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Cruel and Usual

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CRUEL AND USUAL

Footnote Forum Podcast, a CUNY Law Review Production

Michael Maskin: In the summer of 2022, Footnote Forum,¹ the digital portion of the CUNY law review, will publish an article called *Cruel and Usual*. This is one of its authors, Shannon Haupt.

Shannon Haupt: Yeah. So I decided to go to CUNY² and law school in general based on experiences I had living in Michigan and especially advocacy around water issues in Kalamazoo with the Enbridge oil spill³, in Detroit with water shutoffs⁴ and clean air advocacy⁵, and being so approximate to Flint during the height and aftermath of the Flint water crisis,⁶ which sometimes is hard to describe as an aftermath because a lot of people still don't have clean water. So I came to law school in general thinking about environmental advocacy and starting to expose myself to prison abolition theory and activism and the Black Lives Matter movement.

Michael Maskin: When Shannon arrived in New York City, they attended an admitted students event at CUNY School of Law. Other students sat around the table, some new to the city as well, some not. Several professors worked the room, welcoming students to law school and doing their best to stir up a sense of community. One of them, Steve Zeidman, runs the Defenders Clinic.⁷ One of the gold stars on the school's report card, he has salt and pepper hair and a certain gravity unique to long-time public defenders who've seen it all, or to spiritual gurus. Sometimes he seems like both.

¹ *Footnote Forum*, CUNY L. REV., <https://perma.cc/EW7Q-P6W8> (last visited May 1, 2022).

² *CUNY School of Law*, <https://perma.cc/HXP9-PS6X> (last visited May 1, 2022).

³ *Enbridge Spill Response Timeline*, U.S. ENV'T PROT. AGENCY, <https://perma.cc/PJ7A-PDV4> (last visited May 1, 2022).

⁴ See, e.g., Joel Kurth, *Detroit Shut Off Water to 11,800 Homes This Year. Most are Still Off* (Aug. 19, 2019), <https://perma.cc/YC4J-4ZZ9>.

⁵ *Breathe Free Detroit*, ECOLOGY CTR., <https://perma.cc/4NWW-9GE5> (last visited May 1, 2022).

⁶ Melissa Denchek, *Flint Water Crisis: Everything You Need to Know* (Nov. 18, 2018), NAT. RES. DEF. COUNCIL, <https://perma.cc/S4RM-KYLT>.

⁷ *Steve Zeidman*, CUNY SCH. OF L., <https://perma.cc/J7XN-SBAR> (last visited May 1, 2022).

Shannon Haupt: We just started chatting and I talked about some of my background, but that I was also really interested in public defense and that I couldn't—I didn't quite know what the crossover was between those things.

Michael Maskin: Professor Zeidman nodded and smirked after a well-timed pause-

Shannon Haupt: He was just like, "They're more connected than you think." I had no idea really where that would take me but I think it has really guided a lot of what I've tried to involve myself in at school and trying to marry the work that I was exposed to before law school and what I've been doing since. So yeah. Yeah, and now here we are talking about environmental justice inside of prisons.

Michael Maskin: This is the Footnote Forum podcast. I'm your host, Michael Maskin. This year, in the Footnote Forum, we have focused on personal experiences of incarcerated people. In the 25.2 release of our journal, our colleagues present scholarship about environmental justice and especially, how these issues affect marginalized groups. This episode continues those threads with what we think is a really amazing story about a fantastic article written by our classmates, Shannon Haupt and Phil Miller. Shannon is, well, I'll let them introduce themselves.

Shannon Haupt: I'm Shannon Haupt. I am a 3L at CUNY School of Law. I live in Brooklyn and my pronouns are they/them.

Michael Maskin: Fast-forward from the story you heard at the beginning of this episode, Shannon is now in the Defenders Clinic with Professor Zeidman, finding out how true his words were from years ago. This past summer, the summer of 2021, Shannon and our producer Colby went for a walk on the east side of Manhattan. Shannon was so excited about work they were doing with an incarcerated man upstate. The work centered around this man's failing health, poor medical care and some very concerning conditions in the prisons where this man lived, and it all started in the Defenders Clinic.

Shannon Haupt: The Defenders Clinic focuses mostly on clemency, though not exclusively. Clemency is an executive power that the governor of every state has to grant people their freedom from prison, essen-

tially the stroke of a pen.⁸ And so what we do in the Defenders Clinic is work with people who have exhausted every other avenue of possible release from prison, especially people serving really long sentences.

Michael Maskin: Students in the Defenders Clinic partner with these applicants.

Shannon Haupt: And we basically build a relationship with them and their community and support network and build their case of why they should be granted clemency.

Michael Maskin: So when someone gets a really long sentence and has no more chance to appeal and no hope for parole anytime soon, a state's clemency statute gives the governor the power to simply set people free.

Shannon Haupt: I was paired with Susie Charlop, who is another 3L at CUNY, a really great friend and really awesome advocate. And the two of us met Ramon.

Michael Maskin: Shannon and Susie worked with Ramon for several months compiling his case for freedom.

Shannon Haupt: And submitted his clemency application in November of 2021. Yeah and so we emailed and sent just a little intro like, I'm Shannon, I'm Susie, and sharing a little bit about ourselves. I think something that the Clinic emphasizes is, and I think the work in general, it's really important for this kind of work to move from a relationship-building place, so we don't jump right into all the legal issues. It's more about just getting to know each other and building a lot of trust at the start. He replied pretty quickly and was really excited to hear from us. I remember one of the first things that he said because we came ready with a lot of questions to ask him, which now being the one being asked questions, I know how it feels. And he would say sometimes like, "Oh, I'm kind of shy, I don't know."

