NORTHEASTERN UNIVERSITY
LAW JOURNAL

Prisoners' Rights in the Modern Era

VOLUME 7, NO. 1 SPRING 2015

Northeastern University School of Law
416 Huntington Avenue
Boston, Massachusetts 02115

Cite as 7 NE. U. L.J. ____ (2015).

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Editors' Introduction

It is with great pride that the Northeastern University Law Journal publishes its ninth issue, Prisoners' Rights in the Modern Era. When the Journal was founded in 2007, it was the product of tremendous vision and hard work by Northeastern students, faculty, and administration. The Journal continues this tradition, carrying forward Northeastern University School of Law's mission by advancing practice-based legal scholarship with a social justice focus. The Journal has steadily increased its staff size and its online presence, through publication of high-caliber student pieces on its online publication, Extra Legal.

Each year, the Journal hosts a symposium exploring a contemporary topic of interest in the law. This annual event brings practitioners and academics from across the country together to begin discussions that advance our understanding of that topic. This issue contains the product of the symposium held in January 2014 on the topic of prisoners' rights. As the incarcerated population in the United States steadily increases, the rights of those confined by the state are coming increasingly into focus. By design, the layout of this issue follows a linear progression, beginning with an examination of the causes of incarceration, transitioning to a view behind the bars, and ending with an investigation into post-incarceration life. Individually, the articles explore a variety of ways in which the system of mass incarceration impinges on the rights of prisoners, and offer solutions to guard this vulnerable population.

This issue marks a turning point in the history of the Journal, as it will be the last issue based solely on a symposium topic. While the symposium-based publication model was well suited for the Journal's early years, our consistent growth and success have afforded us the opportunity to expand and diversify. We hope that by opening up each issue to articles on topics outside of the one chosen for the annual symposium, the Journal will be able to explore a wider variety of public interest topics, attract even more dynamic and cutting-edge scholars and practitioners, and expand the reach of its burgeoning influence.

This issue would not have been possible without the tremendous efforts of our Staffers and Senior Staffers. We are extremely pleased and proud to know the new iteration of this publication is being left in such capable hands. This decision to reformat the Journal, along with

this issue itself, would not have been possible without the hard work and dedication of those who came before us. We would like to thank the Editorial Boards and Staffers of years past. We are extremely appreciative of the guidance we received from our Faculty Advisors - Associate Dean Sarah Hooke Lee, Professor Michael Meltsner, Professor Gabriel Arkles, and Professor Lee Breckenridge. We would also like to thank Professor Daniel Medwed for his strenuous efforts in securing speakers for the symposium that led to this issue. Lastly, we would like to express our gratitude to Dean Jeremy Paul, Associate Dean Dan Danielsen, and the entire faculty and staff of Northeastern University School of Law for their continued support of the Journal and its mission.

The 2014-2015 Editorial Board owes a debt of gratitude to the 2015-2016 Editorial Board for the hard-work and dedication to excellence they demonstrated in making this publicaion a physical reality.

Editorial Board
Northeastern University Law Journal
Spring 2015

Bar None? Prisoners' Rights in the Modern Age

Daniel S. Medwed[1]

The American public is perhaps more sensitized to the flaws in our criminal justice system than at any time in our history. News accounts of wrongful convictions, racial profiling, violent police-citizen encounters, and botched executions have called into question the policies of a nation that imprisons more people than any other developed nation—upwards of 1.5 million people housed in state or federal prisons according to the Bureau of Justice Statistics.[2] To some extent, this period of questioning and reflection has produced gains; we have witnessed a modest shift away from mandatory minimum sentencing and toward the decriminalization of some narcotics.[3] Parole boards have shown a rising awareness that inmates' claims of innocence should not be held against them in their release decisions.[4] Even more, some states—most notably, Michigan—have formulated innovative re-entry programs to assist prisoners in making the perilous transition from their cell blocks to residential and commercial blocks in neighborhoods throughout the country.[5] These events have prompted some observers to envision an end to mass incarceration in the United States.

Yet this vision is a mirage. Despite all of the talk about

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1 Professor of Law, Northeastern University School of Law. I am grateful to the terrific editorial team at the Northeastern University Law Journal, including Maggy Hansen, Matt Lysiak, Katie Perry-Lorentz, Jordan Payne, and Brian Morrissey, for their help in producing this symposium volume.

2 LAUREN E. GLAZE & DANIELLE KAEBLE, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE U.S., 2013, 2 (2014), *available at* http://www.bjs.gov/index.cfm?ty=pbdetail&iid=5177.

3 *See, e.g.*, Christopher Ingraham, *Americans Overwhelmingly Agree It's Time to End Mandatory Minimum Sentencing*, WASH. POST (Oct. 10, 2014), http://www.washingtonpost.com/blogs/wonkblog/wp/2014/10/10/americans-overwhelmingly-agree-its-time-to-end-mandatory-minimum-sentencing/.

4 Stephanie Clifford, *A Claim of Innocence is No Longer a Roadblock to Parole*, N.Y. TIMES (Nov. 12, 2014), http://www.nytimes.com/2014/11/13/nyregion/a-claim-of-innocence-is-no-longer-a-roadblock-to-parole.html?_r=0; Daniel S. Medwed, *The Innocent Prisoner's Dilemma: Consequences of Failing to Admit Guilt at Parole Hearings*, 93 IOWA L. REV. 491 (2008).

5 *See, e.g.*, Dennis Schrantz, *Coordinating Community Development: The Heart of Michigan's Prisoner Reentry Initiative*, CORRS. TODAY MAG., Apr. 2007, at 42-49.

criminal justice reform and "decarceration," we still live in a country where large swaths of people, especially young men of color, languish behind bars or under the restrictions of probation, parole, or some other form of community supervision.[1] This is likely to remain the case absent dramatic changes to policing practices, wealth inequalities, and the lobbying tactics of corrections officials and affiliated industries. The danger with the decarceration rhetoric is that it deflects attention from those who continue to suffer under horrid conditions of confinement. Indeed, this Symposium explores the contemporary prison experience against this complicated backdrop and asks a fundamental question: what are the gravest problems that inmates face during an era in which many people might naively think that the situation has improved?

The first article and the student note look at factors that contribute to the current, sorry state of our prison system: excessive sentencing and the "school-to-prison pipeline." Michael Meltsner's fantastic speech in the inaugural Hugo Adam Bedau lecture leads things off, noting that excessive sentencing is an epidemic. To Meltsner's sage eyes, recent criminal justice reforms are minuscule—"the penal equivalent of a climate change policy that focuses on better curbside recycling."[2] Meltsner is particularly critical of life without the possibility of parole sentences and argues that inmates staggering under the weight of such sentences may be less fortunate than death row prisoners whose cases often receive zealous defense lawyering and increased vigilance from the bench. Next, Leah Porter's well-designed Note hones in on a recent Massachusetts educational reform that on its surface seems to help close the school-to-prison pipeline for urban youth but that upon closer reflection fails to protect an important sub-group of that population, namely, juveniles formally found to be delinquent.[3]

The next three articles focus on the hazards of daily life, especially the risks of sexual violence and the hurdles that victims must overcome to obtain even a modicum of justice. In *PREA's Peril*, Giovanna Shay follows up on her previous groundbreaking work on the Prison Rape Elimination Act by pointing out problems

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1 *See generally* Glaze & Kaebele, *supra* note 2.

2 Michael Meltsner, *The Dilemmas of Excessive Sentencing: Death May be Different but How Different?* 7 Ne. U. L. J. 5 (2015).

3 Leah Porter, *Educational Obligations to Delinquent Youth: The Role of Public School Districts*, 7 Ne. U. L. J. 211 (2015).

in the law's implementation and the threat of unintended consequences. Among her many observations, Shay cites the statute's meager enforcement mechanisms and reported occurrences indicating that officials have used the law to justify the harassment of inmates perceived to be LGBT.[4] Gabriel Arkles's thoughtful article echoes some of Shay's PREA work and moves beyond that legislation to take a broader look at sexual violence in prison. Arkles puts forth an expansive and creative definition of sexual violence that includes "official carceral sexual violence, particularly searches, certain nonmedical interventions, and prohibitions on consensual sex."[5] Arkles concludes with an innovative concept for a statutory scheme replete with a compensation structure and an oversight committee elected by inmates.

The final piece in this troika consists of a recent Note by Chrisiant Bracken who trains her budding scholarly eye not on sexual violence per se but on draconian policies that curtail the reproductive rights of men. Bracken examines, in particular, the chemical castration of male sex offenders and restrictions on the availability of assisted reproductive technologies for men. Courts have afforded deference to these practices, causing Bracken to ask why limits on the fundamental right to procreate "withstand lower level of scrutiny when applied in a prison context."[6]

Finally, an excellent paper authored by a team led by Leo Beletsky evaluates a dilemma that some offenders encounter upon their release: the possibility of a drug overdose caused by prescription opioids and heroin. People recently released from a correctional setting are "almost 130 times more likely to die of an overdose than the general population, particularly in the immediate two weeks after release."[7] Drawing upon cutting-edge overdose prevention policies from the international arena, Beletsky et al., recommend a number of concrete reforms for domestic re-entry programs, among them, tapping into federal funds potentially available through the Affordable Care Act.

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4 Giovanna Shay, *PREA's Peril*, 7 NE. U. L. J. 21 (2015).

5 Gabriel Arkles, *Regulating Prison Sexual Violence*, 7 NE. U. L. J. 65 (2015).

6 Chrisiant Bracken, *Tracing Two Modern Branches of Reproductive Rights for Male Prisoners*, 7 NE. U. L. J. 125 (2015).

7 Leo Beletsky, Lindsay LaSalle, Michelle Newman, Janine Paré, James Tam and Alyssa Tochka, *Fatal Re-Entry: Legal and Programmatic Opportunities to Curb Opioid Overdose Among Individuals Newly Released from Incarceration,* 7 NE. U. L. J. 149 (2015).

What the papers in this Symposium make clear is that prisoners in this country face an array of challenges even during an era of purported decarceration and criminal justice reform. Excessive sentences, poor treatment of delinquent youth in public schools, sexual violence, compromised reproductive rights, and slipshod reentry programs persist as concerns for prisoners and their advocates in the United States. These issues lie at the core of the social justice mission of Northeastern University School of Law. In the years ahead, I suspect that students and faculty will continue to champion the interests of a population that is among the most vulnerable and oppressed in the nation.

The Dilemmas of Excessive Sentencing: Death May be Different but How Different?

Michael Meltsner[*]

"I care a great deal about capital punishment, but sometimes I think that the focus …on life and death detracts from the attention that should be put on situations in which people are sentenced to huge terms …"[1]

It's a great pleasure to initiate this lecture series in the name of a man who practiced a form of academic life that gives honor both to the calling of philosopher *and* the role of advocate. Hugo Bedau never lowered his standards while invoking the gods of social transformation but he also knew the difference between words and deeds.

I'll repeat what I said three years ago in his presence. Because of his death penalty work, lawyers whose vision often is narrowed to the case before them were able to understand the history and the evolving story of the death penalty in America. He was a true pioneer and, as important, he was both accessible and generous.

Justice Holmes once wrote that "academic life is but half life… a withdrawal from the fight in order to utter smart things that cost you nothing." [2] Plainly he didn't know Hugo Bedau.

Little you hear this afternoon will be new or startling because an increasing number of talented scholars, lawyers and activists have been working hard to change the excessive, disproportionate, costly and ineffective pattern of excessive incarceration that is my subject. I'd like

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* Matthews Distinguished University Professor of Law, Northeastern University School of Law. The text which follows was delivered, with only modest changes here, at Tufts University on March 28, 2014 as the first Hugo Adams Bedau Memorial Lecture. Many thanks to Constance Putnam and Erin Kelly for support and assistance.

1 Michael Romano, *Striking Back: Using Death Penalty Cases to Fight Disproportionate Sentences Imposed Under California's Three Strike Law*, 21 STAN L. & POL'Y REV. 311, 317-18 (2010) (quoting Guido Calabresi).

2 Letter from Oliver Wendell Holmes to Felix Frankfurter (July 15, 1913), *in* OLIVER WENDELL HOLMES, PAPERS (University Publishers of America, 1985) (Holmes was urging Felix Frankfurter to reject an offer to join the Harvard Law School faculty. He suggested Frankfurter keep practicing law).

to name them all but then I'd have little time left to say anything else.

Only two years ago the consensus among those who focus on the sentencing of criminals was that it was difficult to imagine any deep and lasting structural change that would transform the American way of punishment. Since then there has been a chorus of calls for reform; voices have been raised from elites in a manner that usually presages a policy shift.

We have the strange sight of senators Dick Durbin, Rand Paul and Mike Lee on the same page. Attorney General Holder, the NY Times editorial board, a number of leading academic commentators and frustrated trial court sentencing judges have urged that something be done to curtail excessive sentencing and mass incarceration. Legislation has been introduced in Congress and hearings scheduled.

Under the gun of court orders to deal with overcrowding, California has started to parole some lifers.

Responding to recent Supreme Court decisions, many states are trying to sort out what sort of parole hearings and parole standards to use with juveniles who have been sentenced to life.

These are all signs that point to a reform movement and that is a good thing. It also suggests being careful because the easy reforms—only going after narrowly defined nonviolent offenses, weighing the crime to the exclusion of changes in behavior when considering parole, restricting changes to youthful offenders—will not reach the core of our problem with a widespread policy of warehousing.

And piecemeal actions will simply not change much. It is a little like climate change where there is a consensus among the experts and very little movement in what most people refer to as the "real" world. Perhaps the most likely reforms, such as fewer incarcerations for nonviolent crimes and narrower three strike laws, are the penal equivalent of a climate change policy that focuses on better curbside recycling.

Hugo published The Death Penalty in America in 1964, a year after Jack Greenberg gave us the go ahead at the NAACP Legal Defense Fund to mount a campaign to abolish the death penalty through litigation.[3] Fifty years of glorious victories and devastating defeats later we still have a capital punishment system—diminished as it may be—but we also have a much worse penal regime and record of incarceration.

Sadly, much of this situation is an unexpected consequence of

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3 Michael Meltsner, Cruel and Unusual: The Supreme Court and Capital Punishment 12 (Quid Pro Books, 2nd ed. 2011); Evan J. Mandery, A Wild Justice 33-34 (2013).

our campaign to abolish the death penalty. Because I was there I can tell you with some authority that the legal abolitionists of the sixties and seventies did not worry about life without parole (LWOP); quite understandably, too, because we saw our business as saving lives of clients in jeopardy of execution, overwhelmingly due to race and poverty.

But let's leave the past for a moment. Allow yourself to look to the future. Imagine if you will the following scenario: the composition of the Supreme Court has changed. The new majority composed of justices chosen by President Obama and Hilary Clinton looks at trends from the period 2006-12 where six states abolished the death penalty and fifteen to twenty gave indication that they are uncertain about how and when to resume executions.

This new Court also sees that in 2012 only thirty-nine men were executed, down from seventy-eight in little more than a decade and notes that while in 2000 there were 224 death sentences handed down by American courts, in 2012 there were only eighty. Remember that this is a country with yearly homicides in the five figures.

The Justices note that capital punishment is largely a regional phenomenon. In 2012 only nine states conducted an execution; Texas accounted for 15 of the 43. And they remember that since 1976 when authority to execute was restored, of the 1300 to 1400 men and women sent to death over 1100 were from Southern and border states. And they will further note that of the over 3,000 individuals on the death rows of America's prisons today a majority are black and Hispanic.

Recognizing that these abolition trends signal capital punishment has run afoul of "evolving standards of decency" —the oft-cited test for interpretation of the Eighth Amendment's prohibition on cruel and unusual punishment—and additionally that the actual record of criminal justice system behavior confirms a major shift away from the use of capital punishment has taken place, the Justices decide to restrict the death penalty to a very, very small number of cases dealing with some form of mass killing or extreme terrorism.

They do this despite knowing that support for the death penalty is still strong and also knowing that judicial restriction of the death penalty has in the past led to intense criticism and being further aware that this is a country where horrible crimes are committed every day which when reported by the media understandably encourages public outrage.

Legal science fiction, you ask? Maybe, but I believe such a scenario will come to pass, though I am quick to say that when it happens (*if* it happens) many of us in the community of advocates who have pur-

sued this end since the 1960s will have left the scene. Suppose against all odds I prove to be right? Well, of course, it would be no small thing to abandon this expensive, unnecessary, unreliable and brutal sanction, a step that I hope might advance the cause of managing the violence among us.

But even if such progress occurs, if we take a hard look at our criminal justice system we will see an alarming, multi-layered evil that abolition of the death penalty will not cure and may, in the short term at least, worsen.

Let me explain it this way: We will never execute the vast majority of those we now hold on death row whether we terminate the lives of thirty-nine a year or even double or triple that number. Thousands of these mostly men will die in prison. (By the way, the average time between conviction and execution for those (very) few who lose this ghastly lottery is about 15 years.)

Now look at the growing number of life sentences and the growing number of life without parole sentences (LWOP). Life sentences probably add up to 140,000 to 150,000 inmates, and this does not include sentences that are de facto life—say fifty years for a fifty year old man. It has been estimated that one in eleven of all persons in prison are serving life. Forty-nine states authorize such sentences. Nationally, perhaps 40 to 50,000 of the 150,000 life sentences are life without parole. In 1970, Louisiana, to pick out one representative state, had 143 inmates serving LWOP sentences. Today that number is 4,637.

Add to this picture the fact that parole release has been abolished completely in the federal system and a number of states. And to make sure we have the whole picture, consider also that commutation, once a common way of mitigating the harshness of criminal sentences, is now rare.

With the large number of those imprisoned in the United States comes the dramatic cost of incarcerating them. During the great recession, corrections was the fastest expanding segment of state budgets, and over the past two decades its growth as a share of state expenditures has been second only to Medicaid. State corrections costs now top $50 billion annually and consume one in every fifteen discretionary dollars. Prisons employ almost half a million guards and related personnel.

This rise in spending was the result of policy choices that sent more people to prison and kept them there longer. In the 1970s there were 350,000 held; the number today tops two million. We have five per cent of the world's population and 25% of its prisoners. This doesn't count the millions on probation or parole or awaiting trial—in 2010

about one in every forty-eight adults in the U.S. was under supervision.

It shouldn't surprise you that all these numbers also reflect an enormously disproportionate treatment of African Americans and other minorities. One example among many—it has been estimated that 65 per cent of those serving LWOP sentences are minorities. Michelle Alexander has argued persuasively that these numbers amount to an effort to control a feared underclass—young black men seen as dangerous—with devastating results for the poor and in particular for black families.

Federal Judge Michael Ponsor in a recent op-ed column asks "how did the 'the 'land of the free and home of the brave' become the world's biggest prison ward."[4]

He answers that either we Americans are far more dangerous than other people or something is seriously out of whack in the criminal justice system. This formulation doesn't explicitly include the fear factor and in my estimation it is fear that drives the punitive. Fear is an emotion particularly tied to its object and the greatest source of American fear, though over time sublimated and dispersed to others, is still dark male skin.

I ask myself what are the differences between the death row inmate and the life-sentenced man. The shocking answer is very, very little. To begin with both groups are likely to die in prison. As the arbitrariness of death sentencing is undeniable, those facing execution are no more or less dangerous than the lifer. The two populations are demographically similar. As far as prison living and working conditions are concerned it is generally thought that lifers have a slightly better deal but the pattern is uneven and depends on the practice in each state and sometimes each institution. Professor Eva Nilson has concluded that "[T]he prison experience is, in many ways, harsher than it has ever been. Prisons are crowded, with double- and triple-celling being the norm …. New technology has led to increased use of isolation cells and centralized monitoring."[5]

But many death row inmates are better off than anyone confined in one of the forty or so super max prisons where solitary confinement is common. These are inhumane places calculated to destroy personality. On the other hand, many states treat men sentenced to

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4 Michael Ponsor, *The Prisoners I Lose Sleep Over*, WALL STREET J. (Feb. 14, 2014), *available at* http://online.wsj.com/news/articles/SB10001424052702304680904579365440971531708.

5 Eva S. Nilson, *Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Discourse*, 41 U.C. DAVIS L. REV. 111, 116 (2007).

death as if they were wild beasts, holding them in cells twenty-three hours a day and chaining them on the few occasions they are let out of their cells.

In both groups there are many who are mentally ill or have serious personality disorders. In both groups there are men with violent dispositions who don't seem affected much by the passage of time and there are others who, despite the pains of custodial control and the disarray of daily life as caged men, grow and change and pose no great threat to society, a condition that is clearly age-related in many, and in others depends greatly on whether they have family or other support. In short, inmates are as varied as the crimes they have committed—conditions not accurately captured by labels describing the crimes in the criminal code or in the media. Note that not all lifers are murderers and not all murderers are sociopaths by any means.

The similarities between the populations are many but the difference in the way the law treats them is great. One group has a constitutional right to individualized sentencing and the other group doesn't. The standards for measuring the effectiveness of counsel or the proportionality of the sentence to individual culpability is much higher in one case than the other.

The results tell the story that this "death is different" treatment yields. The odds of some form of judicial relief in a death case are at least five or six times better than in cases of life sentences or the many de facto life cases where a judge has tacked on to the sentence a number in excess of the inmate's life expectancy. Two thirds of capital cases are in some fashion reversed for further proceedings. In the lifer cases the percentage is less than ten, some think less than five.

No wonder that many California death row inmates came out against the recent referendum that would have abolished the death penalty in that state and substituted life without parole in its place. A defense attorney commented: "Many of them say, 'I'd rather gamble and have the death penalty dangling there but be able to fight to right a wrong.'"[6] Death *is* different, but is it so different that the law should ignore that the vast majority of the people we are talking about will die of natural causes in the same custodial environment regardless of their sentence?[7]

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6 Bob Egelko, *Death Row Inmates Oppose Prop. 34*, SFGate, http://www.sfgate.com/news/article/Death-Row-inmates-oppose-Prop-34-3891122.php (last updated Apr. 30, 2014).

7 *Id.*

Life without parole sentences were rare until in the 1980s and 90s they were authorized in state after state as an alternative to the death penalty. Polls indicate that support for capital punishment precipitously drops when an LWOP alternative exists. A recent national poll of 1,500 registered voters showed growing support for alternatives to the death penalty compared with previous polls. A clear majority of voters (61%) chose a punishment other than the death penalty for murder when life sentences without parole was an option.

By the way, LWOP was supported by some but not all anti-death penalty advocates. One who didn't was Hugo Bedau, who came out against LWOP as early as 1989. But more representative was the view of the ACLU of Northern California:

" The death penalty costs more, delivers less, and puts innocent lives at risk. Life without parole provides swift, severe, and certain punishment. It provides justice to survivors of murder victims and allows more resources to be invested into solving other murders and preventing violence. Sentencing people to die in prison is the sensible alternative for public safety and murder victims' families."[8]

To meet the state's argument to the jury that the defendant should be executed as a way of ensuring that he will never walk among us, defense lawyers came to argue for a sentence of comparable if not identical harshness. One former prosecutor pointed out that once legislators became familiar with LWOP and courts warranted their constitutionality they were applied to all manner of crimes under three strike and similar laws.

For the growth of LWOP, he blamed "death penalty abolitionists" whom he characterized as having a fervor suggesting "fanaticism"—willing to go to any lengths to eliminate the death penalty.[9] Of course, capital defenders urged juries to spare their clients by using LWOP. They could hardly do otherwise. They may or may not have been abolitionists but they were defense counsel. Should they have not used arguments that could and in many cases did save the lives of their clients?

Some critics suggest that LDF should have waited until there was an organized abolition movement to bring its challenges to the death penalty. But even if LDF could have somehow put aside the inter-

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8 *The Truth About Life Without Parole: Condemned to Die in Prison*, AM. CIVIL LIBERTIES UNION OF N. CAL., https://www.aclunc.org/article/truth-about-life-without-parole-condemned-die-prison (last visited June 4, 2014).

9 I. Bennett Capers, *Defending Life, in* LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY? 167, 173 (Charles J. Ogletree Jr. & Austin Sarat eds., 2012).

est of clients under sentence of death, if we had waited then we would still be waiting because there has never arisen a broad-based national coalition of the sort that had the power to significantly influence legislators to abolish. When I hear this particular argument I remember that it has also been used to critique Brown v Board of Education. Critics of Brown claimed segregation would whither away if only the courts would stay their hand. But it was the second Brown decision in 1955 that brought us the "all deliberate speed" implementing principle that ensured in many places integration of the schools would happen beyond the horizon.

In Gregg v Georgia,[10] the Supreme Court yielded to public opinion as it had in Brown II and reversed the direction it had painfully carved out four years earlier. Its hard to blame abolitionist lawyers for what the Court did in Gregg any more than one could blame Thurgood Marshall for "all deliberate speed." But certainly pressure to abolish played a major role in the problem we confront today along manipulative politicians, pandering media and most of all a quickly reactive public that is understandably concerned by violence and criminality while largely untroubled by the consequences of maintaining a vast world of prisons, the most prominent characteristic of which is that they are racially-skewed warehouses for humans, places to store or deposit not to educate, help or reform.

We seem to have forgotten that justice is for the guilty as well as for the innocent and for the victim. My submission is that we should get past our excessive focus on "death is different," and when it comes to life sentences, we need to grant parole eligibility across the board. Eligibility, of course, does not in any way mean letting everyone out. Charles Manson and Sirhan Sirhan come up for parole regularly and are denied. There are many, many people who are too far gone, too dangerous and too sick.

But the common rejection of parole solely on the basis of the crime committed years before is inconsistent with what we know about who commits crimes and how they develop. A parole board should certainly take into consideration what the inmate did but also who he has become. Certainly parole boards make mistakes but for every Willie Horton, the furloughed Massachusetts prisoner who committed a murder and rape and became the cudgel that beat down Mike Dukakis's presidential bid, there are many paroled inmates who spend the rest

10 Gregg v. Georgia, 428 U.S. 153 (1976).

of their lives respecting the law. By the way, the program that released Horton was otherwise overwhelmingly successful.

Here is law professor and capital case lawyer David Dow:

> It's an undeniable fact that even people who do terrible things can change. A kid who commits murder when he's twenty can be a substantially different person when he's fifty, much less sixty. ...The core defect of LWOP is that it prevents even reformed murderers from serving their families or their society. [It]…robs people of hope; it exaggerates the risk to society of releasing convicted murderers; and it turns prisons into geriatric wards, with inmates rolling around in taxpayer-funded wheelchairs carrying oxygen canisters in their laps."[11]

And here's one story among many:

> In 1972, 19 year old Arnie King, high on drugs, tried to rob and ended up killing a young man who had just passed the bar exam and was out celebrating on the streets of Boston. He is now 61. In 2007, a parole board considering whether to recommend commutation to the governor unanimously found that his rehabilitation during incarceration was "exceptional." By any rational measure, King is the very model of a successful rehabilitation. Arriving in prison as an ignorant and barely literate high school drop out, he is currently a Ph.D. student at the University of Massachusetts, after earning a bachelor's degree and a Masters from Boston University.
>
> While confined and while on furloughs he has organized, administered and directed scores of programs for prisoners. He is well known for his counseling of youth. His applications for commutation have been supported by community groups, local leaders, politicians, religious leaders, former teachers, and prison workers. Hundreds of supporters have come to public hearings attesting to the strength of his social support network. King had a series of disciplinary tickets for minor matters while incarcerated over 40 years but none recently. He has been granted scores of furloughs outside prison walls during his years in prison, completing every one successfully. He used the time to nurture a family and appear before school and community groups. It is clear from the record

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11 David R. Dow, *Life Without Parole: A Different Death Penalty*, DAILY BEAST (Apr. 27, 2012), http://www.thedailybeast.com/articles/2012/04/27/life-without-parole-is-a-terrible-idea.html.

of his efforts to win commutation that King has totally remade himself into a widely loved and respected man.

In 2007, the Parole Board unanimously recommended Arnie's sentence be reduced but Governor Romney failed to act. So he tried again in 2010. After a hearing but before a decision was reached, a released parolee robbed a jewelry store and killed a police officer. Here was the Willie Horton phenomenon. Governor Patrick demanded the Parole Board resign, and on exactly the same record as the earlier Board the new Board he appointed rejected King's application for a commutation recommendation.

You get a sense of the politics governing the issue when you consider that these are the actions of a state with one of the most liberal and farsighted governors in America, a former civil rights lawyer for the Legal Defense Fund and a man who is **not** up for reelection, though of course he may one day seek higher office. You might think that if any public official would have enough empathy and political courage to stare down Willie Horton and let Arnie King return to the community it would be Deval Patrick, but it hasn't happened.

This is the choice often involved in such release decisions: A terrible crime. Forty years in prison. Startling changes in behavior. Little if any danger in release but ever present uncertainty when predicting human behavior. What do we do? A series of recent decisions concerning juveniles under 18 may point the way. A divided Supreme Court has ruled out mandatory life without parole sentences regardless of whether a homicide or a lesser offense is involved. The Court likened life without parole sentences to death sentences and as a result required "demanding individualized sentencing" whereby the sentencing judge would be able to consider the "mitigating qualities of youth."[12] On the surface these cases do not apply to any adult life sentences. They don't even ban LWOP sentences for juveniles but only require they be individualized. And given the composition of the present Court it is unlikely that these precedents will change the way adults are treated in the foreseeable future. But probe a bit and you can see a rough foundation for action.

Juveniles are said to be less culpable because of immaturity, an "undeveloped sense of responsibility" leading to "recklessness, impulsivity and heedless risk-taking." They are subject to negative influences and outside pressure, "have limited control over their own environment" and "lack the ability to [have] extricated themselves from horrific crime-

12 Miller v. Alabama, 132 S.Ct. 2455, 2459 (2012); *see generally* Graham v. Florida, 560 U.S. 48 (2010).

producing settings." All this leads to the conclusion that the juvenile's actions are less likely to be "evidence of irretrievable depravity" and thus insufficient to justify the harshest penalty.

These words apply directly to the Arnie Kings of this world as much as to those who acted out before their 18th birthday. If these factors require individual sentencing at time of trial they also should require looking into changes that have taken place after years of incarceration. It is totally illogical to conclude youth are "less fixed," to use the Court's term, and therefore cannot be sentenced without consideration of individual traits and not also conclude that many of these "less fixed" youth will not be considered "irretrievably depraved" years later. How can we at a time near the crime consider the potential changeability of youth and not do so later when a change in personality and behavior has actually occurred?

Secondly, it is obvious that many of the traits recognized as reducing the culpability of youth apply to other prisoners who weren't under 18 when they offended. Its not news that the adult population we are dealing with is short on self-control, long on impulsivity and significantly touched by various forms of mental disorder, childhood abuse and social deprivation. Many will look totally different after years in prison than when they were younger.

The problems with politically validating reform ideas of this sort are numerous and astute observers are skeptical anything major will take place. After all, many of the crimes we are dealing with seem to deserve a strong penal response especially in a country like ours with a strong retributivist tradition. One journalist recently called Americans punishment addicts. Parole boards, when they exist, are heavily influenced by politics and media. The idea of running prisons with rehabilitation foremost in mind has been rejected by the public and many professionals.

There are also technical impediments. No easy lines exist to distinguish LWOP and other life sentences from other serious offenses and this makes it difficult especially for courts to fashion modest reforms that don't expose the public to the dangerous. The Supreme Court has a long history of narrowly reviewing potentially excessive sentences under the Eighth Amendment's Cruel and Unusual Punishment Clause. And anti-capital punishment activists may see in reforms to LWOP a great threat to the withering away of the death penalty. Finally, any plan that requires individual sentencing and discretionary parole justifies skepticism about our capacity to make choices that aim to predict future behavior.

But at the heart of our difficulty at envisioning reform of the vast prison world we have created is, I think, a lack of trust. We don't trust sentencing judges to use their discretion properly and parole boards to be able to pick out the rehabilitated. The public doesn't trust the politicians to protect them and the politicians don't trust the voters to recognize Willie Horton-type demagoguery for what it is. Most striking is the gap between what the social science professionals derive from study of the criminal justice system and what the public hears and believes.

And there is a large risk aversion problem. Decision makers run no risk of criticism for permissiveness if they incarcerate; only when they bend toward release. This risk aversion contains both the truth of a human right to security and the lie that all will be well if we just lock up miscreants and throw away the key. But if the core objection to the death penalty is that it treats individuals as objects, the truth is that any scheme that refuses to look at individual circumstances fails the same test. If we reject torture because of what it does to personality, to a sense of self, to human dignity, as much as because it involves pain, the system we have approaches torture.

What can be done? There are some obvious reform proposals but I stress the issue is not the rationality of reform but cultural forces, the fear and the racial dynamics that close off major portions of the population from seeing that rationality. There are, however, obvious moves that would shift the landscape.

Firstly, both at sentencing and at points during incarceration offenders should be given a meaningful opportunity to introduce mitigating evidence and proof of change in an effort to win either a reduced sentence or supervised release.

Second, as Michael Romano of the Stanford Law School Three Strikes Clinic argues a trial attorney's failure to look for and present mitigating evidence should without more constitute ineffective assistance of counsel.

Third, the disjunction between resources available to death sentenced defendants and life sentenced defendants should be equalized.

Fourth, a meaningful parole process must be available to all life-sentenced prisoners, the essence of which is that the offense itself is not the only or dominant consideration weighed by board members.

Fifth, if we want to decrease the chances of recidivism, we must end government's indifference to the problems of offender reentry to the community.

Sixth, more attention should be given to the role of the media in reporting crime and criminal court proceedings and to the gap between

what criminologists and other students of the justice system report and what the public receives and believes.

Seventh, the Supreme Court should take challenges to LWOP as an opportunity to right one of its greatest wrongs—our modern day Dred Scot decision—when it turned a blind eye to the implications of disparate sentencing of African Americans in McCleskey v. Kemp.[13] Without going into this sorry history in detail I will say this: the Court has rejected claims of systematic discrimination in sentencing by requiring proof in particular cases that intentional discrimination took place. This is an impossible standard to meet. Judges and jurors today are hardly likely to come forward and assert that they sentenced on the basis of the defendant's race. It's a decision that ignores institutional, systemic and latent racism and its bizarre that a modern judiciary that continually decides major issues on the basis of objective data should take such a position.

Finally, the real power in the criminal justice system has devolved to the prosecution. By adding charges, prosecutors increase the cost of going to trial prohibitively and thereby induce guilty pleas. As a result, power has passed from the courthouse to the district attorney's office. The late William Stunz proposed that judges have power to decline to impose any sentence that seemed "unduly harsh." Statutory maxima would still apply and prosecutors could still negotiate with the defense for lower sentences than the maximum but judges would be free to impose a ceiling. Such a proposal flows from a perception that legislators' power to define crimes and prosecutors' power to charge them needs to be checked by a more muscular judicial response if we are to contain a system that is dominated almost invariably by the notion that "the heavier the sentence, the better."

And here for me things turn back to the abolition of capital punishment, for so long as life sentences without parole appear as leniency, a benefice to the defendant, it will be difficult if not impossible to show how excessive they are in certain cases.

While parts of the world try experiments in reconciliation, even in cases of genocide, we hold tight to its opposite, retribution, which often seems not "just desserts" but a cover for vengeance. Perhaps the retributive-reconciliation binary is too much a zero sum game. For myself I would be satisfied by proportion-

13 McCleskey v. Kemp, 481 U.S. 279 (1987).

ality--which requires individuation and limits. This is a value oft mentioned, occasionally implemented, but mostly rhetorical in our system.

The idea that criminals can't change as a foundation for mandatory minimum sentences and LWOP is ludicrous, especially in a society as uncommitted to history and in love with today as ours. Here's just one theory of change, from David Brooks of the Times, a mysterious subject but one that we no longer seriously attempt to explore with prisoners:

"Human behavior flows from hidden springs and calls for constant and crafty prodding more than blunt hectoring. The way to get someone out of a negative cascade is … to go on offense and try to maximize some alternative good behavior. There's a trove of research suggesting that it's best to tackle negative behaviors obliquely, by redirecting attention toward different, positive ones."[14]

Plainly our prisons don't do much to maximize "alternative good behavior."

Some day we will truly recognize what William Bradford, our second Attorney General, wrote in 1793: Every criminal penalty "which is not absolutely necessary" is "a cruel and tyrannical act."[15] Even the most misguided constitutional originalist will concede that lopping off ears, an accepted penalty in Massachusetts in 1791 along with branding an M on the forehead of a man convicted of manslaughter, now violates the constitution. You needn't be a cockeyed optimist to conclude that our present obsession with warehousing will end. Thousands once were lynched in this country. Men were sentenced to death with scant attention to procedures that are now considered necessities. While the virus of racial sentencing is still with us and retributive urges run deep in our society so does our modern attention to data, cost and effective policy. The problems I canvassed this afternoon will not yield to short-term solutions but that's not an excuse to keep from working to resolve them.

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14 David Brooks, *How People Change*, N.Y. Times, Nov. 26, 2012, at A31.

15 William Bradford, *An Enquiry How Far the Punishment of Death is Necessary in Pennsylvania*, 12 Am. J. Legal Hist. 122, 126 (1793).

But I leave you with a challenge. I have reached the point where I mistrust words divorced from action—even my words. So if you take away anything from what I've said please understand that their author feels they are of nothing unless brigaded with some move in the direction of what these words suggest. Consider Arnie King. He has a web site (www.arnoldking.org), he is on Facebook and he has or will soon have an application for a parole board recommendation to the governor coming up soon. Check out his story. If you are of a mind, don't just give a mental nod or share a lament at his plight. Get on the phone. Get on your computer. Write an email. Tell this governor that Willie Horton is dead and gone and that an act of courage on his part will endure.

When the Legal Defense Fund began its challenge to the death penalty few aside from Hugo Bedau thought we had a chance to win a case like Furman. Evan Mandery in his remarkable book, A Wild Justice, says it was an "audacious idea," like aiming to put a man on the moon.

This time it may be Mars, but we'll get there.

PREA's Peril

Giovanna Shay[1]

This is the second in a series of two symposium pieces that I've written in 2014 about the implementation of the Prison Rape Elimination Act (PREA) regulations.[2] The first installment, entitled *PREA's Elusive Promise*, appeared in the LOYOLA JOURNAL OF PUBLIC INTEREST LAW.[3] It focuses on the provisions of the Department of Justice (DOJ) PREA regulations that are intended to protect LGBT incarcerated people, and describes the PREA regulations as an unprecedented federal reformist effort to change state and local corrections culture through corrections regulations. That piece focuses more on the potential of the regulations—for public education; to perform an "expressive function;"[4] and to change norms and corrections cultures.

This second piece takes a more critical view of the PREA regulations, focusing on issues with implementation, as well as unintended consequences. As I previewed in *PREA's Elusive Promise*, one of the greatest dangers of PREA implementation is that we succeed in creating more "LGBT-friendly" ways of celling people without reducing our nation's unprecedented reliance on incarceration. Hence, this piece is entitled *PREA's Peril*.

The article is in five parts. Part I deals with issues relating to PREA compliance, specifically weak enforcement mechanisms. Part II addresses reported incidents in which PREA has been used

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1 Professor of Law (2012-14), Western New England University School of Law. Although this article will appear after I have left WNEU School of Law to take on a new role, it was written during my time as a WNEU Professor of Law and with support from that institution. Thanks to Western New England Law Librarian Neal Smith for critical research assistance, particularly in finding state corrections policies. Thanks too to Northeastern University School of Law for hosting this symposium on Prisoners' Rights in the Modern Era, and to my co-panelists, attorneys Chase Strangio, Alisha Williams, and Flor Bermudez, for useful exchange about these issues.

2 42 U.S.C. §§ 15601-09 (2012); 28 C.F.R. §§ 115.5-115.501 (2014).

3 Giovanna Shay, *PREA's Elusive Promise: Can DOJ Regulations Protect LGBT Incarcerated People?*, LOY. J. PUB. INT. L. 343 (2014).

4 Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2024 (1996).

as a sword rather than a shield, to justify harassment and abuse of incarcerated people who are or who are perceived to be LGBT. This section includes a fifty state survey of corrections policies that permit discipline for consensual romantic, emotional, or sexual contact between incarcerated people. It is feared that PREA will be used as an excuse for harsh and discriminatory enforcement of these policies, beyond legitimate investigation of sexual abuse. Part III describes what I call "PREA exceptionalism": special "fixes" to America's draconian limitations on court access for prisoners that are limited to sexual abuse cases, as well as court decisions that deny prisoners relief because their complaints are not solely about sexual abuse. Part IV focuses on the perils of success—promoting a corrections industry of training and "best practices" that creates the illusion of an "LGBT-friendly" network of prisons and jails without addressing the root cause of abuse, over-incarceration. Part V concludes by offering some brief thoughts on leveraging the PREA regulations for lasting change.

I. Implementation and Compliance Problems

The first order issues relating to PREA implementation are simple compliance problems.[5] The Bureau of Prisons (BOP) was immediately subject to the DOJ PREA standards.[6] However, implementation of the PREA regulations in the state corrections systems is more indirect. The main enforcement mechanism for PREA is the threatened loss of 5% of the state's federal funding for prisons.[7] Beginning in August 2013, each state's governor must certify that the state is in full compliance with PREA, or, alternatively, that it will use 5% of its federal funding for prisons to achieve full compliance with the PREA standards.[8]

PREA did not create any mechanism for investigating complaints or any DOJ office for ensuring enforcement.[9] Nor did PREA include a private right of action,[10] although some believe that

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5 *See, e.g., Anonymous PREA Hotlines Not So Anonymous,* Prison Legal News, Nov. 2013, at 50.

6 42 U.S.C. § 15607(b)(2012).

7 *Id.* § 15607(e)(2)(A).

8 *Id.* § 15607(e)(2)(A)-(B).

9 David Kaiser & Lovisa Stannow, *Prison Rape: Obama's Program to Stop It*, N.Y. Rev. of Books, October 11, 2012.

10 *See* Ball v. Beckworth, No. CV 11-00037-H-DWM-RKS, 2011 WL 4375806 at *4 (D. Mont. Aug. 31, 2011) ("PREA provides for the reporting of incidents of

the DOJ standards and the information generated by the National Inmate Surveys could assist in demonstrating deliberate indifference in suits for failure to protect.[11] (One district court in Michigan recently concluded that a PREA claim by juveniles housed with adults was not moot despite the Department of Corrections' cessation of the practice).[12]

As David Kaiser and Lovisa Stannow warned in 2012 shortly after the DOJ PREA regulations were issued, the threatened loss of funding is simply too weak a compliance mechanism to create much incentive for some governors to implement the regulations.[13] Moreover, as Kaiser and Stannow pointed out, many local jails do not receive much federal funding, so the possible loss of federal grants is not much of a threat.[14]

Unfortunately, it appears this prediction is playing out in some jurisdictions. As of May 2014, seven states—Arizona, Florida, Idaho, Indiana, Nebraska, Texas, and Utah— either had not met the deadline or had indicated that they would not comply with the PREA regulations.[15] Texas Governor Rick Perry wrote to U.S. Attorney General Eric Holder that he would not certify Texas' compliance with the PREA regulations,[16] referring to PREA as "a counterproductive

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rape in prison, the allocation of grants, and it created a study commission. It does not give rise to a private cause of action.").

11 *See* Chase Strangio & Amy Fettig, Am. Civil Liberties Union, ACLU Prision Rape Elimination Act (PREA) Toolkit: End the Abuse, Protecting LGBTI Prisoners From Sexual Assault (2014).

