceral institutions designed to keep prisoners out of sight." Dolovich, *Exclusion*, *supra* note 187, at 273–74 (emphasis in the original).

234. The 2010 Model State APA contains a comment explaining the exceptions to the definition of "rule," including the "internal management" exception. The comment clarifies that "[i]f unnamed parties in the same factual situation in the future will be bound by the statement, then it is a rule." REVISED MODEL STATE ADMIN. PROC. ACT § 102 cmt. at 17 (UNIF. L. COMM'N 2010). While

could also incorporate language that explicitly includes the DOCs. This clear language could be especially helpful in states where courts have interpreted the internal management exception too broadly, and the case law requires a legislative override. However, this proposal could have the opposite reaction—prompting legislatures to explicitly exclude the DOC—which demonstrates how difficult it is to protect or expand political power for incarcerated people. This reinforces why courts should protect procedural protections for this group from the beginning rather than removing them.

This Note was not able to address all relevant questions. Potential areas for future studies include looking at the election of state judges and determining what effect that has on these decisions; examining private prisons and whether state APAs apply with equal force to them;[235] and examining whether the findings in this paper extend to people who are incarcerated pretrial because they cannot afford bail.

CONCLUSION

State courts analyzing whether Administrative Procedure Acts apply to state correctional agencies are doing far more than statutory interpretation: they are determining the bounds of the public and who receives procedural protections against state power. These courts, and the legislatures that draft APAs, should recognize that incarcerated people remain members of the public. In these cases, courts should focus on clarity of legal reasoning and analysis rather than making conclusory statements and should enforce the separation of powers rather than assuming legislative intent to exclude minority groups. Courts should also be careful not to conflate judicial deference with legislative deference, since legislatures do not have to defer to correctional agencies. Legislatures, for their part, should protect administrative rulemaking processes as a public right.

Rather than granting DOCs exceptionally broad state power over the people in their control, allowing them to create rules unilaterally and in secret, courts and legislatures should ensure that

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this definition would cover the rules discussed in this Note, it might be helpful to be more explicit.

235. *Mandela v. Campbell* held that disciplinary procedures at a private prison were exempt as internal management, but the fact that the prison was private did not factor into the court's reasoning. Mandela v. Campbell, 978 S.W.2d 531, 534 (Tenn. 1998).

incarcerated people benefit from administrative rulemaking requirements that apply elsewhere in our democracy. These protections are particularly urgent because incarceration renders people more vulnerable. This approach would have normative value—reinforcing who constitutes the regulated public—as well as practical value, allowing incarcerated people, their families, and the broader public to influence prison rules and leverage public awareness into political pressure.

APPENDIX: SUMMARY OF CASES AND HOLDINGS

Juris-diction	**Case**	**Year**	**Do rulemaking requirements apply?**	**Which exemption does the court consider?**	**Subject matter of policies in question**
Ariz.	Wilkinson v. State	1992	Yes	Rejects internal management ("IM") and inmate exception	Religious visitation policies
Ark.	Williams v. Ark. Dep't of Corr.	2008	Yes	Rejects IM	Lethal injection
	Ark. Dep't of Corr. v. Williams	2009	No	Applies specific lethal injection protocol exemption (passed after above case)	Lethal injection
Cal.	Morales v. Cal. Dep't of Corr.	2008	Yes	Rejects IM	Lethal injection
Conn.	Pierce v. Lantz	2009	No	Applies IM	Mail censorship and commissary markups
Ga.	Hill v. Owens	2013	No	Applies IM	Lethal injection
Idaho	Searcy v. Idaho Bd. of Corr.	2015	No	Applies IM exception within a statute that pertains specifically to the Board of Correction (not the general APA)	Fees on commissary goods, photo-copying, medical services, and phone calls
N. Mar. I.	Ray v. Attao	2018	Yes	Rejects IM	Disciplinary procedures
Ky.	Bowling v. Ky. Dep't of Corr.	2009	Yes	Rejects IM	Lethal injection
Md.	Massey v. Sec'y, Dep't of Pub. Safety and Corr. Servs.	2005	Yes	Rejects IM	Disciplinary procedures

Juris-diction	**Case**	**Year**	**Do rulemaking requirements apply?**	**Which exemption does the court consider?**	**Subject matter of policies in question**
	Evans v. State	2007	Yes	Rejects IM	Lethal injection
Mich.	Martin v. Dep't of Corr.	1986	Yes	Rejects IM	Disciplinary procedures
Mo.	Middleton v. Mo. Dep't of Corr.	2009	No	Applies inmate exception; lower court had applied both IM and inmate exception	Lethal injection
N.J.	Boone v. N.J. Dep't of Corr.	2009	No	Applies IM	Housing transfer
	Grimes v. N.J. Dep't of Corr.	2017	Yes	Rejects IM	Calling policy
N.Y.	Jones v. Smith	1985	Yes	Rejects IM	Disciplinary procedures
R.I.	Leach v. Vose	1997	No	Applies IM	Disciplinary procedures (good-time credits)
	L'Heureux v. State Dep't of Corr.	1998	No	Applies IM	Disciplinary procedures
Tenn.	Mandela v. Campbell	1998	No	Applies IM	Disciplinary procedures
	Boles v. Tenn. Dep't of Corr.	2001	No	Applies inmate exception	Visitation policies
	Fuller v. Campbell	2003	No	Applies IM	Drug testing procedures
Va.	Porter v. Common-wealth	2008	No	Rejects IM but applies inmate exception	Lethal injection
Wyo.	Bird v. Lampert	2021	No	Applies IM	Inmate class-ification policies