And then he'd launch into a story and that's one of my favorite things about him is that he has this very gentle presence and then can just really, it's very brave and vulnerable and I think it's really cool. Yeah. While it's not explicitly legal advocacy, clemency is I think a lot of narrative, like providing a human story. There are legal issues that are

⁸ *Executive Clemency*, N.Y. DEP'T CORR. & COMM. SERVICES, <https://perma.cc/5QAL-PBD9> (last visited May 1, 2022).

raised but it's not a legal process. It's a political process. Our understanding is that thousands of people apply for clemency.⁹

Michael Maskin: In a good year, maybe a handful are granted.¹⁰

Shannon Haupt: A lot of people, I think, pursue clemency and clemency is viewed as a last resort.

Michael Maskin: The applicants chosen to work with the Defenders Clinic are not likely to get out without it, even though it's a long shot. One recent client is doing 75-to-life. Meaning he will not be eligible for parole until he's 101 years old. Clemency is his only chance at freedom again in this lifetime. But this story is not about clemency.

Shannon Haupt: So Susie and I were working with Ramon to get all of his records together. As someone who has moved through the prison system for 30 years, Ramon has a lot of paperwork and there's a whole process for requesting documents, and one of the documents we request is medical records.

Michael Maskin: At the same time, Ramon told them he had been feeling terrible and thought his health was failing him.

Shannon Haupt: He was in and out of the hospital pretty regularly.

Michael Maskin: Within a year and a half Ramon suffered-

Shannon Haupt: Four separate strokes.

Michael Maskin: And it seemed like no one had a handle on what was causing this.

Shannon Haupt: We are learning that from him anecdotally, and then seeing it on record, of the disjointedness of being sent to a specialist here, being sent to a specialist there.

⁹ *Seeking Mercy From Hochul: Three New York Prisoners Plead Their Cases*, THE CITY (Dec. 19, 2021), <https://perma.cc/NU6Q-QEHU>.

¹⁰ *Governor Hochul Grants Clemency to 10 Individuals and Announces Formation of New Clemency Advisory Panel*, GOVERNOR'S PRESS OFF. (Dec. 24, 2021), <https://perma.cc/95BT-FZCS>.

Michael Maskin: Still Ramon kept identifying new symptoms but no one settled on a diagnosis. Ramon communicated to Shannon and Susie that he continued to feel worse.

Shannon Haupt: So that was obviously a huge alarm for us.

Michael Maskin: Finally, on the advice of professors and mentors and in an effort to try and get Ramon the treatment he needed-

Shannon Haupt: We filed a medical parole application¹¹ on his behalf. We worked with a nurse, Jennifer Grossman, who is really awesome. She has started her own organization called Nurses for Social Justice.¹² We basically sent her all of Ramon's medical records and she was able to put it all together and sort of see a cohesive narrative of, these are the persistent things that keep happening. And he's been treated for strokes four times and they diagnosed this, but he hasn't been treated for it. And basically gave us his entire medical history. And seeing it all in front of us. I remember having calls with Jennifer who has worked with a lot of people on similar issues and she said a few things along the lines of like, this is the worst care that someone has received that I've seen.

Jennifer Grossman: None of that is surprising.

Michael Maskin: This is Jennifer Grossman of Nurses for Social Justice.

Jennifer Grossman: When you read medical records from prisons and jails, I don't know if you can be surprised by the horror of medical issues that goes on there. If you are incarcerated for years and you're drinking water that's contaminated, there's just so many, there's immediate and really long term problems with that. The immediate effect is going to be the symptoms of constipation or diarrhea, stomach cramping, things like that, but the long term of course is cancer.¹³ That's the biggest concern. And there was a study that came out in 2020 I think that talked about the plethora of cancers that are related to contaminated drinking water.¹⁴

¹¹ Cindy Rodriguez, *Sick And Frail As COVID-19 Looms: Medical Parole Still Rare In New York State*, GOTHAMIST (Dec. 30, 2020), <https://perma.cc/DH8G-R3HR>.

¹² *Nurses 4 Social Justice*, <https://perma.cc/P5SR-YMDM> (last visited May 1, 2022).

¹³ *Report on the Environment: Drinking Water*, U.S. ENV'T PROT. AGENCY, <https://perma.cc/U2P7-RAJX> (last visited May 1, 2022).

¹⁴ See Sydney Evans et al., *Cumulative Risk Analysis of Carcinogenic Contaminants in United States Drinking Water*, 5 HELIYON (2019), <https://perma.cc/99Q9-V5WZ>.

Michael Maskin: When Jennifer looked at all of Ramon’s records, she saw many symptoms such as stomach aches and constipation, which could easily go overlooked in a massive bureaucratic institution like the prison system.

Jennifer Grossman: When I looked at Ramon’s case, it was just very clear that he had been really suffering for a long time without the care that he needed and that he was not being paid attention to.

Shannon Haupt: She would be apologizing to us for sounding so angry because of how angry Ramon’s medical records made her. And it was really scary and really grounding that something needed to change and that there’s more going on than what the medical system was acknowledging with Ramon’s symptoms.

Michael Maskin: So let’s talk about the water. Some of the language in the article, and I can quote, “The water smelled like a pond.” “For nearly 18 months,” the water at Elmira Correctional Facility,¹⁵ where Ramon was incarcerated, was “brown and hot to the touch.”¹⁶ Drinking it made [his] ears ring. He said “[i]t tasted like chemicals . . . messed up [his] stomach.”¹⁷ So hearing that and hearing him, I guess — when did he first mention the water? When did it first become an issue that you realized, “Oh, wait, there’s something going on here”?

Shannon Haupt: There was a night many, many years ago where Ramon was in his cell, and the water had been really bad, and then all of a sudden it wasn’t anymore, and then he and his cellmate filled up plastic bags with the water and tied them off and put them under their bed because they weren’t sure how long the water was going to be clean for or healthy to drink for.¹⁸ And Ramon has a long history of gastrointestinal, stomach issues.

Michael Maskin: Ramon also came down with —

Shannon Haupt: — pneumonia around that same time.

¹⁵ *Elmira Correctional Facility*, N.Y. DEP’T OF CORR. & CMTY. SUPERVISION, <https://perma.cc/MY2T-847P> (last visited on May 1, 2022).