12 Doe 1 v. Michigan Dep't. of Corr., No. 13-14356, 2014 WL 2207136, at *7 (E.D. Mich. May 28, 2014).

13 Kaiser & Stannow, *supra* note 9.

14 *Id.*; *see generally* Alex Friedmann, *Prison Rape Elimination Act Standards Finally in Effect, but Will They Be Effective?*, PRISON LEGAL NEWS, Sept. 2013, at 6 ("Notably, for PREA enforcement purposes, the potential loss of federal prison-related grant funding only applies to the states—it is not applicable to local corrections agencies, the federal Bureau of Prisons or other federal agencies that operate detention facilities, nor to private prison contractors.").

15 Sari Horwitz, *States Take Steps to Reduce Sexual Assault in Prisons*, WASHINGTON POST, May 29, 2014, http://www.washingtonpost.com/world/national-security/states-take-steps-to-reduce-sexual-assault-in-prisons/2014/05/28/e0fe0ad6-e69b-11e3-afc6-a1dd9407abcf_story.html; Rebecca Boone, *Some States Opting out of Federal Prison Rape Law*, ASSOCIATED PRESS, May 23, 2014, http://bigstory.ap.org/article/some-states-opting-out-federal-prison-rape-law.

16 Letter from Rick Perry, Governor, Tex., to Eric H. Holder, Jr., Att'y Gen. of U.S. Dep't of Justice (Mar. 28, 2014) (on file with Texas State Library and Archives Commission), *available at* http://www.tdcjunion.com/research/rick_perry_letter.pdf; *see also* Steven Hsieh, *Rick Perry Says Texas Won't Comply With Federal*

and unnecessarily cumbersome and costly regulatory mess for the states."[17]

At the first deadline for certifying PREA compliance (May 15, 2014), only New Hampshire and New Jersey certified full compliance.[18] The Department of Justice (DOJ) permitted states to submit "assurance letters," promising that the jurisdiction will work towards PREA compliance.[19] In mid-May 2014, the National Governor's Association submitted a letter to Attorney General Holder, complaining that federal delays in finalizing the PREA audit instrument and in training and certifying PREA auditors render the timelines for certifying compliance unrealistic.[20] The DOJ confirmed that states submitting "assurance letters" would not be audited for three years, a reprieve that provoked criticism from advocates and a former NPREC Commissioner.[21] Forty-six jurisdictions (including states and territories) provided assurance to the DOJ that they were working towards PREA compliance.[22]

Some local sheriffs also have balked at implementing PREA. In April 2014, Kerr County Texas Sheriff Rusty Hierholzer said that it would be impossible to separate the seventeen year olds housed at the jail from the older incarcerated people, saying, "you might as well

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Standards to Curb Prison Rape, NATION, April 2, 2014, http://www.thenation.com/blog/179159/gov-rick-perry-says-texas-wont-comply-federal-standards-curb-prison-rape.

17 *Id.*

18 James Cole, Deputy Att'y Gen., U.S. Dep't of Justice, Speech at Press Conference Updating States' Efforts to Comply With Prison Rape Elimination Act (May 28, 2014), *available at* 2014 WL 2199861 (D.O.J.).

19 Joaquin Sapien, *Sentenced to Wait: Efforts to End Prison Rape Stall Again*, PROPUBLICA (May 20, 2014, 3:26 PM), http://www.propublica.org/article/sentenced-to-wait-efforts-to-end-prison-rape-stall-again.

20 *Id.* (citing Letter from Dan Crippen, Exec. Dir., Nat'l Governors Ass'n, to Eric Holder, Att'y Gen., U.S. Dep't of Justice (May 14, 2014) (on file with the National Governor's Association), *available at* http://www.nga.org/cms/home/federal-relations/nga-letters/executive-committee-letters/col2-content/main-content-list/prea.html).

21 *Id.*

22 James Cole Speech, *supra* note 18; *see also* Boone, *supra* note 15 (reporting that as of May 23, 2014, at least 10 states--Alaska, New York, Ohio, California, Washington, Oklahoma, West Virginia, Colorado, Mississippi, and Illinois--had informed the DOJ that they were not yet PREA compliant, but were working toward it).

build me a new jail."[23] Heirholzer elaborated, "I don't think we need the federal government coming down here and telling us we need to change the way we've been doing things for years, or else they won't give us federal grants. Well, they can keep their grants."[24]

A number of jails refuse even to take part in the National Inmate Survey (NIS) conducted by the Bureau of Justice Statistics (BJS).[25] Lovisa and Stannow highlight the example of Orleans Parish Prison in New Orleans, where Sheriff Marlin Gusman refused to participate in the 2011 NIS after allegations of abuse were uncovered at the facility in the 2008-2009 NIS.[26] Kaiser and Stannow argue that the Special Litigation Section of the Justice Department's Civil Rights Division should investigate corrections facilities that refuse to participate in the BJS surveys.[27]

On a positive note, some jurisdictions have adopted the PREA regulations in whole or in part as part of state legislation[28] or regulation.[29] In apparent tension with Governor Perry's response, this includes the State of Texas, which enacted legislation adopting PREA in juvenile facilities.[30] In his letter, Governor Perry wrote about efforts Texas has made to reduce sexual abuse in its juvenile facilities

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23 Sean Batura, *Perry, Sheriff Clash With Feds Over Law*, KERRVILLE DAILY TIMES, Apr. 9, 2014, http://dailytimes.com/news/article_050b44b2-bfae-11e3-9fa4-001a4bcf887a.html.

24 *Id.*

25 David Kaiser & Lovisa Stannow, *The Shame of Our Prisons: New Evidence*, N.Y. REVIEW OF BOOKS, Oct. 24, 2013, at n.28 and accompanying text, http://www.nybooks.com/articles/archives/2013/oct/24/shame-our-prisons-new-evidence/ (reviewing ALLEN J. BECK ET AL., BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011-12: NATIONAL INMATE SURVEY, 2011-12 (2013); ALLEN J. BECK ET AL., BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN JUVENILE FACILITIES REPORTED BY YOUTH, 2012: NATIONAL SURVEY OF YOUTH IN CUSTODY, 2012 (2013)) (describing how certain county jails in Alabama, Florida, Georgia, Louisiana, New Mexico, North Carolina, Pennsylvania, Tennessee, and Wisconsin, as well as one tribal jail in Arizona, refused to participate in the most recent National Inmate Survey).

26 *Id.*

27 *Id.*

28 *See* Strangio & Fettig, *supra* note 11, at 2 (describing state legislation that has been passed in Colorado, Connecticut, and Texas, and pending legislation in other states).

29 Shay, *supra* note 3 at nn.35-36.

30 37 TEX. ADMIN. CODE §§ 343.208, 343.412, 343.606, 344.620, 348.134, 355.400, 348.136, 380.9337 (2010) (adopting PREA for juvenile facilities and supervision); 37 TEX. ADMIN. CODE §§ 163.39, 195.41 (providing that

following a high profile widespread abuse scandal in 2007.[31] In 2011, the state passed a law requiring corrections officers in its juvenile system to undergo PREA training.[32]

In jurisdictions seeking to achieve full compliance, the PREA audit process provides an avenue for intervention and enforcement. PREA requires that states conduct independent audits of one-third of their corrections facilities every year[33] so that all facilities are audited every three years.[34] The DOJ is certifying PREA auditors, who are being trained through the National PREA Resource Center.[35] Notices of audits will be posted in corrections facilities; advocates suggest that concerned individuals contact auditors about compliance problems.[36] These avenues for public engagement and intervention are among the most promising aspects of PREA reform.

II. PREA's Unintended Consequences

PREA also has the potential to create new, unintended problems. Unfortunately, it appears that in some jurisdictions PREA is being used as a sword rather than as a shield to harass LGBTQ people. Even before the final regulations were promulgated, commentators

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community residential facilities must protect residents from abuse pursuant to PREA).

31 *See* Ralph Blumenthal, *Investigations Multiplying in Juvenile Abuse Scandal*, N.Y. Times, Mar. 3, 2007, http://www.nytimes.com/2007/03/04/us/04youth.html?pagewanted=print&_r=0 ("A sexual abuse scandal in the Texas juvenile justice system has state politics in an uproar, with accusations that damning reports were doctored and shelved and sexual predators in high positions were allowed to resign without facing charges.").

32 Letter from Rick Perry, *supra* note 16 (describing Texas' efforts to reduce sexual abuse in its corrections systems); Strangio & Fettig , *supra* note 11, at 2. (writing that "Texas passed a piece of legislation that mandates PREA training for correctional officers who work in juvenile facilities," and citing S.B. 653, 82d Leg., Reg. Sess. (Tex. 2011)).

33 28 C.F.R. § 115.401(b) (2014).

34 28 C.F.R. § 115.401(a) (2014).

35 *Auditor Qualifications and Application*, Nat'l PREA Resource Ctr. (2014), http://www.prearesourcecenter.org/audit/auditor-qualifications-and-application; *see also* Brenda V. Smith, *The Prison Rape Elimination Act: Implementation and Unresolved Issues*, 3 Crim. L. Brief 10 (2008) (describing PREA implementation issues at that time, including training and grant funding); *see also* James Cole Speech, *supra* note 18 (reporting that the DOJ had certified 259 PREA auditors to date).

36 Strangio & Fettig, *supra* note 11, at 1-2.

voiced concerns that PREA would be used primarily to target LGBT incarcerated people.[37] Advocates have reported that incarcerated people have received disciplinary infractions for displays of emotion or affection such as holding hands,[38] and published court opinions confirm disciplinary charges for consensual sexual relationships.[39]

U.S. corrections systems overwhelmingly discipline consensual sexual contact between incarcerated people,[40] sometimes punishing even expressions of emotion or familiarity such as kissing, hugging, and handholding.[41] New York, for example, prohibits kissing,

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37 *See* Brenda V. Smith, *Rethinking Prison Sex: Self-Expression & Safety*, 15 COLUM. J. GENDER & L. 185, 193 n.36 (2006) (citing human rights concerns).

38 *See* CATHERINE HANSSENS ET AL., CTR. FOR GEND. & SEXUALITY LAW AT COLUMBIA LAW SCH., A ROADMAP FOR CHANGE: FEDERAL POLICY RECOMMENDATIONS FOR ADDRESSING THE CRIMINALIZATION OF LGBT PEOPLE AND PEOPLE LIVING WITH HIV 22, 68 n.58 (2014), *available at* http://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/files/roadmap_for_change_full_report.pdf; Jessi Lee Jackson, *Sexual Necropolitics and Prison Rape Elimination*, 39 SIGNS 197, 218 (2013); Telephone Interview with Rev. Jason Lydon, Community Minister, Black & Pink, (Oct. 8, 2013) (discussing issues facing LGBT incarcerated people, including harassment and the issuance of disciplinary infractions for behavior perceived to be romantic or affectionate).

39 HANSSENS ET AL., *supra* note 38, at 22, 68 n.58 (citing cases in which incarcerated people were disciplined for apparently consensual sexual relationships); Waller v. Maples, No. 1:11CV00053, 2011 WL 3861370 (E.D. Ark. July 26, 2011), *adopted*, 2011 WL 3861369 (E.D. Ark. Aug. 31, 2011) (convicted of consensual sexual activity with another incarcerated person, but claimed that the other prisoner was a "childhood friend" and that they were not engaged in a sexual relationship at that time); McKnight v. Hobbs, No. 2:10CV00168, 2010 WL 5056024 (E.D. Ark. Nov. 18, 2010), *adopted*, 2010 WL 5056013 (E.D. Ark. Dec. 6, 2010) (disciplined and placed on "PREA status" for sexual activity with another incarcerated person, who was also disciplined); Everson v. Cline, No. 101,914, WL 3172859 (Kan. Ct. App. Oct. 2, 2009) ("admitted to authoring a note that attempted to establish a sexual relationship with a fellow inmate").

40 *See infra* App. A (chart reporting results of fifty state survey of available corrections codes of conduct disciplining consensual sexual contact between incarcerated people).

41 *See, e.g.*, ARIZ. DEP'T OF CORR. DEP'T ORDER 803, INMATE DISCIPLINARY PROCEDURE (2014), *available at* https://corrections.az.gov/sites/default/files/policies/800/0803%20-%20Effective%206-7-14.pdf (Violation 27B defines sexual contact as including "kissing, masturbation or any contact that can be construed as sexual in nature."); IND. DEP'T OF CORR. POLICY & ADMIN. PROCEDURES 02-04-101, THE DISCIPLINARY CODE FOR ADULT OFFENDERS (2012), *available at* http://www.in.gov/idoc/files/02-04-101_The_Disciplinary_Code_for_Adult_Offenders_2__7-1-2012.pdf (defining

embracing, and handholding.[42] Louisiana's disciplinary rules and procedures for adult offenders state that "no offender shall . . . flirt" or make any "overt display of affection in a manner that may elicit sexual arousal with anyone."[43] California's code states: "Inmates must avoid deliberately placing themselves in situations and behaving in a manner, which is designed to encourage illegal sexual acts."[44]

Even more troubling, some jurisdictions discipline gender expression.[45] For example, the State of Michigan punishes "imitating the appearance of the opposite sex," which is defined as "wearing

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prohibited sexual contact to include kissing and handholding, except as allowed under Department policy); State of Iowa Dep't Of Corr. Policy & Procedures No. IO-RD-01, Offender Discipline (2006), *available at* http://www.wcl.american.edu/endsilence/documents/inmate_conduct_doc_iowa.pdf (defining sexual misconduct to include an offender proposing kissing and petting); Kan. Admin. Regs., § 44-12-315(a) (2007) (defining "lewd acts" as "kissing, fondling, touching, or embracing"); Mich. Dep't Of Corr. Policy Directive No. 03.03.105, Prisoner Discipline (2012), *available at* https://www.michigan.gov/documents/corrections/0303105_382060_7.pdf (giving examples of prohibited prisoner/prisoner contact as including kissing and hugging); Nev. Dep't of Corr. Admin. Reg. 707.02, Inmate Disciplinary Process (2010), *available at* http://www.doc.nv.gov/sites/doc/files/pdf/AR707.pdf (one of the major violations is "sexually stimulating activities, including but not limited to caressing, kissing or fondling"); Or. Admin. R. 291-105-0010 (2014) (including kissing as a prohibited sexual activity); State of Vt. Agency of Human Servs. Dep't of Corr. No. 410.01, Facility Rules and Inmate Discipline (2012), *available at* http://www.doc.state.vt.us/about/policies/rpd/correctional-services-301-550/401-500-programs-security-and-supervision/410-01-facility-rules-and-inmate-discipline.pdf (prohibits sexual activity "which produces or is intended to produce sexual stimulation," including kissing); State of W. Va. Div. of Corr. Policy Directive No. 325.00, Discipline of Inmates (2012), *available at* http://www.wvdoc.com/wvdoc/LinkClick.aspx?fileticket=P9SduoPy1aM%3D&tabid=104&mid=156 (prohibits "engag[ing] in any sexual act, such as, but not limited to sexual intercourse, oral sex, kissing, fondling or masturbation."); Wyo. Dep't of Corr. Policy & Procedure No. 3.101, Code of Inmate Discipline (2013), *available at* http://doc.state.wy.us/Media.aspx?mediaId=340 (defines sexual misconduct, a major violation, in part as "kissing, caressing, fondling").

42 N.Y. Comp. Codes R. & Regs. tit. 7, § 270.2 (a prohibited sexual offense by an inmate "includes, but is not limited to kissing, embracing, or handholding.").

43 La. Admin. Code tit. 22 § 1.341 (2014) (characterizing such acts as aggravated sex offenses).

44 Cal. Code Regs. tit. 15, § 3007 (2014).

45 *See generally* Gabriel Arkles, *Correcting Race & Gender: Prison Regulation of Social Hierarchy Through Dress*, 87 N.Y.U. L. Rev. 859 (2012); Strangio & Fettig , *supra* note 11, at 5-6.

clothing of the opposite sex" and the "wearing of makeup by male prisoners."[46] Texas disciplinary rules include a provision punishing "male offenders who refuse to shave or get a haircut."[47] The Idaho Prison Rape Elimination Policy adopted in 2005 states: "to foster an environment safe from sexual misconduct, offenders are prohibited from dressing or displaying the appearance of the opposite gender. Specifically, male offenders displaying feminine or effeminate appearance and female offenders displaying masculine appearance to include, but not limited to, the following: hairstyles, shaping eyebrows, face makeup, undergarments, jewelry, and gender opposite clothing."[48]

Very general disciplinary provisions, or prohibitions on so-called "cross-gender" presentation, might be used to punish incarcerated people perceived to be gay or transgender for supposedly "provoking" sexual attention.[49] Such broad rules also serve to police gender, forcing incarcerated men into a mold of "hyper-masculinity" common in prisons and jails—avoiding expressions of emotion, of affection, and of connection with other people.[50]

One recent case that illustrates a possible "ratcheting up" of prison disciplinary charges under PREA (albeit without mention of the actual or perceived sexual orientations and gender identities of the people involved) is *Waybright v. Ballard*.[51] Incarcerated in West Virginia, Jason Waybright unsuccessfully challenged his disciplinary conviction for "engag[ing] in any sexual act, such as, but not limited

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46 MICH. DEP'T OF CORR., *supra* note 41.

47 TEX. DEP'T OF CRIMINAL JUSTICE, CORR. INST. DIV., DISCIPLINARY RULES AND PROCEDURES FOR OFFENDERS GR-106 (2012), *available at* http://www.tdcj.state.tx.us/documents/cid/Disciplinary_Rules_and_Procedures_for_Offenders_English.pdf.

48 IDAHO DEP'T OF CORR. CONTROL NO. 318.02.01.001, DISCIPLINARY PROCEDURES: OFFENDER (2012), *available at* http://www.idoc.idaho.gov/content/policy/755 (prohibiting prisoners in women's prisons from having masculine hairstyles and prisoners in men's prisons from having effeminate hairstyles under guise of compliance with PREA); *see* HANSSENS ET AL *supra* note 38, at 21.

49 *Cf.* Strangio & Fettig , *supra* note 11, at 5-6 (warning of "[m]is-use of PREA that harms LGBTI individuals, including "policies or practices that limit 'cross-gender' expression because such expression 'invites' sexual assault").

50 *See* Sharon Dolovich, *Two Models of the Prison: Accidental Humanity and Hypermasculinity in the L.A. County Jail*, 102 J. CRIM. L. & CRIMINOLOGY 965, 971 (2012) (describing the "hyper masculinity imperative" in general population in the L.A. County Jail).

51 Waybright v. Ballard, No. 13-0899, 2014 WL 998427 (W. Va. Mar. 14, 2014).

to… kissing, fondling...."[52] A corrections officer had observed Mr. Waybright and two other incarcerated people allegedly "kiss each other on the cheek, grab each other on the butt, and hug each other."[53] The officer who had observed the interaction had described it as "horseplay" in her report,[54] and Mr. Waybright had offered to plead guilty to the lesser disciplinary infraction of "physical contact," which could include embracing or holding hands.[55] However, the disciplinary hearing officer convicted Mr. Waybright of the more serious offense of "engag[ing] in any sexual act," reasoning that the officer who had filed the original report was a "temporary" officer who had not yet undergone PREA training.[56] Waybright was sentenced to sixty days of punitive segregation and loss of privileges.[57]

Although Mr. Waybright brought a pro se habeas petition attempting to challenge this result, the West Virginia courts rejected his claims, reasoning in part that the state possessed discretion to choose the more severe disciplinary charges.[58] While the published opinion does not state Mr. Waybright's actual or perceived sexual orientation and gender identity, his case illustrates how corrections officials might rely on PREA to justify harsher disciplinary treatment of certain offenses.

In *Morales* v. *Pallito*, Martin Morales, a man incarcerated in Vermont who described himself as living an "openly homosexual lifestyle,"[59] alleged that the state has implemented PREA in a way that discriminates against LGBT incarcerated people.[60] According to Morales' court filings, gays "are the focus of virtually every PREA investigation in Vermont's correctional facilities."[61] Morales allegedly engaged in "above-the-clothing" same-sex sexual activity with other incarcerated people,[62] and also has been investigated under PREA for alleged infractions including romantic correspondence with his then-

52 *Id*. at *1.
53 *Id.*
54 *Id.*
55 *Id.*
56 *Id.*
57 *Id.*
58 *Id.* at *3.
59 Morales v. Pallito, No. 2:13 CV 271, 2014 WL 1758163 at *1 (D. Vt. Apr. 30, 2014).
60 *Id*. at *6.
61 *Id*.
62 *Id*. at *1.

boyfriend and sending a romantic letter to another gay prisoner,[63] and "allegedly sharing an embrace with a bisexual prisoner,"[64] which "[a] subsequent investigation determined . . . was not of a sexual nature."[65] In total, Morales has been investigated under PREA 23 times, and he alleged retaliation against gay incarcerated people for attempting to exercise their constitutional rights.[66]

In a report that engaged thoughtfully with Morales' arguments, U.S. Magistrate Judge John M. Conroy recommended that the district court reject Morales' due process and equal protection claims, which it did.[67] The magistrate's report acknowledged commentary arguing that corrections rules banning all consensual sexual activity serve no real purpose, and can be counter-productive.[68] However, it reasoned that prisoners possess no protected interest in sexual activity,[69] and that, even if the Vermont DOC applied PREA in a discriminatory fashion, Morales would still need to prove that the disparity in the treatment of straight and gay incarcerated people was not reasonably related to any legitimate penological interest.[70] The federal district court adopted the magistrate's recommendations and dismissed Mr. Morales' suit.[71]

In this brief symposium contribution, I am not attempting to make the argument that prisons should lift prohibitions on consensual sex between incarcerated people.[72] As U.S. Magistrate Judge Conroy recognized, others have made that argument.[73] A 2014 report by advocacy organizations including the Center for Gender & Sexuality Law at Columbia Law School, urged the DOJ to "amend the PREA

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63 *Id*. at *2.
64 *Id*.
65 *Id*.
66 *Id*.
67 *Id*. at *1, 13.
68 *Id*. at *11.
69 *Id*. at *10.
70 *Id*. at *13.
71 *Id*. at *1.
72 Alice Ristroph, *Sexual Punishments*, 15 COLUM. J. OF GENDER & L. 139, 182 (2006) (arguing that "the PREA does not contemplate the measures that prisoners and several activists and researchers have identified as most important to reducing sexual assaults in prison and their devastating consequences: opportunities for conjugal visits and condom distribution; the elimination of regulations against non-assaultive sexual relations among prisoners").
73 Morales v. Pallito, No. 2:13 CV 271, 2014 WL 1758163 at *11 (D. Vt. Apr. 30, 2014).

regulations to require prisons to eliminate bans on consensual sex among incarcerated people."[74] Former Commissioner of the National Prison Rape Elimination Commission, Brenda V. Smith, has written, "in many situations the prison does not have a legitimate interest in prohibiting prisoner sexual expression and would be better served by using scarce resources to protect prisoners from nonconsensual and coercive sex by staff or other inmates."[75] Smith also has said that blanket prohibitions on sexual contact between incarcerated people promote "selective enforcement."[76] As the chart in the Appendix demonstrates, the vast majority (if not all) U.S. jurisdictions currently have these prohibitions on consensual sexual and romantic contact between incarcerated people. These issues deserve further attention and debate.

Here, I am simply pointing out that extremely broad corrections rules can be used to harass incarcerated people based on actual or perceived LGBT identity. Unfortunately—and ironically, given the intent of the new DOJ regulations to protect LGBT incarcerated people—PREA could be used as a justification to invoke these rules more often.

III. PREA Exceptionalism

PREA also may create a kind of exceptionalism for incarcerated people's claims of sexual abuse, sometimes producing unintended consequences. For example, the PREA regulations provide an administrative "fix"[77] for the draconian exhaustion requirement of the Prison Litigation Reform Act (PLRA).[78] However, PREA's work-around provision applies only to sexual abuse cases. Other serious forms of abuse remain subject to the PLRA. This exerts pressure on incarcerated people and their advocates to frame complaints as claims

74 Hanssens et al., *supra* note 38, at 22.
75 Smith, *supra* note 37, at 186.
76 Brenda V. Smith, *Analyzing Prison Sex: Reconciling Self-Expression With Safety*, 13 Hum. Rts. Brief 17 (2006).
77 28 C.F.R. § 115.52(b)(1) (2012) ("The agency shall not impose a time limit on when an inmate may submit a grievance regarding an allegation of sexual abuse.").
78 42 U.S.C. § 1997e(a) (2013) ("No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.").

of sexual abuse in order to receive a day in court. It also creates incentives for corrections officials to define abuse as non-sexual even when a sexual assault played a role in the incident.

The PLRA includes a mandatory exhaustion requirement that has been interpreted by the Supreme Court to operate as a procedural default rule.[79] Thus, if an incarcerated person fails to meet a deadline in a prison grievance procedure, his federal constitutional claim may never be heard on the merits by a judge.[80] Commentators have noted that this rule creates the potential for manipulation by corrections officials because they design and administer the prison grievance systems,[81] which set the rules of "proper exhaustion."[82]

The PREA regulations attempt to work around this harsh PLRA exhaustion requirement by providing that corrections agencies "shall not impose a time limit on when an inmate may submit a grievance regarding an allegation of sexual abuse." [83] However, the PREA regulations provide an exception only for sexual abuse cases, and state that, "the agency may apply otherwise-applicable time limits to any portion of a grievance that does not allege an incident of sexual abuse."[84]

A recent case from Pennsylvania, *Wakeley* v. *Giroux*,[85] provides an example of courts attempting to recharacterize claims arising from a sexual assault. Ms. Josette Wakeley filed a federal civil rights lawsuit alleging that Pennsylvania state corrections officials failed

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79 Woodford v. Ngo, 548 U.S. 81, 92 (2006).

80 *Id*. at 105 (Stevens, J., dissenting) (describing the harsh effects of the procedural default rule).

81 *See* Derek Borchardt, *The Iron Curtain Redrawn Between Prisons and the Constitution*, 43 COLUM. HUM. RTS. L. REV. 469, 498-518 (2012) (examining changes in state prison grievance procedures and concluding that, at least in Arizona, Arkansas, Colorado, and Oklahoma, "since the enactment of the PLRA, grievance procedures have been updated in ways that cannot be understood as anything but attempts at blocking lawsuits").

82 Jones v. Bock, 549 U.S. 199, 218 (2007) (In *Woodford v. Ngo*, 548 U.S. 81, 88 (2006), the Supreme Court held that "to properly exhaust administrative remedies prisoners must 'complete the administrative review process in accordance with the applicable procedural rules,'" rules that are not defined by the PLRA, but by the prison grievance process itself. Therefore "[c]ompliance with prison grievance procedures, [], is all that is required by the PLRA to 'properly exhaust.'").

83 28 C.F.R. § 115.52(b)(1) (2012).

84 28 C.F.R. § 115.52(b)(2) (2012).

85 Wakeley v. Giroux, No. 1:12- CV-2610, 2014 WL 1515681 (M.D. Pa. Apr. 15, 2014).

to protect her from an assault by her cellmate at SCI Muncy.[86] Ms. Wakeley alleged that her assailant was known to be mentally ill and to have a history of violence against women.[87] (According to the plaintiff, the cellmate was serving a life sentence for the killing of her lover).[88] The complaint alleged that Ms. Wakeley's cellmate made a sexual advance, which she rebuffed.[89] Ms. Wakeley says that her cellmate "then grabbed Plaintiff around the neck and began choking Plaintiff until Plaintiff passed out."[90] While Wakeley was unconscious, the cellmate then allegedly "stripped Plaintiff's clothes, attempted to sexually assault Plaintiff, beat her with a padlock, bit her hard enough to leave marks, and attempted to drown her in a toilet." The U.S. Magistrate Judge's report states "prison staff found [Wakeley] lying unconscious in a pool of blood."[91] Wakeley was "life-flighted" to the hospital, where she remained for three days.[92] After she returned from the hospital, Ms. Wakeley stayed in the prison infirmary for 1 and ½ months, before she was released to a halfway house.[93]

A federal district court granted summary judgment to the corrections officials named as defendants in Ms. Wakeley's suit, on the grounds that she had failed to exhaust administrative remedies pursuant to the PLRA.[94] Wakeley countered, among other things, that PREA permitted her to file an untimely grievance.[95] The district court rejected this argument for two reasons: first, that the PREA regulation had not been promulgated at the time of the assault and did not apply retroactively; and second, that "because Plaintiff is bringing a constitutional claim against Defendants, and not a sexual abuse claim, the regulation does not apply."[96] Thus, the district court characterized a claim about the defendants' alleged failure to protect Ms. Wakeley from sexual assault as "not a sexual abuse claim," when

86 *Id*. at *1.
87 *Id*. at *6.
88 *Id*.
89 *Id*. at *6.
90 *Id*.
91 *Id*. at *7 (magistrate judge's "Report and Recommendation" attached as an addendum to decision).
92 *Id*.
93 *Id*. at *7.
94 *Id*. at *4.
95 *Id*.
96 *Id*.

the implementation of policies and customs to prevent and respond to sexual assault is in fact the central focus of PREA.

Another "fix" to the Prison Litigation Reform Act (PLRA) specific to sexual abuse cases is an amendment to the PLRA physical injury requirement.[97] The PLRA contains a limitation on recovery that previously required a showing of a prior physical injury before permitting recovery of damages for mental or emotional injury. A few courts had concluded that a sexual assault did not count as a physical injury.[98] In response, in 2013 Congress amended the PLRA to make clear that, to recover damages for a mental or emotional injury, an incarcerated person could demonstrate either a prior physical injury *or* "the commission of a sexual act."[99]

This change to the PLRA physical injury requirement was achieved through an amendment to the Violence Against Women Act (VAWA),[100] not through PREA or the DOJ PREA regulations. However, although not actually part of PREA reform, the VAWA amendment is another example of a remedy that makes an exception for carceral sexual abuse, without addressing other violence against incarcerated people.

Such changes suggest that there is sometimes more political momentum to address prison sexual assault than to face other serious abuses in our criminal punishment system: violent conditions and the use of excessive force, constitutionally inadequate physical and mental health care, and a dearth of educational and rehabilitative programming.[101] Although in the wake of the recession there is some

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97 42 U.S.C. § 1997e(e) (2013); *see* James E. Robertson, *A Saving Construction: How to Read the Physical Injury Rule of the Prison Litigation Reform Act*, 26 S. ILL. U. L.J. 1, 4 (2001).

98 *See* 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, 143 (2008) (discussing cases that "have deemed sexual assault not to constitute a 'physical injury' within the meaning of the PLRA").

99 42 U.S.C. § 1997e(e) now provides that, "[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act (as defined in section 2246 of title 18)."

100 Violence Against Women Act, Pub. L. 113-4, § 1101, 127 Stat. 54, 134 (2013) (Sexual Abuse in Custodial Settings).

101 *Cf.* NAT'L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 318 (Jeremy Travis, Bruce Western, & Steve Redburn, eds., 2014).

recent political will to reduce over-incarceration,[102] New York State Governor Cuomo's recent about-face on funding for prison college programs illustrates that it is still too easy to defeat reforms with the slur "soft on crime."[103] The relative policy success on prison sexual violence issues might in part be explained by excellent advocacy efforts on the part of organizations like Just Detention International. However, there are some other, unattractive factors that also contribute to this dynamic. The specter of "prison rape" evokes fears (some of them racialized and homophobic) that may produce unlikely coalitions and generate action.[104] What is needed, however, is the will to confront the true "violence of incarceration,"[105] beyond stereotypes.

IV. The Perils of Success

One of the greatest dangers of PREA is that it will succeed, infusing yet more resources into corrections bureaucracies and incarceration-related businesses. PREA is a source of federal

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102 *See* Vera Inst., Playbook for Change? States Reconsider Mandatory Sentences (Ram Subramanian & Ruth Delany, eds., February 2014) ("All told, at least 29 states have taken steps to roll back mandatory sentences since 2000"); Editorial, *A Rare Opportunity on Criminal Justice*, N.Y. Times, March 15, 2014, http://www.nytimes.com/2014/03/16/opinion/sunday/a-rare-opportunity-on-criminal-justice.html (calling for passage of the Smarter Sentencing Act and the Recidivism Reduction and Public Safety Act and arguing that these "two bipartisan bills now under consideration aim to unwind our decades-long mass incarceration binge and to keep it from happening again.").

103 *See* Thomas Kaplan, *Cuomo Drops Plan to Use State Money to Pay for College Classes for Inmates*, N.Y. Times, April 2, 2014, http://www.nytimes.com/2014/04/03/nyregion/cuomo-drops-plan-to-use-state-money-to-pay-for-college-classes-for-inmates.html.

104 *See* Valerie Jenness & Michael Smyth, *The Passage & Implementation of the Prison Rape Elimination Act: Legal Endogeneity and the Uncertain Road from Symbolic Law to Instrumental Effects*, 22 Stan. L. & Pol'y Rev. 489, 503 (2011) (describing the involvement of evangelical group Prison Fellowship Ministries in the passage of PREA, and pointing out that a common evangelical concern is the control of same-sex sexuality); Kim Shayo Buchanan, *Our Prisons, Ourselves: Race, Gender & the Rule of Law*, 29 Yale L. & Pol'y Rev. 1, 57-59 (2010) (arguing that "the black-on-white rape myth" has "entered the conventional wisdom about prison rape," even though it has been disproved by BJS statistics, and that, "Congress, too, embraced the myth in the congressional findings of the PREA," as did the NPREC in its recommendations, despite survey results to the contrary).

105 The Violence of Incarceration (Phil Scraton & Jude McCulloch, eds., 2008).

funding for training and reform efforts that seek to make corrections "better"—a project that many view with skepticism.

For example, after the Department of Justice issued a findings letter detailing long-term systemic sexual abuse at the Julia Tutwiler Prison for Women in Alabama,[106] the State of Alabama proposed an eighteen-month, $499,900 contract with a private consulting group to address PREA issues.[107] While the need for change in Alabama is manifest, this story illustrates how PREA can capture more resources for corrections-related projects,[108] instead of diverting them to initiatives that could reduce reliance on incarceration.

On a smaller scale, Johnson County, Texas, Sheriff Bob Alford told the Cleburne Rotary Club that PREA rules requiring incarcerated seventeen year-olds to be separated from adults is one of the multiple causes that would require an expansion and renovation of the county jail, costing about $20 million.[109] Johnson County has contracted with a private company to run the jail, and so this increased funding would benefit the corporation.[110] A county judge agreed that the county needed to address the jail's maintenance issues, but said, "I don't know if paying $20 million to benefit a private corporation is the best way to do that."[111]

This critique is similar to the one that prison abolitionists have leveled at prison reform efforts more generally.[112] Anti-prison activist Mariame Kaba recently wrote a blog post entitled "prison reform's in vogue and other strange things…" in which she tried to distinguish between "reformist reforms" and "non-reformist

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106 DOJ Findings Letter, *Investigation of the Julia Tutwiler Prison for Women and Notice of Expanded Investigation* (Jan. 17, 2014), http://www.justice.gov/crt/about/spl/documents/tutwiler_findings_1-17-14.pdf.

107 Kelsey Stein, *Under proposed 18-month, nearly $500,000 contract, consulting firm would focus on fundamental issues at Tutwiler prison*, AL.COM (Mar. 29, 2014, 9:17 AM), http://blog.al.com/wire/2014/03/under_proposed_18-month_nearly.html.

108 Ristroph, *supra* note 72, at 176 ("much of the literature on prison rape takes the same approach: build more, and better panopticons").

109 Matt Smith, *Sheriff Pitches Jail Expansion*, CLEBURNE TIMES REV., May 18, 2014, http://www.cleburnetimesreview.com/news/local_news/sheriff-pitches-jail-expansion/article_d9f2cbda-1cf0-53a1-8539-7f48fdad50e1.html.

110 *Id*.

111 *Id*.

112 *See* ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 84-85, 97-100 (2003); DEAN SPADE, NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW 91-93 (2011).

reforms."[113] Kaba wrote, "[t]o my mind, calls to increase prison funding are reformist reforms that only serve to perpetuate [and] grow prison bureaucracy."[114]

There is particular irony and danger in efforts to reduce sexual violence towards LGBT incarcerated people through corrections reform. It has been only a little more than a decade since the Supreme Court invalidated state laws criminalizing LGBT sexuality,[115] and LGBT people continue to experience heightened exposure to the criminal punishment system,[116] including police harassment[117] and discrimination in prosecution.[118]

More fundamentally, attempting to eliminate prison sexual abuse could be described as oxymoronic, since, as Alice Ristroph has pointed out, prison itself acts as a "sexual punishment,"[119] including loss of privacy and intrusive searches that may be experienced as sexual assaults.[120] Widespread reliance on incarceration contributes to the construction of harmful masculinities that reinforce homophobia and sexism and feed the cycle of prison sexual violence.[121] For these reasons, some argue that only decarceration can end prison sexual abuse.[122]

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113 Mariame Kaba, *Prison Reform's in Vogue and Other Strange Things…*, Truthout (Mar. 21, 2014 at 9:40 AM), http://truth-out.org/news/item/22604-prison-reforms-in-vogue-and-other-strange-things.

114 *Id*.

115 Lawrence v. Texas, 539 U.S. 558 (2003).

116 Joey Mogul, Andrea Ritchie & Kay Whitlock, Queer (In)Justice: The Criminalization of LGBT People in the U.S. 59, 64-67 (2011); *See* Hanssens et al., *supra* note 38, at 36-46.

117 Mogul, *supra* note 116.

118 J. Kelly Strader, *Lawrence's Criminal Law*, 16 Berkeley J. Crim. L. 41, 87-88 (2011) (discussing post-Lawrence prosecution of LGBT teens in situations that might be subject to "Romeo and Juliet" exceptions to statutory rape laws if it involved heterosexual teens); *see generally* Michael J. Higdon, *Queer Teens and Legislative Bullies: The Cruel and Invidious Discrimination Behind Heterosexist Statutory Rape Laws*, 42 U.C. Davis. L. Rev. 195 (2008).

119 Ristroph, *supra* note 72, at 139.

120 The Violence of Incarceration, *supra* note 105.

121 *See* Angela P. Harris, *Heteropatriarchy Kills: Challenging Gender Violence in a Prison Nation*, 37 Wash. U. J.L. & Pol'y 13, 26-32 (2011); Terry A. Kupers, *The Role of Misogyny and Homophobia in Prison Sexual Abuse*, 18 UCLA Women's L.J. 107, 109-20 (2010).

122 *See, e.g.*, David W. Frank, *Abandoned: Abolishing Female Prisons to Prevent Sexual Abuse and Herald an End to Incarceration*, 29 Berkeley J. Gend. L. & Just. 1 (2014) (arguing that the U.S. should end prison sexual victimization by abolishing women's prisons); *see generally* Captive Genders: Trans

V. Leveraging PREA

In her piece questioning recent enthusiasm for criminal law reform, Mariame Kaba quoted Jessica Mitford, who wrote in 1973, "If the starting point is that prisons are intrinsically evil and should be abolished, then the first principle of reform should be to have as few people as possible confined, for as short a time as possible."[123]

Kaba's selection of Mitford's quote is particularly bittersweet, since 1973 marks the approximate starting point of a nearly four-decade expansion of American prisons.[124] Mitford's logic holds true today. There is a growing consensus across the political spectrum that the United States relies too heavily on incarceration, and that this must change.[125]

In this context, PREA advocacy must always be done with the intention to decarcerate, rather than to "improve" corrections. Efforts to address prison sexual assault must seek to heighten transparency, by demanding access to corrections policies and BJS data.[126] PREA advocacy must seek to demonstrate free world engagement in corrections facilities, by connecting with the incarcerated, bringing their voices and stories to a larger audience, and seeking to participate in the development of policies and rules that govern corrections facilities. Most important, anti-violence advocates must suggest alternatives to incarceration at every available opportunity.

As this article was being written, the NEW YORK TIMES published an editorial entitled *End Mass Incarceration Now*, arguing that "the insanity of the situation is plain to people across the political spectrum," and that "[t]he American experiment in mass incarceration has been a moral, legal, social, and economic disaster."[127]

EMBODIMENT AND THE PRISON INDUSTRIAL COMPLEX (Eric A. Stanley & Nat Smith eds., 2011).

123 Kaba, *supra* note 113 (quoting JESSICA MITFORD, KIND AND USUAL PUNISHMENT: THE PRISON BUSINESS 319 (1973)).

124 THE SENTENCING PROJECT, *Incarceration* (2013), http://www.sentencingproject.org/template/page.cfm?id=107.

125 N.Y. TIMES, *supra* note 102.

126 Strangio & Fettig , *supra* note 11, at 1-6 (describing how outside advocates can help to protect LGBTI incarcerated people from abuse by documenting PREA violations, advocating for legislative and policy changes, and, when appropriate, engaging in litigation).

127 Editorial, *End Mass Incarceration Now*, N.Y. TIMES, May 24, 2014, http://www.nytimes.com/2014/05/25/opinion/sunday/end-mass-incarceration-now.html.

We must end prison sexual abuse, but the most effective way to do this is to incarcerate fewer people. Jessica Mitford had it right in 1973. We cannot afford to waste another 40 years.

State	Provision	Key Language
Alabama	ALA. DEP'T OF CORR., MALE INMATE HANDBOOK (2013), available at http://www.doc.state.al.us/docs/PublicMaleInmateHandbook.pdf.	Number 501: Schedule of Rule Violations High Level Violations 1 Indecent Exposure/Exhibitionism/Lewd Conduct: "Lewd conduct consists of any act of a sexual nature or gesture directed at another person."
Alaska	ALASKA DEP'T OF CORR., POLICIES AND PROCEDURES NO. 809.02, PRISONER RULES AND DISCIPLINE: PROHIBITED CONDUCT AND PENALTIES (2013), available at http://www.correct.state.ak.us/pnp/pdf/809.02.pdf.	VII. Procedures C. High-Moderate Infraction 3. "engaging in sexual acts with others or making sexual proposals or threats"
Arizona	ARIZ. DEP'T OF CORR. DEP'T ORDER 803, INMATE DISCIPLINARY PROCEDURE (2014), available at https://corrections.az.gov/sites/default/files/policies/800/0803%20-%20Effective%206-7-14.pdf.	Attachment A Class B Violation 27B: Sexual Contact- "Intentionally or knowingly engaging in sexual contact, which includes kissing, masturbation or any contact that can be construed as sexual in nature."

Arkansas	Ark. Dep't of Corr., Inmate Handbook (2012), available at http://adc.arkansas.gov/resources/Documents/Inmate%20Handbook%202012%20-%20single%20page.pdf.	Behavior Rules and Regulations Category 10: Sexual Activity 10-1. "Engaging in sexual activity with another consenting person.(Second or subsequent offense within six months is Class A)." 10-2. Making sexual proposals to another person (Second or subsequent offense within six months is Class A)."
California	Cal. Code Regs. tit. 15, § 3007 (2014).	Sexual Behavior: "Inmates may not participate in illegal sexual acts. Inmates are specifically excluded in laws, which remove legal restraints from acts between consenting adults. Inmates must avoid deliberately placing themselves in situations and behaving in a manner, which is designed to encourage illegal sexual acts."
Colorado	Colo. Dep't of Corr., Code of Penal Discipline 150-01 (2006), available at http://www.wcl.american.edu/endsilence/documents/inmate_conduct_doc_colorado.pdf.	Class II Offenses 24.5- Sexual harassment is defined to include "any behavior of a sexual or romantic nature whether verbal or non-verbal."

Connecticut	CONN. DEP'T OF CORR., CODE OF PENAL DISCIPLINE, DIRECTIVE 9.5 (2014), available at http://www.ct.gov/doc/lib/doc/pdf/ad/ad0905.pdf.	3. Definitions and Acronyms U. Sexual Abuse: "Includes any of the following acts between persons, regardless of gender, consent, coercion, force or threat. (1)Contact between the penis and the vulva or the penis and the anus, including penetration, however slight; (2) Contact between the mouth and the penis, vulva, or anus; (3) Penetration of the anal or genital opening of another person, however slight, by a hand, finger, object or other instrument; and (4) Any other intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or the buttocks of another person, excluding contact incidental to a physical altercation."
Delaware	DEL. DEP'T OF CORR. POLICY NO. 4.2, RULES OF CONDUCT FOR OFFENDERS (2009), available at http://www.doc.delaware.gov/downloads/policies/policy_4-2.pdf.	V. Policy "Bureau Chiefs shall be responsible for developing written rules of conduct that specify prohibited behavior, penalties that may be imposed for rule violations, and enforcement procedures."

District of Columbia	D.C. Dep't of Corr. Inmate Handbook (date unknown), available at https://www.prisonlegalnews.org/media/publications/dc_doc_inmate_handbook.pdf.	Inmate Disciplinary Code-Code of Offenses Class II-Serious Offenses 206: "Sexual Activity is consensual activity between two inmates or an inmate and a family member or another during a social visit as follows: (a) Homosexual Activity -- physical contact with the genital parts, oral or anus of another person of the same sex. (b) Heterosexual Activity -- physical contact of the breasts, genitalia, oral or anus of a person of the opposite sex. (c) Sexual Contact -- The intentional touching or fondling, either directly or through clothing, of the private body parts of another (including genitalia, anus, groin, breast, inner thigh or buttocks) for the purpose of sexual gratification."

Florida	FLA. ADMIN. CODE ANN. r. 33-601.314 (2014). Fla. Stat. Ann. § 944.35 (West 2010).	9-1 "Obscene or profane act, gesture, or statement—oral, written, or signified" 9-7 "Sex acts or unauthorized physical contact involving inmates" Defines sexual misconduct as: "the oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object, but does not include an act done for a bona fide medical purpose or an internal search conducted in the lawful performance of the employee's duty."
Georgia	GA DEP'T. OF CORR., ORIENTATION HANDBOOK FOR OFFENDERS (date unknown), available at http://www.dcor.state.ga.us/pdf/GDC_Inmate_Handbook.pdf.	Section V- Rules and Regulations Disciplinary Violations b. Violations Against Persons 8. Participating in homosexual or any sexual behavior or activity with any person, male or female. Such behavior also puts you at risk to contract AIDS. 9. Physically assaulting another prisoner or another person sexually. 10. Requesting, demanding, threatening or in any other way inducing any other person to participate in homosexual or any other sexual behavior or activity.

Hawaii	Haw. Dep't of Pub. Safety Corr. Admin. Policy & Procedures COR. 13.03, Adjustment Procedures Governing Serious Misconduct Violations and the Adjustment of Minor Misconduct Violations (2010), available at http://dps.hawaii.gov/policies-and-procedures/pp-cor/.	4.0 Misconduct Rule Violations and Sanctions Moderate Misconduct Violations (8) 8(1) "Engaging in sexual acts." 8(2) "Making sexual proposals or threats."
Idaho	Idaho Dep't of Corr. Control No. 318.02.01.001, Disciplinary Procedures: Offender, (2012), available at http://www.idoc.idaho.gov/content/policy/755.	Appendix A Disciplinary Offenses 69. Sexual Activity: "Engaging in sexual activity with another offender, either clothed or unclothed, to include, but not limited to the following: active or passive contact or fondling of the genitals, breast, buttocks, sexual intercourse/penetration, and/or passionate/sexual kissing where the individuals have either expressed or implied consent."

Illinois	ILL. ADMIN. CODE tit. 20, § 504 App. A (2014).	107. Sexual Misconduct: "Engaging in sexual intercourse, sexual conduct, or gesturing, fondling, or touching done to sexually arouse, intimidate, or harass either or both persons; or engaging in any of these activities with an animal.
Indiana	IND. DEP'T OF CORR. POLICY AND ADMIN. PROCEDURES 02-04-101, THE DISCIPLINARY CODE FOR ADULT OFFENDERS (2012), available at http://www.in.gov/idoc/files/02-04-101_The_Disciplinary_Code_for_Adult_Offenders_2__7-1-2012.pdf.	III. Definitions GG. SEXUAL CONTACT: "Contact between persons that includes any of the following: - Kissing, except for that allowed under Department policy and administrative procedures; - Handholding, except for that allowed under Department policy and administrative procedures; - Touching of the intimate parts of one person to any part of another person whether clothed or unclothed; or, - Any touching by any part of one person or with any object or device of the intimate parts of another person or any parts of the body that may result in sexual arousal or gratification for either party.

Iowa	State of Iowa Dep't Of Corr. Policy and Procedures No. IO-RD-01, Offender Discipline (2006), available at http://www.wcl.american.edu/endsilence/documents/inmate_conduct_doc_iowa.pdf.	IV. Procedures Q. Prohibited Acts 4. Definition of Offenses (by Rule #) 15) Sexual Misconduct – "An offender commits sexual misconduct when the offender proposes a sexual contact or relationship with another person through gestures, such as, kissing, petting, etc., or by written or oral communications or engages in a consensual sexual contact or relationship. Indecent exposure which includes, but is not limited to, offensive exposure of the genitals or pubic areas in a manner designed to be seen by another person shall also constitute sexual misconduct. Gestures of a sexual nature designed to cause, or capable of causing, embarrassment or offense to another person shall also be punishable as sexual misconduct. Class "B" for engaging in sexual acts or sexual contact with another person; Class "C" for all other violations."

Kansas	KAN. ADMIN. REGS. § 44-12-314(a) (2002). KAN. ADMIN. REGS. § 44-12-315(a) (2007).	"Sexual activity; aggravated sexual activity; sodomy; aggravated sodomy (a) No inmate shall commit or induce others to commit an act of sexual intercourse or sodomy, even with the consent of both parties. Participation in such an act shall be prohibited." "Lewd acts. (a) No inmate shall engage in a lewd or lascivious manner in any act of kissing, fondling, touching, or embracing, whether with a person of the same or opposite sex."
Kentucky	KY. CORR. POLICIES AND PROCEDURES NO. 15.2, RULE VIOLATIONS AND PENALTIES (2011), available at http://corrections.ky.gov/communityinfo/Policies%20and%20Procedures/Documents/CH15/15-2%20Rule%20Violations%20and%20Penalties.pdf.	I. Definitions "'Inappropriate sexual behavior with another person' means seductive or obscene acts that include intimate touching, penetration of another's body cavity, and includes homosexual and heterosexual activity." (It is a Category IV Major Violation).

Louisiana	La. Admin. Code tit. 22, § 1.341 (2014).	I. Offender Rules and Violation Descriptions 21. Aggravated Sex Offenses C. Sexual Misconduct (offender-on-offender) (in part): "Offenders may not participate in any sexual activity with each other." F. Other Prohibited Sexual Behavior (offender-on-offender, offender-on-staff or non-incarcerated person): "No offender shall: make sexual remarks, gestures or sounds; flirt; exchange personal items, etc. or make sexual threats in conversation by correspondence or telephone." G. "Overt display of affection in a manner that may elicit sexual arousal with anyone is prohibited."
Maine	03-201-10 Me. Code R. § 20.1 (2013).	VI. Procedures Procedure E: Acts Prohibited (Violations) "Sexual Activity Not under Duress or Force. Any sexual activity not involving force, violence, or duress. Class B."
Maryland	Md. Code Regs. 12.02.27.02 (2014).	(30) "'Sexual act' means two or more individuals involved in an act for sexual arousal or gratification."

Massachusetts	103 MASS. CODE REGS. 430.24 (2014).	Code of Offenses Category 3 3-2 "Engaging in sexual acts with another."
Michigan	MICH. DEP'T OF CORR. POLICY DIRECTIVE NO. 03.03.105, PRISONER DISCIPLINE (2012), available at https://www.michigan.gov/documents/correc-	Attachment A Class I Misconducts 033 (Prisoner/Prisoner contact): "Consensual touching of the sexual or other parts of the body of another person for the purpose of gratifying the sexual desire of either party" Common examples: "Kissing, hugging, intercourse or sodomy" 056 (Imitating appearance): "imitating the appearance of the opposite sex" Common examples: "wearing clothing of the opposite sex, wearing of makeup by male prisoners"

Minnesota	Minn. Dep't Of Corr. Policies, Directives and Instructions Manual No. 202.057, Sexual Abuse/Harassment Prevention, Reporting, and Response (2014), available at http://www.doc.state.mn.us/DOcpolicy2/html/DPW_Display.asp?Opt=202.057.htm.	Definitions "Sexual abuse- B. Sexual abuse of an offender, detainee, or resident by another offender, detainee, or resident includes any of the following acts, if the victim does not consent, is coerced into such act by overt or implied threats of violence, or is unable to consent or refuse: 1. Contact between the penis and the vulva or the penis and the anus, including penetration, however slight; 2. Contact between the mouth and the penis, vulva, or anus; 3. Penetration of the anal or genital opening of another person, however slight, by a hand, finger, object, or other instrument; and 4. Any other intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or the buttocks of another person, excluding contact incidental to a physical altercation."

Mississippi	MISS. DEP'T OF CORR. INMATE HANDBOOK, CHAPTER XI: RULE VIOLATIONS, (2014), available at http://www.mdoc.state.ms.us/Inmate_Handbook/CHAPTER%20XI.pdf.	III. Rule Violations B. Violation Category B (Serious Violations) B25- "Inappropriate sexual behavior with another person or indecent exposure (masturbation)"
Missouri	MO. DEP'T OF CORR. DEP'T PROCEDURE MANUAL NO. D1.8.13, OFFENDER SEXUAL ABUSE AND HARASSMENT (2013), available at http://doc.mo.gov/Documents/PREA/D1_8_13_Policy.pdf.	II. Definitions O. Offender on Offender Sexual Abuse: "Sexual abuse of an offender, detainee, or resident by another offender, detainee, or resident includes any of the following acts, if the victim does not consent, is coerced into such act by overt or implied threats of violence, or is unable to consent or refuse: 1. Contact between the penis and the vulva or the penis and the anus, including penetration, however slight. 2. Contact between the mouth and the penis, vulva, or anus. 3. Penetration of the anal or genital opening of another person, however slight, by a hand, finger, object, or other instrument.

		4. Any other intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or the buttocks of another person, excluding contact incidental to a physical altercation."
Montana	State of Mont. Dep't Of Corr. Policy Directive 3.4.2, Prohibited Acts (2009), available at http://www.cor.mt.gov/content/Resources/Policy/Chapter3/3-4-2.pdf.	IV. Department Directives A. Prohibited Acts 3. "Although it is impossible to define every possible prohibited act or rule violation, the following acts are prohibited in all Department adult offender facilities: 10) …engaging in sexual acts, making sexual proposals or threats; indecent exposure"
Nebraska	68 Neb. Admin. code § 5-005 (2008), http://www.sos.ne.gov/rules-and-regs/regsearch/Rules/Correctional_Services_Dept_of/Title-68_Inmate_Rules_and_Regulations.pdf.	II [C] Sexual Activities: "Consensual intercourse, sodomy, kissing (except as authorized in the visiting room) or touching another person's intimate parts; or intentionally exposing one's sexual organs to another person in a location or manner where such exposure has no legitimate purpose."

Nevada	NEV. DEP'T OF CORR. ADMIN. REG. 707.02, INMATE DISCIPLINARY PROCESS (2010), available at http://www.doc.nv.gov/sites/doc/files/pdf/AR707.pdf.	5. Major Violations MJ30: "Sexually stimulating activities, including but not limited to caressing, kissing, or fondling, except as authorized by Departmental visitation regulations. (Class A)"
New Hampshire	N.H. DEP'T CORR. POLICY & PROCEDURE DIRECTIVE 5.25, PROCESSING SPOT, DISCIPLINARY, INCIDENT & INTELLIGENCE REPORTS (2010), available at https://www.nh.gov/nhdoc/policies/documents/5-25.pdf.	Disciplinary Rule Infractions 8.A: "Requesting or Engaging in any sexual contact another."
New Jersey	N.J. ADMIN. CODE § 10A:4-4.1 (LEXIS through Fed. Reg. July 21, 2014).	Prohibits acts of: "engaging in sexual acts with others" (.051) " making sexual proposals or threats to another" (.052) "indecent exposure" (.053)

New Mexico	N.M. Corr. Dep't, Inmate Discipline CD-090101.A, Inmate Discipline, Attachment A: Category "A" OffenseS (2014), available at http://corrections.state.nm.us/policies/docs/CD-090100.pdf.	A(21): Sexual Misconduct- "The inmate commits this when they are: (a) Touching or having active or passive sexual contact with or fondling of the genitals, mouth, anus, breast, or buttocks of another person, and the person consents to such conduct, regardless of whether the touching or contact is to clothed or unclothed parts of the body;"
New York	N.Y. Comp. Codes R. & Regs. tit. 7, § 270.2 (2014).	B. Institutional Rules of Conduct 2. Rule Series 101 Sex Offenses. iv. 101.21 "An inmate shall not engage in physical contact with another inmate. Prohibited conduct includes, but is not limited to, kissing, embracing or hand- holding."
North Carolina	N.C. Dep't. of Pub. Saf. Prisons Policy & Procedures .0300, Inmate Conduct Rules (2013), available at http://www.doc.state.nc.us/dop/policy_procedure_manual/b0300.pdf.	(n) Sexual Misconduct: "Committing, soliciting, or inciting others to commit a sexual act will be subject to disciplinary action."

North Dakota	N.D. DEP'T CORR. & REHAB., INMATE HANDBOOK (2013), available at http://www.nd.gov/docr/adult/docs/INMATE_HANDBOOK.pdf.	Section 1- Rules and Regulations of the Institution Level II Infractions 213. "'Sexual contact' includes touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person."
Ohio	OHIO ADMIN. CODE § 5120-9-06, INMATE RULES OF CONDUCT (LEXIS through June 30, 2014).	(C) Rule violations: (13) "Consensual physical contact for the purpose of sexually arousing or gratifying either person."
Oklahoma	OKLA. DEP'T OF CORR., ACTS CONSTITUTING RULE VIOLATION, Attachment A to OP-060125 (2013), http://www.ok.gov/doc/	Sexual Activity 10-1 "Engaging in sexual activity with another consenting person excluding time on passes." 10-2 "Making sexual proposals, innuendos, inferences, or threats to another offender."

Oregon	Or. Admin. R. 291-105-0010, (2014).	Prohibited Inmate Conduct and Processing Disciplinary Actions Definitions (41) Sexual Activity: "Sexual contact including, but not limited to, sexual intercourse, deviate sexual intercourse, kissing, fondling, or manipulation of the genitalia, buttocks, and breasts of another person, or of oneself, in a manner that produces or is intended to produce sexual stimulation or gratification."
Pennsylvania	Comm. of PA. Dep't of Corr. Policy Statement DC-ADM 801, Inmate Discipline (2008), available at http://www.cor.state.pa.us/portal/server.pt/community/doc_policies/20643.	A. Class I Charges (Formal Resolution Only (19) "Engaging in sexual acts with others or sodomy."

Rhode Island	R.I. DEP'T OF CORR. POLICY AND PROCEDURE NO. 11.01-5, CODE OF INMATE DISCIPLINE (2009), available at http://www.doc.ri.gov/documents/administration/policy/Added%20in%208-12/11.01-5%20Code%20of%20Inmate%20Discipline.pdf.	Discipline Severity Scale Class 1, Highest, Non-Predatory 130: Disciplines "willingly engaging in sexual acts with others (e.g., sodomy)"

South Carolina	S.C. Dep't of Corr. Policy/Procedure No. ADM-11.39, Staff Sexual Misconduct with Inmates (2004), available at http://www.doc.sc.gov/pubweb/Employment/Policy/ADM-	5. Definitions "Sexual Contact refers to any behavior that includes, but is not limited to, hugging, fondling, kissing, intentional touching, either directly or through clothing, of the genitalia, anus, groin, breast, inner thighs, or buttocks of another individual or any other physical contact except handshakes or that allowed by policy for purposes of life saving and maintaining security (examples of prohibited contact include neck rubs, back rubs, hair touching, massages and caresses)." "Sexual Misconduct refers to any form of consensual or non-consensual physical contact or communication of a sexual nature directed towards an inmate for the purpose of sexual gratification."
South Dakota	S.D. Dep't of Corr., Inmate Living Guide (2013), available at http://doc.sd.gov/documents/adult/InmateLivingGuide-2013.pdf.	Offense in Custody (Major Violations) Category 5 L-9 "Inmate consensual sexual contact. Engaging in consensual sexual contact and/or unnatural acts with another inmate or non-staff member."

Tennessee	STATE OF TENN. DEP'T OF CORR. ADMIN. POLICIES AND PROCEDURES NO. 502.05, DEFINITIONS OF DISCIPLINARY OFFENSES (2014), available at http://www.tn.gov/correction/pdf/504-02.pdf.	VI. Procedures (A) 65. Sexual Misconduct (SXM) (Class B or C): "Any sexual conduct involving an inmate, including those instances where the preponderance of evidence is indicative of a preparation for, or immediate conclusion of such acts, including acts involving people, objects, or animals."

Texas	Tex. Dep't of Criminal Justice, Corr. Inst. Div., Disciplinary Rules and Procedures for Offenders GR-106, (2012), available at http://www.tdcj.state.tx.us/documents/cid/Disciplinary_Rules_and_Procedures_for_Offenders_English.pdf.	Attachment A: Level 1 Offenses 7.0 Sexual abuse: "Forcing another person, by violence, threats of violence, or coercion to perform a sexual act or sexually assaulting with an object, without the effective consent of that person. a. A sexual act is any intentional contact between the genitals of one person and genitals, mouth, anus, or hands of another person. b. Sexual assault with an object is the use of any hand, finger, object, or other instrument to penetrate, however slightly, the genital or anal opening of the body of another person. c. Consent is not effective if it is given by a person who lacks the capacity due to mental or physical limitations, or is induced by force or threat."

Utah	UTAH DEP'T OF CORR., DIV. OF INST. OPERATIONS, INMATE ORIENTATION HANDBOOK (2013), available at http://corrections.utah.gov/images/Brooke/Inmate%20Orientation%20Handbook%202014%201.pdf.	Code of Conduct States that inmates shall: 22. "Not commit a sexual assault or make a verbal, physical, or written threat of sexual assault" 47. "Not engage in or encourage others to engage in prohibited sexual activities, homosexual activities, or indecent exposure."
Vermont	STATE OF VT. AGENCY OF HUMAN SERVS. DEP'T OF CORR. NO. 410.01, FACILITY RULES AND INMATE DISCIPLINE (2012), available at http://www.doc.state.vt.us/about/policies/rpd/correctional-services-301-550/401-500-programs-security-	Standardized Rules and Guidelines for Recommended Sanctions Major "B" Violations 13. "Engaging in sexual acts or activity without use or threat of force, to include but not limited to, kissing, fondling of self or another person in a manner, which produces or is intended to produce sexual stimulation or gratification without the appearance of threat or harm on the part of both persons"
Virginia	VA. DEP'T OF CORR. OPERATING PROCEDURE NO. 861.1, OFFENDER DISCIPLINE, INSTITUTIONS (2013), available at http://vadoc.virginia.gov/About/procedures/documents/800/861-1.pdf.	V. Code of Offenses (4-4226) B. Category II Offenses 209. "Engaging in sexual acts with others by consent." [Does not apply to any sexual act involving an employee]

Washington	Wash. Admin. Code § 137-25-020 (2014).	Serious infractions Category B-Level 1 504: "Engaging in sexual acts with others within the facility with the exception of approved conjugal visits."
West Virginia	State of W. Va. Div. of Corr. Policy Directive No. 325.00, Discipline of Inmates (2012), available at http://www.wvdoc.com/wvdoc/LinkClick.aspx?fileticket=P9SduoPy1aM%3D&tabid=104&mid=156.	V. Procedure (A) 1. Class 1 Offenses c. 103- Rape/Sexual Assault/Sexual Abuse/Sexual Acts: (3) "engage in any sexual act, such as, but not limited to sexual intercourse, oral sex, kissing, fondling or masturbation."
Wisconsin	Wis. Admin. Code DOC § 303.15 (2003).	Disciplines sexual conduct and states that "lack of consent is not an element of the offense of sexual conduct."

Regulating Prison Sexual Violence

Gabriel Arkles[1]

Abstract: An end to sexual violence requires bodily autonomy, sexual self-determination, redistribution of wealth and power, and an end to subordination based on gender, race, disability, sexuality, nationality, and class. Because the project of incarceration does not align with bodily autonomy, sexual self-determination, redistribution, or anti-subordination, tensions arise within areas of law that purport to prohibit sexual violence in or through prisons. This article examines these tensions, analyzing the ways in which constitutional, statutory, and administrative law permit or require correctional staff, medical personnel, and law enforcement officers to control, view, touch, and penetrate bodies in nonconsensual, violent, and intimate ways—sometimes while using the rhetoric of ending sexual violence. In particular, the article focuses on searches, nonconsensual medical interventions, and prohibitions of consensual sex as ways that prison systems perpetrate sexual violence against prisoners while often complying with First, Fourth and Eighth Amendment law and the Prison Rape Elimination Act. While these practices harm all prisoners, they can have particularly severe consequences for prisoners who are transgender, women, queer, disabled, youth, or people of color. This article raises questions about the framing of sexual violence as individual acts that always take place outside or in violation of the law, suggesting that in some contexts the law still not only condones sexual violence, but also acts as an agent of sexual violence.

1 Professor of Legal Skills at Northeastern University School of Law. I would like to thank my wonderful research assistants Chelsea Brisbois, Shira Burton, Molli Freeman-Lynde, Julie Howe, Sara Maeder, Amanda Montel, Stas Moroz, Jenna Pollock, and Kyle Rapiñan for all of their work. I would also like to thank Noa Ben-Asher, Owen Daniel-McCarter, Sharon Dolovich, Pooja Gehi, Betsy Ginsberg, Susan Hazeldean, Valerie Jenness, Sylvia Law, Dori Lewis, Lynn Lu, Jason Lydon, Deborah Malamud, Alison Mikkor, Danya Reda, Anna Roberts, Giovanna Shay, Brenda Smith, Dean Spade, Chase Strangio, Tony Thompson, Rebecca Widom, the members of the NYU School of Law Lawyering Scholarship Colloquium, the LatCrit/SALT Junior Faculty Development Workshop, and the Law and Society Association for their feedback and support in the development of this piece.

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Introduction

In 2012, the Supreme Court's decision in *Florence v. Burlington*[2] permitted agents of the government to conduct strip searches of misdemeanor arrestees without reasonable suspicion. Within a month, the Department of Justice (DOJ) promulgated federal regulations for the Prison Rape Elimination Act (PREA), providing guidance to federal, state, and local carceral agencies pursuant to a statutory mandate to detect, prevent, reduce, and punish prison rape.[3]

The PREA regulations purport to—and to some extent do—limit circumstances where prisoners experience touching, viewing, or other manipulation of their genitals, anus, buttocks, or breasts against their will. *Florence*, on the other hand, expands circumstances where prisoners undergo searches of their naked bodies.[4] These contemporaneous legal developments reveal doctrinal and normative

2 Florence v. Bd. of Chosen Freeholders of Cnty. of Burlington, 132 S. Ct. 1510 (2012).
3 42 U.S.C.A. § 15602(3) (West, Westlaw through P.L. 113-234).
4 *See Florence*, 132 S. Ct. at 1514.

questions about the nature of sexual violence and the role of the government in preventing, perpetrating, and punishing it.

In this article, I argue that a fundamental tension arises in efforts to curb carceral sexual violence. Preventing sexual violence requires an expansion of bodily autonomy for prisoners, in that to be free from sexual violence one must have at least the ability to prevent certain nonconsensual acts upon the body. Also, sexual self-determination, including not only the freedom to say "no," but also to say "yes," is an integral part of preventing sexual violence.[5] And as many women-of-color feminists and critical theorists have established, freedom from sexual violence requires redistribution of wealth and power[6] and an end to gender, racial, class, sexuality, nationality, and disability-based subordination.[7]

However, imprisonment demands major infringements on the bodily autonomy and self-determination of prisoners that courts, regulators, and legislatures frequently hesitate to curtail. For example, carceral agencies routinely require their staff and contractors to perform strip searches, body cavity searches, and nonconsensual medical interventions on prisoners: acts that have much in common with other forms of sexual violence. Carceral agencies and their staff control the movements, activities, clothing, sexual expression, basic hygiene, nutrition, and virtually every other aspect of the biological and social lives of prisoners.[8] As Alice Ristroph argues, incarceration

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5 *See generally* Jaclyn Friedman & Jessica Valenti, Yes Means Yes! Visions of Female Sexual Power and a World Without Rape (2008).

6 *See* Miriam Zoila Pérez, *When Sexual Autonomy Isn't Enough, in* Yes Means Yes! Visions of Female Sexual Power and a World Without Rape 141, 149 (Jaclyn Friedman & Jessica Valenti eds., 2008).

7 *See* Lee Jacob Riggs, *A Love Letter from an Anti-Rape Activist to Her Feminist Sex-Toy Store*, *in* Yes Means Yes! Visions of Female Sexual Power and a World Without Rape 107, 111 (Jaclyn Friedman & Jessica Valenti eds., 2008) ("The prison-industrial complex, to which the mainstream rape crisis movement is intimately and often unquestioningly linked, is an embodiment of nonconsent used to reinforce race and class inequality."); Maria Barile, *Individual-Systemic Violence: Disabled Women's Standpoint*, 4. J. Int'l Women's Stud. 1, 8 (2002), *available at* http://vc.bridgew.edu/cgi/viewcontent.cgi?article=1558&context=jiws.

8 Sharon Dolovich, *Foreword: Incarceration American-Style*, 3 Harv. L. & Pol'y Rev. 237, 237-38 (2009) (noting restricted movement, limited access to media, limited contact with family and friends, restricted access to property, and lack of privacy among definitive techniques of incarceration); Brenda V. Smith, *Rethinking Prison Sex: Self-Expression and Safety*, 15 Colum. J. Gend. & L.

is inherently a sexual punishment, because of the extent of corporal control that carceral systems exert over prisoners.[9] Incarceration cannot be fully desexualized.[10] Carceral mechanisms also aggravate inequitable distribution of wealth and power, as well as subordination on the basis of race, gender, class, disability, nationality, religion, and sexuality.[11]

A reluctance to frankly confront the tension between protection of autonomy and maintenance of control has diminished possibilities for meaningfully and transparently addressing carceral sexual violence. In this article, I begin that frank confrontation.

In Part I, I examine how we identify certain acts as sexual violence or not-sexual violence. Race, gender, the motivation of the perpetrator, and the role of law and government have an enormous, and unjustifiable, impact on which acts U.S. legal systems and the public consider sexually violent. I then discuss certain forms of official carceral sexual violence, particularly searches, certain nonconsensual medical interventions, and prohibitions on consensual sex, explaining why we should consider them forms of sexual violence. Lawmakers have made most, but not all, of these forms of official carceral sexual violence lawful. The claim that searches, in particular, are a form

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185, 200 (2006) (criticizing the overregulation of prisoners' sexual activities); Alice Ristroph, *Sexual Punishments*, 15 COLUM. J. GEND. & L. 139, 144 (2006) ("[Incarceration] involves state action against the body and state control of the body to a degree unmatched in other political contexts"); Gabriel Arkles, *Correcting Race and Gender Prison Regulation of Social Hierarchy Through Dress,* 87 N.Y.U.L. REV. 859, 897 (2012) (reviewing detailed rules for the clothing, hair, and appearance of prisoners).

9 *See* Ristroph, *supra* note 8.

10 *See id*. at 184 ("At best, it seems that extensive surveillance and strict control of prisoners could reduce the incidents of physically violent rape, but such measures come at the price of prisoners' autonomy and may only increase distortions of sexuality within the prison. However we define rape, however we resolve the difficult issues of force and nonconsent, there remains '*the institution of confinement* itself.'"); see also, Giovanna Shay, *PREA's Elusive Promise: Can DOJ Regulations Protect LGBT Incarcerated People?,* 15 LOY. J. PUB. INT. L. 343, 355 (2014) ("Most fundamentally, PREA does not address the root problem that exposes too many people to prison sexual violence--over-incarceration").

11 *See* Gabriel Arkles, *Safety and Solidarity Across Gender Lines: Rethinking Segregation of Transgender People in Detention*, 18 TEMP. POL. & CIV. RTS. L. REV. 515, 519-22 (2009).

of sexual violence is not new,[12] but it remains controversial, and therefore worth elaborating.

Next, in Part II, I explain maneuvers that lawmakers, including legislatures, courts, agencies, and individuals who work for these parts of the government, use to promote forms of carceral sexual violence. Lawmakers do not necessarily form a specific conscious intent to defend sexual violence; they may believe their own rationalizations. Nonetheless, these maneuvers support sexual violence.

With one key maneuver, they create legal schemes that prevent prisoners from having the power or money to effectively contest what happens to them.[13] This maneuver reduces the chance not only that prisoners will successfully challenge which acts are defined as lawful, but also that they will have meaningful recourse regarding the many acts of sexual violence that are already defined as unlawful. Another maneuver manipulates definitions of sexual violence to create exclusions for acts that would otherwise fall into those definitions, but which lawmakers wish to protect or promote. This maneuver is what makes so much official carceral sexual violence lawful. The last maneuver I examine involves defending forms of sexual violence in the name of ending sexual violence, a particularly contradictory but peculiarly powerful way to diffuse opposition to carceral sexual violence and to maintain the appearance of legitimacy for sexually violent government actions.

Finally, I offer an imagined alternative statutory scheme that would contest these maneuvers. Instead of manipulating definitions, this scheme would candidly address both lawful and unlawful sexual violence. Instead of keeping power and money away from prisoners, it would create a compensation scheme and empower a committee elected by prisoners to make further changes. Instead of pretending that sexual violence could help prevent sexual violence, it would

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12 Angela Y. Davis, Abolition Democracy: Beyond Empire, Prisons, and Torture 58 (2005); Cathy Pereira, *Strip Searching as Sexual Assault*, 27 Hecate 187, 188 (2001); Beth Richie, Arrested Justice: Black Women, Violence, and America's Prison Nation 51 (2012) ("[B]ecause pat searches and body cavity examinations are routine 'security procedures' in most jails and prisons, women are exposed to potential legitimate sexual exploitation"); Luana Ross, Inventing the Savage: The Social Construction of Native American Criminality 114 (1998) ("Many incarcerated women experience assessment as rape, particularly the debasing cavity searches.").

13 *See infra* section III(A).

address prevention of sexual violence by reducing incarceration. I offer this alternative more as a thought experiment than as a serious proposal to work toward for policy reform; I cannot defend it against a host of constitutional and moral objections, except to say that it is somewhat better than what we have now. However, I think it helps to open up thinking about what it would mean to be honest about what we do with our carceral systems, and what we could do with attempts to reform them.

I. Understanding Sexual Violence

A. Critiques of Dominant Understandings of Power, Sex, and Violence

In this section, I review popular and dominant (mis) understandings of sexual violence, including the role of race, gender, and disability-based hierarchy; the conception of an evil perpetrator and innocent victim; and the idea of sexual violence as something that is individual, anomalous, illegal, and primarily about sex. Throughout, I share critiques of these understandings, and I conclude with those models I find both more realistic and more promising toward the goal of ending sexual violence.

Law is more likely to recognize acts as sexual violence when doing so supports social hierarchies related to race and gender.[14] Under slavery it was a legal impossibility for a white man to rape a Black woman.[15] It was a social, political, and interpersonal reality—sexual violence against Black women was (and is) pervasive—but it was legally sanctioned.[16] Until the 1970s, it was also a legal impossibility for a man to rape his wife.[17] White people had legal access to the

14 *See* Beverly J. Ross, *Does Diversity in Legal Scholarship Make A Difference?: A Look at the Law of Rape*, 100 DICK. L. REV. 795, 802-04 (1996).

15 *See* Jeffrey J. Pokorak, *Rape as a Badge of Slavery: The Legal History of, and Remedies for, Prosecutorial Race-of-Victim Charging Disparities*, 7 NEV. L.J. 1, 9 (2006).

16 *See id.*; Vernetta D. Young & Zoe Spencer, *Multiple Jeopardy: The Impact of Race, Gender, and Slavery on the Punishment of Women in Antebellum America, in* RACE, GENDER, & PUNISHMENT: FROM COLONIALISM TO THE WAR ON TERROR 65, 67 (Mary Bosworth & Jeanne Flavin eds., 2007) (noting rape as one form of punishment used against enslaved Black women); Brenda V. Smith, *Sexual Abuse of Women in United States Prisons: A Modern Corollary of Slavery*, 33 FORDHAM URB. L.J. 571, 577 (2006) ("Sexual abuse was a prominent feature of the enslavement of African women in the United States.")

17 *See* Ross, *supra* note 14, at 812-13.

bodies of Black slaves; husbands had legal access to the bodies of their wives.[18] While these laws have shifted, the dynamics persist.[19]

Outside of prisons, sexual violence has been more easily recognized when a Black man is alleged to have raped a white woman.[20] While many people have resisted this conception of sexual violence and have had some success in shifting these assumptions, racism is too central to the formulation of ideas about sexual violence in the U.S. for it to have faded away. Sexual violence perpetrated primarily by white nontrans men against people of color, particularly Black, Native, and immigrant women and trans people, has rarely provoked much attention or outcry in U.S. society.[21]

In the sex-segregated carceral context, the figure of the white woman gets replaced with the figure of the white man. As Kim Shayo Buchanan has illustrated, this black-prisoner-on-white-prisoner conception of carceral sexual violence has shown remarkable

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18 *See id.*; *see also* Pokorak, *supra* note 15.

19 *See, e.g.,* Samhita Mukhopadhyay, *Trial by Media: Black Female Lasciviousness and the Question of Consent*, *in* Yes Means Yes! Visions of Female Sexual Power and a World Without Rape, 151-53 (Jaclyn Friedman & Jessica Valenti eds., 2008).

20 *See, e.g.,* Richie, *supra* note 12, at 15-16 ("The further a woman's sexuality, age, class, criminal background, and race are from hegemonic norms, the more likely it is that they will be harmed—and the more likely that their harm will not be taken seriously by their community, by anti-violence programs, or by the general public"); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 Stan. L. Rev. 1241, 1291 (1991) (noting persistent focus on white women as victims of Black male violence even when pretending concern over Black women victims); James W. Messerschmidt, *"We Must Protect our Southern Women": On Whiteness, Masculinities, and Lynching*, *in* Race, Gender, & Punishment: from Colonialism to the War on Terror 77-89 (Mary Bosworth & Jeanne Flavin eds., 2007) ("Lynching [of African American men] upheld white privilege and underpinned the objectified figure of white women defined as 'ours' and protected by 'us' from 'them'"); Kristin Bumiller, In an Abusive State: How Neoliberalism Appropriated the Feminist Movement against Sexual Violence 22 (2008) ("Fascination with interracial rape, while leading to the excessive attention to the threat of black men to white women, also contributes to cultural conditions that allow the perpetuation of white-on-black rape without notice or consequence.").

21 *See, e.g.,* Smith, *supra* note 16, at 604 n.170; Andrea Smith, Conquest: Sexual Violence and American Indian Genocide 15 (2005); INCITE! Women of Color Against Violence, Immigration Enforcement Fact Sheet, *available at* http://www.incite-national.org/sites/default/files/incite_files/resource_docs/0767_toolkitrev-immigration.pdf.

resilience,[22] even in light of empirical evidence that staff-perpetrated sexual violence is more common than prisoner-perpetrated sexual violence; that multiracial, not white, prisoners are particularly targeted for prisoner-perpetrated sexual violence; and that Black, not white, prisoners are particularly targeted for staff-perpetrated sexual violence.[23] Because of the extraordinarily high rates of incarceration of people of color,[24] even if rates of sexual violence were consistent across race, the actual numbers of people of color victims of carceral sexual violence would be greater than the numbers of white victims of carceral sexual violence.

While men are usually imagined as the main targets of sexual abuse in prison, it is primarily, but not exclusively, people perceived as female, feminine, transgender, and/or gender nonconforming who are targeted for carceral sexual violence. Empirical evidence has indicated that sexual abuse is significantly more common in women's prisons than in men's.[25] Research has also resulted in a wide consensus that transgender and gender nonconforming people are much more likely than non-trans men to experience sexual violence

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22 Kim Shayo Buchanan, *E-Race-ing Gender: The Racial Construction of Prison Rape, in* MASCULINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH 187, 188 (Frank R. Cooper & Ann C. McGinley eds., 2012).

23 *Id*.

24 *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLOR BLINDNESS 7 (2010) ("In some states, black men have been admitted to prison on drug charges at rates twenty to fifty times greater than those of white men"); SILJA J.A. TALVI, WOMEN BEHIND BARS: THE CRISIS OF WOMEN IN THE U.S. PRISON SYSTEM 47 (discussing the disproportionate incarceration rates of Native and Latino men and women in various states); Peter Wagner, *Incarceration Is Not an Equal Opportunity Punishment*, PRISON POLICY INITIATIVE (Aug. 28, 2012), http://www.prisonpolicy.org/articles/notequal.html (stating that as of 2004, there were 380 White people incarcerated per 100,000 members of the population, compared to 966 Latino people and 2207 Black people); OMAR C. JADWAT, ACLU, THE ARBITRARY DETENTION OF IMMIGRANTS AFTER SEPTEMBER 11, at 1 (2014) *available at* http://www.aclu.org/files/iclr/jadwat.pdf (last visited Feb. 12, 2015) (describing arbitrary arrest and detention of Muslim men from South Asian and Middle Eastern countries after September 11).

25 *See, e.g.*, PAUL GUERINO & ALLEN J. BECK, U.S. DEP'T OF JUSTICE, SEXUAL VICTIMIZATION REPORTED BY CORRECTIONAL AUTHORITIES, 2007-2008 6 (Brian R. Higgens & Jill Duncan eds., 2011), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/svraca0708.pdf ("Females represent 7% of sentenced prison inmates but accounted for 21% of all victims of inmate-on-inmate sexual victimization in federal and state prisons. Similarly, females account for 13% of inmates in local jails but 32% of all victims").

in men's facilities.[26] Numerous scholars have described the severe impact of carceral sexual violence on women of color and transgender people of color, as well as the larger social hierarchies this violence perpetuates.[27]

The empirical studies mentioned above use narrow definitions of sexual violence, recognizing only certain forms of unlawful sexual violence. In fact, all or almost all prisoners experience carceral sexual violence.[28] Nonetheless, the fact that popular conceptions of carceral sexual violence remain so inaccurately racialized and gendered in the face of even conservative research helps show just how entrenched racism, sexism, and transphobia are in what *seems* like sexual violence. Indeed, the focus on men's prisons and male victims may have been central to the passage of the Prison Rape Elimination Act.[29]

Disability rarely figures centrally in discussions of sexual violence, but it is also core to constructions of "what counts" as sexual violence. Perhaps the most common references to disability

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26 Valerie Jenness et al., Violence in Correctional Facilities: An Empirical Examination of Sexual Assault 31 (2007), *available at* http://ucicorrections.seweb.uci.edu/files/ 2013/06/Executive_Summary_of_Val_s_PREA_report.pdf.

27 *See, e.g.*, Smith, *Sexual Abuse of Women in United States Prisons, supra* note 16, at 604. ("At base, both slave-owners and correction officers used sexual domination and coercion of women to reinforce notions of domination and authority over the powerless."); *see also* Andrea Ritchie, *Law Enforcement Violence Against Women of Color, in* The Color of Violence: The INCITE! Anthology 138 (2006); Joey L. Mogul, Andrea J. Ritchie & Kay Whitlock, Queer (In)Justice: The Criminalization of LGBT People in the United States 12 (2011); S. Lamble, *Transforming Carceral Logics: 10 Reasons to Dismantle the Prison Industrial Complex Through Queer/Trans Analysis, in* Captive Genders: Trans Embodiment and the Prison Industrial Complex 235, 243-44 (Eric A. Stanley & Nat Smith eds., 2011); Richie, *supra* note 12, at 41 and 91 (2012).

28 Jason Lydon, Oral Presentation at Columbia Law School: Convening for Roadmap for Change (May 6, 2013) (commenting that "100% of your [imprisoned] clients are survivors of sexual assault"). Prisoners routinely get searched; in fact, agencies typically have policies requiring search of prisoners at intake. *See, e.g.*, N.H. Code Admin. R. Cor 402.01(b)(1); Minn. R. 2911.2525 (1)(c) (2013); 28 C.F.R. § 551.103 (2014); N.J. Admin. Code § 10A:31- 2.2, 2.3, 21 (a)(2) (2015); because, as I explain below in Section I(B)(1), searches are a form of sexual violence, it follows that all - or at least almost all - prisoners have experienced sexual violence in prison.

29 Brenda V. Smith, *The Prison Rape Elimination Act: Implementation and Unresolved Issues*, 3 Am. U. Crim. L. Brf. 10, 10 (2008), *available at* http://www.wcl.american.edu/endsilence/documents/PREA-CriminalLawBrief-FINALinPRINT.pdf.

and sexual violence involve vilifying disabled people—particularly people with mental disabilities—as dangerous and likely to be sexually violent,[30] as well as lamenting sexual violence perpetrated against individual people with intellectual or physical disabilities, who are often portrayed as helpless or even infantile.[31] These portrayals exclude structural analysis or consideration of the role of incarceration in sexual violence. But incarceration and institutional subordination are central to much of the sexual violence directed at disabled people, both because disabled people are so likely to be targeted for incarceration and because unchecked sexual violence is so prevalent in institutions specifically designed to incarcerate disabled people, such as nursing homes and psychiatric hospitals.[32]

Ideas about the character of individual perpetrators and victims of sexual assault also impact acknowledgment of sexual violence. Doctrine that focuses on the perspective of individual perpetrators and supports only certain types of victims cannot address large-scale racial or gender subordination.[33] Legal and popular conceptions

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30 A number of states have statutes providing for indefinite involuntary psychiatric commitment for people convicted of sex offenses after they have served their sentences. *See, e.g.*, WASH. REV. CODE ANN. § 71.09.025 (West 2009); IOWA CODE ANN. § 229A.7 (West 2009).

31 *See* Deborah W. Denno, *Sexuality, Rape, and Mental Retardation*, 1997 U. ILL. L. REV. 315, 320 (1997); Tobin Siebers, *A Sexual Culture for Disabled People*, *in* SEX AND DISABILITY 37, 44 (Robert McRuer & Anna Mollow eds., 2012) ("Paralysis is also pictured easily as sexual passivity or receptiveness—an invitation to sexual predators, since the erotic imagination thrives on clichéd positions and gestures.").

32 Robert A. Hawks, *Grandparent Molesting: Sexual Abuse of Elderly Nursing Home Residents and Its Prevention*, 8 MARQ. ELDER'S ADVISOR 159, 160, 164 (2006) (noting prevalence of sexual abuse against people in nursing homes); Amenoma Hartocollos, *Abuse is Found at Psychiatric Unit Run by the City*, N.Y. TIMES, Feb. 6, 2009, *available at* http://www.nytimes.com/2009/02/06/nyregion/06kings.html (reporting pattern of sexual violence among patients at Brooklyn psychiatric hospital); David Jackson & Gary Marx, *Kids Sexually Assaulted at Psychiatric Hospitals, Reports Say*, CHICAGO TRIBUNE, Sept. 21, 2010, *available at* http://articles.chicagotribune.com/2010-09-21/news/ct-met-psych-hospital-rapes-20100921_1_psychiatric-hospitals-hospital-staff-sexual-abuse (reporting at least eighteen cases of sexual abuse in Chicago psychiatric hospitals).