¹⁶ Shannon Haupt & Phil Miller, *Cruel and Usual: Contaminated Water in New York State Prisons*, 25 CUNY L. REV. FOOTNOTE F. 120, 126 (2022).

¹⁷ *Id.* at 148.

¹⁸ *See id.* at 147.

Michael Maskin: So Shannon and Susie began tapping their networks asking, “What do we do? How can we help this man?”

Shannon Haupt: And we pretty quickly were able to set up a call with Mark Shervington, who is an advocate with the Release Aging People from Prison campaign¹⁹ and was really enthusiastic to talk to us about his experiences and his perspective on the issue. He shared about his time at Otisville Correctional Facility²⁰ and the prevalence of *H. pylori*, which is a bacteria that can travel through water as well as other ways of transmission.²¹ But his recounting was that *H. pylori* was a huge issue at Otisville.²² That I think was a tipping point in looking at the issue because we were able to find cases from Otisville and Green Haven²³ a little bit later on that were filed by prisoners representing themselves, alleging these issues.²⁴

And a lot of them are two parts. The first is the water issue and then the second is the denial of medical care related to whatever health issues they got from the water. *H. pylori* causes a lot of gastrointestinal- at minimum, discomfort, and at the most, it can have really serious long term effects.²⁵ He mentioned having pneumonia around the time that the water switched from being terrible to clean enough that he filled up bags

¹⁹ *About Us*, RELEASE AGING PEOPLE IN PRISON, <https://perma.cc/6THA-XTZD> (last visited May 1, 2022); see also *Our People*, RELEASE AGING PEOPLE IN PRISON, <https://perma.cc/4V5F-JCDF> (last visited May 1, 2022) (explaining Mark Shervington’s background and leadership role at the agency).

²⁰ *Otisville Correctional Facility*, N.Y. DEP’T OF CORRS. AND CMTY. SUPERVISION, <https://perma.cc/R4MK-BSF3> (last visited May 1, 2022).

²¹ See *Helicobacter Pylori (H. Pylori) Infection*, MAYO CLINIC (May 28, 2021), <https://perma.cc/969V-2SHS> (describing symptoms, causes and risk factors of *H. pylori*); see also Edward Lyon, *Preliminary Injunction Sought Over Contaminated Drinking Water at Connecticut Prison*, PRISON LEGAL NEWS (Jan. 9, 2020), <https://perma.cc/P96Y-YYSG> (accounting for cases of *H. pylori* due to water contamination in prisons in Connecticut).

²² See, e.g., *Cherry v. Edwards*, No. 01 CIV. 7886 (FM), 2005 WL 107095, at *1-6 (S.D.N.Y. Jan. 18, 2005) (describing complaints of *H. pylori* exposure by people incarcerated at Otisville Correctional Facility dating as far back as 1999).

²³ See generally *Green Haven Correctional Facility*, N.Y. DEP’T OF CORRS. AND CMTY. SUPERVISION, <https://perma.cc/H7P7-27KR> (last visited May 1, 2022).

²⁴ See *Cherry*, *supra* note 22; see *Wright v. N.Y. State Dep’t of Corr. Servs.*, No. 06CIV03400(RJS)(THK), 2008 WL 5055660, at *1-9 (S.D.N.Y. Oct. 10, 2008) (describing complaints of exposure to *H. pylori* exposure and other bacteria from contaminated water by people incarcerated at Green Haven Correctional Facility).

²⁵ See MAYO CLINIC, *supra* note 21 (listing the symptoms of *H. pylori* infection, including abdominal pain, nausea, loss of appetite, frequent burping, bloating, and unintentional weight loss and longer term complications including ulcers, inflammation of the stomach lining, and stomach cancer).

with it. And I did a Google search about Legionnaires' disease,²⁶ which was something that was co-occurring in Flint, Michigan with the lead water crisis.²⁷ Legionnaire's disease is a type of pneumonia caused by Legionella bacteria.²⁸

Michael Maskin: Remember from the intro, Shannon was doing environmental activism in Michigan when the Flint water crisis story made national news.

Shannon Haupt: It was all over the news all the time that there was Legionnaires' outbreak in the water.²⁹

Michael Maskin: In putting together this episode, we found it remarkable how many of Shannon's life experiences came together in one man's story. Not only did Shannon move to New York for law school, but at their first event, they sat next to the professor who is a recognized leader in the field of clemency. They got paired with a client, not only who sought clemency but who also needed medical attention. His randomly selected clinic student just happened to be someone who lived near Flint during that tragedy and who could begin putting these pieces together. Still there's only so much anyone can do when evidence and the people who need to hear it are separated by walls, fences, and an information barricade through which even a simple phone call can be difficult.

Operator: The prepaid collect call from an incarcerated individual at state department of corrections and community supervision. This call is subject to recording and monitoring. To accept charges, press one. To refuse charges, thank you for using Securus.³⁰ You may start the conversation now.

²⁶ See *Legionnaires' Disease*, MAYO CLINIC (May 24, 2021), <https://perma.cc/N42C-F6ZT> ("Legionnaires' disease is a severe form of pneumonia — lung inflammation usually caused by infection. It's caused by a bacterium known as legionella.").

²⁷ David Shultz, *Was Flint's Deadly Legionnaires' Epidemic Caused by Low Chlorine Levels in the Water Supply?*, SCIENCE (Feb. 5, 2018), <https://perma.cc/AW73-SGCN> (describing a study linking an increase in Legionnaires' infections in Flint with a decrease in chlorine in the city water supply during the water crisis).

²⁸ See MAYO CLINIC, *supra* note 26.

²⁹ See, e.g., Ralph Ellis & Sara Ganim, *Flint Learns of Legionnaires' Disease Spike as Water Crisis Continues*, CNN (Jan. 13, 2016, 8:13 PM), <https://perma.cc/ZMQ2-5KLM>.

³⁰ *About Us*, SECURUS TECH., <https://perma.cc/77DA-KTC8> (last visited Apr. 27, 2022).