33 Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1296 (1991); Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, *in* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 29 (Kimberlé Crenshaw et al. eds., 1995); Charles R. Lawrence

of sexual violence tend to focus on the perspective of the alleged perpetrator. Alan Freeman articulated and critiqued the perpetrator perspective in the context of anti-discrimination law.[34] As Freeman explains, doctrine that focuses on the intent of the perpetrator of racist discrimination elides the impact on the victim.[35] In taking an individualized approach that values the thoughts and feelings of a perpetrator of racism over the perspectives of people of color, the law fails to consider or address the actual conditions people of color live in.[36] Catherine MacKinnon applies this analysis to law regarding sexual violence.[37] She argues that again, because the law tends to focus on the understanding and motivation of perpetrators of sexual violence, the law disregards and devalues the experience and opinions of survivors of sexual violence.[38]

A perpetrator perspective limits acknowledgement of sexual violence to those situations where an alleged perpetrator can be conceived of as a terrible individual who set out to harm others for his own power, pleasure, or sexual gratification.[39] While some law enforcement officers, correctional officers, health care professionals, and others working in carceral settings do at times have these reasons for their acts, many routine, lawful acts of sexual violence are likely not the product of these motivations. Most of the time the staff probably does what they do because it is a part of their job. The individual perpetrator may be an eager, indifferent, or reluctant participant in the act, and may be fired or otherwise punished for refusal to participate in it.[40] The line staff in many detention facilities have few economic options other than these jobs and would lose their jobs if they did not routinely conduct strip searches and comparable

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III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317, 325 (1987); Pooja Gehi, *Gendered (In)security: Migration and Criminalization in the Security State*, 35 Harv. J. L. & Gend. 357, 391 (2012).

34 Freeman, *supra* note 33, at 29.

35 *Id*.

36 *Id*.

37 *See* MacKinnon, *supra* note 33, at 1303-04.

38 *Id*. at 1304.

39 Gehi, *supra* note 33, at 391.

40 Hannah Arendt has demonstrated, in the context of the Holocaust, that many of the individuals who engage in monstrous acts do not do so because they derive pleasure from it. Hannah Arendt, Eichmann in Jerusalem: A Report on the Banality of Evil 105 (1963) ("…the murderers were not sadists or killers by nature; on the contrary, a systematic effort was made to weed out all those who derived physical pleasure from what they did.").

acts.[41] This reality is inconsistent with an image of a perpetrator of sexual violence as a monstrous individual intent on his personal pride and pleasure.

The counterpart to the image of the evil perpetrator is that of the innocent victim. Prisoners tend to be dehumanized in a way that reduces concern over the treatment they experience.[42] Some believe prisoners have brought sexual abuse on themselves through committing a crime or otherwise becoming imprisoned.[43] Even among feminists and anti-violence advocates, particularly white feminists and white anti-violence advocates, violence in prisons has received little attention. "Slashing, suicide, the proliferation of HIV, strip searches, medical neglect, and rape of prisoners have largely been ignored by antiviolence activists."[44] This perspective is consistent with longstanding minimization of the harms of sexual violence to people of color and the blaming of victims perceived as less than wholly innocent. These forms of victim blaming undermine

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41 *See* KING ET AL., THE SENTENCING PROJECT, BIG PRISONS, SMALL TOWNS: PRISON ECONOMICS IN RURAL AMERICA 15-16 (2003), http://prison.ppjr.org/files/tracy%20huling%20prisons%20economy%20study.pdf. These coercive conditions should not necessarily absolve staff of responsibility for their actions, but they should be acknowledged. *Cf*. Dena Al-Adeeb, *Reflection in a Time of War: A Letter to My Sisters in* THE COLOR OF VIOLENCE: THE INCITE! ANTHOLOGY 113 (INCITE! Women of Color Against Violence ed., 2006) (arguing that coercive conditions of participation in imperialist military forces do not absolve soldiers of their responsibility for military violence).

42 *See* JUANITA DÍAZ-COTTO, CHICANA LIVES AND CRIMINAL JUSTICE 188 (2006) (quoting imprisoned women saying that guards treated them as "animals" and "nothing"); DYLAN RODRIGUEZ, FORCED PASSAGES 198 (2006) ("Death as *logic* implies … a necessary contradiction and impossibility that simultaneously revises our conception of death by inscribing it onto *living* bodies/subjects (here the imprisoned), while constituting a different kind of absence, a ritualized finality that articulates through the statecraft of imprisonment."); Sharon Dolovich, *Exclusion and Control in the Carceral State*, 16 BERKELEY J. CRIM. L. 259, 288 (2011) (describing process by "which criminal offenders become not just nonhuman but something inherently scarier and more threatening").

43 *See* Dolovich, *supra* note 8, at 251 (2009) (explaining that prison staff sometimes tell prisoners who complain about sexual abuse to "fight or fuck.").

44 Statement by Critical Resistance and INCITE! Women of Color Against Violence, *Gender Violence and the Prison-Industrial Complex, in* THE COLOR OF VIOLENCE: THE INCITE! ANTHOLOGY 223, 224 (INCITE! Women of Color Against Violence ed., 2006).

the goal of preventing sexual violence.[45] The types of carceral sexual violence identified as worth stopping tend to be those where the victim seems at least relatively innocent. Speaking in support of PREA, Representative Wolf shared an example of the type of conduct he expected PREA to address: "a 19-year-old college student in Florida, in jail on marijuana charges, was raped by a cell mate who was being held on charges of sexual battery… within hours of the student being placed in his cell."[46]

The evil perpetrator / innocent victim dyad reduces violence to an individual act that occurs between two people. Women-of-color feminists and critical theorists have problematized individualized notions of violence.[47] Sexual violence is a group-based phenomenon that does group-based harm, including reinforcement of social hierarchies, promotion of the idea that not all types of people deserve to have control over their own bodies, and provocation of fear among particular social groups.[48]

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45 *See* Richie, *supra* note 12, at 121-22 (discussing link between lack of response to violence with victim-blaming, and likelihood of Black women experiencing victim-blaming); Patricia Hill Collins, Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment 81–82 (2d ed. 2000) (noting the origins in slavery of stereotypes of sexual aggression among Black women, and the concomitant rationale for sexual abuse on enslaved women); Bumiller, *supra* note 20, at 11 (noting that despite formal legal advances, prosecutors continue to selectively pursue cases involving "good victims,' women whose behavior conforms to traditional expectations and whose assaults involve unambiguous circumstances").

46 Statement of Mr. Wolf, Prison Rape Elimination Act of 2003, 149 Cong. Rec. H7764-01, H7766, 2003 WL 21726949, at *6 (July 25, 2003).

47 *See, e.g.*, Haunani-Kay Trask, *The Color of Violence*, *in* The Color of Violence: The INCITE! Anthology 81, 83 (INCITE! Women of Color Against Violence ed., 2006) (describing incarceration, homelessness, and under education of Native Hawaiians as violent); *see* Collins, *supra* note 45, at 134 (describing the role of law and government in undermining Black women's control of their own sexuality).

48 *See, e.g.*, Eric Rothschild, *Recognizing Another Face of Hate Crimes: Rape As A Gender-Bias Crime*, 4 Md. J. Contemp. Legal Issues 231, 264 (1993); Eli Clare, *Stones in my Pockets, Stones in my Heart*, *in* The Disability Studies Reader 563, 566 (Lennard J. Davis ed., 3d ed. 1997) ("We live in a time of epidemic child abuse, in a world where sexual and physical violence against children isn't only a personal tragedy and a symptom of power run amok, but also a form of social control… these adults teach children bodily lessons about power and hierarchy, about being boys, being girls, being children, being Black, being working-class, being disabled.").

Popularly, sexual violence is also supposed to be relatively rare, an aberration, and most certainly illegal. Despite a great deal of feminist scholarship illuminating the pervasiveness of sexual violence and the changes in law over time, views of sexual violence as a consistently criminalized anomaly remain entrenched in many arenas.[49] The legality and regularity of acts of carceral sexual violence take these acts outside the realm of what many, including the individuals involved in these acts themselves, consider sexual violence.[50]

Finally, many still assume that sexual violence is primarily about sex and sexual desire, even though, again, feminists have illustrated that sexual violence is at least as much about power as it is about sex.[51] Much official lawful carceral sexual violence imposes power, coercion, and control common to multiple forms of sexual violence on an institutional level; it may have little to do with sexual desire and may not involve what the participants think of as sex.[52]

As alternatives to these limited frameworks for understanding sexual violence, theorists have offered anti-subordination approaches, which focus attention on power dynamics that systematically disenfranchise one social group in favor of another, as well as

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49 Lidia Yuknavitch, *Explicit Violence*, RUMPUS (Aug. 22, 2012), http://therumpus.net/2012/08/explicit-violence/.

50 This tendency is consistent with Arendt's theory of the banality of evil. *See* ARENDT, *supra* note 40, at 116 ("As Eichmann told it, the most potent factor in the soothing of his own conscience was the simple fact that he could see no one, no one at all, who actually was against the Final Solution."); *see* ARENDT, *supra* note 40, at 135 ("Whatever he did he did, as far as he could see, as a law-abiding citizen."); *see also* DEAN SPADE, NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW (2011).

51 *See* Riggs, *supra* note 7, at 109 ("It is a truism in the anti-rape movement that rape is not motivated by sexual desire; it is motivated by a desire for power and control, working to uphold systems of oppression. To say that sex and rape are unrelated, however, is to both ignore the deep scars across the sexual selves of masses of people and avoid the dismantling of the symbiotic relationship between a sex-negative culture and a culture that supports sex in the absence of consent."); COLLINS, supra note 45, at 135 ("[R]ape and other forms of sexual violence act to strip victims of their will to resist and make them passive and submissive to the will of the rapist.").

52 Smith, *Sexual Abuse of Women in United States Prisons, supra* note 16, at 604 ("Like women slaves, women prisoners are seen as untrustworthy, promiscuous, and seductive."); RICHIE, *supra* note 12, at 91 ("State violence and harmful public policies could not fit into the everywoman analytical paradigm of the male violence that focused on individual men.").

survivor-centered approaches, which focus attention on the opinions, experiences, and demands of people who have experienced violence.[53] Sexual self-determination sometimes forms part of these demands. "[A]s long as we continue to view it [rape] as a crime committed by an individual against another individual, absent of any social context, we will have little success in combating it. Women must feel fully entitled to public engagement and consensual sex."[54] However, sexual self-determination is not enough. "Immigrant women will not be free from rape until we see economic justice, until all people have access to living-wage jobs, education, healthcare services, and safe living environments."[55]

As I turn to considering forms of carceral sexual violence, I do so operating from an anti-subordination, survivor-centered approach that values bodily autonomy, sexual self-determination, an end to racial, gender, and disability-based hierarchies, and economic justice. I understand that an individual or an institution may perpetrate sexual violence; that culture often promotes sexual violence; and that any human being may experience sexual violence. I also understand the motivation of the perpetrator should not be the focus in determining whether sexual violence has occurred, and that power matters at least as much as sex.

B. Sexual Violence in Carceral Contexts

1. Searches

Searches that law enforcement officers and staff of carceral institutions conduct constitute sexual violence. Nonetheless, relatively few searches are unlawful.

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53 *See, e.g.,* Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention,* 113 Harv. L. Rev. 550, 596 (1999) (proposing a survivor-centered approach that "emphasiz[es] the importance of engaging the battered woman in ways that do not replicate the violence of the battering relationship"); Ruth Colker, *Anti-subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. Rev. 1003 (1986) (arguing for a stronger focus on anti-subordination in race and sex discrimination cases).

54 Jill Filipovic, *Offensive Feminism: The Conservative Gender Norms that Perpetuate Rape Culture, and How Feminists Can Fight Back, in* Yes Means Yes! Visions of Female Sexual Power and a World Without Rape 13, 27 (Jaclyn Friedman & Jessica Valenti ed., 2008).

55 Pérez, *supra* note 6, at 149.

The physical acts of searches and lack of consent mirror other forms of sexual violence. They involve viewing, touching, or penetrating a person's body, including the genitals, anus, breasts, thighs, mouth, and buttocks. While some searches may be "consensual" for Fourth amendment purposes in that the person does not vocally object or physically resist,[56] not fighting back against a potentially dangerous aggressor is very different from giving full, free, knowing consent. Angela Y. Davis explains that the role of guards and prisoners can distract from the fundamental fact that guards do to prisoners just what many of us would easily recognize as sexual violence in another context: "[I]f uniforms are replaced with civilian clothes—the guard's and the prisoner's—then the act of strip searching would look exactly like the sexual violence that is experienced by the prisoner who is ordered to remove her clothing, stoop, and spread her buttocks."[57]

While not all people subject to these searches understand them as sexual violence, many do. For example, David Gilbert describes developments in New York prisons: "there is a new form of humiliation of 'pat frisks' that are nothing short of sexual molestation—which also serve as a provocation since a reaction can set off a beating and 'box' (isolation) time."[58] Others think of the experience as very similar to sexual violence, if not identical to it. One woman describes her experience of a search as follows:

> I honestly felt the only way to prevent the search becoming more intrusive or sexual was to remain as quiet and docile as possible. I later wondered why I was so passive. All I could answer was that it was an experience similar to sexual assault. I felt the same helplessness, the same abuse by a male in authority, the same sense of degradation and lack of escape.[59]

The impact of searches on individual survivors also corresponds to the impact of other forms of sexual violence. While the impact of sexual violence varies from person to person and incident to incident,

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56 *See, e.g.,* Florida v. Bostick, 501 U.S. 429, 435 (1991).

57 *See, e.g.,* Davis, *supra* note 12, at 58.

58 DAVID GILBERT, *Attica: Thirty Years Later, in* THE NEW ABOLITIONISTS: (NEO) SLAVE NARRATIVES AND CONTEMPORARY PRISON WRITINGS 311, 314 (Joy James ed., 2005).

59 Pereira, *supra* note 12, at 188.

many people experience trauma. One woman who was strip searched experienced paranoia, suicidal feelings, and depression afterward, and would not undress anywhere but in a closet.[60] Physical injuries with long-term consequences also result, as in the case of the Black teenager whose testicles were ruptured by police during a stop and frisk.[61] The fear and sense of powerlessness that can accompany any sexual violence may be especially severe when the government supports and perpetrates the act, because of the relative power of the government as compared to an individual.[62]

Like other forms of sexual violence, searches cause not only individual but also group-based harm, reinforcing social hierarchies.[63] The racialized and gendered dynamics of incarceration aggravate such harm.[64] Cameo Watkins connects her experience of being strip searched during initial prison processing to the legacy of slavery:

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60 Herman Schwartz, *How the Supreme Court Came to Embrace Strip Searches for Trivial Offenses*, The Nation (Aug. 16, 2012), http://www.thenation.com/article/169419/how-supreme-court-came-embrace-strip-searches-trivial-offenses.

61 *Cop 'Stops And Frisks' African American Teen, Literally Destroying His Genitals*, Pol. Blindspot (Jan. 22, 2014), http://politicalblindspot.com/stop-and-frisk-of-african-american-teen/.

62 *See, e.g.,* Ritchie, *Law Enforcement Violence Against Women of Color, supra* note 27, at 149 (describing hesitation of many women to come forward about a police officer who raped, sexually assaulted, and/or inappropriately searched them because of fear of police retaliation).

63 *See, e.g.*, Andrea Smith, *supra* note 21, (explaining the role of sexual violence in settler colonialism and other forms of hierarchy and domination); *see* Julie Goldscheid, *Gender-Motivated Violence: Developing A Meaningful Paradigm for Civil Rights Enforcement*, 22 Harv. Women's L.J. 123, 124 (1999) ("rather than being random and private matters, domestic violence, rape, and sexual assault are violent expressions of discrimination much like other bias-related crimes directed at individuals because of their race, color, religion, national origin, sexual orientation, or disability"); Morgan Bassichis, Alexander Lee, & Dean Spade, *Building an Abolitionist Trans and Queer Movement with Everything We've Got, in* Captive Genders: Trans Embodiment and the Prison Industrial Complex 15, 26-28 (Eric A. Stanley & Nat Smith eds., 2011).

64 Herman Schwartz, *Shock and Humiliation: How People Are Being Strip-Searched for Trivial Offenses*, The Nation (Aug. 20, 2012), http://www.thenation.com/article/169419/how-supreme-court-came-embrace-strip-searches-trivial-offenses (noting that people of color and political activists are particularly vulnerable to practices of arrest for minor offenses and subsequent suspicionless strip searching).

> It was the worst thing that I have ever experienced. I remember thinking at the time that this had to have been close to what my ancestors had been through. At that moment I remember thinking I am no longer a person, that I had crossed the boundary, crossed the line from human to not only animal but owned. I felt…it was worse than…it was the worst experience I've ever had.[65]

Like other forms of sexual violence, searches are also a form of exerting control.[66] Laura Whitehorn describes pat searches in prisons: "The point is not to locate contraband; it's to reduce you to a completely powerless person. If I had pushed a guard's hands away they would have sent me to the hole for assault. In fact, that did happen once. It reduces you to an object, not worthy of being defended."[67] Commentators including feminist author Naomi Wolf and anti-violence organization Philly Survivor Support Collective have criticized the political uses of forced stripping and sexual humiliation.[68]

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65 Pereira, *supra* note 12, at 188 ("On the one hand you would feel great about the visit but really raped and angry about the strip search afterwards. It was impossible to 'get used to it' or 'switch off from it' or be objective to it. In fact some women preferred not to have a visit because they couldn't handle the strip search afterwards.").

66 at frisks that happen outside of custodial settings on the street can also be a form of sexual violence. Michelle Alexander describes stop-and-frisk operations as "humiliating, demeaning rituals for young men of color." ALEXANDER, *supra* note 24, at 136. These frisks are often even worse for women and transgender people. Wendy Ruderman, *For Women in Streets, Deeper Humiliation*, N.Y. TIMES, Aug. 7, 2012, at A1 ("When officers conduct stops upon shaky or baseless legal foundations, people of both sexes often say they felt violated. Yet stops of women by male officers can often involve an additional element of embarrassment and perhaps sexual intimidation, according to women who provided their accounts of being stopped by the police."); Amnesty Int'l Staff, STONEWALLED: POLICE ABUSE AND MISCONDUCT AGAINST LESBIAN, GAY, BISEXUAL AND TRANSGENDER PEOPLE IN THE U.S. 60, 81 (2005), http://www.amnesty.org/en/library/asset/AMR51/122/2005/en/2200113d-d4bd-11dd-8a23-d58a49c0d652/amr511222005en.pdf.

67 Marilyn Buck & Laura Whitehorn, *Cruel but not Unusual, in* THE NEW ABOLITIONISTS: (NEO) SLAVE NARRATIVES AND CONTEMPORARY PRISON WRITINGS 259, 262 (Joy James, ed. 2005).

68 Naomi Wolf, *How the US Uses Sexual Humiliation as a Political Tool to Control the Masses*, THE GUARDIAN, Apr. 5, 2012, *available at* http://www.guardian.co.uk/

2. Certain Nonconsensual Medical Interventions

> [H]ow can women of color rely on the Medical Industrial Complex for care and respect? In fact, can't women of color instead expect re-victimization when coming into contact with the MIC? Can't we expect our autonomy and self-determination to be inhibited, and our safety to be threatened?
>
> --Ana Clarissa Rojas Durazo[69]

Certain nonconsensual medical interventions, including certain refusals to provide necessary medical care, also constitute sexual violence. Some, but not all, of these interventions are lawful.

At common law, performing a medical procedure without the consent of the patient is a battery.[70] Nonconsensual gynecological exams may, under certain circumstances, constitute criminal and tortious sexual abuse.[71] While some states have passed laws requiring people seeking abortions to undergo a vaginal ultrasound[72]—another

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commentisfree/cifamerica/2012/apr/05/us-sexual-humiliation-political-control (drawing connections between U.S. chattel slavery, Nazi German internment, and current U.S. law enforcement practices); *Strip Searches Make Us All Less Safe,* Philly Survivor Support Collective (Apr. 23, 2002), http://phillysurvivorsupportcollective.wordpress.com/2012/04/ ("The Florence v. County of Burlington Supreme Court decision is a way of scaring all of us so that we don't challenge state power for fear of being arrested and sexually humiliated. This is another way that the state uses sexual violence as a means of control.").

69 Ana Clarissa Rojas Durazo, *Medical Violence Against People of Color and the Medicalization of Domestic Violence in* The Color of Violence: The INCITE! Anthology 179, 186 (INCITE! Women of Color Against Violence ed., 2006).

70 Sekerez v. Rush Univ. Med. Ctr., 954 N.E.2d 383, 394 (Ill. App. Ct. 2011), *reh'g denied* (Aug. 2, 2011), *appeal denied*, 962 N.E.2d 489 (Ill. 2011).

71 *See* People v. Burpo, 647 N.E.2d 996, 998 (Ill. 1995) (upholding constitutionality of statute prohibiting nonconsensual penetration when used to indict a gynecologist for acts during gynecological exams); McNair v. State, 825 P.2d 571, 572 (Nev. 1992) (upholding conviction of gynecologist who penetrated patients with his penis during examinations); Princeton Ins. Co. v. Chunmuang, 698 A.2d 9, 10, 18 (N.J. 1997) (finding that medical malpractice insurance exemption of coverage for criminal acts applied to sexual abuse committed in the course of gynecological exam).

72 *See, e.g.*, Abortion by physician; determination of viability; ultrasound test required exceptions; penalties, La. Rev. Stat. Ann. § 1299.35.2(d) (2014); Va. Code Ann. § 18.2-76 (West 2012); Guttmacher Inst., *State*

form of nonconsensual penetration—advocates have had some success persuading courts to strike down these laws on constitutional grounds. [73]

Prisoners retain a limited right to refuse treatment, but state interests significantly constrain this right.[74] For example, if certain substantive and procedural thresholds are met, medical professionals may medicate detained people with psychiatric disabilities against their will.[75] Courts have held that nonconsensual treatment with insulin for diabetes,[76] nonconsensual testing for AIDS,[77] nonconsensual vaccination for Hepatitis A,[78] and nonconsensual artificial nutrition and hydration[79] do not violate prisoners' constitutional rights. As I will discuss further below, courts have also found some nonconsensual gynecological and rectal exams to be lawful. However, nonconsensual treatment may not always be permitted, particularly where the prisoner objects based on sincerely held religious beliefs.[80] Deliberate denial of necessary medical care can also be unlawful.[81]

In or out of prison, people often do give full, free, knowing consent to medical interventions. In some situations, providing medical care to someone who cannot consent—someone who is, for example, unconscious—may be appropriate. Here, I am only considering those situations where a person could have consented but did not, or where a person could not consent and no legitimate medical need supported the intervention. I don't argue that every nonconsensual medical intervention is a form of sexual violence;

Policies in Brief: Requirements for Ultrasound, at 1-2, http://www.guttmacher.org/statecenter/spibs/spib_RFU.pdf (last updated Feb. 1, 2015) (providing national review of related laws).

73 *See, e.g.*, Tex. Med. Providers Performing Abortion Services v. Lakey, 806 F. Supp. 2d 942, 975 (W.D. Tex. 2011) *vacated in part*, 667 F.3d 570 (5th Cir. 2012).

74 White v. Napoleon, 897 F.2d 103, 113 (3d Cir. 1990).

75 Washington v. Harper, 494 U.S. 210, 225 (1990).

76 State *ex rel.* Schuetzle v. Vogel, 537 N.W.2d 358, 364 (N.D. 1995).

77 Dunn v. White, 880 F.2d 1188, 1196 (10th Cir. 1989).

78 Powers v. Snyder, 484 F.3d 929, 931 (7th Cir. 2007) (finding no constitutional violation where defendants forced prisoner to work in dangerous conditions and required him to receive a vaccination to prevent contraction of Hepatitis A during work assignment).

79 Hill v. Dep't of Corr., 992 A.2d 933, 939 (Pa. Commw. Ct. 2010); *but see* Thor v. Superior Court, 855 P.2d 375, 378 (Cal. 1993).

80 Comm. of Pa., Dept. of Corr. v. Lindsey, 984 A.2d 573, 573 (Pa. Commw. Ct. 2009).

81 Estelle v. Gamble, 429 U.S. 97, 104 (1976).

while nonconsensual medical interventions may always be violent, the violence is not necessarily always sexual. I focus on those nonconsensual medical interventions that involve stripping someone or forcing someone to strip; touching or penetrating the genitals, anus, breasts, or reproductive organs; or harming a person's capacity for sexual pleasure, sexual acts, or reproduction.

Like searches, the physical acts of nonconsensual medical interventions are often indistinguishable from other forms of sexual violence. Mandatory medical exams are widely imposed in prisons and jails, including gynecological exams.[82] "[Women prisoners] have experienced sexual violence in their private lives, in their domestic lives, in their intimate lives. And then they go to prison where their bodies are handled by so-called doctors who are sticking things into their vaginas and their anuses and it feels exactly like the sexual abuse that they have already experienced."[83] One imprisoned woman describes her physical pain and the doctor's denial of her experience during an exam as follows: "[He] is the biggest man with the biggest hands... [H]e tried to force his way into my cervix and he kept telling me it wasn't painful while I was crying and tears were streaming down my face."[84]

Some prisoners experience nonconsensual vaginal and anal exams as sexual violence. Michann Meadows sued over a doctor non-consensually penetrating her vagina.[85] She cried out during the exam

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82 *See, e.g., Testing*, Mich. Dep't of Corr., http://www.michigan.gov/corrections/0,4551,7-119-9741_9742-23414--,00.html (last visited Feb. 20, 2015) ("All prisoners are given a TB test and a physical, including a blood test for HIV and venereal disease…Offenders are also given psychological testing"); Juanita Díaz-Cotto, Chicana Lives and Criminal Justice 200 (2006) ("They do a pap smear…that's mandatory when you go in"); *ODOC Intake & Assessment*, Or. Dep't of Corr., http://www.oregon.gov/doc/OMR/pages/intake_and_assessment.aspx (last visited Feb. 20, 2015) ("During this process, which may last several hours, individuals undergo an abbreviated medical/mental health evaluation and are given a tuberculosis skin test.").

83 Interview with Angela Y. Davis, DVD: Visions of Abolition: From Critical Resistance to a New Way of Life, Gender Violence and the Prison Industrial Complex (2012), MVD Entm't Group, *available at* http://www.films.com/ecTitleDetail.aspx?TitleID=28349. Beth Richie also acknowledges that survivors of sexual violence can be re-traumatized by "insensitive medical examinations." Richie, *supra* note 12, at 49.

84 Human Rights Program at Justice Now, *Prisons as a Tool of Reproductive Oppression*, 5 Stan. J. C.R. & C.L. 309, 328 (2009).

85 Meadows v. Reeves, 1:11-CV-00257-GBC PC, 2012 WL 1583023, at *2 (E.D. Cal. May 4, 2012).

and demanded that the doctor stop "jiggling [his] fingers in and out of [her]."[86] He refused to stop and pushed his fingers inside of her even harder, claiming that he needed to do what he was doing to "get around her uterus."[87] The exam caused her pain and bleeding.[88] Afterward, a nurse gave Meadows a menstrual pad and privately advised her to file a complaint against the doctor for his conduct.[89] In her complaint, Meadows said she felt sexually violated.[90]

Jessie Hill sued over a doctor non-consensually penetrating his anus and rectum.[91] Guards took Hill to a prison doctor after he complained of rectal pain.[92] He told the doctor that he consented only to a visual examination and specifically told the doctor not to stick anything in his rectum.[93] The doctor stuck his finger in Hill's rectum over his protests.[94] When Hill called for the guards to help him, they laughed at him instead.[95] Hill said that he experienced the penetration as rape.[96]

Also like searches, nonconsensual medical interventions infringe on the same interests in bodily integrity, privacy, dignity, self-determination, and autonomy as in sexual violence more broadly, and can cause similar types of harm.[97] Forced exams to investigate sexual violence, which typically involve penetration of the mouth, vagina, and/or anus and come on the heels of other sexual violence, can be particularly harmful. "Almost all interviewees in a recent study of survivors of sexual abuse said they were re-traumatized by the medical examination procedures…. [B]ecause there is an underlying assumption that they are not to be believed, material evidence must

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86 *Id*.
87 *Id*.
88 *Id*.
89 *Id*.
90 *Id*.
91 Hill v. Rectenwald, 5:10CV00030JMM/JTK, 2010 WL 2610667, at *1-2 (E.D. Ark. June 17, 2010), *report and recommendation adopted*, 5:10CV00030JMM/JTK, 2010 WL 2610659 (E.D. Ark. June 28, 2010).
92 *Id.* at *1.
93 *Id.* at *1-2.
94 *Id.*
95 *Id.*
96 *Id.*
97 *See, e.g.*, Camille Gear Rich, *What Dignity Demands: The Challenges of Creating Sexual Harassment Protections for Prisons and Other Non-Workplace Settings*, 83 S. CAL. L. REV. 1, 5 (2009) (identifying the dignitary harm involved in sexual harassment in prisons).

be collected from their bodies as they are objectified and invaded, penetrated a second time by medical intervention."[98] A prisoner in a California women's facility said, "Ninety-nine percent of the women have been abused or raped. To have a man take us into an office the size of a closet . . . stripped down . . . rough and hurts us . . . it takes us right back to the beginning."[99]

Other forms of nonconsensual medical interventions, such as sterilization, also violently control people's sexuality and reproduction.[100] As one Black trans man subjected to a hysterectomy in a California prison said, "I felt coerced. I didn't understand the procedure….I never planned on having children but I would have liked the option to be mine."[101] The history of nonconsensual sterilization in prisons—including psychiatric institutions—is extensive. These practices have tended to target disabled people, low-income people, indigenous people, queer people, gender nonconforming people, Black people, immigrants, and sexually active women.[102] While these practices have often targeted people with a uterus, they have certainly not spared people with testicles. Nonconsensual castration has been used as a punishment for alleged sexual violence, a treatment for homosexuality, and a part of medical experimentation.[103] Nonconsensual sterilization practices are not over. Justice Now recently documented extensive practices of nonconsensual sterilization in California women's prisons, which seemed to target non-trans women of color and trans men of color.[104] Like other forms

98 *See* Durazo, *supra* note 69, at 187.

99 *See* Human Rights Program at Justice Now, *supra* note 84, at 327.

100 ("Because of the way they impact and manipulate women's sexual and reproductive lives, coercively sterilizing women, forcing them through economic incentives (like the threat of being fired) to terminate pregnancies, and offering them long-term birth control at no or low cost are all forms of sexual violence against immigrant women") Pérez, *supra* note 6, at 146.

101 *See* Human Rights Program at Justice Now, *supra* note 84, at 322.

102 Tony Platt, *The Frightening Agenda of the American Eugenics Movement* (July 7, 2003), http://historynewsnetwork.org/article/1551.

103 Harriet Washington, Medical Apartheid: The Dark History of Medical Experimentation on Black Americans from Colonial Times to the Present 244 (2008).

104 *See* Human Rights Program At Justice Now, *supra* note 84, at 32; *see also* Victoria Law, Resistance Behind Bars: The Struggles of Incarcerated Women 32 (2009) (describing the nonconsensual removal of most of a woman's cervix); Salimah Hankins, Advancing Human Rights A Status Report on Human Rights in the United States

of sexual violence, these nonconsensual sterilizations invade people's bodies against their will and cause serious harm. Hysterectomy and castration can cause not only medical complications and dramatic curtailment of reproductive possibilities, but also limit capacity for sexual pleasure.[105]

Nonconsensual medical interventions not directly targeted at genitals or reproductive organs can also be used as a way to support other forms of sexual violence. When a transgender woman in a Pennsylvania prison went on a hunger strike to demand protection from sexual assault, the prison responding by force-feeding her.[106] Forced psychiatric treatment has been used to punish those who report rape[107] and those who show consensual affectionate or sexual connection with other prisoners.[108] Forced psychiatric treatment can also be a form of sexual violence in and of itself, such as when staff members keep watch on prisoners whom they have forced to go naked.[109] When one woman reported that a guard raped her, she was immediately transferred to a psychiatric hospital for prisoners, where she was harassed.[110] When she attempted suicide, three male guards stripped her naked and tied her spread-eagle to a bed, forcing her to stay there for nine hours.[111]

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61 (2014), http://www.ushrnetwork.org/sites/ushrnetwork.org/files/2014_ushrn_hr_report.pdf

105 Nara Schoenberg, *Ladies, Scientists Have Found Out Some Very Interesting Details About Your Sex Life,* CHI. TRIBUNE, Sept. 19, 2012 http://articles.chicagotribune.com/2012-09-19/health/sc-health-0919-lady-parts-20120919_1_medical-research-anatomy-cervix; Barry R. Komisaruk, Eleni Frangos, & Beverly Whipple, *Hysterectomy Improves Sexual Response? Addressing a Crucial Omission in the Literature*, 18 J. MINIM. INVASIVE GYNECOL. 288 (2011), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3090744/.

106 Lori Falce, *Corrections Department Sues to Force Treatment of Transgender Inmate*, CTR. DAILY TIMES, July 11, 2014, http://www.centredaily.com/2014/07/11/4261645/corrections-department-sues-to.html.

107 *See* Law, *supra* note 104, at 67.

108 Nikki Lee Diamond, *Behind These Mascaraed Eyes: Passing Life in Prison*, in NOBODY PASSES: REJECTING THE RULES OF GENDER AND CONFORMITY 197, 202 (Mattilda, a.k.a. Matt Bernstein Sycamore, ed. 2006).

109 White v. Marshall, CIV. 208CV362-CSC, 2008 WL 4826283 (M.D. Ala. Nov. 5, 2008) (describing practice of placing prisoner in a "strip cell" on suicide watch).

110 Law, *supra* note 104, at 155-56; *see also* Gabriel Arkles, *Gun Control, Mental Illness, and Black Trans and Lesbian Survival*, 42 SW. L. REV. 855, 885 (2013).

111 *See* Arkles, *supra* note 110.

Denial of medical care[112] can also be sexual violence, in a very similar way. Refusal to treat cancer, sexually transmitted diseases, and other conditions, as well as refusal to provide gender-affirming care to trans prisoners, shortens life spans, curtails reproductive capacity, and limits possibilities for sexual activity and pleasure.[113] For example, one imprisoned woman needed a mammogram and biopsy to investigate a lump in her breast. [114] Her prison refused to provide it for years.[115] By the time she got the test, the cancer had spread and she needed to have both breasts removed.[116] She also had heavy vaginal bleeding for 18 months before getting treated with a hysterectomy.[117] Many prisoners have reported inadequate HIV treatment, which among other things makes sex more dangerous.[118] Some trans women denied gender-affirming hormone treatments have performed castration surgeries on themselves.[119] Many trans people denied gender-affirming treatment find it more difficult to have sex at all, or in the ways they want to, or in ways that bring them as much pleasure as possible.[120]

Deliberate denial of necessary medical treatment and forced sterilization without medical reasons are often unlawful,[121] even if not recognized as sexual violence. Many of the other forms of nonconsensual medical interventions I have described, however, are lawful.

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112 *See* Durazo, *supra* note 69, at 186.
113 *See* Human Rights Program At Justice Now, *supra* note 84, at 329.
114 *See* Law, *supra* note 104, at 31.
115 *Id*.
116 *Id*.
117 *Id*.
118 Gus Cairns, *No-one With an Undetectable Viral Load, Gay or Heterosexual, Transmits HIV in First Two Years of PARTNER Study*, NAM, Mar. 4, 2014, http://www.aidsmap.com/No-one-with-an-undetectable-viral-load-gay-or-heterosexual-transmits-HIV-in-first-two-years-of-PARTNER-study/page/2832748/ (finding virtually no risk of HIV transmission in sero-mixed couples where the HIV-positive partner received effective anti-retroviral treatment).
119 George Brown, *Autocastration and Autopenectomy as Surgical Self-Treatment in Incarcerated Persons with Gender Identity Disorder*, 12 Int'l J. Transgenderism 31, 33-35 (2010).
120 Griet De Cuypere et al., *Sexual and Physical Health After Sex Reassignment Surgery*, 34 Archives of Sexual Behav. 679, 679 (2005) (finding that 80% of trans people reported improvement in sexuality after gender affirming surgery).
121 *See* Estelle v. Gamble, 429 U.S. 97, 104 (1976); Skinner v. Okla. ex rel. Williamson, 316 U.S. 535, 541-43 (1942).

3. Prohibitions on Consensual Sex

n there are times
when i want to love without fear
i just want to love without fear
don't you?
--Maiana Minahal[122]

Almost all U.S. prisons prohibit consensual sexual relationships between prisoners.[123] Many prisons also prohibit other forms of affectionate physical contact, like kissing, hugging, or handholding, as well as solitary expressions of sexuality, like masturbation.[124] Courts have consistently upheld these restrictions against challenge.[125] Carceral prohibitions on consensual sex are a form of sexual violence because they violently, non-consensually, control people's sexuality. These restrictions also often lead to other forms of sexual violence.

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122 Maiana Minahal, *Poem On Trying to Love Without Fear* in THE COLOR OF VIOLENCE: THE INCITE! ANTHOLOGY 267, 268 (INCITE! Women of Color Against Violence ed., 2006).

123 *See, e.g.*, Smith, *Rethinking Prison Sex, supra* note 8, at 200 ("In every state, correctional policies prohibit sexual behavior by inmates, whether that conduct is with staff or other inmates."); OR. ADMIN. R. 291-105-0015(2)(m) (2015) (prohibiting consensual sex among prisoners); N.J. ADMIN. CODE § 10A:9-2.13 (d)(5) (2015) (same); KAN. ADMIN. REGS. 44-12-314(a) (2015) (same); Abby Wilkerson, *Disability, Sex Radicalism, and Political Agency*, *in* FEMINIST DISABILITY STUDIES 193, 194 (Kim Q. Hall, ed. 2011) (describing limitations on sex, relationships, and masturbation in nursing homes and other institutions); Siebers, *supra* note 31, at 43 (same).

124 *See, e.g.*, Arkles, *supra* note 11, at 534-35; Ken Picard, *A Gay Transgender Inmate Sues for Passion in Prison*, SEVEN DAYS (Feb. 26, 2014), (*quoting* Paul Wright), *available at* http://www.sevendaysvt.com/vermont/a-gay-transgender-inmate-sues-for-passion-in-prison/Content?oid=2316357 ("Most prisons also have rules against masturbation. […] If you think that one's not being violated on a regular basis, denial isn't just a river in Egypt.").

125 *See* Arkles, *supra* note 11, at 534-35.

Prohibitions on consensual sex devalue consent. "[R]ape culture works by restricting a person's control of hir body, limiting hir sense of ownership of it, and granting others a sense of entitlement to it."[126] Prohibitions on consensual sex always seek to control intimate bodily acts, and assert government power over what one may do with one's body. Prohibitions on consensual sex infringe on interests of bodily integrity, privacy, dignity, self-determination, and autonomy.[127]

Many feminists argue that increasing sexual autonomy, particularly for women, trans people, and queer people, is a central part of ending sexual violence—although alone it is not enough.[128] Self-defining and self-determining sexuality, and forming intimate connections with other people, can fuel survival and resistance. "[A]ll systems of oppression rely on harnessing the power of the erotic…when self-defined by Black women ourselves, Black women's sexualities can become an important place of resistance. Just as harnessing the power of the erotic is important for domination, reclaiming and self-defining that same eroticism may constitute one path toward Black women's empowerment."[129]

126 Hazel/Cedar Troost, *Reclaiming Touch: Rape Culture, Explicit Verbal Consent, and Body Sovereignty, in* Yes Means Yes! Visions of Female Sexual Power and a World Without Rape 171, 171 (Jaclyn Friedman & Jessica Valenti, ed. 2008).

127 *See* Smith, *Rethinking Prison Sex, supra* note 8, at 232 ("[P]ermitting a greater degree of sexual expression recognizes the inherent dignity of human beings, which survives imprisonment."); Smith Tiloma Jayasinghe, *When Pregnancy Is Outlawed, Only Outlaws Will be Pregnant in* Yes Means Yes! 265, 269 ("Someone else's paternalistically taking away her choice to have sex… renders her… less than human.").

128 *See* Pérez, *supra* note 6, at 142.

129 *See* Collins, *supra* note 45, at 128.

In her groundbreaking work on prison sex, Brenda V. Smith explores prisoners' interests in sex, including sex for pleasure, trade, freedom, transgression, procreation, safety, and love.[130] Many prisoners have described the importance of sexual self-expression while incarcerated. One formerly incarcerated woman said, "The incarceration experience is brutal and lonely, and I believe that it is only natural for women to seek to alleviate feelings of loneliness through nonsexual or sexual intimacy during the stay."[131] Regina Diamond, an incarcerated lesbian, asked, "How and why would anyone be expected and forced to live without love from a significant other regardless of the environment? It's insane!"[132] A formerly incarcerated man said, "Sex is like drinking down an ocean of cloudless Montana sky, soaring, expansive, ever onward."[133] A Pennsylvania study found that "Some respondents [in a study of trans and gender variant prisoners] describe the ways in which having sex and/or creating partnerships supported their resilience by providing companionship, protection, and access to resources."[134]

130 *See generally* Smith, *Rethinking Prison Sex, supra* note 8.

131 CraneStation, *What Happens to Sexuality in Prison: Frog Gravy 79,* SMIRKING CHIMP BLOG (Jan. 19, 2012, 8:43 PM), http://www.smirkingchimp.com/thread/cranestation/40852/what-happens-to-sexuality-in-prison-frog-gravy-79.

132 Toshio Meronek with Regina Diamond, Faith Phillips & Lala, *How We Get By: Resisting Gender Regulations When "You Have No Right to Be Who You Are,"* THE ABOLITIONIST, Summer 2012, at 5, *available at* http://abolitionistpaper.files.wordpress.com/2012/10/abolitionist-17-english.pdf.

133 Neil Edgar, *Inside the Box*, *in* THAT'S REVOLTING! QUEER STRATEGIES FOR RESISTING ASSIMILATION 139 (Mattilda Bernstein Sycamore ed., 2004).

134 PASCAL EMMER, ADRIAN LOWE & R. BARRETT MARSHALL, THIS IS A PRISON, GLITTER IS NOT ALLOWED: EXPERIENCES OF TRANS AND GENDER VARIANT PEOPLE IN PENNSYLVANIA'S PRISON SYSTEMS 36 (2011).

The enforcement of prohibitions on consensual sex often involves physical and sexual violence. Detecting sex requires extensive surveillance, which may involve viewing the naked body or even touching or penetrating the body through searches or medical exams. Punishing people for consensual sex also often involves direct intrusion on the body, including forcibly removing people from where they are and placing them in solitary confinement. "In both jails and in the prison I was in, sexual contact was punishable by time in the hole."[135] Loss of good time credits, another common punishment for consensual sex, forces people to remain in prison for longer periods of time. Lin Elliot said, "Even in states—such as here in Washington—where there are no laws against homosexuality, consensual sex between prisoners is against prison rules and can result in severe punishment—even loss of 'good time,' thereby extending a person's sentence."[136] Placement in solitary confinement, as well as longer terms of confinement in prison, in turn make people more vulnerable to other forms of sexual violence, including rape. Other penalties for consensual sex include forced labor, and forced separation from one's lover.[137] Punishments are not always equal: they can be worse for trans people and for HIV positive people.[138]

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135 CraneStation, *supra* note 131; *see also* Toshio Meronek with Regina Diamond, Faith Phillips, & Lala, *supra* note 132, at 5 ("Sex was forbidden, and if people were caught, they would get a blue sheet [a disciplinary write-up], and were often sent to 'lock' [solitary confinement].").

136 Karen Moulding & Nat'l Lawyers Guild, 2 Sexual Orientation and the Law § 15:26 (2013) (quoting Lin Elliott, *Building Bridges*, Breakthrough, Spring 1993, at 46.).

137 CraneStation, *supra* note 131; Prince, *A Story… About Me Inside Prisons in Prison Officials Stop at Nothing to Separate Lovers in PAC*, Sylvia Rivera Law Project, Jan. 29, 2014, *available at* http://srlp.org/prison-officials-stop-at-nothing-to-separate-lovers-in-pac/ ("Then, they sent me to the box for a bullshit ass ticket, and moved me out the jail just to separate us.").

138 "[S]ince both the guy I was with and I are both on paper for having HIV, now we are both sitting in Ad-Seg without being allowed to attend the hearing…. This is my first time ever receiving a case of this manner and now I'm being treated as though I've been repeatedly written up for this….They lied on the paperwork- they don't care! …They don't want us Gay and Transgenders in population in the first place." *Trans Folks Down for the Fight*, Black & Pink Newspaper, Oct. 2013, at 4, *available at* http://issuu.com/blackandpink/docs/10-2013.

Prohibitions on consensual sex perpetrate homophobia and transphobia, which can increase the level of sexual and other violence targeting people perceived as trans or queer. While trans and queer people are far from the only people having sex in prison, they are often assumed to be having sex and get punished for it.[139] Historically, concerns about sexuality in prison have focused at least as much on homosexuality as on sexual assault.[140] Courts continue to accept stopping or discouraging homosexuality and homosexual relationships as "legitimate penological objectives."[141] Because prisons tend to conflate queer and trans identity, consensual sex in prison, and sexual assault, prison officials have at times interpreted measures against rape to express zero tolerance for queer and trans people.[142] Some prison officials expressed confusion about the PREA regulation stating that prisons may not treat consensual sex the same as sexual assault.[143] This confusion speaks to the deeper issue—that prison officials still see queer sex as the problem, not sexual assault—or they see the two as indistinguishable and identically bad. Jason Lydon, a formerly incarcerated gay man and founder of Black and Pink, explains, "[u]nfortunately, it is against the rules, and in many states against the law, for prisoners to have sex with each other (and in some places prisoners even get in trouble for masturbating). The Prison Rape Elimination Act (PREA) has also increased guard harassment of prisoners in romantic relationships with each other. Black and Pink has gotten reports of prisoners getting disciplinary tickets for simply holding hands."[144]

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139 Arkles, *supra* note 11, at 534-35.

140 *See generally* REGINA KUNZEL, CRIMINAL INTIMACY: PRISON AND THE UNEVEN HISTORY OF MODERN AMERICAN SEXUALITY (2008).

141 *See generally* Thornburgh v. Abbott, 490 U.S. 401 (1989); Willson v. Buss, 370 F. Supp. 2d 782 (N.D. Ind. 2005).

142 *See* Arkles, *supra* note 11.

143 National Standards to Prevent, Detect, and Respond to Prison Rape, 77 Fed. Reg. 37,106, 37, 174 (June 20, 2012) (codified at 28 C.F.R. pt. 115).

144 Jason, *Message from Jason,* BLACK & PINK NEWSPAPER, Oct. 2013, at 2, *available at* http://issuu.com/blackandpink/docs/10-2013).

Martin Morales, in her pro se complaint challenging Vermont prohibitions on consensual sex in prison, identified a host of problems that the prohibitions caused, including "sexual assaults within the incarceration system…homophobia…hatred…and bigotry."[145] Citing Romer v. Evans, she explained that these prohibitions are rooted in anti-LGBT prejudice.[146] As another author explains, teaching homophobic, transphobic, and sexist sexual shame can make people more vulnerable to abuse in relationships. "If that little girl has learned that her queer longings and desires are sinful … and dirty, and that she should expect to be beaten and raped by the upstanding citizens … then how will she know when the things her lover does to her are abusive? If that non-gender-conforming child has never been allowed to name hir own body, and learned everyone but hirself has the right to name, manipulate, and modify hir body, then how will ze know when a touch is invasive?"[147]

Others have also pointed out that prohibitions on consensual sex keep prisoners from learning positive relationship skills. Paul Wright says, "If most prisoners are going to be getting out, how are you helping to make them better people from when they came in? […] If you accept the fact that relationships are a normal part of human existence, what are you doing to normalize that?"[148] Derrick Corley, a writer and prisoner in New York, said, "If it is true that healthy people have healthy relationships, and, if these relationships are systematically denied prisoners, then how can we be expected to eventually live in society as normal, law-abiding, productive people?"[149]

145 Complaint ¶ 13, at 4, Morales v. Pallito, 2014 WL 1758163 (D. Vt. Apr. 30, 2014) (No. 2:13-cv-00271).

146 *Id*. at 23-24.

147 Toni Amato, *Shame is the First Betrayer, in* Yes Means Yes! Visions of Female Sexual Power and a World Without Rape 221, 224 (Jaclyn Friedman & Jessica Valenti, eds., 2008).

148 Ken Picard, *A Gay Transgender Inmate Sues for Passion in Prison,* Seven Days, Feb. 26, 2014, *available at* http://www.sevendaysvt.com/vermont/a-gay-transgender-inmate-sues-for-passion-in-prison/Content?oid=2316357.

149 Smith, *supra* note 8, *at* 185, n.37 (quoting Derrick Corley, *Prison Friendships*, *in* Prison Masculinities 107 (Don Sabo et al. eds., 2001).

The focus on preventing consensual sex can lead prison officials to put prisoners in unnecessarily dangerous situations. A prisoner named Steven said, "They will put you in a 12 X 8 cell with a homophobe and expect you to get along with your cellmate. Heaven forbid they put you in a cell with another bisexual, transgender, or gay individual because they will automatically assume that ya'll are having sex. What do they care if we have consensual sex?"[150] A stud[151] in a women's state prison agrees: "If you want to have a relationship with somebody or cell up with them that should be your business. This would create a much safer environment for everybody."[152]

The prohibitions on consensual sex can also deter prisoners from coming forward about sexual assault, for fear that they will be punished for having sex. That is exactly what happened to one of my former clients, who was disciplined for having sex when she told a staff member that another prisoner had raped her.

Brenda V. Smith points out that if prisons permitted consensual sexual expression, they could improve in several ways. For example, they could "appropriately identify[] acts that are consensual as opposed to coerced … to more accurately report information to the Bureau of Justice Statistics and meet the data collection requirements of the [Prison Rape Elimination] Act."[153] This shift in focus would also lead officials to devote their limited resources to focus on preventing, investigating, and responding to sexual violence, rather than consensual sex.[154] She acknowledges that "recognizing and granting inmates a degree of sexual expression may enhance inmate safety by decreasing prison rape" and agrees with those described above that it would also "help prisoners learn healthy and responsible sexual behavior prior to reentering the community."[155]

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150 Steven, *Letters to Our Family,* BLACK & PINK NEWSPAPER, Jan. 2014, at 3, *available at* http://issuu.com/blackandpink/docs/jan_2014_final.

151 "Some people of color assigned female at birth with a masculine gender presentation identify with the term stud." Arkles, *Correcting Race and Gender, supra* note *8, at* 873 n. 61.

152 EMMER, LOWE & MARSHALL, *supra* note 134, at 45.

153 Smith, *Rethinking Prison Sex, supra* note 8, at 228.

154 *Id.* at 228-29.

155 *Id*. at 232.

Prohibitions on consensual sex also make sex riskier, contributing to transmission of HIV and other STDs. "Acknowledging that a broad range of sex occurs in correctional settings for a variety of reasons would enable prison officials to take appropriate health measures such as condom distribution."[156] Lawmakers use the prohibitions on consensual sex as a justification for prohibiting condoms.[157] Even in those rare situations where a prison provides condoms, if it still prohibits sex, then sex is less likely to be planned and more likely to occur when an unsupervised moment arises--even if no condom is available.[158] This state-created vulnerability to HIV and STDs also constitutes sexual violence.

II. Legal Support for, and Regulation of, Sexual Violence

The law not only permits, but also often requires or perpetuates, these and other forms of sexual violence. To maintain perceptions of legitimacy, to ease discomfort of those charged with carrying out its functions, and to appease dissenters, the legal system must at least appear to fight sexual violence. Indeed, fighting sexual violence is one of the justifications for having laws at all, particularly criminal laws.[159]

As people seek to fight sexual violence through the law, but fail to change fundamental functions of the law that create sexual violence, contradictions inevitably emerge in doctrine that lawmakers must either resolve or hide. Three maneuvers they use to do so in prison law include keeping money and power away from prisoners in enforcement schemes related to sexual violence, crafting selective definitions of sexual violence, and justifying sexual violence in the name of preventing, investigating, or responding to it.

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156 *Id.* at 230.

157 *See id.* at 229-30; Susan Abram, *Condoms for Prisoners and Porn Stars Debated by Legislature,* L.A. Daily News (May 16, 2013), http://www.dailynews.com/general-news/20130516/condoms-for-prisoners-and-porn-stars-debated-by-legislature (quoting an Assemblywoman opposed to a bill for condom distribution in prisoners as saying, "This bill aids and abets illegal sexual activity by inmates").

158 Russell K. Robinson, *Masculinity as Prison: Sexual Identity, Race, and Incarceration*, 99 Cal. L. Rev. 1309, 1367 (2011).

159 *Theories of Criminal Law*, Stanford Encyclopedia of Philosophy 20 (2014), *available at* http://plato.stanford.edu/entries/criminal-law/.

A. Keeping Money and Power Out of the Hands of Prisoners

One category of legal maneuvers to support sexual violence without appearing to do so involves creating procedural and substantive barriers to prisoners seeking redress about sexual violence. Keeping power away from particular groups of people is also intrinsic to sexual violence generally.

These types of maneuvers arise particularly when prisoners seek accountability or damages for *unlawful* acts of sexual violence. Outlawing sexual violence does little good when prisoners who experience sexual violence have little power to do anything about it.

The Prison Rape Elimination Act (PREA) serves as a key example. Most strikingly, PREA does not create a private right of action, which would have allowed prisoners to sue prison officials who failed to comply with PREA in a way that harmed them. [160] Instead, Congress left enforcement entirely in the hands of DOJ.[161] As I have discussed elsewhere,[162] courts have used the lack of private right of action to eliminate consideration of PREA, not only as its own cause of action, but also for purposes of the constitutional claims prisoners bring.

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160 *See, e.g.*, Monts v. Greer, No. 5:12-CV-258-MP-GRJ, 2013 WL 5436763, at *3 (N.D. Fla. July 15, 2013), *report and recommendation rejected sub nom*. Monts v. Dep't of Corr., No. 5:12-CV-00258-MP, 2013 WL 5436758 (N.D. Fla. Sept. 27, 2013) (noting lack of private right of action in PREA); Brown v. Parnell, CIV.A No. 5:09CV-P159-R, 2010 WL 1418735, at *5 (W.D. Ky. Apr. 7, 2010) (same); Faz v. North Kern State Prison, No. CV-F-11-0610-LJO-JLT, 2011 WL 4565918 at *5 (E.D. Cal., Sept. 29, 2011) (same).

161 42 U.S.C.A. § 15607 (West 2013); Attorney General Enforcement of PREA National Standards to Prevent, Detect, and Respond to Prison Rape, giving the DOJ enforcement responsibility, http://ojp.gov/programs/pdfs/prea_final_rule.pdf.

162 Gabriel Arkles, *A Decade of Disservice with the Prison Rape Elimination Act*, N.Y.U. J. LEGIS. & PUB. POLICY (forthcoming 2015).

Additionally, PREA provided funding and power only to entities neither made up of nor controlled by prisoners. Millions of dollars flowed from the federal government as a result of PREA, none of it earmarked to go to survivors of carceral sexual violence. Instead, the money went to fund "personnel, training, technical assistance, data collection, and equipment to prevent and prosecute prisoner rape."[163] PREA also created and funded the National Prison Rape Elimination Commission (NPREC) to conduct research and hold hearings about prison rape and to develop recommended national standards to detect, prevent, reduce, and respond to prison rape, which the Attorney General would then consult to develop regulations.[164] Congress and the President, not prisoners, had the opportunity to appoint Commissioners.[165] Nonetheless, NPREC did an unusually good job of seeking prisoner participation in developing the standards.[166] NPREC also did unusually well at taking that participation seriously in formulating their original draft standards. Unfortunately, the ultimate regulations depart substantially from those original draft standards.[167] Much of what is good about the PREA regulations likely results from NPREC's solicitation and consideration of prisoner input, but Congress did not require such accountability in creating the law.

163 Grants To Protect Inmates and Safeguard Communities, 42 U.S.C. § 15605(a) (2011).

164 Cindy Struckman-Johnson & Dave Struckman-Johnson, *Stopping Prison Rape: The Evolution of Standards Recommended by PREA's National Prison Rape Elimination Commission,* 93 Prison J. 335, 341 (2013), *available at* http://tpj.sagepub.com/content/93/3/335.

165 *Id.*

166 *See* Shay, *supra* note 10.

167 *See infra* Section III.B.

Another, older legislative maneuver to keep money and power out of the hands of prisoners is the Prison Litigation Reform Act (PLRA), a 1996 law designed to keep prisoners' claims out of courts.[168] The PLRA has been discussed extensively elsewhere.[169] For these purposes, suffice to say that it is probably the single most effective legislative intervention to prevent prisoners from bringing meritorious lawsuits about sexual violence.[170] It requires physical injury before prisoners may sue for damages; some courts have found that sexual violence has not resulted in physical injury.[171] It requires proper exhaustion of administrative remedies, which effectively reduces statutes of limitation to mere weeks and creates significant, often counterintuitive procedural hurdles that survivors must navigate to preserve their right to sue.[172] It also requires even prisoners with no money to pay in order to file their claims.[173] Prisoners may put off payment if they have not yet had three law suits dismissed, but even deferred payment creates an enormous financial burden for people who have no access to jobs except possibly for prison labor compensated at less than a dollar an hour.[174]

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168 *See* Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1557-60 (2003).

169 *See generally* HUMAN RIGHTS WATCH, NO EQUAL JUSTICE: THE PRISON LITIGATION REFORM ACT IN THE UNITED STATES (2009).

170 *Id.* at 2-4.

171 Prison Litigation Reform Act, 42 U.S.C. § 1997e(e) (2000); *see generally* Hancock v. Payne, No. CIV.A.103CV671JMRJMR, 2006 WL 21751, at *3 (S.D. Miss. Jan. 4, 2006).

172 HUMAN RIGHTS WATCH, *supra* note 169, at 3

173 *See* Schlanger, *supra* note 168, at 1628, 1645–49.

174 *See id.* at 1645–49 ("A hundred and fifty dollars is a lot of money in prison - months or more of wages for those whose money comes from prison employ ment.").

Other aspects of prison law also work to deprive prisoners of power and money. For example, under Supreme Court precedent, courts must defer to prison officials on a wide range of issues.[175] Courts have gutted prisoners' constitutional rights in order to support "legitimate penological interests."[176] Doctrine on qualified immunity and supervisory immunity erect further barriers to holding officials accountable, even when courts find they have violated the constitution.[177]

175 Overton v. Bazzetta, 539 U.S. 126, 132 (2003).

176 Beard v. Banks, 548 U.S. 521, 528 (2006) ("[T]he Constitution sometimes permits greater restriction of such [constitutional] rights in a prison than it would allow elsewhere.").

177 *See* Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 581, 584 (1998); Schlanger, *supra* note 168, at 1606–07.

Alexis Raeshaun Bell's claim is representative of many complaints about searches that may be unlawfully sexually violent. These complaints involve being groped and fondled during searches, searched repeatedly as a form of harassment, penetrated during searches other than physical body cavity searches, publicly strip searched, and verbally harassed during searches.[178] When Bell, a transgender woman, was in line to get medications in a Los Angeles county jail, a deputy ordered her to follow him down a hall.[179] He made her take off all of her clothes, bend over, and spread her cheeks.[180] He then "tapped and rubbed [Bell's] buttocks with a flashlight" and made comments about her gender, anatomy and sexuality in a way that she found harassing and degrading.[181] Finally, he kicked her clothing away and told her to return to her cell naked.[182]

178 *See, e.g.*, Kimberly v. State, 116 P.3d 7 (Haw. 2005); Richie, *supra* note 12, at 51 ("it is not uncommon, therefore, for women to complain about a guard groping rather than 'pat searching,' forcefully inserting foreign objects in them as a way to conduct a 'cavity search,' or 'taunting them in sexually explicit terms' while observing them during bathing and dressing routines."); Watson v. Sec'y Pa. Dep't of Corr., 436 F. App'x 131, 136 (3d Cir. 2011) (finding that allegations that guard grabbed prisoner's penis and testicles during a strip search and told him he would enjoy it raised a Fourth Amendment claim); Meriwether v. Faulkner, 821 F.2d 408, 411, 418 (7th Cir. 1987) (noting that while the trans woman plaintiff alleged she was forced to strip in front of prisoners and guards as a form of harassment, her rights to privacy were curtailed in the prison environment); SYLVIA RIVERA LAW PROJECT, IT'S WAR IN HERE: A REPORT ON THE TREATMENT OF TRANSGENDER AND INTERSEX PEOPLE IN NEW YORK STATE MEN'S PRISONS 21-22 (2007) (documenting the experiences of trans women in men's prisons in New York, many of whom report sexual violence by correction officers via searches).

179 Verdict and Summary Statement, Bell v. Cnty of L.A, WL 4375768 (C.D.Cal. 2008) (No. CV-07-81872009), 2009 WL 6407941, [hereinafter *Bell* Verdict and Summary Statement].

180 *Id*.

181 Motion for Summary Judgment at 1, Bell v. Cnty of L.A., WL 4375768 (C.D.Cal. 2008) (No. CV-07-8187), 2009 WL 6407941.

182 *Bell* Verdict and Summary Statement, *supra* note 180.

Bell brought a claim about the deputy's conduct during the search and about the failure of supervisory officials to respond to her complaints, using PREA and the First, Fourth, Eighth, and Fourteenth Amendments.[183] Early in the case, the court granted the motion for summary judgment of the supervisory defendants.[184] The court held that PREA did not affect its analysis because it lacked a private right of action.[185] The court further held that Bell did not have any right to have her complaints addressed and that without allegations of personal involvement the supervisory defendants were not liable.[186] While her case against the individual officer did continue at that time, later she withdrew the case with permission of the court for reasons not clear in the record.[187]

When Jessie Hill challenged the nonconsensual rectal examination he underwent in court, he also lost.[188] The court ruled that brief digital penetration of the rectum when performed by a physician on a patient who complained of rectal pain did not rise to the level of conduct prohibited by the Eighth Amendment.[189]

183 See Bell Verdict and Summary Statement *supra* note 180, at 2.
184 *Id*. at 7.
185 *Id*. at 6.
186 *Id*. at 4-5.
187 *Id.*
188 Hill v. Rectenwald, No. 5:10CV00030JMM/JTK, 2010 WL 2610667, at *2-4 (E.D. Ark. June 17), *report and recommendation adopted*, No. 5:10CV00030JMM/JTK, 2010 WL 2610659 (E.D. Ark. June 28, 2010).
189 Rectenwald, *aff'd* No. 11-3012, 2012 WL 2580185 (8th Cir. July 5, 2012).

In *Florence,* the Supreme Court moved power even further away from prisoners. While the legality of suspicionless strip searches was already largely accepted for people incarcerated pursuant to a conviction or held as felony pre-trial detainees, prior to *Florence* a number of Circuits had ruled that suspicionless strip searches were illegal for misdemeanor pre-trial detainees.[190] In *Florence*, the Supreme Court ruled that these searches were not unreasonable under the Fourth Amendment. Florence failed to overcome the deference accorded to jail officials.[191] The Court not only condoned strip searches without any individualized suspicion to support the need for them, but also approved general purposes for strip searches in addition to contraband detection: identification of wounds or infections on the body and identification of gang tattoos or other physical signifiers of gang affiliation.[192] The Court thus accepted stripping arrestees in part in order to determine their medical needs,[193] even though the staff seeing them naked would presumably not have any medical training and even though, in virtually all situations, there would be other ways to detect medical needs of arrestees, including arrestees' own statements of need for care for their wounds. The Court sends the message that prisoners' voices need not be taken seriously even at the level of saying when they are hurt.

Together, the procedural, substantive, and financial hurdles to litigation, not to mention the risk of retaliation, permits prison staff to operate without accountability even when they engage in unlawful sexual violence.

B. Gaming the Definitions

Another striking way that lawmakers support sexual violence is manipulating definitions. Because many official carceral acts are sexual violence under many general definitions, redefining them as not-sexual violence sometimes requires complicated maneuvering. PREA provides one prime example of such maneuvering.

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190 *See, e.g.*, Hartline v. Gallo, 546 F.3d 95, 100-02 (2d Cir. 2008); Way v. Cnty. of Ventura, 445 F.3d 1157, 1161-62 (9th Cir. 2006); Wilson v. Jones, 251 F.3d 1340, 1343 (11th Cir. 2001); Roberts v. Rhode Island, 239 F.3d 107, 113 (1st Cir. 2001).

191 *See* Florence v. Bd. of Chosen Freeholders, 132 S. Ct. 1510, 1518 (2012)

192 *Id*.

193 *Id*.

PREA specifically excludes official sexual violence from its purview. PREA uses a fairly conventional definition for rape, focusing on the acts committed and the absence of or incapacity for consent on the part of the survivor. PREA addresses not just forcible rape, but also other forms of sexual violence.[194] For example, one set of acts that the statute includes as rape is "the carnal knowledge, oral sodomy, sexual assault with an object, or sexual fondling of a person achieved through the exploitation of the fear or threat of physical violence or bodily injury."[195] On its face, this definition includes many searches and nonconsensual medical examinations. However, PREA then limits its sweep with a set of exemptions. Specifically, the statute exempts:

> custodial or medical personnel gathering physical evidence, or engaged in other legitimate medical treatment, in the course of investigating prison rape; the use of a health care provider's hands or fingers or the use of medical devices in the course of appropriate medical treatment unrelated to prison rape; or the use of a health care provider's hands or fingers and the use of instruments to perform body cavity searches in order to maintain security and safety within the prison or detention facility, provided that the search is conducted in a manner consistent with constitutional requirements.[196]

The balance the statute creates thus indicates that some acts constitute prison rape unless they are conducted for the purpose of investigating prison rape or for other medical or correctional reasons. Thus, it formulates sexual abuse with an object achieved through the exploitation or the fear or the threat of physical violence or bodily injury as not-rape when a healthcare provider is doing it for the "right" sort of reasons.

194 42 U.S.C.A. § 15609(9) (West 2003).
195 *Id*.
196 42 U.S.C.A. § 15609(12) (West 2003).

PREA authorized the DOJ to develop an alternative definition of prison rape,[197] which it did. This definition evolved over time. In both the original draft of recommended standards from NPREC ("original NPREC proposal") and the final rule that DOJ promulgated, looking at prisoners naked is defined as voyeurism—which in turn is defined as sexual abuse—only when *not related to official duties*.[198] The original NPREC proposed definition of sexual abuse did, however, appear to encompass many searches that involved touching. Sexually abusive contact was defined as "[t]ouching without penetration by a staff member of an inmate with or without his or her consent, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks."[199]

The final rule ultimately defined sexual abuse differently. The relevant provision states: "Any other intentional contact, either directly or through the clothing, of or with the genitalia, anus, groin, breast, inner thigh, or the buttocks, that is unrelated to official duties or where the staff member, contractor, or volunteer has the intent to abuse, arouse, or gratify sexual desire."[200] This definition, in contrast to the original proposal, creates an exception that makes conduct something other than sexual abuse depending on the relationship of the act to official duties and the motivations of the actor, thus relying on a perpetrator perspective.

197 42 U.S.C.A. § 15603(A)(2)(a) (West 2005) (charging the Bureau of Justice Statistics with defining prison rape for purposes of research); 42 U.S.C.A. § 15607(a)(1) (West 2013) (requiring Attorney General to promulgate national standards for "detection, prevention, reduction, and punishment of prison rape").

198 NAT'L PRISON RAPE ELIMINATION COMM'N, Standards for the Prevention, Detection, Response and Monitoring of Sexual Abuse in Prisons and Jails and Supplemental Standards for Facilities with Immigration Detainees 14; 28 C.F.R. § 115.6 (2012).

199 NAT'L PRISON RAPE ELIMINATION COMM'N, *supra* note 198, at 14.

200 28 C.F.R. § 115.6 (2012).

The original NPREC proposal would have imposed some specific limits on when searches could be conducted, even those not within the definition of sexual abuse. In the glossary section, NPREC defined different types of searches, including a pat-down search, a strip search, a visual body cavity search, and a physical body cavity search. For each of these types of searches, NPREC incorporated different restrictions into the definition. The restrictions were lightest for pat-downs, but even there pat-downs were to be done "in order to determine whether he or she is holding an illegal object or other dangerous contraband" and involved only a "superficial" running of the hands over the body.[201]

Strip searches[202] and visual body cavity searches,[203] however, were only permissible "when necessary to protect the overriding security needs of the facility" "on reasonable suspicion that the inmate is secreting drugs or weapons or if his or her appearance and conduct suggests a likelihood of having engaged in prohibited behavior."[204] Under the original proposal, these searches had to be done in private, could not involve touching, and could only be done by staff of the same gender as the prisoner.[205]

201 Nat'l Prison Rape Elimination Comm'n, Standards for the Prevention Detection, Response, and Monitoring of Sexual Abuse in Adult Prisons and Jails and Supplemental Standards for Facilities with Immigration Detainees 12 (2008).

202 *Id.* at 15 ("A search that requires a person to remove or arrange some or all of his or her clothing so as to permit a visual inspection of the underclothing, breasts, buttocks, or genitalia of such person.").

203 *Id.* ("A visual inspection of a body cavity, defined as stomach, rectal cavity, vagina, mouth, nose, or ears, for the purpose of discovering any drugs, weapons, or other dangerous contraband concealed in the body cavity.").

204 *Id.*

205 *Id.*

Further restrictions were proposed for physical body cavity searches.[206] Only authorized medical practitioners could do the searches and the conditions for them had to be sanitary in addition to private.[207] The word "absolutely" was also added before "necessary" in describing when they could be conducted.[208] Taken together, the original NPREC proposal seemed to acknowledge that many searches could be a form of sexual abuse. The proposal nonetheless would have permitted searches, but under limited circumstances. While far from perfect, this approach offered advantages in that it acknowledged to some extent the nature and seriousness of the acts that carceral agencies and their staff engaged in and took that into account in determining when these acts could be conducted.

The final rule, however, eliminated the definition of physical and visual body cavity searches altogether, eliminated the term "superficial" from the pat-down definition, and eliminated virtually all the restrictions described above from the definition of strip searches.[209] The PREA regulations did incorporate substantial limitations on cross-gender searches.[210] However, while these limits on *who* can conduct a search are important to many people and have a significant body of case law and research to support them,[211] the PREA regulations leave virtually unregulated *when, where, how,* and *whether* a search may be conducted.

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206 *Id.* at 13 ("A physical intrusion into a body cavity, defined as stomach, rectal cavity, vagina, mouth, nose, or ears, for the purpose of discovering drugs, weapons, or other dangerous contraband concealed in the body cavity.").

207 *Id.*

208 *Id.*

209 28 C.F.R. § 115.5 (2012).

210 28 C.F.R. §§ 115.15, .115, .215, .315 (2012).

211 Jordan v. Gardner, 986 F.2d 1521, 1526 (9th Cir. 1993) ("In short, we are satisfied that the cross-gender clothed body search policy constituted 'infliction of pain.'"); Colman v. Vasquez, 142 F. Supp. 2d 226, 233-34 (D. Conn. 2001) (denying motion to dismiss concerning cross-gender pat frisks); Brenda V. Smith, *Watching You, Watching Me*, 15 YALE J.L. & FEMINISM 225, 229 (2003) ("One of the most often called for remedies for sexual misconduct has been to end the cross-gender supervision of female inmates."). However, the regulations do not adequately address the crucial issue of how the limitations on cross-gender searches apply to trans prisoners.

The PREA regulations also leave the area of nonconsensual medical interventions virtually unregulated. It appears that, according to the regulations, nonconsensual medical interventions would consist of sexual abuse only where the healthcare provider "has the intent to abuse, arouse, or gratify sexual desire," which would not cover most of the forms of sexually violent medical interventions described above.[212] DOJ thus chose not to clarify the statutory language creating exemptions for certain acts of medical personnel, such as what medical care if any is "appropriate" without the consent of the patient.[213] The only references to medical care in the PREA regulations involve ensuring that prisoners who have experienced sexual abuse have access to it.[214]

Constitutional case law also dances around the issue of official carceral sexual violence, avoiding acknowledging it and permitting prison officials to engage in it. The majority in *Florence* minimized the harm to Albert Florence and did not consider strip searches as a form of sexual violence. The dissent gave greater acknowledgment to the level of violation involved, stating that "[e]ven when carried out in a respectful manner, and even absent any physical touching, such searches are inherently harmful, humiliating, and degrading."[215] However, they too avoided the language of sexual violence.[216]

C. Defending Sexual Violence as a Way to Stop Sexual Violence

As discussed above, PREA created an exemption from the definition of prison rape for acts committed in the course of investigating prison rape. This type of reasoning—sexual violence is justified if it is committed in order to fight other sexual violence—is not restricted to Congress. Courts also employ it with some regularity.

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212 28 C.F.R. § 115.6 (2012).
213 42 U.S.C.A. § 15609(12)(B) (2013).
214 *See* 28 C.F.R. § 115.82 (2012).
215 Florence v. Bd. of Chosen Freeholders, 132 S. Ct. 1510, 1526 (2012) (Breyer, J., dissenting).
216 Albert Florence said the strip searches made him feel wronged and belittled. Am. Constitution Soc'y & Nat'l Constitution Ctr., *The Story Behind Florence v. Burlington,* Vimeo 02:30-02:45 (Oct. 6, 2011, 6:36 PM), http://vimeo.com/30161234.

Even for people not incarcerated, the law sometimes not only permits, but also requires, highly invasive, nonconsensual medical interventions performed on the genitals of survivors of sexual assault. For example, a number of courts have compelled complaining witnesses in child sexual abuse cases to undergo gynecological examinations against their will.[217] In other words, these courts compel young children to submit to someone forcing them to undress, looking at their genitals, and penetrating their vaginas with fingers, a swab, or a speculum against their will, in the name of investigating sexual assault allegedly committed against them.

Law enforcement officials also at times think these sorts of tactics make sense to use on alleged perpetrators. In the course of an investigation of "sexting," Virginia police recently demanded a teenager strip, get injected with drugs to cause an erection, and permit police to take pictures of his erect penis.[218]

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217 *See* Clark v. Commonwealth, 521 S.E. 2d 313,316 (Va. Ct. App. 1999) *vacated on reh'g en banc,* 535 S.E. 2d 181 (Va. Ct. App. 2000) *aff'd,* 551 S.E. 2d 642 (Va. 2001) (surveying relevant state and federal decisions); *see also* BUMILLER, *supra* note 20, at 32-33 (describing the retraumatizing and voyeuristic aspects of these examinations).

218 Annie-Rose Strasser, *Virginia Police Want to Force a 17 Year-Old Boy to Have an Erection, and Then Take Pictures of It*, THINK PROGRESS (July 9, 2014, 1:00 PM) http://thinkprogress.org/justice/2014/07/09/3458159/manassas-erection-pictures-police/.

The case of *Lowry v. Honeycutt* gives a particularly clear example of how the various maneuvers and official forms of carceral violence work against prisoners. A guard caught Lenny Dean Lowry engaging in consensual sexual activity with another prisoner.[219] Lowry described the behavior as "horseplay" and the prison later classified it as "sodomy."[220] According to the guard, another prisoner was pressing his penis against Lowry's buttocks.[221] While Lowry explained that no intercourse had occurred, the activity was consensual, and he did not want to have a rape exam, guards forced him to get a rape exam in the prison clinic.[222] They told him that he had no choice because the exam was required under PREA.[223] They then forced him to go to a hospital in shackles to get examined again. While a nurse examined him, a guard laughed and made jokes about him.[224] The facts recited in the opinion do not describe the acts involved in the examination, but typically a rape exam includes a penetrative examination of the rectum to collect semen for possible DNA identification of a perpetrator.[225] The guard and the nurse also took pictures of Lowry's penis and anus.[226] Lowry described it as '"the most degrading, humiliating, and debasing experience I've ever had to endure."'[227] Afterward, the prison disciplined him for engaging in consensual sodomy and charged him $672.18 for the expense of the exam and investigation.[228]

219 Lowry v. Honeycutt, 211 F. App'x 709, 710 (10th Cir. 2007).
220 *Id.*
221 *Id.*
222 *Id.*
223 Lowry v. Honeycutt, 05-3241-SAC, 2005 WL 1993460, at *1 (D. Kan. Aug. 17, 2005).
224 *Lowry*, 211 F. App'x at 710-11.
225 Linda E. Ledray, Sexual Assault Resource Service, Sexual Assault Nurse Examiner Development & Orientation Guide 64, 73, 75 (1999), *available* at https://www.ncjrs.gov/ovc_archives/reports/saneguide.pdf; *see also* Durazo, *supra* note 71, at 187 (describing retraumatizing nature of sexual assault examinations).
226 *Lowry*, 211 F. App'x at 710-11.
227 *Id.* at 711.
228 *Id.*

PREA does not, in fact, require prisoners to submit to forensic exams.[229] The statute does not speak to the subject. The regulations were not in force at the time. However, they indicate: "The agency shall offer all victims of sexual abuse access to forensic medical examinations, whether on-site or at an outside facility, without financial cost, where evidentiarily or medically appropriate."[230] The verb *offer* does not suggest that carceral agencies should or may, much less must, *force* detainees to undergo such exams (and explicitly prohibits charging them for the exam). In rejecting Lowry's claim, the district court complained: "The court is not cited to any provision in the Prison Rape Elimination Act or other federal law or even in Kansas prison regulations setting forth minimum conditions which must exist before a prisoner thought to have been involved in prohibited sexual activity may be required to undergo a medical sexual abuse exam."[231] Of course Lowry could not have cited any law or regulation setting forth *when* a forced rape exam could occur, because neither PREA nor any other statute or regulation *authorized* such an exam in the first place.

The Tenth Circuit nonetheless affirmed the dismissal of Lowry's claims. The court concluded that "in light of prison officials' legitimate concerns about the health risks of sexual abuse and sexually transmitted diseases, Mr. Lowry's allegations do not indicate that requiring a rape examination was inconsistent with legitimate medical and penological objectives."[232] The court did not question the connection between these interests and the exam, despite the undisputed fact that the sexual interaction was consensual and the lack of any assertions that Lowry was tested, treated, or offered post-exposure prophylaxis for any potential sexually transmitted diseases.

229 Prison Rape Elimination Act, 42 U.S.C. §§ 15601-15609 (2003).
230 28 C.F.R. § 115.21(c) (2012).
231 *Honeycutt*, 2005 WL 1993460, at *4.
232 *Lowry*, 211 F. App'x at 712.

Thus, staff deprived Lowry of power over his own body through disciplining him for consensual sex and penetrating and photographing his naked body against his will; they also deprived him of money by forcing him to pay for this nonconsensual procedure. Through the PLRA, he no doubt also lost money for filing his lawsuit. However, no one involved identified what he experienced as sexual violence; only the consensual sexual activity he shared with another prisoner was referred to as sexual violence. The court also accepted illogical justifications for the prison officials' sexual violence toward Lowry, justifying their actions as a way of fighting sexual violence.

III. Imagining Alternate Approaches to Regulating Carceral Sexual Violence

Faced with the knowledge that law enforcement and carceral systems use sexual violence as a way to control prisoners, one is left with the question of what to do about it.

Some may conclude that these forms of sexual violence are necessary to effectively incarcerate people, and that because incarceration is important, sexual violence should still be permitted. These people may think that it is best to continue without change.

Others may believe that it is possible and desirable to incarcerate people without sexual violence. They might seek reforms that would eliminate searches, certain nonconsensual medical interventions, prohibitions on consensual sex, and the wide array of other forms of sexual violence in prisons.

Others, and I count myself among them, agree with the first group that to some extent these forms of sexual violence may be necessary to incarcerate people. While effective incarceration does not require the extent of invasive searches and other sexual violence currently conducted, if prisons stopped searching anyone at all, I expect that at least some prisoners would sneak in contraband that they would use to oppose prison officials' control over them, and possibly escape. However, I do not agree that incarceration is important enough to justify sexual violence. Ultimately, I concur with others who believe that community accountability, cultural change, anti-subordination, transformative justice, and prison abolition will lead us to ending sexual violence.[233] We should work toward those goals at all times in all the ways available to us, including supporting organizations already doing this work.[234]

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233 *See generally, e.g.*, ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 10, 107 (2003) (on prison abolition); GENERATION FIVE, TOWARD TRANSFORMATIVE JUSTICE: A LIBERATORY APPROACH TO CHILD SEXUAL ABUSE AND OTHER FORMS OF INTIMATE AND COMMUNITY VIOLENCE 2, 15, 23 (2007), *available at* http://www.generationfive.org/wp-content/uploads/2013/07/G5_Toward_Transformative_Justice-Document.pdf (on transformative justice); Anthony C. Thompson, *What Happens Behind Locked Doors: The Difficulty of Addressing and Eliminating Rape in Prison*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 119, 123 (2009) (on cultural change); CREATIVE INTERVENTIONS, CREATIVE INTERVENTIONS TOOLKIT: A PRACTICAL GUIDE TO STOP INTERPERSONAL VIOLENCE (2012), http://www.creative-interventions.org/tools/toolkit/ (on transformative justice and community accountability); Bassichis, *supra* note 63, at 15 (on prison abolition and transformative justice); Rochelle Robinson, *Speaking The Unspeakable: The Pervasive Nature of Male Oppression and Rape Culture*, BLACK GIRL DANGEROUS (Mar. 26, 2014), http://www.blackgirldangerous.org/2014/03/speaking-unspeakable-pervasive-nature-male-oppression-rape-culture/ (on cultural change).

234 *See, e.g.*, *About INCITE!*, INCITE! WOMEN OF COLOR AGAINST VIOLENCE, http://www.incite-national.org/page/about-incite, (last visited Mar. 4, 2015) (describing INCITE! movement projects on police violence, reproductive justice, and media justice); *Safe Neighborhood Campaign*, AUDRE LORDE PROJECT, http://alp.org/safe-neighborhood-campaign (last visited Mar. 4, 2015) (describing the goals of the Safe Neighborhood Campaign in ending violence against the lesbian, gay, bisexual, Two-Spirit, transgender, and gender nonconforming community); *About*, CRITICAL RESISTANCE, http://criticalresistance.org/about/ (last visited Mar. 4, 2015) (describing mission of building a movement to end the prison industrial complex); PROSTITUTES' EDUCATION NETWORK, http://www.bayswan.org/penet.html (last visited Mar. 4, 2015) (compiling information about organizing around sex work and decriminalization); *Purpose and Analysis*, BLACK & PINK, http://www.blackandpink.org/purpose-analysis/ (last visited Mar. 4, 2015) (describing

However, here I would like to explore a different path. Traditional law reform cannot end carceral sexual violence. Criminalizing all the forms of sexual violence I have just identified would only lead to absurd results if carceral practices stayed fundamentally the same: any time anyone got arrested and searched, someone else would have to arrest and search the person who just conducted the search, who would then have to get arrested and searched in turn, and so on. Even if every carceral agency repealed its rules against consensual sexual expression, that formal legal change might have little practical impact. Even now, people are often punished for consensual sexual expression under different guises. Prison officials disciplined Morales for "misuse of mail" when she wrote a romantic letter to another prisoner.[235] When staff saw Nikki Lee Diamond and her friends hugging, they didn't formally charge her with anything at all; they just turned her down for a job and transferred her to a close custody psychiatric unit for an "evaluation."[236] Prisons might even try to manipulate the new absence of rules to excuse rape—in fact, they already sometimes try to cast rape as consensual sex as a way of escaping blame.[237]

Accepting these limitations, and inspired by Derrick Bell's racial realist thought experiments,[238] I want to consider alternative ways of regulating sexual violence. What might candid legal interventions look like that did not bother trying to end carceral sexual violence, but instead accepted that sexual violence—some of it lawful and some of it unlawful—will occur routinely in prisons, and nonetheless tried to provide some support to survivors and reduction in the frequency of sexual violence? Below I outline some aspects of a statutory scheme about carceral sexual violence in an attempt to answer this question.

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abolition as goal and strategy of organization); *Accountability Processes*, Philly Stands Up!, http://www.phillystandsup.com/ourwork.html (last visited Mar. 4, 2015) (describing the accountability work the organization does with perpetrators of sexual assault).

235 Complaint ¶ 13, at 4, Morales v. Pallito, 2014 WL 1758163 (D. Vt. Apr. 30, 2014) (No. 2:13-cv-00271).

236 Diamond, *supra* note 108 at 202.

237 Parker Marie Malloy, *Activists Call for Release of Trans Immigration Detainee Raped in Custody,* Advocate.com (Aug. 01, 2014, 4:13 PM), http://www.advocate.com/politics/transgender/2014/08/01/activists-call-release-trans-immigration-detainee-raped-custody.

238 Derrick Bell, Faces at the Bottom of the Well: The Permanence of Racism 43 (1993).

A. Prevention

To help reduce the incidence of unlawful carceral sexual violence, the statute would reduce the incarceration of people likely to experience unlawful sexual violence. This portion of the statute might involve provisions like the following.

- Courts must suspend any sentence of incarceration in its entirety if the person sentenced is highly likely to be unlawfully sexually assaulted in detention or has actually been unlawfully sexually assaulted in detention. Any sentence of incarceration must be reduced by half if the person sentenced is moderately likely to be unlawfully sexually assaulted in detention or has been a witness to unlawful carceral sexual violence.[239]
- Courts will presume that anyone who is transgender, female, disabled, and/or young is highly likely to be unlawfully sexually assaulted in detention unless the government proves otherwise.[240]
- A court may not order any person to be held pending trial or civilly committed without first finding by clear and convincing evidence that the person would perpetrate more violence while released on their own recognizance than they would perpetrate or experience while incarcerated.[241]

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239 A similar proposal appeared in the original draft NPREC standards for immigration detention. NPREC, NATIONAL PRISON RAPE ELIMINATION COMMISSION STANDARDS FOR THE PREVENTION, DETECTION, RESPONSE, AND MONITORING OF SEXUAL ABUSE IN LOCKUPS AND SUPPLEMENTAL STANDARDS FOR LOCKUPS WITH IMMIGRATION DETAINEES 62 (2008) (on file with author).

240 Disability, youth, and a trans and/or female gender are already widely acknowledged as characteristics of people targeted for unlawful sexual violence in prison. *See, e.g.*, 28 C.F.R. § 115.41(d)(1)-(10) (2012).