Ramon Henriquez: My name is Ramona Henriquez. I'm a prisoner here at Sullivan correctional facility³¹ in New York state. I've been incarcerated 30 years going up 31 since I was 16 years old. I'm serving 40 years to life for double homicide. I took two lives when I was a kid. I'm sorry, I can't.

Shannon Haupt: It's okay, Ramon. You're doing great.

Ramon Henriquez: You got me crying and in a maximum security prison. You got to be ashamed of yourself.

Michael Maskin: Ramon told us about experiencing his first stroke.

Ramon Henriquez: I pick up the water, the pot, to pour the water to a cup in this hand, and the pot falls out of my hand. And I said, "Yo, I couldn't hold it up." And my hand just went weak, and then my leg went weak, and I fell on the floor. And I'm still talking to him like—

Shannon Haupt: Yeah

Ramon Henriquez: like my life depended on it, right? And I'm explaining through the process that what my mind is going through that I feel like somebody is squeezing my brain. They started yelling for the officers. Then they came and took me out, and they thought I was on drugs. And they're asking me what did I take? And I'm telling them, "Look, I don't feel my hand. I don't feel my leg, my arm, my whole left side's numb." And . . .

Michael Maskin: Over the course of 2020 Ramon would have four confirmed strokes. Soon after, Shannon and Susie came up with the idea of applying for medical parole for Ramon. One of the stories Ramon tells which led to the suspicion that the water in his prison could be a major source of his health problems involves an ice machine. Ramon has been a refrigeration mechanic inside. While working on ice machines and other pipes, he would see serious corrosion to pipes and tubing where it should not normally exist. This was caused by the same water coming out of the faucets in the cells. Ramon described it as —

Ramon Henriquez: Like you're drinking pond water. It smells like pond water. Right, now, this is water that's supposed to be chlorinated

³¹ *Sullivan Correctional Facility*, DEP'T OF CORR. AND CMTY. SUPERVISION, <https://perma.cc/6ASV-U7H3> (last visited Apr. 27, 2022).

and all that, treated. At Elmira Correctional Facility, the water was rust. They had a steam return line break upfront somewhere in the superintendent's office, and they had to shut the steam down. Now, the water I had coming out of my cell, I put grievances in, I put complaints in. They just said I was crazy. They put me in mental health, the water used to come out hot.

Shannon Haupt: Yeah

Ramon Henriquez: Right. This is H block in Elmira and G block. The water was coming out hot, and it looked like tea from the rust. And I told them that this tasted and smelled like the condensate return from the steam. I said, it shouldn't be possible that this is coming out of my sink. And it used to hiss like "sh sh", you know. So it was like a lot of air pressure, and there's supposed to be no air in there.

Shannon Haupt: Yeah

Ramon Henriquez: So I told them, I said, "You might have the steam return hooked up somewhere." "Shut up. You're stupid. You're crazy. You don't know what you're talking about." They sent me to mental health. Now, I ended up getting a psychiatric evaluation over that.

Shannon Haupt: Wow.

Ramon Henriquez: Okay. So then that pipe broke and the *water was ice cold and crystal clear*. The whole time I took plastic bags and filled them up with water, made the garbage bags.

And I filled up all the buckets and bowls I had in my cell. I had a problem defecating because I couldn't use the bathroom because I was always dehydrated.

Shannon Haupt: Yeah

Ramon Henriquez: No matter how much of this water I would drink, I couldn't go to the bathroom. That day I drank that water out of that sink that was clear, and my neighbor too also, we drank that and we were able to use the bathroom like 10 minutes later. You go to the shower, I don't know if it's too much chlorine in the water or whatever it is, but it burns your eyeballs. Here they had fecal matter in the water in the summertime. They never told us anything too. The Department of Health was the one that made the complaint and they gave us water, but

they never told us that they had emails and they'd been warned that there was fecal matter in the Old Fallsburg area in the drinking water. Oh, that's my stomach though. I have to take medication for my stomach every day. Two pills, 40 milligrams of Prilosec. I mean Pepcid every day.

Shannon Haupt: Yeah

Ramon Henriquez: For the rest of my life.

Michael Maskin: Ramon, did you ever talk with any of the COs or any of the prison staff about the water and try to see if they could do something about it?

Ramon Henriquez: Yeah. You know what they did, they sent me to mental health. They said I was crazy.

Shannon Haupt: Ramon, I'm wondering, do the COs drink the water themselves?

Ramon Henriquez: Only if they got to boil it. I've seen them drink it.

Shannon Haupt: Yeah.

Ramon Henriquez: But nobody drinks it straight up, no, except us. And the bottle. We buy bottles of water, 20 ounce bottles of water for 31, 36 cents a bottle. So that's \$17. You only can buy 48 and 48 don't last.

Shannon Haupt: Right.

Ramon Henriquez: H. pylori is very present at this prison. And we don't know how we're getting it. Either we are getting it from the trays or the food utensils that are being used in the mess hall to cook, or maybe it's the water itself coming out of the sink. But *a lot* of people are getting that here.

Michael Maskin: It seems like he was being gaslit and he was relying on rumors from other people incarcerated. He was relying on just these whispers about the water which, you know. Here's someone who's getting pneumonia, getting Legionnaires' disease from brown, hot murky water, and yet, the COs, the corrections officers are bringing their

own bottled water in. It seems like no one was taking seriously what he was saying that he's literally getting sick from being forced to drink this water that he has no choice not to drink. It really seems like there is this collective resistance to actually acknowledging that what he's saying is true.

Shannon Haupt: There's a huge gap between what people are experiencing inside of prison day to day and what DOCCS have on record as far as the quality of the conditions. I think still Ramon would say that like it's not just the water that's causing his health issues. We know that every year spent inside takes on average two years off of someone's life and that's for a lot of reasons. Water is possibly one of them. Based on what people are experiencing inside, it very likely is. And I'm hedging that against what is actually being reported, which is that the water is fine and that there are no contaminant exceedances or anything like that for us to be worried about. So, there is this like very infuriating, I think gaslighting is a really good way to frame it because, yeah, Ramon filed grievances³² about this, which are complaints up the chain of command inside of a prison often just get reviewed and nothing actionable comes from it.

But it's often, like for Ramon, the only way that he could lodge a complaint about what was going on. I mean Ramon is incredibly resilient and creative and has just been so attentive to what's going on throughout the time that he's been inside. One of the first places that I found a source about contaminated water in prison was Prison Legal News,³³ which is a website that people who are currently incarcerated often write to and are published in. And I found an article written by someone talking about ways to filter your water in your cell and of ways to test it and treat it with just things that you might have.

Panagioti Tsolkas: My name is Panagioti Tsolkas. I use him/his pronouns.

³² The formal complaint procedure for people incarcerated in New York State Prisons is governed by the Prison Litigation Reform Act. The first action a person must take to raise an issue is to file a grievance. The grievance process is an internal complaint system governed by the prison itself. When a grievance is denied, the person can appeal the denial. An incarcerated person cannot pursue legal action until they have exhausted all administrative remedies, e.g. filed a grievance, and appealed its denial. This process of "exhaustion" can take years. See 42 U.S.C. § 1997e(a); see also AM. C.L. UNION, *Know Your Rights: The Prison Litigation Reform Act (PLRA)*, <https://perma.cc/4X3W-L8E9> (last updated Nov. 2002) (explaining the grievance process).

³³ *Prison Legal News*, HUM. RTS. DEF. CTR., <https://perma.cc/583W-5DC8> (last visited Apr. 27, 2022).

Michael Maskin: This is an assistant editor with Prison Legal News, the site Shannon just mentioned. They provide resources to incarcerated people and their families, often about the conditions of confinement.

Panagioti Tsolkas: One of the topics that we've looked into a lot is environmental justice in prisons and specifically water quality and the impact of building prisons and operating prisons, both on prisoners and on the surrounding ecosystems. The outcome that we found consistently was that prisons are toxic places generally, and that there's specific aspects of toxicity that can be attributed to them.

Michael Maskin: Some of the problems they found include-

Panagioti Tsolkas: The higher levels of radon, poor ventilation and in other ways totally substandard healthcare to address a problem or even recognize it, water contamination, sewage problems.³⁴ They were finding broad spectrum violations consistently at prisons. And I think that points to what could be done. But the problem as we know is that prisons don't tend to get scrutinized at that level. And some areas are actually exempt from certain standards. Like you can't apply OSHA standards or labor standards to prison work because, not actually, people aren't considered employees or laborers.³⁵ Essentially, they're considered slaves under the 13th amendment so labor protections don't apply to them.³⁶ So in relation to environmental policy, you know, so we see that these policies are on the books that do exist to protect public health, but they don't get applied in a way that protects prisoners.

Panagioti Tsolkas: I think the example you gave of medical neglect and prisons is also very similar where there are these mandates on the books that people are supposed to benefit from basic public health

³⁴ Panagioti Tsolkas, *Litigation Surrounding Radon Exposure at Connecticut Prison Moves Forward*, PRISON LEGAL NEWS (Nov. 6, 2018) at 45, <https://perma.cc/79RF-4KKF>; Panagioti Tsolkas, *Incarceration, Justice and the Planet: How the Fight Against Toxic Prisons May Shape the Future of Environmentalism*, PRISON LEGAL NEWS (Jun. 3, 2016) at 1, <https://perma.cc/327D-URSJ>.

³⁵ *Harker v. State Use Indus.*, 990 F.2d 131, 135 (4th Cir. 1993).

³⁶ Daniele Selby, *How the 13th Amendment Kept Slavery Alive: Perspectives From the Prison Where Slavery Never Ended*, INNOCENCE PROJECT (Sept. 17, 2021), <https://perma.cc/9NWJ-QEEE>; see also Becky Little, *Does an Exception Clause in the 13th Amendment Still Permit Slavery?*, (Oct. 2, 2018), <https://perma.cc/9NWJ-QEEE> (first-hand accounts of labor conditions at Angola Prison).

standards whether they're in prison or not, but we see it so often that it doesn't happen that way. And I think at the common thread there is that there's a level of is a dehumanization or maintaining like kind of a second class of people when someone is put in a jail or prison that there's a question about whether they are afforded the same basic rights and the same basic human and civil rights.³⁷ And I think pointing to the prison labor slavery problem, that that's a clear indication that there is very much so on the record in the US Constitution an acceptance of prisoners as less deserving of basic human rights and protections. And that's got to change. I think in order to address the toxic water problems in prisons that has to change.

Phil Miller: Three of my years inside were spent inside of solitary confinement. But my first couple of weeks, I began to notice like pressure and pain in my lower abdomen and what it was was a hernia. And I knew what it was because I had had one before, maybe five years earlier. So my name is Phil Miller. I am a 2L at the CUNY School of Law. My pronouns are he, him, his, and I'm familiar with some of the aspects about water in prison because I spent 17 years of my life in New York state prisons. And so I remember the nurse walking down the gallery one day and I was trying to get her attention because the solitary, you know, you're lucky when people decide to walk down the gallery and if you have to share a story with them and tell them something, you want to make sure you get their attention because they speed walk and it might be another day or who knows, all day before they come back.

Michael Maskin: In order to get a nurse's attention, people in solitary would often have to-

Phil Miller: Bang on the door, shout, wave, something, anything to catch their attention, whether they hear you see you, something. So this nurse was walking down the gallery and I got her attention. She came to the cell and I said, "Listen, can you please put me on the medical call out list so that I can see the doctor because I have a hernia." And she just stared. She's like, "You have a hernia?" I said, "Yeah, I have a hernia." She's like, "How do you know?" I was like, "Well, I had one before and I know what it feels like." She was like, "How long have you been feeling the pain or how long do you think you've had this hernia?" And I'm like, "I've probably had this hernia now for at least a few

³⁷ *Prison Conditions*, EQUAL JUST. INITIATIVE, <https://perma.cc/F8AY-6TTP> (last visited Apr. 27, 2022).

months, at least and it's a point now where it's bulging through the skin and I know what it is."