241 Some mechanisms for incarceration already require an assessment of dangerousness. For example, the state may not involuntarily commit someone for psychiatric treatment without finding by clear and convincing evidence that the person is dangerous to self or others as a result of mental illness, and commitment would be the least restrictive alternative. *See* O'Connor v. Donaldson, 422 U.S. 563, 575-76 (1975); Addington v. Texas, 441 U.S. 418, 430-33 (1979). However, that test tends to devalue the safety of prisoners. What I propose here is an additional test that, unlike the existing one, requires a *relative* assessment of dangerousness. Thus, even if a person were dangerous, the state would not be permitted to incarcerate that person unless the violence would be greater if they were released than if they were confined. This test

B. Mitigation

Some aspects of incarceration could change to reduce some forms of lawful and unlawful sexual violence. Such measures would seek to modestly increase the control that prisoners have over their own bodies, create a paper trail for later compensation (see below), prohibit certain forms of sexual violence, and reduce situations where prisoners are particularly vulnerable to both unlawful and lawful sexual violence.

- Solitary confinement and involuntary protective custody must be eliminated entirely.[242]
- Consensual sexual or affectionate activity among prisoners may not be prohibited or punished.[243]
- Single cells and facilities to shower and use the toilet privately must be available to anyone who requests them.[244]

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would refuse to devalue the safety of people who are incarcerated compared to the safety of those who are not.

242 This proposal emerges from persistent demands of many currently and formerly incarcerated people. *See, e.g.*, Sarah Shourd, *The Iranian Government Locked Me in Solitary Confinement for 410 Days. Today, My Thoughts are with the Hunger Strikers*, ACLU (July 17, 2013, 1:10 PM), https://www.aclu.org/blog/prisoners-rights/iranian-government-locked-me-solitary-confinement-410-days-today-my-thoughts ("With nearly 30,000 prisoners on hunger strike in California last week and 80,000 prisoners who remain in solitary confinement nationwide, the time is now to end this practice in our country."); Anthony Graves, *When I Was on Death Row, I Saw a Bunch of Dead Men Walking. Solitary Confinement Killed Everything Inside Them,* ACLU (July 27, 2013, 11:03 AM), https://www.aclu.org/blog/prisoners-rights-capital-punishment/when-i-was-death-row-i-saw-bunch-dead-men-walking-solitary ("You start to play tricks with your mind just to survive. This is no way to live."); *Take Action: Demand Safer Housing for Trans People in New York State Prisons!*, Sylvia Rivera Law Project, http://srlp.org/endsolitary/ (last visited Feb. 18, 2015); *Prisoners' Demands*, PRISONER HUNGER STRIKE SOLIDARITY (Apr. 03, 2011), http://prisonerhungerstrikesolidarity.wordpress.com/the-prisoners-demands-2/.

243 *See supra* Section II(B)(3).

244 These facilities would permit prisoners slightly greater control over who can see their naked bodies, and would not necessarily cost anything more than a curtain. Many have made this recommendation for trans prisoners, but all prisoners could benefit from it. *See, e.g.*, EMMER. LOWE & MARSHALL ET AL., *supra* note 134, at 21; Sylvia Rivera Law Project, *supra* note 178, at 36.

- No prisoner, contractor, or staff member may be disciplined or retaliated against for reporting sexual abuse, under any circumstances.[245]
- Strip searches and body cavity searches may only be conducted upon probable cause to believe a prisoner has a weapon that could not be discovered with less intrusive means. They may only be conducted in private with no more people present than those necessary to conduct the search, and they must be documented.[246]
- No staff member or contractor may be disciplined or retaliated against for refusing to search a prisoner, conduct a nonconsensual medical intervention on a prisoner, or punish a prisoner for consensual sexual activity.[247]
- Prisoners who wish to create support, accountability, or education groups related to sexual violence must receive the permission and resources necessary to do so.[248]

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245 PREA already insists on some measures on this point. In particular, the regulations state that the agency may not discipline prisoners for making good faith reports of sexual abuse, even if the agency "does not establish evidence sufficient to substantiate the allegation." 28 C.F.R. § 115.78(f) (2012). However, agencies may still discipline prisoners for reporting sexual violence if the agencies determine the prisoners did not act with "good faith." That exception is too susceptible to abuse.

246 The proposal reflects some of the language from the original draft PREA standards, *See* NAT'L PRISON RAPE ELIMINATION COMM'N, STANDARDS FOR THE PREVENTION DETECTION, RESPONSE, AND MONITORING OF SEXUAL ABUSE IN ADULT PRISONS AND JAILS AND SUPPLEMENTAL STANDARDS FOR FACILITIES WITH IMMIGRATION DETAINEES (2008); *see, e.g.*, N.Y. POLICE DEP'T, INTERIM ORDER, REVISION TO PATROL GUIDE 208-05 (May 25, 2011).

247 Staff members and contractors should not face the prospect of losing their jobs or other adverse actions if they decide that they are not willing to participate in sexual violence. *See supra* text accompanying notes 41-42.

248 Prisoners organizing among themselves can be an important way to promote safety, but prisons currently often try to disrupt any such organizing. *See, e.g.*, Robert "Rabi" Cepeda, *True Gay Gangstas,* SYLVIA RIVERA LAW PROJECT PAC. BLOG (April 24, 2014), http://srlp.org/learn-about-the-gay-gang-that-supports-its-members-behind-bars/; Arkles, *supra* note 11, sections III and IV.

- Quality, respectful mental and physical health care must be made available to any prisoner, contractor, or staff member who requests or needs it. No medical care or exams may be conducted on anyone who is capable of giving consent without first obtaining their consent. Outside of an emergency, no medical care or exams may be conducted on anyone who is not capable of giving consent without first obtaining permission from the person's health care power of attorney, if one exists. No medical care or exams may be conducted on anyone who is not capable of giving consent without a legitimate medical reason.[249]

In addition to the above, the PLRA should be repealed in its entirety, which would remove one of the greatest barriers to prisoners holding prison officials accountable for unlawful sexual violence and other violations of their legal rights.[250]

C. Compensation

To provide a financial incentive to minimize sexual violence, and to provide some measure of support for survivors of prison sexual violence, prisoners should receive compensation from the government when the government subjects them to sexual violence. Because ranking which forms of sexual violence are worse than others is distasteful, the same amount for every type of act might be most appropriate. Another option would be to create a schedule for different types of sexual violence ranked on the basis of level of invasiveness, legality, and identity of perpetrator. Whatever the amount is, it should be adjusted annually for inflation. The schedule option might look something like this:

- $10,000 for each instance of lawful nonconsensual touching of the genitals, buttocks, or breasts through clothing (e.g. pat frisks);
- $20,000 for each instance of lawful nonconsensual viewing of the genitals, buttocks, or breasts (e.g., strip searches, certain nonconsensual medical interventions);

249 *See supra* section II(B)(2).
250 *See supra* section III(A); Human Rights Watch, No Equal Justice: The Prison Litigation Reform Act in the U.S. (2009).

- $30,000 for each instance of lawful nonconsensual penetration of any body part (e.g., physical body cavity searches, certain nonconsensual medical interventions);
- $50,000 for each instance of unlawful sexual violence perpetrated by another prisoner; and
- $100,000 for each instance of unlawful sexual violence perpetrated by a contractor or staff member (e.g., rape; involuntary sterilization; deliberate denial of necessary medical care).

Prisoners should be able to opt to have the funds released to them at once, or to have the funds placed in an interest-yielding account and released to them at the end of their term of imprisonment. These funds should not be subject to seizure for court fees, debts, or Son of Sam laws,[251] and should be in addition to compensation received from other sources, such as law suits and insurance.

The process for getting compensation should be simple, likely administrative, and accessible to all prisoners (people who don't speak English, illiterate people, disabled people, deaf people, and others would all have to be accommodated). If a prisoner filed a claim for compensation asserting facts that, if true, would support the claim, and if she also submitted any corroborating evidence, such as a witness statement, a letter from an outside agency for survivors of sexual violence, or information about evidence in the control of the agency, then the burden should shift to the prison to prove that sexual violence did not occur. If the agency contested the claim and the claim was substantiated, the agency should pay 150% of the original amount.

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251 Son of Sam laws permit crime victims to recover money from prisoners convicted of crimes against them. *See, e.g.,* N.Y. Exec. Law § 632-a (McKinney) ("any crime victim shall have the right to bring a civil action in a court of competent jurisdiction to recover money damages from a person convicted of a crime of which the crime victim is a victim…within three years of the discovery of any profits from a crime or funds of a convicted person"); N.J. Stat. Ann. § 52:4B-64 (West); Wyo. Stat. Ann. § 1-40-303 (West).

D. Monitoring and Adjustment

Finally, to reduce carceral sexual violence or to support communities affected by carceral violence, and to create some accountability to prisoners and their communities, a different sort of monitoring entity should form.

- A Committee on the Regulation of Prison Sexual Violence will be convened.
- The Committee will consist of twenty-four members elected every two years.
- Twelve members will be elected by majority vote in a secret ballot. Eligible voters will include all those currently incarcerated in facilities within the borders of, funded, or controlled by the U.S.
- People held in particular carceral settings will elect twelve members. Thus, in separate elections, people currently held against their will in 1) state and territorial prisons, 2) federal prisons (under the authority of the Bureau of Prisons), 3) immigration and customs detention facilities (under the authority of the Department of Homeland Security), 4) detention facilities for enemy combatants (under the authority of the CIA), 5) military prisons and brigs (under the authority of the Department of Defense), 6) juvenile detention facilities, 7) nursing homes, 8) court-mandated residential drug treatment facilities, 9) psychiatric hospitals, 10) city and county jails, 11) police lock-ups, and 12) prisons operated by the Bureau of Indian Affairs[252] will elect a representative by secret ballot.
- To be eligible to run for the committee, a person must be currently incarcerated, formerly incarcerated, or a survivor of law enforcement violence.

252 Of course, none of these provisions would govern facilities run by tribes themselves, any more than they would govern the facilities of any other sovereign nations.

- The committee must have substantial representation of people particularly likely to be targeted for carceral sexual violence. Thus, at all times, the members of the committee must be at least one third women; one third trans or gender nonconforming people, one third Black people; one third gay, lesbian, bisexual, or queer people; one third disabled people or people with chronic illness, one third immigrants, one third youth, and two thirds people of color, and must include at least two members who are convicted sex offenders.[253]
- The government must provide funding for the committee to carry out its functions, including funding for research, outreach, technical assistance, elections, meetings, and salaries for members.
- The committee may issue guidelines for actions carceral institutions should take to reduce sexual violence in addition to or instead of the rules in the statute. If those guidelines reflect a consensus opinion of participating committee members, within 30 days, every carceral and law enforcement agency must elect to opt in or opt out of compliance.
    - Those agencies that opt out of compliance must pay a fee in an amount set by the committee.
    - Those agencies that opt in to compliance must pay a fine in an amount set by the committee for any failure to abide by their consensus guidelines.

253 People convicted of sex offenses are likely to get targeted for sexual violence in prisons. *See, e.g.*, 28 C.F.R. §115.41(d)(6) (2012).

- The agencies must pay such fees and fines to the committee. The committee must donate all such funds in full within 30 days of receipt to any community-based nongovernmental organization with a majority of its leadership from a group or groups disproportionately targeted for carceral sexual violence (such as current or former prisoners, people of color, immigrants, disabled people, currently or formerly homeless people, or trans people) that does work to support survivors, promote bodily autonomy and sexual self-determination, create community accountability, end subordination, redistribute wealth and power, implement transformative justice, change rape culture, or abolish prisons. To preserve the independence of the organizations, the committee must make the donation anonymously and may make no attempt to influence or control the activities of the organizations. Additionally, the committee should not make any contributions that would amount to more than 10% of an organization's budget for the prior fiscal year.[254]

I do not offer this idea as a serious proposal, but to give an example of what it would mean to be honest about the situation we are in right now. Political feasibility and constitutionality aside, I think aspects of the ideas I just offered are morally repugnant and not the best way to use energy and resources. For example, I do not think it is acceptable to condone sexual violence or pretend that a few thousand dollars could ever compensate for the damage it causes. But, I still think it would be superior to what we have now. For the best alternatives, we should look at what affected communities have already developed,[255] and support those efforts instead.

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254 In this way, hopefully organizations will not become overly dependent on funding from carceral sexual violence. *See generally* INCITE! Women of Color Against Violence, The Revolution Will Not be Funded: Beyond the Non-Profit Industrial Complex (INCITE! Women of Color Against Violence ed., 2006).

255 *See supra* notes 248-49.

Conclusion

A frank look at our current carceral practices reveal rampant sexual violence—much of it lawful, and much of it not. Rather than contend candidly with those realities, our lawmakers have generally chosen to smooth over them by manipulating definitions of sexual violence, defending sexual violence as a way to stop sexual violence, and keeping power and money away from those most likely to challenge current conditions. Fundamentally, incarceration probably cannot work *without* at least some level of sexual violence. That does not, however, make searches, nonconsensual medical interventions, prohibitions on consensual sex, or any of the other forms of carceral sexual violence any more normatively acceptable or just. To contend with these issues, we must shed some of the racist, sexist, transphobic, ableist, xenophobic, and homophobic frames we have learned for recognizing what is "real" sexual violence, and take seriously not only decarceration, but also the cultural change, community accountability, and mutual support that we need to build a world without sexual violence.

Tracing Two Modern Branches of Reproductive Rights for Male Prisoners

Chrisiant Bracken et al.

In July of 2013, the Center for Investigative Reporting revealed that nearly 150 female inmates housed by the California Department of Corrections and Rehabilitation between 2006 and 2010 had been sterilized by prison medical staff without proper consent.[1] The news received significant media attention, and prompted the legislature to order an investigation by the State Auditor, and to eventually pass legislation banning the practice.[2] The State Auditor's report, issued in June 2014, confirmed that at least thirty-nine female inmates had been

1 Corey Johnson, *Female Inmates Sterilized in California Prisons Without Approval*, The Ctr. for Investigative Reporting (July 7, 2013), http://www.cironline.org/reports/female-inmates-sterilized-california-prisons-without-approval-4917.

2 Carimah Townes, *California Prisons Illegally Sterilized Dozens Of Women, Audit Finds*, Think Progress (June 21, 2014), http://thinkprogress.org/justice/2014/06/21/3451634/audit-confirms-illegal-sterilizations/; Laurel Rosenhall, *California Senate Passes Bill to Ban Sterilizing Prison Inmates*, Sacramento Bee (May 27, 2014), http://blogs.sacbee.com/capitolalertlatest/2014/05/california-senate-passes-bill-to-ban-sterilizing-prison-inmates.html; *California Bill Tackles Sterilization of Female Inmates*, Aljazeera Am. (Apr. 2, 2014), http://america.aljazeera.com/watch/shows/the-stream/the-stream-officialblog/2014/4/2/california-bill-tacklessterilizationoffemaleinmates.html; *Nearly 150 Incarcerated Women Forced Into Sterilization Procedures in California Prisons*, Corr. Ass'n of N.Y. (Aug. 14, 2013), http://www.correctionalassociation.org/news/more-than-100-incarcerated-women-endured-forced-sterilized-in-california-prisons; Alex Stern, *Sterilization Abuse in State Prisons: Time to Break With California's Long Eugenic Patterns*, Huffington Post (July 23, 2014), http://www.huffingtonpost.com/alex-stern/sterilization-california-prisons_b_3631287.html; Patrick McGreevy & Phil Willon, *Female Inmate Surgery Broke Law*, L.A Times (July 14, 2013), http://articles.latimes.com/2013/jul/14/local/la-me- prison-sterilization-20130714; Bill Chappell, *California's Prison Sterilizations Reportedly Echo Eugenics Era*, Nat'l Public Radio (July 9, 2013), http://www.npr.org/blogs/thetwo-way/2013/07/09/200444613/californias-prison- sterilizations-reportedly-echoes-eugenics-era; Katie McDonough, *Report Finds Female Inmates Were Sterilized in California Prisons Without Approval*, Salon (July 7 2013), http://www.salon.com/2013/07/07/female_inmates_sterilized_in_california_prisons_without_state_app royal/.

"sterilized following deficiencies in the informed consent process."[3] This discovery added fuel to ongoing debates concerning a host of problematic practices regarding the treatment of incarcerated women. Female inmates often lack adequate access to reproductive healthcare, including HIV testing, prenatal care,[4] and birth control,[5] while subject to a significant risk of sexual assault by prison guards.[6] Many states routinely shackle pregnant women during medical appointments, labor, and transit to and from medical facilities for obstetric care.[7] Criticism of this practice has led twenty-one states to enact laws banning such policies in the last fifteen years, although reports indicate that shackling bans are not well enforced.[8] The last thirty years have also seen an increase in the criminalization of women's behavior

3 CAL. STATE AUDITOR, STERILIZATION OF FEMALE INMATES, *available at* https://www.auditor.ca.gov/pdfs/reports/2013-120.pdf.

4 *Reproductive Justice in the Prison System*, LAW STUDENTS FOR REPROD. JUSTICE (2011), http://lsrj.org/documents/factsheets/11_RJ%20in%20the%20Prison%20System.pdf

5 Ami Rice, *The Contraceptive Needs of Incarcerated Women: A Case Report*, AM. CONG. OF OBSTETRICIANS & GYNECOLOGISTS (July 2013), http://www.acog.org/About-ACOG/ACOG-Departments/Long-Acting-Reversible-Contraception/Projects-to-Assess-Bedsider-in-Ob-Gyn-Practice/The-Contraceptive-Needs-of-Incarcerated-Women; ACLU OF PA, REPRODUCTIVE HEALTH LOCKED UP: AN EXAMINATION OF PENNSYLVANIA JAIL POLICIES 22-23 (2012), *available at* http://www.aclupa.org/download_file/view_inline/756/484/.

6 AMNESTY INT'L, UNITED STATES OF AMERICA: "NOT PART OF MY SENTENCE": VIOLATIONS OF THE HUMAN HIGHTS OF WOMEN IN CUSTODY (1999), *available at* http://www.amnesty.org/en/library/asset/AMR51/001/1999/en/ab8c7840-e363-11dd-937f-a170d47c4a8d/amr510011999en.html; *see generally* Nat'l Prison Rape Elimination Comm'n, National Prison Rape Elimination Commission Report 56 (2009), *available at* http://www.ncjrs.gov/pdffiles1/226680.pdf.

7 Priscilla A. Ocen, *Punishing Pregnancy: Race, Incarceration and the Shackling of Pregnant Prisoners*, 100 CALIF. L. REV. 5 (2012).

8 Audrey Quinn, *In Labor, In Chains: The Outrageous Shackling of Pregnant Inmates* N.Y. TIMES (July 26, 2014), http://www.nytimes.com/2014/07/27/opinion/sunday/the-outrageous-shackling-of-pregnant-inmates.html?_r=0; Ocen, *supra* note 7.

during pregnancy,[9] particularly drug use,[10] prompting discussion as to the benefits and dangers of such policies.[11] The dramatic increase in incarceration of women over the last thirty years[12] has propelled these discussions, prompting prison administrators, legislatures, and judicial bodies to consider how the right to procreate can, should, or must be circumscribed within the prison environment.

The reproductive rights of male inmates have received comparably little attention. This is unsurprising, since male inmates neither become pregnant nor give birth, making concerns about behavior and treatment during pregnancy inapplicable. What attention male inmates have received has been focused primarily on issues of sexual violence.[13] In this paper, I explore two other areas in which male inmates' reproductive rights have been addressed in recent years: the first being "chemical castration" of inmates convicted of sex offenses, and the second, restrictions on male inmates' use of

9 Janet Gallagher *Prenantal Invasions & Interventions: What's Wrong with Fetal Rights* 10 Harv. Women's L.J. 9, 10 (1987); Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States 1973-2005: Implications for Women's Legal Status and Public Health*, 38 J. Health Pol. Pol'y & L. 2, 312 (2013).

10 Guttmacher Inst., State Policies in Brief: Substance Abuse During Pregnancy (2014).

11 Niraj Chokshi, *Criminalizing Harmful Substance Abuse During Pregnancy: Is There a Problem With That?*, Washington Post, May 1, 2014, http://www.washingtonpost.com/blogs/govbeat/wp/2014/05/01/criminalizing-harmful-substance-abuse-during-pregnancy-is-there-a-problem-with-that/; Ada Calhoun, *The Criminalization of Bad Mothers*, N.Y. Times Mag., Apr. 25, 2012, http://www.nytimes.com/2012/04/29/magazine/the-criminalization-of-bad-mothers.html?pagewanted=all&_r=0.

12 The Sentencing Project, Incarcerated Women, 1 (Sept. 2012), *available at* http://www.sentencingproject.org/doc/publications/cc_Incarcerated_Women_Factsheet_Sep24sp.pdf (noting the number of women in prison increased by 646% between 1980 and 2010).

13 Patrick Strudwick, *Sex in Men's Prisons: 'The US System Cultivates Rape. If You Treat People like Animals, They Behave Like It.'*, The Independent (Mar. 1, 2014), http://www.independent.co.uk/news/world/americas/sex-in-mens-prisons-the-us-system-cultivates-rape-if-you-treat-people-like-animals-they-behave-like-it-9155241.html; Nancy Wolff & Jing Shi, *Contextualization of Physical and Sexual Assault in Male Prisons: Incidents and Their Aftermath*, 15 J. of Corr. Health Care 58–82 (2009), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2811042/pdf/ni hms168245.pdf; Human Rights Watch, No Escape: Male Rape in U.S. Prisons (2001), *available at* http://www.hrw.org/reports/2001/prison/report.html; Christine A. Saum et al., *Sex in Prison: Exploring the Myths and Realities*, 75 Prison J. 413 (1995).

assisted reproductive technologies. Both raise issues concerning how courts have downplayed the importance of a fundamental right in the prison context, requiring that restrictions on the right to procreate be subject to rational basis scrutiny, rather than the strict scrutiny such restrictions would receive outside of prisons.

Castration as a punishment for criminal behavior was first brought before the Supreme Court in *Skinner v. State of Oklahoma ex. rel. Williamson*, in which the Court struck down on equal protection grounds a state statute which punished recidivists by surgical castration.[14] Surgical castration as a punishment fell out of favor during the mid-20th century, but the rise of methods of "chemical castration" led to nine states enacting statutes imposing use of anti-androgen medication on individuals convicted of sex offenses. Medication was imposed either during incarceration or as a condition of parole.[15] These statutes raise questions about consent and about limitations on the fundamental right to procreate that are imposed during incarceration but continue their effects beyond release.

Male inmates have brought legal challenges seeking to artificially inseminate non-incarcerated female partners only twice,[16] but the frameworks and arguments brought by the parties to these cases and incorporated in the courts' opinions are illustrative of the multiple angles from which to view the issue. They raise the question of whether such requests should be treated as attempts to exercise a fundamental right to procreate, or some more narrowly drawn right to access assisted reproductive technology. They also raise significant questions as to why restrictions on a fundamental constitutional right need only withstand a lower level of scrutiny when applied in a prison context.

I. The Roots of the Sterilization of Prisoners

More than 60,000 Americans were forcibly sterilized between 1907 and the mid-1970s under state statutes based on eugenic

14 Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 536 (1942).

15 Charles L. Scott & Trent Holmberg, *Castration of Sex Offenders: Prisoners' Rights Versus Public Safety*, 31 J. AM. ACAD. PSYCHIATRY L. 502, 503 (2003).

16 Goodwin v. Turner, 908 F.2d 1395, 1396 (8th Cir. 1990); Gerber v. Hickman, 291 F.3d 617, 619 (9th Cir. 2002).

theory.[17] Thirty-three states had forced sterilization programs, covering some combination of "idiots, feeble-minded, drunkards, drug fiends, epileptics, syphilitics, moral and sexual perverts, and . . . criminals who have been twice convicted of a felony."[18] Some of those sterilized were in penal or mental institutions, others as a result of the recommendation of doctors, lawyers, social workers or even their neighbors.[19]

The eugenics movement as a modern concept was developed in the mid-19th century by Sir Francis Galton, and reached its greatest popularity in the early 20th century. The movement sought to improve the population by selectively breeding to eliminate genetic traits deemed unfavorable or inferior.[20] During this period several nations, among them the United States, implemented eugenics programs that included components such as genetic screening, birth control, marriage restrictions, and compulsory sterilization.[21]

Most forced sterilizations during this era were justified under eugenic motivations, rather than punishment. Believing that hereditary defects caused crime, eugenicists saw individuals convicted of crime as genetically inferior and sought to have them sterilized to prevent passage of their supposedly inferior genes to further generations. Compulsory sterilizations characterized as overtly punitive accounted for few of the overall number of compulsory sterilizations.[22] Under the Oklahoma Habitual Criminal Sterilization Act, Jack Skinner was subjected to compulsory sterilization because stealing chickens and armed robbery were deemed felonies involving "moral turpitude."[23] He challenged the statute on Fourteenth Amendment due process and equal protection grounds. The statute treated larceny as a crime involving moral turpitude, but treated embezzlement as a crime not

17 Elizabeth Cohen, *North Carolina Lawmakers OK Payments to Victims of Forced Sterilization*, CNN U.S. (July 28, 2013), http://www.cnn.com/2013/07/26/us/north-carolina-sterilization-payments

18 Harry H. Laughlin, *Eugenical Sterilization in the United States, in* Chicago: Municipal Court of Chicago, 187 (1922).

19 Cohen, *supra* note 17.

20 Popular Eugenics: National Efficiency and American Mass Culture in the 1930s 2-3 (Susan Currell & Christina Cogdell eds., Ohio Univ. Press, 2006).

21 Philip Reilly, The Surgical Solution: A History of Involuntary Sterilization in the United States 154 (Johns Hopkins Univ. Press, 1991).

22 *Id.* at 153-54.

23 Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 536 (1942).

involving moral turpitude. The Supreme Court determined that the crimes were similar, and that the distinction drawn between them was "conspicuously artificial." Thus, Oklahoma's imposition of a harsher penalty for Skinner's crime than for a comparable white-collar crime violated Skinner's right to equal protection of the laws.[24] The Court applied strict scrutiny to classifications made in sterilization laws and explained that "procreation [is] fundamental to the very existence and survival of the race."[25]

II. Chemical Castration for Sex Offenders: A New Approach to an Old Problem

A. Surgical Castration and Vasectomy as Cruel and Unusual Punishment

Surgical castration has been considered cruel and unusual punishment in many parts of the United States since the early 20th century. A 1914 case challenged Iowa's statute authorizing vasectomy on the mentally ill, drug and alcohol addicts and repeat felons.[26] The court noted that even in Blackstone's time,[27] castration was "looked down upon as too cruel, and was no longer performed."[28] The court held "[n]o one can doubt but that under our present civilization if castration were to be adopted as a mode of punishment for any crime, all minds would so revolt that all courts without hesitation would declare it to be a cruel and unusual punishment."[29] While noting the difference between castration and vasectomy, the court found that "the purpose and the same shame and humiliation and degradation and mental torture are the same in one case as in the other."[30]

A similar case in 1918 challenged Nevada's required vasectomies for individuals convicted of rape, child sexual abuse, or

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24 *Id.* at 542.
25 *Id.* at 541.
26 Davis v. Berry, 216 F. 413, 414 (S.D. Iowa.1914).
27 Sir William Blackstone was an 18th century English jurist, judge, law professor and politician. His four-volume *Commentaries on the Laws of England* had a profound influence on the American legal system and is often cited in Supreme Court decisions. *See* Albert S. Miles, David L. Dagley and Christina H. Yau, *Blackstone and His American Legacy*, 5 AUSTRALIA & NEW ZEALAND J. L. & EDU. 46 (2000).
28 *Davis*, 215 F. at 416.
29 *Id.* at 417.
30 *Id.*

"habitual criminals." The court held that "as a preventive of [rape] vasectomy is without effect."[31] The court also noted, "if the purpose of the Nevada statute be to prevent the transmission of criminal tendencies, it must be noted that it does not apply to all convicted offenders, not even to all who are habitual criminals."[32] Finally, the court considered the possibility that criminals might reform, noting that,"a fair opportunity to retrieve [one's] fall is quite as important as the eugenic possibilities of vasectomy."[33]

In South Carolina, surgical castration was offered as a condition of parole as recently as 1985.[34] In *State v. Brown*, three defendants convicted of first-degree criminal sexual conduct were offered to reduce their thirty-year prison sentences with five years of probation upon agreement to and successful completion of surgical castration.[35] The court held that conditioning parole on surgical castration was contrary to public policy and constituted cruel and unusual punishment.[36]

In 1999, the Texas legislature repealed a statute allowing chemical castration as a condition of parole for convicted sex offenders.[37] In the same year, Oklahoma legislators attempted to pass a law creating the option of chemical or surgical castration as a condition of parole for sex offenders in that state.[38] The proposed legislation would have permitted chemical castration of an individual convicted of a first offense of first- or second-degree rape, and surgical castration for repeat offenders.[39] The bill passed the Senate, but was not heard by a House committee.[40] The same bill made it through both houses of the legislature in 2002, only to be vetoed by the

31 Mickle v. Henrichs, 262 F. 687, 688 (D. Nev. 1918).
32 *Id.* at 688.
33 *Id.* at 691.
34 State v. Brown, 326 S.E.2d 410, 411 (S.C. 1985).
35 *Id.* at 411.
36 *Id.* at 410–12.
37 Tex. Gov't Code Ann. § 508.226 (West 1999).
38 John Greiner, *Senate Approves Castration of Sex Offenders*, NewsOK (Mar. 11, 1999), http://newsok.com/senate-approves-castration-of-sex-offenders/article/2645696.
39 *Id.*
40 Tim Talley, *House Panel Won't Hear Castration Bill Chairman Labels Plan Unconstitutional,* NewsOK, (Mar. 23, 1999), http://newsok.com/house-panel-wont-hear-castration-bill-chairman-labels-plan-unconstitutional/article/2647066.

governor.[41] Again in 2004, the bill passed the Senate, but did not make it through the House.[42]

Thus, with a few exceptions, surgical castration has long been rejected in the United States as an appropriate method of punishing sex offenses and/or reducing recidivism among sex offenders. The development of hormone-based therapy to treat pathological sexual behavior in men has led states to experiment with requiring or offering such therapy, termed "chemical castration," to inmates convicted of sex offenses.

B. Chemical Castration: A Slightly Different Story

The term "chemical castration" refers to administration of hormonotherapy, specifically anti-androgens such as medroxyprogesterone acetate (MPA), commonly marketed as Depo-Provera, and cyproterone acetate (CPA), commonly marketed as Cyprostate or Androcur.[43] The effect of these medications is to diminish testosterone levels and induce feelings of sexual calm, but neither changes the direction of sexual urges.[44]

The first reported use of hormone-based medications to reduce pathological sexual behavior in men was in 1944.[45] German physicians prescribed anti-androgens to curb behavior of male paraphiliacs in the 1960s.[46] MPA was first used for this purpose in 1966. [47] Chemical castration is particularly appealing as a treatment for sexual offenders due to their documented high rate of recidivism.[48] However, clinical psychologists divide sexual offenders into four types, only one of which, Type IV, includes paraphiliacs who are compelled to commit sex crimes to realize their sexual fantasies.[49] Type IV is the only group

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41 Michael McNutt & Randy Ellis, *2006 to Have its Share of Unusual Measures*, NewsOK (Jan. 22, 2006), http://newsok.com/2006-to-have-its-share-of-unusual-measures/article/2928540.

42 *Id.*

43 Scott & Holmberg, *supra* note 15.

44 Arthur L. Brody & Richard Green, *Washington State's Unscientific Approach to the Problem of Repeat Sex Offenders*, 22 BULL. AM. ACAD. PSYCHIATRY L. 343, 349-50 (1994).

45 Scott & Holmberg, *supra* note 16.

46 *Id.*

47 *Id.*

48 Avital Stadler, *California Injects New Life Into an Old Idea: Taking a Shot at Recidivism, Chemical Castration, and the Constitution*, 46 EMORY L.J. 1285, 1288 (1997).

49 *Id.* at 1289.

for whom Depo-Provera treatment has been shown to be effective.[50] Sexual offenders in the other recognized groups include those who are unable to admit their actions or accept the criminality of those actions, are focused on shifting the blame for their actions to non-sexual motivations, or are actually motivated by nonsexual elements such as anger, power, or violence.[51] Sex offenders that fall into these three groups do not benefit from anti-androgen treatment,[52] either because they are unwilling to comply with behavioral and medical therapy, or because reduction in testosterone does not address their motivation for committing sex offenses.[53]

1. *State Statutes*

California was the first state to enact a statute authorizing chemical castration of sex offenders through anti-androgen treatment.[54] The statute, which is still in effect, provides for judicial discretion to order chemical castration as a condition of parole for first-time convictions of sodomy, lewd and lascivious acts, oral copulation or penetration by a foreign object where the victim is under thirteen years.[55] Eight other states have passed legislation governing either mandatory or discretionary sentencing of convicted sexual offenders to anti-androgen treatment or use of such treatment as a condition of parole.[56] Georgia repealed its chemical castration statute in 2006, while Oregon similarly repealed a statute mandating chemical castration for eligible first-time offenders in 2011.[57]

Currently California, Montana, Wisconsin, Florida, Iowa and Louisiana are the only states that have laws in effect allowing or requiring chemical castration for sex offenders in various circumstances. Each state statute varies from the others in whether the castration is mandatory, discretionary, or voluntary, what behavior triggers the castration statute, and the weight given to the victim's age, among other factors.[58] As previously noted, the Texas statute requires

50 *Id.* at 1288–89.
51 *Id.*
52 *Id.*
53 Brody & Green, *supra* note 44, at 352.
54 Stadler, *supra* note 48, at 1299.
55 Cal. Penal Code §645(a) (West 1997).
56 Scott & Holmberg, *supra* note 15, at 503.
57 Ga. Code Ann., § 16-6-4 (West 2009); Rev. Stat. § 144.625 (2011).
58 Scott & Holmberg, *supra* note 15, at 503.

complete voluntary consent for castration under all circumstances. Florida's statute requires mandatory chemical castration for repeat offenders,[59] while California's statute mandates chemical castration for repeat sex offenders where victims were under the age of thirteen.[60] Iowa's statute mandates chemical castration for repeat offenders except where the court makes a finding that such treatment would be ineffective.[61] Montana and Wisconsin's statutes are completely discretionary, whereas California, Florida, and Iowa allow courts to order chemical castration for first-time offenders.[62] In Louisiana, cases regarding repeat sexual offenders or in which the victim was younger than twelve years old are mandated to participate in a mental health treatment plan, which may include chemical castration treatment.[63] Conviction for any of five specific sex offenses will subject someone to Louisiana's castration statute,[64] whereas Florida's statute only applies to those convicted of sexual battery, which includes "oral, anal, or vaginal penetration by, or union with, the sexual organ of another . . . or any other object."[65] Iowa's statute covers anyone convicted of any of nine specific sex offenses, if the victim is twelve years old or younger.[66] Montana's statute imposes chemical castration particularly for sex crimes resulting in bodily injury to the victim or where the victim was less than sixteen years old.[67] States also vary considerably regarding who pays for the treatment, whether medical or psychological evaluations are mandated or offered before treatment commences, the qualifications required of such examiners, what medications are approved for chemical castration, whether informed consent is required, and the duration of treatment ordered.[68]

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59 FLA. STAT. ANN. § 794.0235(1)(a) (West 2013).
60 CAL. PENAL CODE §645(b) (West 1997).
61 IOWA CODE § 903B.10(1) (2013).
62 MONT. CODE ANN. §45-5-512 (2013); WIS. STAT. ANN. §304.06 (2011); CAL. PENAL CODE §645(a) (West 1997); FLA. STAT. ANN. § 794.0235(1)(a) (West 2013); IOWA. CODE. § 903B.10(1) (2013).
63 *See* LA. REV. STAT. ANN. §§ 15:538(C)(1)(b)-(C)(3)(c)(i) (2012).
64 LA. REV. STAT. ANN. § 43.6(A) (2014).
65 FLA. STAT. ANN. § 794.01 (West 2013).
66 IOWA CODE § 903B.10(1) (2013).
67 MONT. CODE ANN. § 45-5-512 (2013); *see also* § 45-5-502(3); § 45-5-503(3)(a); § 45-5-507(4); §45-5-507(5)(a).
68 Scott & Holmberg, *supra* note 15 at 503–04.

2. Constitutional Challenges

Challenges to chemical castration statutes have been suggested under the Eighth Amendment's prohibition against cruel and unusual punishment, and under the procedural and substantive due process and equal protection guarantees of the Fourteenth Amendment.[69]

The Eighth Amendment's prohibition on cruel and unusual punishment seems like an ideal vehicle for attacking chemical castration statutes, as it was successful in abolishing surgical castration and vasectomy as criminal sanctions. The Supreme Court has never considered whether castration, surgical or chemical, is cruel and unusual. To determine if a punishment is cruel and unusual, the Supreme Court considers whether the punishment is inherently cruel and unusual, whether it is proportional to the crime, and whether the state can achieve its goal through less intrusive means.[70] The Court also looks to evolving standards of decency in determining whether punishments violate the Eighth Amendment.[71] The fact that only eight states have promulgated statutes allowing chemical castration in the fifty years since its advent, and that two such states have subsequently repealed their statutes within a decade of their passage argues that chemical castration does not comport with public opinion regarding humane justice.

In assessing proportionality, it must be recognized that the sexual assault of minors is a reprehensible crime with significant repercussions for victims and communities, and recidivism among sexual offenders is higher than other crimes. However, the long-term effects of MPA treatment are mostly unknown, and serious side effects to its use are known. MPA can cause excessive weight gain, malaise, migraine headaches, severe leg cramps, elevation of blood pressure, gastrointestinal complaints, gallbladder stones and diabetes.[72] The FDA also notes that Depo-Provera can result in loss of bone density, formation of blood clots, decrease in glucose tolerance, depression, convulsions, disturbances of liver function and may increase the

69 *Id.* at 505–07.

70 Jason O. Runckel, *Abuse It and Lose It: A Look at California's Mandatory Chemical Castration Law* 28 Pac. L.J. 547 (1997).

71 *Id.* at 581.

72 Walter J. Meyer, Collier Cole & Evangeline Emory, *Depo Provera Treatment for Sex Offending Behavior: An Evaluation of Outcome,* 20(3) Bull. Am. Acad. Psychiatry L. 249, at 249-59 (1992).

risk of various cancers.[73] Offenders are forced to undergo hormone treatment with unknown long-term effects without giving informed consent, which is arguably disproportionate to their crimes. Chemical castration is often framed as a less intrusive method of preventing recidivism, as it allows offenders to be released into the community instead of being incarcerated for longer sentences. However, it can also be argued that interfering with the hormones of sex offenders, with its attendant impacts on physical and mental health is at least as intrusive as keeping such individuals imprisoned.

Additionally, an Eighth Amendment argument is problematic because it is unclear whether states have imposed these statutes as punishment or treatment. Courts have previously held that medical treatments are not subject to Eighth Amendment scrutiny, thus Eighth Amendment arguments against chemical castration are dependent on the purpose courts attribute to these statutes, whether they are intended as treatment or punishment.[74] Courts use a four-part test to distinguish between treatment and punishment, looking to whether the treatment has therapeutic value, whether it is part of an ongoing program of treatment, whether the effects are unduly harsh in relation to the benefits, and whether the treatment is experimental or an accepted practice.[75] However, no court has yet applied this test to a statute allowing chemical castration. Many of the state statutes include the word "treatment" in the relevant section title, which arguably exempts them from Eighth Amendment scrutiny.[76] Several statutes do not fulfill the treatment test, as they do not require psychological or other treatment and they have questionable therapeutic effects for sex offenders not motivated by paraphilias.

Opponents of chemical castration also critique state statutes permitting chemical castration on the premise that it violates the Fourteenth Amendment's guarantee of due process prior to a deprivation of liberty. Among the liberty interests protected by the

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73 Pharmacia & Upjohn Co., Depo-Provera Full Prescribing Information (Oct. 2010), *available at* http://www.accessdata.fda.gov/drugsatfda_docs/label/2010/020246s036lbl.pdf

74 Shai Nurkin Leinwand, *Aversion Therapy: Punishment as Treatment and Treatment as Cruel and Unusual Punishment*, 49 S. CAL. L. REV. 880, 946-47 (1976).

75 Runckel, *supra* note 70, at 579 (citing Rennie v. Klein, 462 F. Supp. 1131, 1136-38 (D.N.J. 1978)).

76 MONT. CODE ANN. § 45-5-512(1) (2013); CAL. PENAL CODE § 645(A) (West 1997); IOWA CODE § 903B.10(1) (2013); WIS. STAT. ANN. § 304.06(1Q)(B) (2011).

Fourteenth Amendment is bodily integrity, which includes the right to refuse medical treatment.[77] This liberty must balance against the state interest, which is high in this case. The perceived solution of chemical castration to solve sexual re-offending prioritizes the state's interest in protecting potential child victims of sexual assault at the expense of the right to bodily integrity of the convicted sex offender. The Ninth Circuit Court of Appeals opined that chemical castration "would, if prescribed against the will of a defendant on supervised release, implicate a particularly significant liberty interest."[78] The court noted that chemical castration alters behavior and interferes with mental processes, and thus determined that it was "at the extreme end of the spectrum of intrusive medications and procedures," and thus that its imposition on an inmate would require preliminary findings that such treatment was necessary to encourage deterrence, protect the public, or provide the defendant with rehabilitative services and that it involve no greater deprivation of liberty than necessary.[79] Various Supreme Court cases have also addressed what procedural protections must be in place for inmates refusing treatment.[80] The Court requires a determination that the individual has a mental illness or abnormality, that the proposed treatment is in the inmate's medical interest, that the mandated treatment is essential for the inmate's safety or the safety of others, and that there are no less intrusive alternatives.[81] Many of the state statutes governing chemical castration would fall short of this standard on the first prong, because they impose chemical castration without a determination that an individual's sex offenses are motivated by a paraphilia. As discussed above, of the four identified categories of sex offender, only one category is likely to experience behavior modification as a result of anti-androgen treatment. For the other categories of offender, the state is arbitrarily imposing chemical castration with no indication that there is a mental illness, that the treatment is in the inmate's medical interest, or that such treatment is essential for the safety of others, since such treatment is unlikely to have any effect on recidivism.

77 Cruzan by Cruzan, v. Dir. of Mo. Dep't of Health, 497 U.S. 261, 278 (1990).
78 United States v. Cope, 527 F.3d 944, 955 n.5 (9th Cir. 2008).
79 *Id.*
80 *See Cruzan*, 497 U.S. 261; Washington v. Harper, 494 U.S. 210 (1990); Riggins v. Nevada, 504 U.S. 134, 135 (1992).
81 *Riggins*, 504 U.S. at 135.

Thus far only the Court of Appeals for California's Fifth District has heard a case challenging the constitutionality of a court order that a convicted sex offender undergo MPA treatment upon parole.[82] In that case, the defendant was convicted of multiple counts, including aggravated assault and various charges relating to sodomy of a minor child under fourteen years of age.[83] The defendant challenged the imposition of MPA treatment as violating his right to due process and constituting cruel and unusual punishment.[84] Unfortunately, the defendant's attorney failed to challenge the constitutionality of the order in the trial court, and therefore these issues were not preserved for appellate review. The court declined to rule on them and recommended that the defendant pursue his claims in a habeas corpus proceeding.[85]

Finally, mandated chemical castration affects the fundamental right to procreation, because it reduces the testosterone levels and fertility of participants. In *Turner v. Safley*, the Supreme Court held that prison regulations impinging on inmates' fundamental rights would only be subject to rational basis review, as "subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to … adopt innovative solutions to the intractable problems of prison administration."[86] Thus, it is likely that if mandated chemical castration statutes were challenged on the basis of their restriction of the fundamental right to procreate, they would be upheld as rationally related to a legitimate and neutral state interest, that of preventing recidivism among sex offenders.