And she was like. "Impossible." She said, "If you've had a hernia for that long, you'd be dead already." And then she walked away and she didn't put me on the medical call out list so I never got to see the doctor. She came back, the next day, I said, "Listen, can you please let me see the doctor?" And there in most facilities, and especially in a solitary confinement facility, the nurse who does the rounds is the gatekeeper between you and the doctor. So getting to see the doctor, you have to go through the nurse first and they have to take your name and everything like that. So I ended up having to write letters to everyone, grievances, letters to outside organizations, to all of the prison's administrative staff until finally someone listened and got me to see the doctor. And soon as I saw the doctor and he checked me out, he said, "This is a hernia. It's kind of advanced. What took you so long to come see me?" I was like, "You got to be kidding me." But yeah, that kind of thing happens a lot.

The water complaints were *almost never* taken seriously. Usually when things start happening with the water, the first thing that starts happening is prisoners will begin to speak amongst themselves like, "Yo, my water's coming out of my sink, this color or this taste." And someone else will like, "Yeah. So is mine." Blah, blah, blah. And then we'll talk to somebody in another building to see if they're having similar issues. And eventually we'll make it to, we'll start talking to the ILC reps,³⁸ I mean liaison. Now they switched it to I think offender liaison something, but it was called the inmate liaison committee. And their job is to take any complaints from the prisoner population to the prison administration and share our concerns and try to find a resolution. And so you would bring the issues to them. The facility staff would listen to those issues.

And then in terms of water specifically, they'd always say, "There's nothing wrong with the water. It was tested at the source. It's fine." Meanwhile, on our end, the prisoner side of the sink, the water comes out brown. It tastes super metallic. It's hard to drink. Me and other friends of mine would try to mask the flavor because you need water and your cell is locked, you're not getting water from any other source, it's the sink where it's going to come from. And so if it's brown or tastes horrible, you still need water whether it's to make your juice or your coffee or cook your spaghetti or whatever you have, you need the water.

³⁸ N.Y. DEP'T OF CORR. AND CMTY. SUPERVISION, No. 4002, INCARCERATED LIAISON COMMITTEE (ILC) (Aug. 2, 2021), <https://doccs.ny.gov/system/files/documents/2021/08/4002.pdf>.

And so we would try to mask the flavor of it with iced tea packets, mixed two or three of them together and just hope that the flavor of the iced tea would overpower whatever flavor of the water already had or coffee or hot chocolate, things like that.

But even with those additives, you'd still be able to taste the water. Many facilities do sell bottled water. Not every facility sells it in their commissary. And when they do, you're limited by the amount of income you have because your prison wages are usually, average is about 25 cents an hour. If you have a good job depending and by good, I mean one of the higher paying ones, which can go up to 35 cents an hour, 36 cents. If you're making license plates for the state like in Auburn correctional facility, I think they might go as high as 60 something cents. Maybe one or two people have that high of a pay grade. But for the most part, people are not making enough money to buy enough bottled water to last them every single day of the month. At some point you have to drink water in your cell and there's just no way around it.

Michael Maskin: And did the guards have to drink it too?

Phil Miller: Oh no, no, no. I've never once in all of my years seen a CO drink water, prison water. Every single one of them had big, clear gallon jugs of their own water and they would just carry it with them like it was a pet. They just put it down on the desk, wherever they went, they walked with it, took it with them. They would not drink regular water. And I've had COs tell me, "You couldn't pay me to drink this water."

Michael Maskin: Phil said people even tried to convince their visitors to sneak water out of the facility from the visiting room and to have it tested. They hoped this might lead to universal testing inside the prison.

Phil Miller: That was our dream for all the prisons, really.

Michael Maskin: From an advocacy perspective, we talked a lot about voicelessness, helplessness. And yet it sounds like there are incarcerated people who are yelling, who are literally yelling and trying to make noise and raise awareness. And so as somebody who's worked as a jailhouse lawyer, and also now you can see from an advocacy perspective, how would you suggest what is effective?

Phil Miller: Well, there's only so much you can do. Almost always someone, people will try to come together and try to find a way to bring

more attention to something. So another example of helplessness, that word just triggered something and it's not related to water, but while I was in solitary confinement, a few cells down for me was a guy who had been there for a couple of years already or a few years already. But he was in his cell and he began yelling for help. Now in solitary confinement, the guards are lazy so they rarely will do their rounds. They're supposed to make rounds every certain, I don't know if it's every hour, every 45 minutes, something like that and then check off whatever form that says they made their round or click a button on the wall somewhere that does it.

But many times they don't do it or they'll come in just to where the button is and then go around as a shortcut and hit the other one, just so it looks like they made their rounds, they do stuff like that. And so they don't really walk as much as they're supposed to. And so there's this one guy who was having a heart attack in his cell and he began to yell for help and no guards were coming. And so finally, you know, his neighbors heard him and then everyone, they started saying, "Yo, what's up, what's up?" He's like, "Please, please call for help." And so then they start yelling and then everyone else hears it. We can't see each other because we're all in our individual cells but we hear it and so then everyone starts yelling to try to make more noise for a guard to hear us on the gallery. So they come down to see at least what the fuck is going, what's happening. Damn.

And so the guards finally came down, but in solitary, there are special procedures before they can open the cell because they in their minds, they think maybe you're just faking this to get them to open the gate so you can attack them or something stupid like that. So a guard came down, he wouldn't open the gate to help him, the guy is on the floor yelling, "Please help me. My chest is hurting. Please help me!" That CO was like, "I can't do anything." So he called the Sergeant. He had to wait for the Sergeant to come down. The Sergeant came down, but they still don't have enough staff ratio for one person. They need three or something like that. So they had to wait for more people. By the time they got him out, he died and he had been calling for help for maybe about 10 minutes. It's just a crazy situation. So there's always an air of helplessness.