If strict scrutiny were to be applied to chemical castration statutes, states might succeed in convincing a court that their interest in preventing recidivism among sex offenders is not only legitimate, but compelling. However, it is far from clear that any of these statutes are narrowly tailored to that end, especially considering the aforementioned failure of MPA treatment to address the root causes of offending among much of the sex offender population. The statutes are over-inclusive, forcing hormone treatment on those who will not benefit from it, and whose treatment in this manner will not provide heightened safety to the public. The level of scrutiny

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82 People v. Foster, No. F061174, 2012 WL 688247 (Cal. Ct. App. Mar. 2, 2012).
83 *Id.* at *1.
84 *Id.*
85 *Id.* at *15.
86 Turner v. Safley, 482 U.S. 78, 89 (1987).

applied would likely depend on the specific statute and whether the hormone treatment was left to judicial discretion, imposed by statute automatically based on conviction for a certain offense, or presented as an option for an inmate seeking parole.

It is unclear how many sex offenders are actually receiving MPA treatment at any given time. The California Department of Corrections identified 687 individuals on parole at the time the California statute was passed who would be eligible for the treatment.[87] News reports estimated that 200 convicted child molesters were being released from custody each week at the time of the law's passage.[88] However, the California measure is retroactive, and thus also applies to twice-convicted sex offenders who were on parole at the time the law went into effect. Further, since the statute is discretionary, not all eligible individuals will be subject to the treatment. Among the six states with chemical castration provisions, there are approximately 258,000 registered sex offenders.[89] Again, due to the discretionary nature of the imposition of such treatment, it is difficult to determine how many individuals eligible under the statutes are being required to or are choosing to take the anti-androgen medication.

Convicted sex offenders continue to possess constitutional rights and freedoms that must be protected. Mandating that they undergo hormonal treatment which has not been established to increase the safety of the community and which carries significant side effects arguably violates their constitutional rights. The fact that the imposition of such treatment is usually discretionary, and in some cases considered "voluntary" by the convicted individual, and the fact that it is styled as "treatment" rather than "punishment" clouds the determination of whether the constitutionally recognized right to procreate is being infringed. Where the application of the statute requires a finding that the defendant is an appropriate candidate for

87 Cal. S. Rules Comm., Analysis of S. Floor Bill No. 3339 (Aug. 15, 1996).

88 Stadler, *supra* note 48, at 1297.

89 This figure is based on the aggregate numbers reported by the six states with chemical castration provisions, *see* Montana Department of Justice Sex Offender Registry, https://doj.mt.gov/svor/; Iowa Sex Offender Registry, http://www.iowasexoffender.com/; California Department of Justice, http://meganslaw.ca.gov/; Wisconsin Department of Corrections Sex Offender Registry, http://offender.doc.state.wi.us/public/; Florida Sexual Offenders and Predators, http://offender.fdle.state.fl.us/offender/homepage.do; Texas Public Sex Offender Registry, https://records.txdps.state.tx.us/SexOffender/.

such treatment based on the testimony of clinicians, and where the state incorporates MPA treatment as part of a larger course of therapy and behavior modification, it is less clear that such treatment violates the constitutional rights of convicted sex offenders.

III. Goodwin and Gerber: "What prisoners do with their seed once it's spilt"

The Supreme Court has generally held that a prisoner "retains those [constitutional] rights that are not inconsistent with his status as a prisoner,"[90] though incarceration must, by necessity, limit such rights to some degree.[91] Previously the right of procreation was understood to be inconsistent with the status of prisoner and therefore to be a privilege prisons could accord inmates (in the form of conjugal visits), rather than an enforceable right.[92] However, now that technology has obviated the need for sexual intercourse to achieve procreation, several male inmates have attempted to test the waters for a constitutional opening.[93]

A. Restriction of Fundamental Rights for Incarcerated Persons

In *Procunier v. Martinez*, the Supreme Court established both that federal courts must be responsive to the constitutional claims of prisoners, and that they must accord deference to prison authorities when making decisions in this area.[94] Accordingly, the Court has found that prisoners retain only those rights "not inconsistent with [their] status as . . . prisoner[s] or with the legitimate penological objectives of the corrections system,"[95] and has specified that deference must be given to prison administrators in considering the constitutionality of prison regulations, even those that impact rights recognized as fundamental.[96] They have identified that the governmental objective

90 Pell v. Procunier, 417 U.S. 817, 822 (1974).
91 Price v. Johnston, 334 U.S. 266, 285 (1948).
92 Goodwin v. Turner, 702 F. Supp. 1452, 1454 (W.D. Mo. 1988).
93 *Id.* at 1452; Goodwin v. Turner, 908 F.2d 1395, 1396 (8th Cir. 1990); Gerber v. Hickman, 264 F.3d 882, 884 (9th Cir. 2001); Gerber v. Hickman, 291 F.3d 617, 619 (9th Cir. 2002).
94 Procunier v. Martinez, 416 U.S. 396 (1974).
95 *Pell*, 417 U.S. at 822.
96 Turner v. Safley, 482 U.S. 78, 89 (1987); Jones v. N.C. Prisoners' Union, 433 U.S. 119, 128 (1977).

used to justify a prison regulation must be a legitimate and neutral one, and there must be a valid, rational connection between the objective and the regulation.[97] Courts should also consider whether alternative means of exercising the right in question are available to prison inmates, the impact of accommodating the asserted constitutional right on guards, other inmates, and the allocation of prison resources, and the availability of ready alternatives.[98]

Fundamental rights found to survive incarceration include due process in the right to administrative appeals, right of access to the parole process, protection against unequal treatment on the basis of race, sex, and creed, and limited rights to speech and religion.[99] Regarding fundamental rights in the area of family choice and personal privacy, the Court has held that the right to marry survives incarceration as well as the right to retain one's procreative ability for use after release from prison.[100] The Third Circuit has held that the right to have an abortion survives incarceration.[101] Conversely, the right to marital privacy, conjugal visits and contact visits have been held not to survive incarceration, due to concerns about maintaining order, ensuring security and possible interference with the rehabilitation goals of the prison setting.[102]

The Court has made a distinction between rights only impacting prisoners and rights impacting prisoners as well as non-incarcerated individuals. *Martinez* concerned a content-based restriction on prison correspondence, which the Court held violated the First Amendment rights of the non-prisoners corresponding with prisoners, avoiding the question of prisoners' rights.[103] The Court held that prison regulations that implicate the First Amendment rights of free citizens must further "an important or substantial governmental interest unrelated to the suppression of expression," and must not be "more restrictive than is necessary or essential."[104]

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97 *Turner*, 482 U.S. at 89-90.
98 *Id.* at 90.
99 Richard Guidice Jr., Note, *Procreation and the Prisoner: Does the Right to Procreate Survive Incarceration and Do Legitimate Penological Interests Justify Restrictions on the Exercise of the Right*, 29 Fordham Urb. L.J. 2277, 2284 (2002).
100 *Turner*, 482 U.S. at 95-96.
101 Monmouth Cnty. Corr. Inst'l. Inmates v. Lanzaro, 834 F.2d 326, 351 (3d. Cir. 1987).
102 Guidice, *supra* note 99, at 2287-88.
103 *Turner*, 482 U.S. at 85.
104 Procunier v. Martinez, 416 U.S. 396, 413 (1974).

B. Recent Constitutional Challenges Seeking a Right to Procreate Through Artificial Means

The first modern case involving the right of prisoners to procreate came before the Eighth Circuit in 1990.[105] Goodwin, an inmate in a Bureau of Prisons Medical Facility in Missouri, requested that prison authorities assist him in artificially inseminating his wife, and sought habeas corpus relief after his request was denied.[106] The District Court held the deprivation of Goodwin's right to procreate was not permanent, but was only a delay until he was paroled. The Court found that artificial insemination fell within the realm of incidents of marriage that were unavailable to inmates due to being fundamentally incompatible with incarceration, as well as falling outside the "rubric of the right to privacy."[107] The Court mentioned security concerns obliquely, but failed to explicitly state how artificial insemination is fundamentally incompatible with incarceration.

The Eighth Circuit declined to rule that the prison regulation should be subject to strict scrutiny because it directly impacted Goodwin's wife, stating that the wife's associational rights were not relevant.[108] The Court determined that the regulation satisfied the four-prong test articulated in *Turner*.[109] Regarding the first prong, it noted that Bureau of Prisons policy required equal facilities and conditions for prisoners, which would require the option for women to procreate if it provided a corresponding benefit to men to procreate. This would require significant financial and infrastructural outlay, taxing the limited resources of the Bureau, and therefore the burden on the Bureau in accommodating Goodwin would be great.[110] The Court found that even without the existence of alternative means of exercising Goodwin's right to procreate, the regulation was still reasonable because no alternatives could exist without "compromising prison policy or expending a large amount of prison resources."[111] The Court also noted that the effect of accommodating Goodwin's asserted right on other inmates would be significant, as providing expanded medical services to open this right to female inmates would

105 Goodwin v. Turner, 908 F.2d 1395, 1396 (8th Cir. 1990).
106 *Id.* at 1396.
107 Goodwin v. Turner, 702 F. Supp. 1452, 1454 (W.D. Mo. 1988).
108 *Goodwin*, 908 F.2d at 1399.
109 *Id.* at 1399-1400.
110 *Id.* at 1400.
111 *Id.*

move resources away from other legitimate penological interests such as security and rehabilitative programming.[112]

The dissenting opinion pointed out significant shortcomings in the argument against accommodating Goodwin's asserted right. The dissent noted that the "reasons advanced by the Bureau for denying Goodwin's request have been evanescent and shifting."[113] The dissent expressed skepticism at the justification put forth by the Bureau and accepted by the majority that Bureau policy would require the extension of a corresponding benefit to artificial insemination to all female prisoners, saying that "equal treatment of inmates is not a legitimate interest when it is accomplished at the expense of denying the exercise of an otherwise accommodatable constitutional right."[114] The dissent pointed out that prisons "are often required to accommodate the exercise of a particular right in some circumstances and, because of different security or administrative burdens, permitted to deny it in others."[115] Other cases lend support to the idea that all inmates are not similarly situated for equal protection purposes, and that factors in making such a determination include security level, number of inmates, makeup of the prison population, types of crimes committed, sentences imposed, average length of stay, and history of violence within a facility.[116]

The dissenting opinion in *Goodwin II* noted that courts have specifically found different treatment of male and female inmates to withstand equal protection scrutiny,[117] partially because prisons

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112 *Id.*

113 *Id.* at 1404.

114 *Id.* at 1405.

115 *Id.*

116 Klinger v. Dep't of Corr., 31 F.3d 727, 731-32 (8th Cir. 1994); Pargo v. Elliot, 894 F. Supp.1243, 1259 (S.D. Iowa 1995); Women Prisoners of D.C. Dep't of Corr. v. District of Columbia, 93 F.3d 910, 924-26 (D.C. Cir. 1996); DuPont v. Comm'r of Corr., 861 N.E.2d 744, 753-54 (Mass. 2007).

117 *Goodwin*, 908 F.2d at 1406. The dissent specifically mentioned Pitts v. Thornburgh, 866 F.2d 1450, 1454–59 (D.C. Cir. 1989) (prison policy of incarcerating female inmates in West Virginia and male inmates near the District of Columbia did not violate equal protection because the government's interest in preventing overcrowding and traditional separation of genders in prison were substantially related to the gender classification) and Morrow v. Harwell, 768 F.2d 619, 626 (5th Cir. 1985) (prison policy of granting more visiting hours for male inmates held not to violate equal protection because males constitute a greater proportion of population and no individual inmate received more time based on gender).

have traditionally been gender-segregated, and are thus prone to have many differences among the relevant factors. The *Goodwin II* dissent argued all that was needed was to give Goodwin a clean container and allow the container to be given to his wife, diminishing the impact of accommodation of the right on guards, other inmates and allocation of prison resources.[118] The dissent also criticized the majority for expanding beyond the present case by addressing hypothetical medical services needed for female inmates.[119]

Gerber v. Hickman concerned a similar restriction on the right to procreate of a male inmate in a California State Prison.[120] The case came before the Ninth Circuit Court of Appeals in 2002, twelve years after the Eighth Circuit decided *Goodwin*. In this case, Gerber was sentenced to life without parole and his wife was in her forties,[121] whereas Goodwin's wife had been in her thirties and he had been within five years of his release date.[122] Gerber's case initially went to the Senior Circuit Judge of the Ninth Circuit sitting in designation, who held that Gerber's right to procreate survived incarceration subject to restrictions based on legitimate penological interests, and that prison policy of treating male and female inmates equally to the extent possible would not be implicated in allowing Gerber to provide semen to artificially inseminate his wife.[123] Senior Circuit Judge Bright noted that men and women were not similarly situated with respect to artificial insemination, and that Gerber was not seeking to be artificially inseminated but to provide a sperm sample.[124]

The Ninth Circuit reheard the case *en banc* and reversed, holding that Gerber had no fundamental right to require the prison warden to accommodate his request to provide sperm to his wife for artificial insemination.[125] The majority based its decision on "the nature and goals of the correctional system, including isolating prisoners, deterring crime, punishing offenders and providing rehabilitation."[126] The Court noted "restrictions also serve . . . as reminders that, under our system of justice, deterrence and retribution are factors in addition

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118 *Goodwin*, 908 F.2d at 1406.
119 *Id.*
120 Gerber v. Hickman, 291 F. 3d 617, 619 (9th Cir. 2002).
121 *Id.*
122 *Goodwin*, 908 F.2d at 1397..
123 Gerber v. Hickman, 264 F.2d 882, 892 (9th Cir. 2001).
124 *Id.* at 891.
125 *Gerber*, 291 F.3d at 623.
126 *Id.* at 622.

to correction."[127] Since it seems unlikely that restricting an inmate's ability to provide a sperm sample to his wife would serve to either rehabilitate him from his crimes or deter him from future crimes, it seems that the Court based its decision primarily on the legitimate penological objective of punishing Gerber and exacting retribution on him through restricting his access to procreation.

Circuit Judge Kozinski wrote a spirited dissent in *Gerber*, in which she broke Gerber's request into five steps and analyzed each one for its consistency with incarceration. She noted that step one, masturbation, was not fundamentally inconsistent with incarceration, nor did the prison have any "penological interest in what prisoners do with their seed once it's spilt."[128] She identified no problem with Gerber's desire to mail a package containing semen or hand such a package to his attorney, noting that Gerber was "not claiming an exemption from routine security checks."[129] Judge Kozinski pointed out that once the package made it outside the prison, "the prison's legitimate interest in it [would be] greatly diminished . . . [w]hether it is used to inseminate Ms. Gerber, to clone Gerber or as a paperweight has no conceivable effect on the safe and efficient operation of the California prison system."[130] Finally, the dissent criticized the majority's reliance on the principle that "abrogating the right to procreate 'serves the goals of isolating prisoners, deterring crime, punishing offenders, and providing rehabilitation,'" pointing out that "such judgments must be made by the legislature in setting the nature and degree of punishment for particular crimes," and that "[p]rison administrators may not supplement the punishment imposed by the legislature because they believe doing so would enhance 'deterrence and retribution.'"[131]

Goodwin and *Gerber* both seem to showcase prison administrators' and courts' reluctance to re-evaluate restrictions on the right to procreate in the face of technological advances that appear to undermine the reasoning for such restrictions. These decisions cling to reasoning that is either conclusory, focused on dubious claims of the need to extend involved and expensive procreative medical care to all inmates, or reasoning that intrudes into determining punishment,

127 *Id.* at 621 (citing Hudson v. Palmer, 468 U.S. 517, 524 (1984)).
128 *Id.* at 629 (Kozinski, J., dissenting).
129 *Id.*
130 *Id.*
131 *Id.* at 631-32.

which is properly in the purview of the legislature. Strong dissents in both cases point out the practical realities of what is being requested to enable the exercise of a fundamental constitutional right, noting that requests for specimen cups and transport does not seem particularly onerous or incompatible with security, punishment, deterrence and rehabilitation. Based on the time elapsed between *Goodwin* and *Gerber*, it would seem that perhaps another challenge to these restrictions is due.

Conclusion

It is well established that "(l)awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights,"[132] because some rights are "inconsistent with … status as a prisoner or with the legitimate penological objectives of the corrections system."[133] Challenges to many prison policies present difficulties arising from lowered standards of scrutiny or higher standards of proof applied to prison regulations and significant deference given to prison officials in administering prisons.[134] Despite recognizing that the right to procreate is a fundamental right, the Supreme Court has held prison restrictions impinging on this right to a rational basis standard of scrutiny, rather than the strict scrutiny such regulations would receive outside the prison environment.[135] Yet exploring decisions in this area over the last twenty years highlights some areas that suggest possibilities for further challenges.

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132 Price v. Johnston, 334 U.S. 266, 285 (1948).

133 Pell v. Procunier, 417 U.S. 817, 822 (1974).

134 *See* Farmer v. Brennan, 511 U.S. 825, 837-38 (1994) (unless prison officials actually knew of and disregarded substantial risk of serious harm to prisoners, prison conditions are not "punishment" within the meaning of the Eighth Amendment); Sandin v. Conner, 515 U.S. 472, 486-87 (1995) (holding that disciplinary segregation was not atypical and did not work "a major disruption in [the inmate's] environment" therefore such segregation did not implicate a constitutional liberty interest); Wilkinson v. Austin, 545 U.S. 209, 223 (2005) ("The touchstone of the inquiry into the existence of a protected, state-created liberty interest in avoiding restrictive conditions of confinement is not the language of regulations regarding those conditions but the nature of those conditions themselves 'in relation to the ordinary incidents of prison life.'"); Cruz v. Beto, 405 U.S. 319, 321 (1972) ("We are not unmindful that prison officials must be accorded latitude in the administration of prison affairs . . ..").

135 Turner v. Safley, 482 U.S. 78, 89 (1987).

With respect to mandated or discretionary hormone treatment for convicted sex offenders, the statutes that include "voluntary" treatment should be challenged on the basis that inmates are unable to give meaningful consent in this context, when the choice is between liberty with the medication and indefinite confinement without the medication. Statutes that style this type of hormone therapy and necessary medical treatment may be challenged on the basis that the science does not support the necessity or even a clear benefit to imposing such treatment for the medical benefit of the inmate or the safety of the public. Proceeding with such challenges would likely require building a greater scientific record than currently exists to assess the effects of such medication on sex offenders. Statutes that require an individualized determination of whether such treatment is appropriate, and which incorporate hormone therapy into a comprehensive treatment plan are more likely to withstand constitutional scrutiny.

Assisted reproduction has progressed in the twelve years since Gerber's case was decided by the Ninth Circuit. The courts in *Goodwin* and *Gerber* spoke of a hypothetical future need to provide assisted reproductive services to female inmates as a result of granting male inmates the right to provide semen samples, as well as focusing on concerns of unreasonable difficulty and cost to the prison in accommodating such requests. However, the Ninth Circuit also specifically noted that prison restrictions have a retributive role, as well as deterrence and rehabilitation. It is also possible that some discomfort with the assisted reproductive process motivated such policies. Mounting a new challenge to such a policy, relying on some of Judge Bright's and Judge Kozinski's reasoning in their respective opinions, could potentially be successful, as attitudes towards assisted reproduction have evolved. Judge Bright's statement that men and women are not similarly situated with respect to artificial insemination, and Judge Kozinski's refreshingly direct listing of what steps are actually involved in the process requested, could provide a solid foundation for a renewed challenge to such restrictions.

Prisons are, by their nature, restrictive environments, but courts have repeatedly recognized that "[f]ederal courts sit … to enforce the constitutional rights of all 'persons,' which include prisoners,"[136] and that "there is no iron curtain drawn between the

136 *Cruz*, 405 U.S. at 321.

Constitution and the prisons of this country."[137] The whittling away of fundamental rights in the service of the "needs and exigencies of the institutional environment"[138] is a dangerous road, and pushing back against the infringement of such rights is vital.

137 Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974).
138 *Id.* at 555.

Fatal Re-Entry: Legal and Programmatic Opportunities to Curb Opioid Overdose Among Individuals Newly Released from Incarceration

Leo Beletsky, Lindsay LaSalle, Michelle Newman, Janine Paré, James Tam and Alyssa Tochka[1]

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1 Leo Beletsky, J.D., M.P.H., Assistant Professor of Law and Health Sciences, Northeastern University School of Law & Bouvé College of Health Sciences; Lindsay LaSalle, J.D., Staff Attorney, Drug Policy Alliance; Michelle Amelia Newman, J.D. Candidate at Northeastern University School of Law, Class of 2015; Janine M. Paré, J.D. Candidate at Northeastern University School of Law, Class of 2015; James S. Tam, J.D. Candidate at Northeastern University School of Law, Class of 2015; Alyssa B. Tochka, J.D. Candidate at Boston University School of Law, Class of 2015.

Introduction

The United States is in the midst of a public health crisis: Every year, well over 24,000 Americans die from opioid overdose.[2] This staggering death toll is equivalent to a weekly jumbo jet crash. After a decade of rapid growth, overdose caused by prescription opioids and heroin now tops the accidental death rankings, beating out automobile accidents, AIDS, and other high-profile killers.[3]

Overdose does not discriminate, cutting across all geographic, economic, and racial divides. But some groups are especially vulnerable.[4] This article is dedicated to one such group: individuals re-entering the community from correctional settings. In the immediate two weeks after release, people in this group are almost 130 times more likely to die of an overdose than the general population.[5]

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2 CJ Arlotta, *Deaths Involving Opioids, Heroin Continue to Rise, Report Shows*, FORBES (Jan. 16, 2015), http://www.forbes.com/sites/cjarlotta/2015/01/16/deaths-involving-opioids-heroin-continue-to-rise-report-shows/ (estimating the overall 2013 number of drug overdose deaths at 43,982); *see also* CTRS. FOR DISEASE CONTROL & PREVENTION, PRESCRIPTION DRUG OVERDOSE IN THE UNITED STATES: FACT SHEET (2014), *available at* http://www.cdc.gov/homeandrecreationalsafety/overdose/facts.html [hereinafter CDC 2014]; *see also* Rose A. Rudd et al., *Increases in Heroin Overdose Deaths — 28 States, 2010 to 2012*, 63 MMWR 849 (2014), at Table 1 (estimating the number of 2012 heroin overdose fatalities for 18 states (56% coverage of the US population) at 3,635. Extrapolating from this datapoint, the national number of heroin overdose deaths is approximately equal to the number for the 18 covered states divided by the proportion of the U.S. population covered, or 3,635/.56 = 6,491. To account for the theoretical possibility of systematically lower rates of overdose in states not covered as compared by states covered in the cited study, it may be prudent to reduce this crude national estimate by 20%, resulting in a conservative estimate of approximately 5,193 fatalities). The 2012 estimate for total opioid overdose deaths—including both heroin and OPR—is thus derived by combining the national OPR estimate of 16,007 with the crude fatal heroin overdose estimate of 5,193 to arrive at a 21,200 estimate.

3 *See* CDC 2014, *supra* note 2 ("Drug overdose was the leading cause of injury death in 2012. Among people 25 to 64 years old, drug overdose caused more deaths than motor vehicle traffic crashes.").

4 *Policy Impact: Prescription Painkiller Overdoses*, CTRS. FOR DISEASE CONTROL & PREVENTION, *http*://www.cdc.gov/HomeandRecreationalSafety/pdf/PolicyImpact-PrescriptionPainkillerOD.pdf (last visited July 14, 2014).

5 *See, e.g.*, Ingrid A. Binswanger et al., *Mortality After Prison Release: Opioid Overdose and Other Causes of Death, Risk Factors, and Time Trends From 1999 To 2009*, 159(9)

The United States leads the world in both the absolute number as well as the percentage of incarcerated individuals.[6] Taken together, the rising levels of drug misuse in our society, chronic underfunding of community substance abuse and mental health services, and the increased risk of criminal justice involvement among those affected by substance use and mental health disorders translates to a correctional population disproportionately affected by these issues.[7] Correctional institutions act as the de-facto mental health care system in this country,[8] but only a fraction of those who struggle with mental health problems are able to receive adequate care behind bars.[9] In

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Annals Internal Med. 592, 592–93 (2013) [hereinafter Binswanger et al. 2013] (noting that in the state of Washington, 8.3% of all opioid overdose fatalities during the study period were attributable to those recently released from correctional custody); Ingrid A. Binswanger et al., *Release From Prison—A High Risk of Death for Former Inmates*, 356(2) New Eng. J. Med. 157, 157, 160–61 (2007) [hereinafter Binswanger et al. 2007] (Among Washington State prisoners, overdose mortality risk was elevated 12-fold compared to similar demographic groups within the general population. In the first two weeks post-release, the adjusted relative risk was especially high, at 129); *see also* P.B. Christensen et al., *Mortality Among Danish Drug Users Released From Prison*, 2(1) Int'l J. Prisoner Health 13, 13–19 (2006); Michael Farrell & John Marsden, *Acute Risk of Drug-Related Death Among Newly Released Prisoners in England and Wales*, 103 Addiction 251, 252–54 (2007); Nicola Singleton et al., *Drug-Related Mortality Among Newly Released Prisoners*, Home Off. Online Rep. Series: London. Rep. No. 187 (2003); Prevention of Acute Drug-Related Mortality in Prison Populations During the Immediate Post-Release Period, World Health Org., 5–8 (2014) (reviewing international studies on overdose mortality post-release) [hereinafter World Health Org. 2014].

6 Jeremy Travis et al., The Growth of Incarceration in the United States: Exploring Causes and Consequences 36–37 (Nat'l Acads. Press 2014) (concluding that "the current U.S. rate of incarceration is unprecedented by both historical and comparative standards.").

7 H. Richard Lamb & Linda E. Weinberger, *The Shift of Psychiatric Inpatient Care From Hospitals to Jails and Prisons*, 33(4) J. Am. Acad. Psychiatry L. 529, 529–30, 532–33 (2005).

8 *See* Bridget M. Kuehn, *Criminal Justice Becomes Front Line for Mental Health Care*, 311 JAMA 1953, 1953 (2014).

9 Redonna K. Chandler et al., *Treating Drug Abuse and Addiction in the Criminal Justice System: Improving Public Health and Safety*, 301(2) JAMA 183, 185 (2009); *see* Timothy Williams, *Jails Have Become Warehouses for the Poor, Ill and Addicted, a Report Says*, N.Y. Times, Feb. 11, 2015, at A19, *available at* http://www.nytimes.com/2015/02/11/us/jails-have-become-warehouses-for-the-poor-ill-and-addicted-a-report-says.html?_r=0 ("And the study said that while 68 percent of jail inmates had a history of abusing drugs, alcohol or both, jail-based drug treatment programs had been underfunded").

the particular case of substance use disorders, upwards of 80% of incarcerated individuals are estimated to require treatment, but only a small percentage receive any help at all; access to adequate, evidence-based substance abuse services is downright dismal.[10]

As a result, most incarcerated individuals with substance use disorders re-enter the community without having received appropriate treatment and support while in custody. Reintegrating into society from jail or prison can be chaotic and stressful. During this time, individuals struggle to secure work, health care, a safe place to sleep, and many other elements of social and economic support.[11] This can lead to self-medication and relapse of pre-existing substance abuse.[12]

Tragedy results when mass incarceration meets our society's failure to adequately treat substance abuse and mental health problems. In the days and months immediately following release from prisons and jails, thousands of lives are lost to fatal overdoses.[13] The

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10 NAT'L INST. ON DRUG ABUSE, PRINCIPLES OF DRUG ABUSE TREATMENT FOR CRIMINAL JUSTICE POPULATIONS: A RESEARCH-BASED GUIDE 13 (2012), *available at* http://www.drugabuse.gov/sites/default/files/txcriminaljustice_0.pdf; *see also* Elizabeth L.C. Merrall et al., *Meta-analysis of Drug-related Deaths Soon After Release from Prison*. 105(9) ADDICTION 1545, 1549 (2010) (stating variation in availability of drug treatment programs inside as well as outside prison); *see also* Kathryn M. Nowotny, *Race/Ethnic Disparities in the Utilization of Treatment for Drug Dependent Inmates in U.S. State Correctional Facilities*, 40 ADDICTIVE BEHAVS. 148, 150 (2015) (noting that, of all covered individuals in prison who were diagnosed with substance use disorder using DSM IV criteria, "[f]orty six percent of whites report having received some kind of treatment compared to 43 percent of blacks and 33 percent of Latinos" (p-value omitted) and "of those who received treatment, self-help groups are the most commonly reported with 83 percent receiving that form of treatment, Detox (27%) and drug maintenance programs (35%) are the least reported").

11 Ingrid A. Binswanger et al., *Research, Return to Drug Use and Overdose After Release From Prison: A Qualitative Study of Risk and Protective Factors*, 7(3) ADDICTION SCI. & CLINICAL PRAC. 1, 3–6 (2012) [hereinafter Binswanger et al. 2012].

12 *Id.* at 7.

13 There were over 21,000 opioid overdose deaths in the United States in 2012. *See* CDC 2014 and Rudd, *supra* note 2. Though national figures are not available, over 8% of all overdose deaths in Washington were estimated to be among recently-released individuals. *See* Binswanger et al. 2013, *supra* note 5, at 592–93. In fact, overdose is just one of the potentially life-threatening health issues that afflicts individuals upon re-entry. *See, e.g.*, Emily A. Wang, et al., *A High Risk of Hispitalization Following Release from Correctional Facilities in Medicare Beneficiaries: A Retrospective Matched Cohort Study, 2002 to 2010*, 173(17) JAMA INTERNAL MED. 1621, 1621–23 (2013).

most acute overdose risk is concentrated in the first two weeks after release.[14] Overdose often results when newly-released individuals resume drug use after a period of abstinence basing their intake on pre-incarceration doses, when they use drugs from unfamiliar sources and of unknown strength, or as a result of mixing multiple substances.

It is easy to cast post-incarceration substance use—and consequent overdose—as the re-entering individual's character weakness or a propensity towards reckless behavior. Nevertheless, modern addiction science reframes such relapse as a foreseeable consequence of the chronic nature of substance use disorders.[15] This scientific evidence also provides clear guidance on how most of the resulting fatalities can be prevented.[16] This article considers the creation of fatal overdose risk among formerly incarcerated individuals as an unacceptable collateral harm emanating from criminal justice involvement.

In order to address this largely overlooked public health problem, we explore a range of legal channels that can help persuade the state (broadly construed) to address a risk to which it substantially contributes. We consider a number of doctrinal approaches, guided by the belief that spending time behind bars must not translate to a death sentence for so many Americans. Whether as a part of possible legal actions or an action agenda on its own right, we present a number of programmatic interventions and policy reforms that may alleviate this crisis. Our analysis also highlights the potential role of

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14 *See* Binswanger et al. 2007, *supra* note 5, at 157, 160–61; Binswanger et al. 2012, *supra* note 11, at 1; Traci Green et al., *Staying Alive on the Outside: Opioid Overdose Prevention and Response for People Leaving Prison*, *abstract available at* https://apha.confex.com/apha/140am/webprogram/Paper271542.html (forthcoming); Farrell & Marsden, *supra* note 5, at 254; Merrall, *supra* note 10, at 1549; Clarissa S. Krisnky et al., *Drugs, Detention, and Death: A Study of the Mortality of Recently Released Prisoners*, 30(1) Am. J. Forensic Med. & Pathology 6, 6–9 (2009). Additionally, overlapping risk factors, such as an increasingly older and aging prison population, can exacerbate the risk of overdose post-release. *See* Human Rights Watch, *Old Behind Bars: The Aging Prison Population in the United States* (January 2012), at 6, *available at* http://www.hrw.org/sites/default/files/reports/usprisons0112webwcover_0_0.pdf (calculating that, between 2007 and 2010, the number of sentenced federal and state prisoners aged 65 or older grew an astonishing 94 times faster than the total sentenced prisoner population).

15 *See generally* Nat'l Inst. on Drug Abuse, Principles of Drug Addiction Treatment, A Research-based Guide, Third Ed. (2012), http://www.drugabuse.gov/sites/default/files/podat_1.pdf.

16 *See id.*

the Affordable Care Act (ACA) in facilitating overdose prevention before, during and post-incarceration. This agenda is especially timely given the current move by federal and state governments towards releasing large numbers of individuals incarcerated on drug-related charges to ease prison over-crowding or as a result of legal reforms, pardons, or exonerations.[17]

In Section I, we provide an overview of the opioid overdose epidemic and the special vulnerability among criminal justice-involved individuals. In Section II, we examine the scientific evidence on prevention measures that should be, but are currently rarely deployed to address this vulnerability. In Section III, we explore various legal theories that could be invoked in efforts to motivate government actors to take a greater responsibility for preventing post-incarceration overdose deaths. In Section IV, we cover additional mechanisms to motivate institutional change. We conclude by outlining a policy and programmatic agenda for reducing the vulnerability of criminal justice-involved individuals to opioid overdose.

I. Background

Since the 1980s, the number of Americans behind bars has risen significantly. In 2011, there were approximately seven million Americans under the supervision of the correctional system, with more than twelve million cycling in and out of jails.[18] Much of this surge is attributed to the "War on Drugs," as well as to the sharp defunding and dismantling of publicly-financed mental health and substance use treatment resources.[19]

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17 Matt Apuzzo, *New Rule Permits Early Release for Thousands of Drug Offenders*, N.Y. TIMES, July 19, 2014, at A12, *available at* http://www.nytimes.com/2014/07/19/us/new-rule-permits-early-release-for-thousands-of-drug-offenders.html?_r=0.

18 LAUREN E. GLAZE & ERIKA PARK, BUREAU OF JUSTICE STATISTICS: U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2011, BULLETIN NCJ 239972 (2012), *available at* http://www.bjs.gov/content/pub/pdf/cpus11.pdf.http://www.bjs.gov/content/pub/pdf/cpus11.pdf; AMY L. SOLOMON ET AL., LIFE AFTER LOCKUP: IMPROVING REENTRY FROM JAIL TO PRISON, xv (Urban Inst. 2008), http://www.urban.org/uploadedpdf/411660_life_after_lockup.pdf (last visited Dec. 3, 2014).

19 Michelle McKenzie et al., *Overcoming Obstacles to Implementing Methadone Maintenance for Prisoners: Implications for Policy and Practice*, 5(4) J. OPIOID MGMT. 219 (2009), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2936228/pdf/nihms155566.pdf.; NAT'L ALLIANCE OF MENTAL ILLNESS,

The mass incarceration paradigm is defined by gross racial and economic disparities. In 2010, roughly half of individuals sentenced to state prisons for drug-related crimes were African American[20] despite comprising only about 13% of the population of the United States.[21] Evidence that African Americans are not any more likely to misuse drugs or engage in drug-related crimes than whites underscores the gross and systemic injustice of these disparities.[22]

The War on Drugs has had little impact on the rate of drug abuse in the United States. In fact, after decades of steady growth, opioid abuse (including both prescription analgesics and illicit opioids like heroin) is at an all-time high.[23] As of 2011, approximately 145 out of every 10,000 Americans in the general population were nonmedical users of opioid pain relievers and 9 to 16 out of every 10,000 Americans were users of heroin.[24] Based on sporadic testing anywhere from 5-15% of US arrestees have detectible blood levels of opioids at the time of detention, and over three percent report having used heroin within the past seven days.[25] There is also evidence that at least 200,000 heroin users are estimated to pass through the

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State Legislation Report: Trends, Themes and Best Practices of State Mental Health Legislation 16 (2013), *available at* http://www.nami.org/Content/NavigationMenu/State_Advocacy/Tools_for_Leaders/2013StateLegislationReportFinal.pdf.

20 E. Ann Carson & William J. Sabol, Bureau of Justice Statistics: U.S. Dep't of Justice, Prisoners in 2011, Bulletin NCJ 239808 (2012), *available at* http://www.bjs.gov/content/pub/pdf/p11.pdf.

21 *State and County Quick Facts:* USA, U.S. Census Bureau (Mar. 10, 2013), http://quickfacts.census.gov/qfd/states/00000.html (last visited Mar. 10, 2013).

22 *See generally* Li-Tzy Wu, et al., *Racial/Ethnic Variations in Substance-Related Disorders Among Adolescents in the United States*, 68 Arch. Gen. Psychiatry 1176, 1181–84 (2011).

23 *Policy Impact: Prescription Painkiller Overdoses*, Ctrs. for Disease Control & Prevention, http://www.cdc.gov/homeandrecreationalsafety/rxbrief/ (last visited Oct. 10, 2014).

24 The Substance Abuse & Mental Healthcare Admin., Results from the 2011 National Survey on Drug Use and Health: Summary of National Findings, 1–2 (2012), *available at* http://www.samhsa.gov/data/nsduh/2k11results/nsduhresults2011.pdf (noting 4.5 million non-medical prescription drug users and 281,000-500,000 heroin users).

25 Data cover a systematically selected sample of male arrestees by the ADAM program. In 2012, 1,938 interviews and 1,736 urine specimens were collected in the five sentinel ADAM sites, representing over 14,000 arrests of adult males in the counties. *See* Office of Nat'l Drug Control & Policy, Exec. Office of the President, ADAM II 2012 Annual Report (2012), *available at* http://

correctional system each year.[26] The overall rate of arrestees who may misuse opioids, but do not have them in their system at the time of arrest is unknown.

A significant number of individuals with opioid dependency are under custody in criminal justice institutions. In fact, at least 200,000 heroin users are estimated to pass through the correctional system each year.[27] Put another way, upwards of 85% of the incarcerated population either meet the clinical criteria for substance abuse or addiction, have histories of substance abuse, were under the influence of alcohol or other drugs at the time of their crime, committed their offense to obtain drugs, were incarcerated for an alcohol or drug law violation, or shared some combination of these characteristics.[28] Accordingly, inmates are at a much higher risk of substance abuse than the general public. Moreover, drug use does not necessarily abate upon incarceration.[29] The sporadic availability and usage of drugs within jail and prison walls is well documented,[30] as are the in-custody overdoses that result.

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www.whitehouse.gov/sites/default/files/ondcp/policy-and-research/adam_ii_2012_annual_rpt_final_final.pdf.

26 McKenzie et al., *supra* note 19, at 2.

27 McKenzie et al., *supra* note 19, at 2.

28 Nat'l Ctr. for Addiction & Substance Abuse at Columbia Univ. ("CASA"), BEHIND BARS II: SUBSTANCE ABUSE AND AMERICA'S PRISON POPULATION (Feb. 2010) at i.

29 As just a few examples, Pennsylvania implemented an intensive Drug Interdiction Program between 1995 and 1998 after six inmates died of drug overdoses between 1995 and 1996, 44 inmates in California prisons died from drug overdoses between 2006 and 2008, and at least seven Arizona inmates died from accidental overdoses between 2010 and 2012. *See* Thomas E. Feucht & Andrew Keyser, *Reducing Drug Use in Prisons: Pennsylvania's Approach*, 241 NAT'L INST. OF JUSTICE J. 11, 11 (Oct. 1999), *available at* https://www.ncjrs.gov/pdffiles1/jr000241c.pdf (last visited July 29, 2014); David Crary, *Drugs Inside Prison Walls*, THE WASHINGTON TIMES, Jan. 27, 2010, http://www.washingtontimes.com/news/2010/jan/27/drugs-inside-prison-walls/?page=all (last visited July 29, 2014); Bob Ortega, *Arizona Prisons Struggle with Drugs*, REPUBLIC, (June 3, 2012), http://www.azcentral.com/news/20120601arizona-prison-deaths-drugs.html.

30 The 1998 Annual Study of Jails, which examined 36,215 drug tests from inmates in a representative sample of 820 jail jurisdictions, found that 10% of samples tested positive for drugs. Doris James Wilson, DRUG USE, TESTING, AND TREATMENT IN LOCAL JAILS (2000), *available at* http://www.bjs.gov/content/pub/pdf/duttj.pdf. In 2003, a report by the Justice Department's Office of the Inspector General stated that the Bureau of Prisons was falling short in efforts to address a "continuing problem with inmate drug use and

Criminal justice institutions such as jails, prisons, detention centers, and mandated drug-treatment programs vary widely with respect to the populations served, lengths of stay, and services available. For most incarcerated individuals with addiction issues, time behind bars does not present an opportunity to receive comprehensive, evidence-based substance abuse treatment and counseling.[31] Rather, treatment services are generally absent, and overdose prevention services are virtually non-existent.[32]

Without appropriate care, undergoing severe opioid withdrawal in jail or prison is an extremely distressing health condition.[33] At times, withdrawal is accompanied by profuse vomiting, diarrhea, and hostile, even violent behavior. Unmediated withdrawal is potentially life-threatening.[34] It also creates a danger of self-harm or harm to others.[35]

Additionally, incarceration settings present their own stressors and trauma, including pervasive physical and sexual abuse.[36] As a result, most re-enter the community untreated and often traumatized, without so much as the basic knowledge of the risk factors associated

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drug smuggling in almost every institution." *See* Crary, *supra* note 29. In a 2013 initial screening of a quarter of California's prison population, nearly 25% of inmates tested positive for drugs. *See* KCRA, *California Prisons Find 1 in 4 Inmates Used Drugs*, KCRA.COM, Apr. 7, 2014, http://www.kcra.com/news/california-prisons-find-1-in-4-inmates-used-drugs/25368246#!X9vDy (last visited July 29, 2014).

31 See Nowotny, *supra* note 10 and accompanying text; *see also* Chandler et al., *supra* note 9.

32 *Id.*; Josiah D. Rich et al., *Attitudes and Practices Regarding the Use of Methadone in US State and Federal Prisons*, 82 J. OF URB. HEALTH 411, 411 (2005); *see also* Carmen E. Albizu-García et al., *Characteristics of Inmates Witnessing Overdoes Events in Prison: Implications for Prevention in the Correctional Setting*, 6 HARM REDUCTION J. 1, 7 (2009) (stating that drug overdose events are frequently witnessed which requires prompt interventions to reduce drug related harm within the correctional system).

33 *Clinical Management of Drug Dependence in the Adult Prison Setting*, U.K. DEP'T OF HEALTH, 15, *available at* http://www.nta.nhs.uk/uploads/clinicalmanagementofdrugdependenceintheadultprisonsetting-incamendmentatpara7.7.pdf.

34 *See, e.g.*, Cecil Brace v. Massachusetts, 673 F. Supp. 2d 36 (D. Mass. 2009) (a wrongful death lawsuit where failure to provide appropriate care for an incarcerated individual in withdrawal was alleged to have caused death).

35 *See* U.K. DEP'T OF HEALTH, *supra* note 33, at 14.