Michael Maskin: Why not just fix the water? Why is there such a hesitancy from docs to make these changes? It would cut down on complaints. It would probably mean an increase in state funding to these facilities and make them more habitable. Why is there this hesitancy, this gaslighting, this indifference to actually making these changes?

Phil Miller: I have no idea why facilities or the entire system wouldn't want to look into the complaints about water more seriously and have it tested inside. It could only be to the benefit of everyone who's drinking it. One guess, and I'm probably wrong but would be maybe the negative publicity that would come from confirming something was actually wrong with water in multiple locations. And that just negative publicity for the DOCCS system, but anything that happens in DOCCS reflects on the governor. So usually governors have their little secret backdoor quiet policies about what's going to come out to the media, what's not about prisons. Prisons are the worst thing the governor has to deal with in terms of publicity.³⁹ And so I'm thinking that might be a deterrent, but that's just my guess because I really don't know why they would not want to test the water. I don't know.

Michael Maskin: So what happens next?

Shannon Haupt: So, zooming out a little bit, a gap that seemed like it needed to be filled is, what is the actual testing practices for water in prisons? What is it right now? Because people inside are not apprised of the information, and on paper the results are coming back that there's no contamination. And yet, we have a litany of complaints about the terrible quality. And so what's actually going on?

Michael Maskin: Shannon worked with a number of professors and legal professionals to draft FOIL requests⁴⁰ to find out more about water testing in prisons and about how water moves through the facility. They discovered several cases where people tried to bring attention to these issues in court only to be denied early in the process every time, even where an incarcerated person's claim narrated experiences similar to Ramon's and raised issues about the water.⁴¹

Shannon Haupt: If DOCCS comes back and says, "Here's our official record, the water's clean." Then, the case gets dismissed.

³⁹ Rachel Barkow, *Our Leaders Have the Power to Release People in Prison. Now They Must Use it*, APPEAL (Mar. 27, 2020), <https://perma.cc/YP5R-P3RD>.

⁴⁰ See Shannon Haupt & Phil Miller, *Cruel and Usual: Contaminated Water in New York State Prisons*, 25 CUNY L. REV. FOOTNOTE F. 120, 145 (2022).

⁴¹ Cherry, *supra* note 22 at *1; Robinson v. Edwards, No. 04 Civ. 2804(PAC), 2006 WL 1889900, at *1 (S.D.N.Y. July 5, 2006); Wright, *supra* note 24 at *1.

Michael Maskin: Finally Shannon's research led them to professor Anthony Moffa at the University of Maine.⁴² Professor Moffa does a lot of research around prison conditions and human rights issues. He turned Shannon onto this idea that Ramon might have a claim.

Shannon Haupt: Rooted in the Eighth Amendment that certain conditions of confinement amount to cruel and unusual punishment.⁴³

Michael Maskin: They also found that:

Shannon Haupt: Recognition of a threat of future harm can be enough to satisfy the standard for cruel and unusual punishment. And that's from a case where a prisoner was being exposed to secondhand smoke, and he filed a lawsuit saying that that constant exposure and his inability to move away from it, to avoid it, always being exposed to it, was predisposing him to a risk of future health problems. And it's so well documented the harm of secondhand smoke. He was able to really quantify the harm that he was exposed to.⁴⁴

Michael Maskin: So that sounds like a big win.

Shannon Haupt: Part of why it's difficult is because the standard for the actor who contributed to the cruel and unusual punishment is deliberate indifference.⁴⁵ So they have to know about the issue and know that it's bad, for lack of a more complicating term and then do, and then not do something about it. So what I see with the gap between what people are experiencing and what DOCCS is saying on paper is an intentional or willful ignorance to the problem. Their failure to document or properly diagnose or address any issue that comes up is so that they have on paper or that they don't know that there's a problem, so that when this case comes forward, they can say, "We have on record that the water is fine." Water testing does happen at prisons right now.

⁴² *Anthony Moffa: Associate Professor of Law*, UNIV. OF MAINE L. SCH., (last visited Apr. 25, 2022), <https://perma.cc/YW9R-GM7E>.

⁴³ See *Farmer v. Brennan*, 511 U.S. 825, 825 (1994) (alleging Eighth Amendment violation where prison officials were deliberately indifferent to petitioner's safety from violent assault); see also *Estelle v. Gamble*, 429 U.S. 97, 97 (1976) (alleging Eighth Amendment violation where corrections' medical director and other officials failed to provide adequate treatment following respondent's prison work-related injury).

⁴⁴ *Helling v. McKinney*, 509 U.S. 25, 25 (1993) (alleging Eighth Amendment violation where prison officials put respondent's health at risk by allowing him to be exposed to cigarette smoke).

⁴⁵ *Id.* at 36 (explaining that "[t]he subjective factor, deliberate indifference, should be determined in light of the prison authorities' current attitudes and conduct").

There's national and state mandates around how water is tested. The issue that I suspect exists is that water is only getting tested at specific points of the prisons. So if you think about a water delivery system, you have whatever the source is.

Michael Maskin: A river, maybe a reservoir gets piped through a water treatment facility.⁴⁶

Shannon Haupt: And then you have a transportation from the source to the building.

Michael Maskin: These are the water mains that bring water from treatment facilities to our homes and buildings just like in every municipality across the country.⁴⁷

Shannon Haupt: The actual physical building. And a lot of times water is tested at that point, where the water is meeting the building before it goes into the distribution system in the infrastructure of the prison.⁴⁸ So at that point, the water might be fine. It actually is coming out with accurate results that there's no contamination. But we don't know what's changing once it goes into the prison. Is it sitting? Are the pipes old? We know that they are because some of these prisons are 100 years old and a lot of them still have lead pipes.⁴⁹ And we don't have a record despite a lot of FOIL requests of where exactly pinpointed in prisons is the water actually getting tested.

Michael Maskin: And what happens between that point and the point at which residents of those prisons make contact with the water, at the faucets and in the showers. As Shannon developed a working relationship and friendship with Ramon, they found it impossible to do this research and hear of these conditions without feeling heartbroken for this man and everyone in his situation.

⁴⁶ Pier Giorgio Nembrini, *Water, Sanitation, Hygiene and Habitat in Prisons*, INT'L COMM. OF THE RED CROSS 29 (Aug. 2005).

⁴⁷ See, e.g., *How is Water Distributed?*, AM. GEOSCIENCES INST. (last visited Apr. 25, 2022), <https://perma.cc/2M8J-95RY>.

⁴⁸ *Water-related Diseases and Contaminants in Public Water Systems*, CTRS. FOR DISEASE CONTROL & PREVENTION (Apr. 7, 2014), <https://perma.cc/E27P-6DTZ> (explaining that service line contamination occurs after the water has been drawn from the source site; therefore testing at the source will not reveal contamination that occurs through contact with the service line).

⁴⁹ See Kimberley M.S. Cartier, *An Unfought Geoscience Battle in U.S. Prisons*, EOS (Nov. 10, 2020), <https://perma.cc/2H5Q-UN7F>.

Shannon Haupt: To go for so long without clean water coming out of his faucet, and then the relief that he experienced when it switched all of a sudden and inexplicably to being clean, I can't possibly begin to enumerate the ways in which someone's agency and control are stripped from them through incarceration. But I think that Ramon has really made a lot of efforts to make sure that his voice is heard. This kind of issue can't be approached as a single problem that if we just fix this then prisons are okay. Like, I think there are a lot of different ways to approach it. And one that I find very appealing is this idea of looking at what the constitution of the United States demands through an abolitionist lens, which is that if we are actually guaranteed freedom from cruel and unusual punishment, a right to life, liberty, and happiness and due process, then what's happening right now is none of those things.

Jennifer Grossman: Even though people go into healthcare-

Michael Maskin: Jennifer Grossman again.

Jennifer Grossman: And they say, it's their calling or maybe they don't. Maybe it's just because it's good money and good health insurance and good for you, but there's still power issues. There's still all the hierarchy. There's still your entire life that you have and you're just going to a job. And I have seen, not in an incarcerated setting, right, where that's a million times worse, but just in a primary care setting or just in a hospital setting or even, you know, at a clinic that's supposed to have higher standards than everywhere else, people use their power or their need for control and power to hurt each other.

Jennifer Grossman: And one of the ways that people do that is to withhold, and they withhold medical care, they withhold compassion. They punish. That is what I see all of the time in all of these types of settings because we are humans. And that's not going to stop, which is why we have to have controls in place, right? It's why we have to be more careful with the people that are the most vulnerable and try to pad them from this, right, try to protect them from this. And unfortunately that is really, really rare and really hard to get people to do, and it costs money.

Michael Maskin: I would offer maybe as, like, my own desire to try to shift towards optimism, but if-

Jennifer Grossman: Yes! Yes, yes.

Michael Maskin: But you're right. I mean, I would say, you know, my . . . my thinking is too, humans created this mess. We created these systems. Prison is not a natural thing. The healthcare system is also not a natural thing. And as opposed to, you could argue compassion and empathy and sympathy are natural and are natural feelings. And so if humans were able to create this stuff, then maybe we can also dismantle it, and maybe we can also undo those things in a way that we can't undo compassion. We can't undo empathy. We can't undo those things because we didn't create them. They just are.

Jennifer Grossman: And I am, I am hopeful for that. Yeah.

Michael Maskin: The Footnote Forum podcast⁵⁰ is part of the CUNY Law Review⁵¹ at the City University of New York School of Law.⁵² Shannon and Phil's article is available on the Footnote Forum website at cunylawreview.org. That's C-U-N-Y-L-A-W-R-E-V-I-E-W-O-R-G. I highly encourage you to go read it. You can also find the transcript of this episode at that address.

This episode was produced by, me, Michael Maskin, along with Clementine Stormes and Colby Williams. With writing and direction by Colby Williams. It was edited by Tunde Ogunfolaju and Colby Williams.

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We recorded at CUNY School of Law and at Make Life Studios in the Brooklyn Navy Yard.⁵³ They have an amazing studio and you have to check them out.

Finally, keep up with Jennifer Grossman and Nurses for Social Justice at nurses, the number 4, socialjustice.org. That's N-U-R-S-E-S-4-S-O-C-I-A-L-J-U-S-T-I-C-E.O-R-G.⁵⁴ And Panagioti Tsolkas and Prison Legal News at prisonlegalnews.org, P-R-I-S-O-N-L-E-G-A-L-N-E-W-S.O-R-G.⁵⁵

⁵⁰ *Footnote Forum Podcast Archives*, CUNY SCH. OF L., <https://perma.cc/TM64-5HZ9> (last visited Apr. 25, 2022).

⁵¹ *CUNY Law Review*, CUNY SCH. OF L., <https://perma.cc/A83R-SPN2> (last visited Apr. 25, 2022).

⁵² CUNY SCH. OF L., <https://perma.cc/KPJ7-HWC8> (last visited Apr. 25, 2022).

⁵³ MAKE LIFE STUDIO, <https://perma.cc/R8NS-KGA7> (last visited Apr. 25, 2022).

⁵⁴ NURSES FOR SOC. JUST., <https://perma.cc/6QRN-VNG6> (last visited Apr. 25, 2022).

⁵⁵ PRISON LEGAL NEWS, <https://perma.cc/E6BX-DNV9> (last visited Apr. 25, 2022).

Personally, something that struck me from talking with Shannon, Phil, and Ramon was how people outside the prison system have an easier time making their voices heard than those inside, especially on issues that directly affect incarcerated people. We all have a voice and each one of us can use it in powerful ways, even if we aren't lawyers. Thank you for listening.