36 *See* ALLEN J. BECK & CANDACE JOHNSON, BUREAU OF JUSTICE STATISTICS: U.S. DEP'T OF JUSTICE, SEXUAL VICTIMIZATION REPORTED BY FORMER STATE PRISONERS, BULLETIN NCJ 237363 (2008), *available at* http://www.bjs.gov/content/pub/pdf/svrfsp08.pdf.

with post-release overdose or the tools by which they might be able to save their own life or the lives of other similarly-situated individuals.[37]

When recently released individuals return to substance use, they face several physical and psychological factors that elevate overdose risk. Although incarcerated individuals still have access to drugs while incarcerated, that access is limited compared to community settings.[38] Therefore, after spending time in jail or prison, a person's tolerance decreases drastically. As a result, what was a normal dose for an individual prior to incarceration could suddenly be enough to kill him or her.[39] Lowered tolerance can also be exacerbated by use of more than one drug at a time.[40] Combining alcohol with an opioid, for instance, can increase the propensity of opioids to suppress breathing.[41] In fact, the risk of death doubles with every illicit drug consumed in combination with opioids.[42]

Opioid dependence is within the constellation of factors that have been found to impede successful reintegration. Other factors include physical or sexual abuse, homelessness and unemployment.[43] These characteristics can trigger relapse and contribute to an elevated risk of overdose.[44] Indeed, formerly incarcerated individuals have cited overdose as a result of self-medication to escape the multiple stressors created by the struggle to reintegrate into society.[45]

Criminal justice institutions are well aware of the post-release substance misuse relapse and overdose risk among those in their custody, both as a general matter and in many individual cases.[46]

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37 Green et al., *supra* note 14.
38 Binswanger et al. 2012, *supra* note 11, at 5.
39 McKenzie et al., *supra* note 19, at 7.
40 World Health Org. 2014, *supra* note 5, at 10–11.
41 *Id.*
42 *Id.*
43 *See generally* Christopher J. Mumola & Jennifer C. Karberg, Bureau of Justice Statistics: U.S. Dep't of Justice, Drug Use and Dependence, State and Federal Prisoners, 2004, Bulletin NCJ 213530 (2004), *available at* http://www.bjs.gov/content/pub/pdf/dudsfp04.pdf.
44 Binswanger et al. 2012, *supra* note 11, at 7.
45 *Id.*
46 Most correctional institutions include a basic health screening upon intake. *See* Patricia L. Hardyman et al., Nat'l Inst. of Corrs., U.S. Dep't of Justice, Prisoner Intake Systems: Assessing Needs and Classifying Prisoners 9 (2004), *available at* http://static.nicic.gov/Library/019033.pdf; *see also* ABA Criminal Justice Standards on Treatment of Prisoners, 23-2.1, *available at* http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_treatmentprisoners.

These institutions are also optimally situated to provide targeted services to incarcerated individuals to facilitate recovery and prevent their death upon release. Although many structural and systemic changes are needed to comprehensively address the multiple issues facing newly-released individuals, the distinct harm of fatal overdose can be mitigated relatively easily. As we detail below, properly targeted evidence-based services such as drug treatment, overdose education, and fatality prevention training can be provided directly to incarcerated individuals—in some instances, with minimal cost and effort.[47]

The current reality is that very few correctional institutions take these straightforward prevention measures. The reasons behind this system-wide failure are varied. For instance, access to treatment while in custody as well as bridges to care for re-entering individuals are complicated by an entire constellation of factors.[48] Many policymakers and correctional officials do not view medication assisted treatment (MAT)—the only kind of drug treatment proven to reduce overdose risk—as appropriate for custodial settings.[49] Moreover, direct overdose prevention education and training may be seen as running counter to encouraging those re-entering the community to abstain from drug use.[50] Lastly, given that providing health care services already constitutes the largest and the fastest-rising component of correctional spending, the cost of additional programming is likely also a barrier.

A broader structural explanation for the lack of action on the part of correctional institutions is that people who populate prisons and jails represent some of the most disenfranchised members of our

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html#23-2.1 (Intake screening stating that "[c]orrectional authorities should screen each prisoner as soon as possible upon the prisoner's admission to a correctional facility to identify issues requiring immediate assessment or attention, such as illness, communicable diseases, mental health problems, drug or alcohol intoxication or withdrawal . . .").

47 *See, e.g.*, Traci Green et al., *Development of an Incarceration-Specific Overdose Prevention Video: Staying Alive on the Outside*, Health Educ. J., Sept. 2014, at 2–3, *available at* http://hej.sagepub.com/content/early/2014/09/19/0017896914550321.full.pdf+html.

48 Josiah D. Rich et al., *How Health Care Reform Can Transform The Health Of Criminal Justice–Involved Individuals*, 33 Health Aff. 462, 465 (2014).

49 *See infra* notes 55-79 and accompanying text.

50 Tessie Castillo, *Drug Relapse Denial and How it Kills*, Huffington Post (June 25, 2014), http://www.huffingtonpost.com/tessie-castillo/drug-relapse-denial-and-h_b_5529345.html.

society. [51] In practice, those most affected by criminal justice policies are least able to shape them. These individuals often lack access to political, economic, and social capital to affect reform and marshal public resources. [52] The issue of opioid overdose in this population vividly demonstrates how such disempowerment may translate to perpetuating avoidable public health harms.

Current sentencing reform, expansion of clemency, and court decrees mandating the easing of prison over-crowding will lead to an expansion in the number of newly released individuals. Those convicted of drug offenses have faced disparities in prison sentencing, so the federal and some state governments have made efforts to restore a sense of fairness to a greater number of people with drug law violations.[53] A growing number of state-level initiatives parallel the U.S. Justice Department's expansion of the criteria for clemency to potentially thousands of inmates. Unless adequate risk reduction steps are taken, these—otherwise positive—reforms can put thousands of individuals at risk of fatal overdose.[54]

Overdose among the recently released is a public health issue that affects not only the specific individual, but also their families, friends, and the community at large.[55] The criminal justice system

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51 *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2012); *see also* BECKY PETTIT, INVISIBLE MEN: MASS INCARCERATION AND THE MYTH OF BLACK PROGRESS (2012) (detailing the systematic disengagement of incarcerated populations, particularly populations of color, from mainstream services, employment, and even being included in census and other socio-demographic data).

52 *See, e.g.*, LISA KERBER, TEXAS DEP'T OF CRIMINAL JUSTICE STATE JAIL DIV., SUBSTANCE ABUSE AMONG FEMALE STATE JAIL INMATES (1998), http://www.utexas.edu/research/cswr/gcattc/documents/female_inmates1998.pdf (last visited August 2, 2014) (A 1998 survey conducted on female state inmates in Texas found that forty-two percent of female inmates with a history of substance abuse had an annual family income of less than $10,000 at time of entry. Sixty-five percent of individuals with a history of substance abuse did not graduate from high school.).

53 Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Attorney General Holder: Justice Department Set to Expand Clemency Criteria, Will Prepare for Wave of Applications from Drug Offenders in Federal Prison (Apr. 21, 2014), http://www.justice.gov/opa/pr/2014/April/14-ag-409.html.

54 *Id.*

55 MAYA DOE-SIMKINS & DHARMA CORTÉS, BOS. PUB. HEALTH COMM'N, OPIOID OVERDOSE PREVENTION FOR PUBLIC SAFETY AND LAW ENFORCEMENT 6 (2010), http://harmreduction.org/wp-content/uploads/2012/02/MA-Law-enforcement-training.pdf.

has an obligation to make inmates' community reintegration as safe as possible. With the availability of evidence-based tools to reduce the elevated risk of overdose faced by the newly released, it behooves us, as a society, to demand these simple measures to become standard.

II. Proven Prevention Measures Exist, but are not Utilized

A set of evidence-based interventions have been shown to address substance abuse relapse and associated overdose death risk in the days and weeks after release from incarceration.

A. Medication-Assisted Treatment

MAT, otherwise known as opioid substitution treatment, refers to the use of medications to treat opioid dependence. The U.S. Food and Drug Administration has approved three medications for use in treating opioid dependence: methadone, naltrexone, and buprenorphine.[56] These medications are typically used in combination with counseling and behavioral therapies. Based on extensive research, these regiments have been found to be safe, effective and cost-effective across social, geographic, and other settings and diverse populations.[57]

Providing MAT during incarceration and connecting patients to appropriate treatment immediately following release significantly reduces substance use relapse and overdose deaths among re-entering individuals. One illustrative study following people who were incarcerated and participated in prison-based methadone treatment found that post release, seventeen individuals among those who did not maintain MAT participation died from overdose during the four-year follow-up period; in contrast, none of those who maintained

56 Physicians & Lawyers for Nat'l Drug Policy, Alcohol and Other Drug Problems: A Public Health and Public Safety Priority 40–41 (2008); *see also* Gregory B. Collins & Mark S. McAllister, *Buprenorphine Maintenance: A New Treatment for Opioid Dependence*, 74 Cleveland Clinic J. Med. 514, 514–16 (2007) (describing use of buprenorphine and methadone in treating opioid dependence); Patrick G. O'Connor & David A. Fiellin, *Pharmacologic Treatment of Heroin-Dependent Patients*, 133 Annals Internal Med. 40, 44–47 (2000) (describing use of naltrexone in treating opioid dependence).

57 Nat'l Insts. of Health, *Effective Medical Treatment of Opiate Addiction*, 15(6) N.I.H. Cons. Statement 1, 4, 21 (1997).

their MAT enrollment experienced a fatal opioid overdose death.[58] In another randomized trial, there were no overdose deaths for patients assigned to counseling and referral to a methadone program or counseling and methadone while incarcerated, while four such deaths occurred to those participants assigned to counseling only during the twelve-month follow-up period.[59] Research estimates that MAT participation confers inmates with a fourteen-fold risk reduction in overdose mortality after release.[60]

Access to effective drug treatment during incarceration also carries a range of additional positive benefits for both the incarcerated individual as well as other stakeholders.[61] Broader research is needed

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58 Kate A. Dolan et al., *Four-Year Follow-Up of Imprisoned Male Heroin Users and Methadone Treatment: Mortality, Reincarceration, and Hepatitis C Infection*, 100(6) ADDICTION 820, 820–28 (2005).

59 Timothy W. Kinlock et al., *A Randomized Clinical Trial of Methadone Maintenance for Prisoners: Results at 12 Months Postrelease*, 37 J. SUBST. ABUSE TREAT. 277, 277–85 (2009).

60 Thierry Favrod-Coune et al., *Opioid Substitution Treatment in Pretrial Prison Detention: A Case Study from Geneva, Switzerland*, 143 SWISS MED. WKLY, 1, 1 (2013).

61 MAT during incarceration has been proven to reduce crime and recidivism. *See, e.g.*, Michael S. Gordon et al., *A Randomized Clinical Trial of Methadone Maintenance for Prisoners: Findings at 6 Months Post-Release*, 103 ADDICTION 1333, 1333–42 (2008); Timothy W. Kinlock et al., *A Study of Methadone Maintenance for Male Prisoners: 3-Month Postrelease Outcomes*, 35 CRIM. JUSTICE BEHAV. 34, 34–47 (2008); Kinlock et al., *supra* note 59, at 277–85; Victor Tomasino et al., *The Key Extended Entry Program (KEEP): A Methadone Treatment Program for Opioid-Dependent Inmates*, 68 MT. SINAI J. MED. 14, 14–20 (2001). Methadone maintenance treatment during incarceration also reduces heroin use and increases treatment rates both while incarcerated and in the community upon release. *See, e.g.*, Robert Heimer et al., *Methadone Maintenance in Prison: Evaluation of a Pilot Program in Puerto Rico*, 83(2) DRUG & ALCOHOL DEPENDENCE 122, 122–29 (2006); Stephen Magura et al., *The Effectiveness of In-Jail Methadone Maintenance*, J. DRUG ISSUES 75, 75–97 (1993); Kate A. Dolan et al., *A Randomized Controlled Trial of Methadone Maintenance Treatment Versus Wait List Controls in an Australian Prison System*, 72 DRUG & ALCOHOL DEPENDENCE 59, 59–65 (2003); Dolan et al., *supra* note 58, at 820–28; Michelle McKenzie et al., *A Randomized Trial of Methadone Initiation Prior to Release From Incarceration*, 33(1) SUBST. ABUSE 19, 19–29 (2012); Carmen E. Albizu-García et al., *Buprenorphine-Naloxone Treatment for Pre-Release Opioid Dependent Inmates in Puerto Rico*, 1(3) J. ADDICT. MED. 126, 126–32 (2007). Finally, MAT in correctional settings confers important public health benefits, such as reducing the spread of infectious diseases. *See, e.g.*, Shane Darke et al., *Drug Use and Injection Risktaking Among Prison Methadone Maintenance Patients*, 93(8) ADDICTION 1169, 1169–75 (1998); Steven L. Bakti et al., *A Controlled Trial of Methadone Treatment Combined with Directly Observed Isoniazid for Tuberculosis Prevention in Injection Drug Users*, 66 DRUG &

to more precisely quantify the overdose prevention benefits of MAT during incarceration and the post-release period, but the near-total lack of access to MAT therapeutic modalities in U.S. correctional facilities[62] precludes at-scale research efforts.

Based on these and other data, the Office of National Drug Control Policy (ONDCP), the Center for Disease Control and Prevention (CDC), the National Institutes of Health (NIH), the World Health Organization (WHO), and the National Commission on Correctional Healthcare have all unequivocally recommended that correctional systems offer MAT to treat opioid-dependent persons under legal supervision.[63] Both methadone and suboxone (buprenorphine) appear on the WHO's essential medicines list (EML)[64]—a list of pharmaceuticals that WHO recommends that all health systems or governments should make available to their populations. International norms also dictate that correctional settings shall offer the same array of pharmaceutical products available in the community.[65]

Given the high prevalence of substance use disorder, including opioid dependence among individuals booked into U.S. prisons or jails,[66] initiating MAT behind bars and linking re-entering patients to community-based treatment services should be a widespread,

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Alcohol Dependence 283, 283 (2002); S. Larney, *Does Opioid Substitution Treatment in Prisons Reduce Injecting-Related HIV Risk Behaviours? A Systematic Review*, 105 Addiction 216, 216–23 (2010); David S. Metzger et al., *Human Immunodeficiency Virus Seroconversion Among Intravenous Drug Users In-and Out-of-Treatment: An 18 Month Prospective Follow-Up*, 6 J. Acq. Immun. Def. Syn. 1049, 1049–56 (1993); Lisa A. Marsch, *The Efficacy of Methadone Maintenance Interventions in Reducing Illicit Opioid Use, HIV Risk Behavior and Criminality: A Meta-Analysis*, 93(4) Addiction 515, 515-32 (1998); Sandra A. Springer & Frederick L. Altice, *Improving the Care for HIV-Infected Prisoners: An Integrated Prison-Release Health Model*, Public Health Behind Bars: From Prisons to Communities 535–55 (Robert B. Greifinger et al. eds., 2007).

62 *See* Nowotny, *supra* note 10 and accompanying text.

63 *Substance Abuse Treatment for Injection Drug Users: A Strategy with Many Benefits*, Ctrs. for Disease Control & Prevention (last accessed Jan. 31, 2015), http://www.cdc.gov/idu/facts/TreatmentFin.pdf; Interventions to Address HIV in Prison: Drug dependence Treatment, World Health Org. (2007); Nat'l Insts. of Health, *supra* note 56, at 1–38.

64 Lars Møller et al., *Interventions to Address HIV in Prison: Drug Dependence Treatment,* World Health Org. (2007).

65 *Id.*

66 McKenzie et al., *supra* note 19, at 2; *see also* Nowotny, *supra* note 10 and accompanying text.

standard practice.[67] Shockingly—and inexplicably—this is far from reality, as MAT availability to opioid dependent individuals in incarceration settings is almost entirely lacking. [68] In a national survey of forty respondent state prison medical directors (having jurisdiction over 88% of the of U.S. state and federal prisoners), ***none*** offered methadone treatment to incarcerated individuals other than pregnant women.[69] These results are consistent with a U.S. Department of Justice report, which found that less than 0.5% of state and federally incarcerated individuals receive any MAT.[70] Another survey reported that only 0.2% of people in prison and jail have access to MAT.[71] Further, a study of state medical directors found that over 85% of state prison systems did not provide any buprenorphine access. [72]

Even in the small number of instances where some access exists, no data are available to assess what circumstances trigger such access and whether medication is provided only for detoxification, or for maintenance, as is recommended.[73] Fragmented evidence suggests that, where available, medication-assisted detoxification (MAD) and treatment in correction settings is often inadequate and not based on established best practices.[74] A national study covering 245 U.S. jails found that only 12% of the incarcerated population that reported being a MAT patient at the time of arrest received any continuation

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67 BENNETT W. FLETCHER ET AL., NAT'L INST. ON DRUG ABUSE, PRINCIPLES OF DRUG ABUSE TREATMENT FOR CRIMINAL JUSTICE POPULATIONS: A RESEARCH-BASED GUIDE (2014), *available at* http://www.drugabuse.gov/sites/default/files/txcriminaljustice_0.pdf (last visited Aug. 4, 2014) (stating, e.g., "Medications are an important part of treatment for many drug abusing offenders. Medicines such as methadone, buprenorphine, and extended-release naltrexone have been shown to reduce heroin use and should be made available to individuals who could benefit from them"); *id.* at 5.

68 Hannah K. Knudsen et al., *Adoption and Implementation of Medications in Addiction Treatment Programs*, 5 J. ADDICTION MED. 21, 21–27 (2011).

69 Rich et al., *supra* note 32, at 413; *see also* R. Heimer et al., *supra* note 62, at 123 ("In the U.S., no domestic prison currently provides methadone maintenance for sentenced inmates").

70 MUMOLA & KARBERG, *supra* note 43, at 9.

71 CASA, *supra* note 28, at 2-4.

72 Amy Nunn et al., *Methadone and Buprenorphine Prescribing and Referral Practices in US Prison Systems: Results From a Nationwide Survey*, 105 DRUG & ALCOHOL DEPENDENCE 83, 86 (2009).

73 *Id.*

74 *See generally* Rich et al., *supra* note 48, at 464–65.

of therapy.[75] It is unclear to what extent the access cited by the researchers constituted true MAT as opposed to MAD.[76] Illustrating the outrageous paucity of treatment, only one jail program in the United States is known for providing comprehensive MAT behind bars—Rikers Island Jail's Key Extended Entry Program (KEEP). KEEP performs approximately 18,000 detoxifications and 4,000 admissions for methadone treatment per year, resulting in a battery of public health, criminal justice, and economic benefits.[77]

Whether or not MAT or MAD is supplied by correctional institutions, re-entering individuals are rarely bridged to appropriate care in the community. A national survey of jail administrators found that less than 10% reported referring opioid-dependent individuals incarcerated in jails to methadone programs upon their release.[78] Linking treatment during incarceration with robust treatment and support services post-release in the community should be standard for overdose prevention as well as a number of other public health and public safety reasons.

Jails and prisons are not the only correctional settings in which individuals under criminal justice control are denied access to proven drug treatment. Despite endorsement by the National Association of Drug Court Professionals, many—and perhaps most—drug courts currently prohibit evidence-based treatment and other maintenance

75 Kevin Fiscella et al., *Jail Management of Arrestees/Inmates Enrolled in Community Methadone Maintenance Programs*, 81(4) J. Urb. Health 645, 649 (2004).
76 *Id.*
77 Tomasino et al., *supra* note 61, at 14.
78 Rich et al., *supra* note 32, at 413.

therapies because of an ideological preference for abstinence.[79] Overdose deaths are directly linked to these policies.[80]

MAT in the incarceration settings, when continued during post-release is both effective and cost-effective. If widely adopted, it is likely to result in sharp decreases in overdose risk, especially when coupled with education and naloxone prescription elements we discuss next.

B. Overdose Education and Naloxone Access Pre-Release

Naloxone hydrochloride is a fast-acting medication that, when administered during an overdose, blocks the effects of opioids on the brain and restores breathing.[81] This antagonist has no potential for abuse; side effects are rare.[82] Since it was first introduced in the

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79 COLLEEN O'DONNELL & MARCIA TRICK, NAT'L ASS'N OF STATE ALCOHOL & DRUG ABUSE DIRS., METHADONE MAINTENANCE TREATMENT AND THE CRIMINAL JUSTICE SYSTEM (2006); *California Drug Courts Denying Methadone*, CSAM NEWS Q. NEWSLETTER (Cal. Soc'y of Addiction Med., S.F., Cal.), Winter 2002. With new rules announced to tie federal drug court funding to policies permitting MAT, these bans may at last change. *See* Substance Abuse & Mental Health Servs. Admin. (SAHMSA), *Grants to Expand Substance Abuse Treatment Capacity in Adult and Family Drug Courts,* (2015) http://www.samhsa.gov/grants/grant-announcements/ti-15-002 (last visited Mar. 9, 2015) (conditioning federal funding as follows: "Applicants must affirm…that the treatment drug court(s) for which funds are sought will not: 1) deny any appropriate and eligible client for the treatment drug court access to the program because of their use of FDA-approved MAT medications (e.g., methadone, injectable naltrexone, noninjectable naltrexone, disulfiram, acamprosate calcium, buprenorphine, etc.) that is in accordance with an appropriately authorized [physician's prescription]; and 2) mandate that a drug court client no longer use MAT as part of the conditions of the drug court if such a mandate is inconsistent with a physician's recommendation or prescription. If an application does not include the Statement of Assurance affirming these conditions, the application will be screened out and will not be reviewed").

80 Peggy Fulton Hora, *Trading One Addiction for Another?*, 2(4) J. MAINT. ADDICTIONS 71, 73–74 (2005) (describing the case of Brad Moore, a Nevada County drug court client, who died of a heroin overdose on December 15, 1999, shortly after being ordered by the drug court judge supervising him to withdraw from his methadone program and become entirely "drug-free").

81 Scott Burris et al., *Stopping an Invisible Epidemic: Legal Issues in the Provision of Naloxone to Prevent Opioid Overdose*, 1 DREXEL L. REV. 273, 287–88 (2009); *see also What is Naloxone?*, DRUG POLICY ALLIANCE, http://www.drugpolicy.org/sites/default/files/DPA_FactSheet_Naloxone.pdf (last visited July 29, 2014).

82 *See* Burris et al., *supra* note 81, at 287; *see generally* Leo Beletsky et al., *Prevention of Fatal Opioid Overdose*, 308(18) J. AM. MED. ASS'N 1863, 1863–64 (2012).

early 1970s, "naloxone has been used safely and effectively for over forty years in ambulances and emergency rooms across the country."[83] Increasingly, naloxone is also available by prescription from a physician, through pharmacies working under collaborative practice agreements, and is distributed by community-based programs offering opioid overdose prevention services.[84] Naloxone distribution and education is a highly effective means of reducing overdose deaths.[85] According to the CDC, programs that have distributed naloxone to drug users, their family members, friends, and others who are likely to witness an overdose have logged at least 10,000 overdose reversals,[86] slashing overdose rates for entire participating communities.[87]

Despite the staggering and disproportionate toll of overdose on newly-released individuals, only a handful of programs in jails and prisons are distributing naloxone to inmates before they re-enter the community.[88] Given the small number and modest scale of these interventions, data evaluating their effectiveness is sparse. Initial results are highly promising, however. As of June 2011, Scotland's National Naloxone Program has distributed 'take-home' naloxone kits to all incarcerated individuals at risk of opioid related overdose upon release from prison.[89] The naloxone rescue kit is stored with the prisoner's personal belongings, until the individual collects them upon release.[90] In 2013, a significant decrease in the percentage of

83 Drug Policy Alliance, *supra* note 81, at 1.

84 Burris et al., *supra* note 81, at 277–78; Felice J. Freyer, *Rhode Island Makes Lifesaving Overdose Drug Easily Available*, Providence J. (Feb. 15, 2014), http://www.providencejournal.com/breaking-news/content/20140215-rhode-island-makes-lifesaving-overdose-drug-easily-available.ece.

85 *See* Burris et al., *supra* note 81, at 277, 287.

86 Ctrs. for Disease Control & Prevention, Community-Based Opioid Overdose Prevention Programs Providing Naloxone – United States, 2010 (2012), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6106a1.htm.

87 Alexander Walley et al., *Opioid Overdose Rates and Implementation of Overdose Education and Nasal Naloxone Distribution in Massachusetts: Interrupted Time Series Analysis*, 346 BMJ 1, 1–12 (2013).

88 *See* Green et al., *supra* note 47, at 4–6; *see also infra* notes 88-106 and accompanying text.

89 Info. Servs. Div., Nat'l Servs. Scot., National Naloxone Programme Sctoland – Naloxone Kits Issues in 2013/2014 and Trend in Opioid-Related Deaths 13 (2014), *available at* https://isdscotland.scot.nhs.uk/Health-Topics/Drugs-and-Alcohol-Misuse/Publications/2014-10-28/2014-10-28-Naloxone-Summary.pdf?12183779479.

90 *Id.*

opioid related deaths occurring within four weeks of prison release was observed (4.7%) compared to the 2006-10 baseline rate (9.8%).[91]

Though in the early stages of evaluation, the naloxone investigation (N-ALIVE) randomized trial in the United Kingdom involves assigning 56,000 incarcerated individuals to either receive a take-home supply of emergency naloxone upon release in conjunction with overdose education or to education alone.[92] Amongst the control group of 28,000 eligible ex-prisoners that receive naloxone, researchers expect to detect a 30% reduction in overdose deaths—from the anticipated 140 deaths during the first four weeks of release down to a lower level of just under 100 deaths.[93]

In view of this evidence, incorporation of overdose education, program referral, and naloxone distribution prior to release is a feasible and inexpensive intervention available to significantly reduce opioid overdose mortality risk among newly-released individuals. Especially given the paucity of treatment available behind bars, overdose education and naloxone access may in many jurisdictions represent the only opioid overdose intervention realistically available for this population. Nevertheless, at the time of writing, only a small number of programs in the United States—including those in New York's Erie County, New Mexico, San Francisco, Seattle, and Rhode Island—offer naloxone to incarcerated individuals upon release.[94]

As just one example, the goals of the San Francisco County Jail Naloxone Pilot[95] are to: 1) educate incarcerated individuals

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91 *Id.* at 3.

92 John Strang et al., *Take-Home Emergency Naloxone to Prevent Heroin Overdose Deaths after Prison Release: Rationale and Practicalities for the N-ALIVE Randomized Trial*, 90(5) J. OF URB. HEALTH 983, 991 (2013).

93 *Id.*

94 E-mail from Harm Reduction Coal. to author (Oct. 30, 2014, 12:46 EST) (on file with author); *see also* Lynn Arditi, *ACI Inmates Preparing to Re-Enter Society Learn How to Help Survive a Drug Overdose*, PROVIDENCE J., AUG. 6 2014, *available at* http://www.providencejournal.com/news/government/20140806-aci-inmates-preparing-to-re-enter-society-learn-how-to-help-survive-a-drug-overdose.ece (Rhode Island, San Francisco, Seattle, Kent offering naloxone kits to prisoners upon release).

95 The SF County Jail naloxone pilot is a collaboration between: 1) The Drug Overdose Prevention and Education (DOPE) Project, a program of the Harm Reduction Coalition with funding and support from the San Francisco Department of Public Health; 2) Jail Health Services (JHS), LHEAP Program (Linkage to Health Education and Prevention) with funding and support from the San Francisco Department of Public Health; and 3) Re-Entry Pod at CJ2, a program overseen by the San Francisco Adult Probation Department.

about to re-enter the community about the high risk of overdose; 2) offer the option of obtaining a naloxone kit in their property when they are released; 3) integrate overdose prevention into the wider array of services for substance using adults, including substance abuse treatment, STD testing, and linkage to care; and 4) decrease overdose mortality among people leaving jail and re-entering the community.[96] The naloxone is provided by a community organization (dispensed via standing order from the San Francisco Department of Public Health) and jail staff are trained by the organization to provide overdose prevention education.[97] Incarcerated individuals in participating housing units are visited monthly by trained staff and are called to participate within one month of their release date.[98] At that time, participants watch an informational video on overdose risk following release and can then opt to receive naloxone.[99] If he opts in, the prisoner meets with staff one-on-one to go over any questions, practice with a naloxone demonstration, and complete paperwork.[100] A naloxone kit is then placed in the incarcerated individuals' property.[101] Though not screened for overdose risk, of the 101 participants who have been eligible to receive naloxone thus far, an overwhelming majority (65%) opted to receive a kit.[102] It remains to be seen how many overdoses are reversed as a result of the pilot but, at the very least, it provides an opportunity for overdose education and access to naloxone that otherwise would not exist.

A number of programs provide overdose prevention education to incarcerated individuals in the United States without the accompanying naloxone distribution. Prevention Point Pittsburgh's (PPP) Overdose Prevention Project, for example, has offered one-hour training sessions for people who are incarcerated at the Allegheny County Jail in Allegheny County, Pennsylvania since 2003.[103] The

96 Draft Protocol of S.F. County Jail Naloxone Pilot from DOPE (Mar. 15, 2013) (on file with author).
97 S.F. County Jail Naloxone Pilot PowerPoint Presentation (on file with author).
98 *Id.*
99 *Id.* at 7.
100 *Id.*
101 *Id.*
102 *Id.* at 8.
103 Eliza Wheeler et al., *Guide to Developing and Managing Overdose Prevention and Take-Home Naloxone Products*, Harm Reduction Coal. 32 (2012), *available at* http://harmreduction.org/wp-content/uploads/2012/11/od-manual-final-links.pdf.

sessions are run by trainers from a local syringe exchange program and cover overdose risks, prevention, and instruction on rescue breathing.[104] Trainers provide literature on other issues like Hepatitis C and HIV, as well as information about cocaine and opioid overdose.[105] The trainings have been overwhelmingly well received, and many visitors at the city's syringe exchange program have said that they learned about its services from the "jail trainings."[106] In addition to serving as a model for overdose education in jail, PPP also provides a means of linking people who were formerly incarcerated to public health prevention organizations upon release—something that is understood to be a major gap in the re-entry process.[107]

Overdose prevention and naloxone distribution programs in jails and prisons provide incarcerated individuals with critical information such as their unique risk of overdose following release, how to recognize and respond to an overdose, and where to access naloxone if it is not provided by the program. Although evaluation of the US program impact is still preliminary, taken in concert with international data, evidence suggests that such initiatives will help save lives.

C. Overdose Prevention as Part of Comprehensive Re-Entry Support

Increasing access to MAT within incarceration settings and post-release, and overdose prevention services and education represent narrowly targeted interventions that are critical to reducing overdose risk among newly-released individuals. Given the multiple and complex challenges that characterize community reintegration, these interventions must be incorporated into a broader set of efforts to provide social support and services to this population.

The days and weeks following release can be chaotic, disorienting, and highly stressful.[108] Inadequate social support, disrupted networks, strained financial resources, and lack of access to healthcare coverage and medical and mental healthcare all contribute to the elevated risk of overdose.[109] Relapse after release

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104 *Id.* at 33.
105 *Id.*
106 *Id.* at 32.
107 *See, e.g.*, Rich et al., *supra* note 48, at 462–64.
108 *See* Binswanger et al. 2012, *supra* note 11, at 7.
109 *Id.*; *see also* Rich et al., *supra* note 48, at 465–66.

is particularly heightened by exposure and access to illicit substances in the environment to which recently released individuals return.[110]

Federal and state statutes and regulations bar those with criminal records from taking residence in public and subsidized housing.[111] Although a substantial proportion of individuals will reside with family, friends, or in their own home on the first night of release,[112] many have no other choice but to enter a shelter or "halfway house."[113] These institutions are often located in neighborhoods with a high concentration of illicit substance users, and may themselves house a population that is at higher risk of having substance use disorders.[114] Many of these institutions, however, have stringent policies regarding drug use, including curfews and prohibition of MAT enrollment in some cases.[115] Partly because it is difficult to secure beds in institutions designed to facilitate reentry, homelessness is a common fate for many formerly incarcerated.[116]

Criminal justice involved individuals are also at an elevated risk of unemployment. Lack of education and economic opportunity is both a cause and effect of incarceration.[117] Securing employment after serving a criminal conviction is especially difficult because most employers screen out applicants with a history of criminal justice involvement.[118]

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110 Binswanger et al. 2012, *supra* note 11, at 6.

111 *Criminal Offender Record Information*, Cmty. Res. Info. Inc. http://www.massresources.org/cori.html (last visited Mar. 10, 2014).

112 Christy Visher et al., *Life After Prison: Tracking the Experiences of Male Prisoners Returning to Chicago, Cleveland, and Houston*, Urban Inst. 3 (May 2010), http://www.urban.org/UploadedPDF/412100-life-after-prison.pdf.

113 *Id.* at 19.

114 *See* Binswanger et al. 2012, *supra* note 11, at 4.

115 *Legality of Denying Access to Medication Assisted Treatment in the Criminal Justice System*, Legal Action Ctr. 3–8 (Dec. 1, 2011) http://www.lac.org/doc_library/lac/publications/MAT_Report_FINAL_12-1-2011.pdf.

116 This is especially true of individuals listed on sex offender registries. *See* Joseph Goldstein, *Housing Restrictions Keep Sex Offenders in Prison Beyond Release Dates*, N.Y. Times, Aug. 21, 2014, at A18.

117 Lance Lochner & Enrico Moretti, *The Effect of Education on Crime: Evidence from Prison Inmates, Arrests, and Self-Reports*, 2003 American Economic Review 94(1), *available at* http://eml.berkeley.edu/~moretti/lm46.pdf.

118 Current efforts to outlaw this practice known as "ban the box" have been making some inroads, although this practice remains pervasive. *See generally Ban the Box*, Nat'l Empl. Law Project (2014), *http://www.nelp.org/page/-/SCLP/Ban-the-Box.Current.pdf?nocdn=1*.

Health care and other services that the individual may have received while behind bars are often times disrupted or terminated once the individual reenters society. Although access to evidence-based drug treatment in correctional settings is lacking, correctional custodians are constitutionally mandated to provide—and pay for—adequate medical and psychiatric care to all incarcerated persons. Upon re-entry, however, such care is usually interrupted because of several factors, including failure to effectively link newly released individuals to community-based services, lack of options for accessible providers, and suspension of health insurance benefits. Some of these gaps inevitably result from the need to attend to other, more urgent life priorities, like housing and employment.

Given the complicated and unsupported landscape to which many formerly incarcerated individuals return, specialized housing programs can serve as a supportive environment, providing a bridge to treatment, as well as comprehensive overdose prevention education and naloxone access programs.[119] While initiatives providing structural support and case management are successful among former incarcerated individuals in reducing the risk of substance use relapse,[120] access to such services is rare.

III. Motivating State Actors to Address Overdose Risk: Legal Options

In view of the highly-foreseeable risk of overdose among newly-released inmates, how can the legal system be used to motivate correctional settings to adopt simple and cost-effective risk reduction strategies? The authors did not find any case law directly addressing the question of whether state actors or institutions can be held liable for the overdose of a formerly incarcerated individual during the critical post-release period. To inform an analysis of potential claims, we turned to analogous case law concerning patients or incarcerated individuals who have brought tort claims of negligence or wrongful death against medical professionals, medical facilities, and state actors. Many courts hold mental health professionals liable for a patient's

119 F.A.C.E. (Freedom Advocates Celebrating Ex-Offenders) is a Maryland based group that exemplifies one model of comprehensive reentry support. *See* FREEDOM ADVOCATES CELEBRATING EX-OFFENDERS, http://http://www.facebaltimore.org/ (last visited Mar. 8, 2013).

120 *See* Binswanger et al. 2012, *supra* note 11, at 6.

self-harm or harm of a third party after the patient's release from professional care or institutional control, if that harm was reasonably foreseeable.[121] Though the cases are very fact-specific, courts have found that a duty of care attaches to a health care professional or state institution to prevent foreseeable harm by their patients or dependents, even post-release.[122]

As described above, prisons are acting as de-facto mental health care and custodial institutions in the U.S.[123] Yet, several formidable hurdles exist to the use of tort liability to hold health professionals and state officials accountable for the heightened overdose risk to incarcerated individuals upon release, including questions of causation and immunity for state actors. The following sections provide a general overview of the main principles of and challenges to holding state officials and health institutions accountable for harm that occurs to a patient[124] in the days and weeks after their discharge.

This section lays out a number of factors that a practitioner could consider in building a case under tort law for formerly incarcerated overdose victims, as well as the major obstacles that could be encountered in such suits. The subsequent section explores the types of claims that individuals could bring while still incarcerated, including constitutional and statutory claims at the federal and state level. These sections aim to highlight elements that may constitute the strongest case addressing post-release overdose harm, while also acknowledging the serious limitations to litigating this issue in the courts.

A. Common Law Tort Claims

1. Duty of Care: Imposing Liability on Custodians for Patients Post-Release

To establish a claim for negligence, a plaintiff must meet four elements: (1) a duty requiring the defendant to conform to a certain standard of care; (2) a failure on the defendant's part to meet

121 *See infra* notes 123-153 and accompanying text.
122 *See infra* notes 130-154 and accompanying text.
123 *See* Kuehn, *supra* note 8; *see also supra* notes 27-54 and accompanying text.
124 The authors primarily looked at cases of post-discharge harm to a third party by a patient or formerly incarcerated person because they present analogous scenarios; the cases are therefore distinguishable from accidental or intentional overdose death where no third party harm occurs.

that standard; (3) a reasonably close causal connection between the conduct and the resulting injury; and (4) actual injury.[125] Generally, the first issue a plaintiff bringing a negligence claim will encounter is that of whether a duty of care attaches under the circumstances.

One established predicate to liability in tort law is the existence of a "special relationship" between two parties, which imposes a duty of care on a party.[126] A "special relationship" includes that of a mental health professional to his/her patient or a custodian, such as a prison official to a prisoner.[127] The duty of care may require one person to take affirmative action to avoid foreseeable harm to the other, or to warn a third party of foreseeable harm.

The duty to warn was expounded by the California Supreme Court in *Tarasoff v. Regents of the University of California*, a seminal case holding that a special relationship existed between a psychotherapist and an outpatient; this imposed a duty on the health professional to act reasonably to protect foreseeable victims from harm by the patient.[128] In *Tarasoff*, the victim's parents brought a wrongful death claim against the defendant's therapist, who was employed at a university hospital, as well as the campus police and the university itself. Because the defendant confided in the therapist his intention to kill Tatiana Tarasoff, the court held that the therapist had a duty to warn the victim of the impending danger and that a claim for breach of this duty could be brought against the medical professional and the university as his employer.[129] The court stated: "When a therapist determines, or pursuant to the standards of his profession should

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125 Ontiveros v. Borak, 667 P.2d 200, 204 (Ariz. 1983) (citing WILLIAM L. PROSSER, HANDOOK OF THE LAW OF TORTS § 30, at 143 (4th ed. 1971)).

126 RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 41(a) (2012); *see* Mark A. Sessums & Robert S. Swaine, *Halfway Houses and Mental Health Treatment Facilities - Establishing Duty in Tort*, 77 FLA. B.J. 91, 91 (2003).

127 RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 41(b) (2012).

128 Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 342–43 (Cal. 1976).

129 *Id.* at 347–48. However, the court still barred the plaintiffs' claims on immunity grounds. The court held that California law protected public entities and their employees from liability for "'any injury resulting from determining in accordance with any applicable enactment … whether to confine a person for mental illness.'" *Id.* at 351. The court also held that the campus officers were entitled to immunity under a California law that declared, "'the professional person in charge of the facility providing 72-hour treatment and evaluation, his designee, and the peace officer responsible for the detainment of the person shall not be held civilly or criminally liable for any action by a person released at or before the end of 72 hours.'" *Id.* at 353 (italics omitted).

determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger."[130] Although the holding focused on a duty to warn third parties, the holding was later interpreted to also cover the duty to engage in other affirmative steps to protect potential victims when particular harm is foreseeable.[131]

Tarasoff and other case law have been integrated in the Restatement (Third) of Torts, which underscores the duty of health care professionals and their employers to protect patients under their care, as well as their foreseeable victims.[132] In the context of residential facilities, the special relationship between the institution and its patient creates an obligation for the facilities "to perform their duties such that the residents are not injured and those injured by negligent actions or inactions have recourse through an action for damages and a trial by jury."[133]

While there is no need for a patient to be "committed" or under the direct control of the health professional or facility for liability to attach,[134] the "mere fact of residency in a facility" at some point in time is not necessarily sufficient to establish a duty of care upon discharge.[135] In addition, whether the duty of care *requires* a medical professional to take action to hospitalize, commit, or

130 *Id.* at 340. Four years after this ruling, in *Thompson v. County of Alameda*, the court clarified that this duty to act only attaches to the "foreseeable and identifiable" victims of the health professional's patient. 614 P.2d 728, 734 (Cal. 1980).

131 *See generally* Peter F. Lake, *Revisiting* Tarasoff, 58 Alb. L. Rev. 97 (1994); Fillmore Buckner & Marvin Firestone, *"Where the Public Peril Begins" 25 Years After* Tarasoff, 21 J. Legal Med. 187, 200–04 (2000).

132 Restatement (Third) of Torts: Phys. & Emot. Harm § 41 cmt. (g) (2012) ("a health-care professional can pursue, and may have a statutory obligation to seek, involuntary commitment of patients who are dangerous to themselves or others").

133 Sessums & Swaine, *supra* note 126, at 93–94.

134 *See, e.g.*, Nova Univ., Inc., v. Wagner, 491 So. 2d 1116, 1118 (Fla. 1986) ("We merely hold that a facility in the business of taking charge of persons likely to harm others has an ordinary duty to exercise reasonable care in its operation to avoid foreseeable attacks by its charges upon third persons. If reasonable care is exercised, there can be no liability. The alternative, the exercise of no care or unreasonable lack of care, subjects the facility to liability"). Sessums & Swaine note that "[t]his is especially true when one who voluntarily assumes such a responsibility creates a grossly negligent policy, such as precluding the use by residents of prescribed antidepressants, and this policy causes a death." Sessums & Swaine, *supra* note 126, at 93.

135 Sessums & Swaine, *supra* note 126, at 91.

otherwise "order" an outpatient to comply with treatment is very much a function of the facts of a case and the foreseeability of harm. For example, a Florida court has held that a psychiatrist had no duty to involuntarily hospitalize a patient and was not negligently liable for the patient's attempted suicide.[136] However, a Nebraska court, relying on *Tarasoff*, found the relationship between a psychotherapist and his voluntary outpatient sufficient to impose an affirmative duty on the therapist to control the conduct of his patient for the protection of himself or those persons foreseeably endangered by the patient.[137] The Vermont Supreme Court broadly stated that "[w]hether or not there is actual control over an outpatient in a mental health clinic setting similar to that exercised over institutionalized patients, the relationship between a clinical therapist and his or her patient 'is sufficient to create a duty to exercise reasonable care to protect a potential victim of another's conduct.'"[138]

In the context of post-incarceration overdoses, it is necessary to review how the existence of a special relationship and the accompanying duty of care apply to a recently released individual's foreseeable injury.[139] Given the reality that incarceration settings serve as the nation's largest mental health care and commitment system,[140] a documented history of self-harm and mental health

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136 *See* Paddock v. Chacko, 522 So. 2d 410, 411–12, 414–15 (Fla. Dist. Ct. App. 1988). In this case, the psychiatrist did recommend hospitalization, but the recommendation was not followed by the plaintiff's father.

137 Lipari v. Sears, Roebuck & Co., 497 F. Supp. 185, 191, 193 (D. Neb. 1980) (third-party negligence claim brought against U.S. after a Veterans Administration outpatient shot and killed a woman in a crowded dining room).

138 Peck v. Counseling Serv. of Addison Cnty., Inc., 499 A.2d 422, 425 (Vt. 1985) (quoting Tarasoff, 551 P. 2d 334, 334 (Cal. 1976)); *see* 2 AM. JUR. PROOF OF FACTS 3d 327 *Psychotherapist's Liability For Failure To Protect Third Person* (originally published in 1988; updated Apr. 2014).

139 Courts and academics have already noted that such analysis arises when there is a custodian or supervisory relationship. *See* Schmelz v. Sheriff of Monroe Cnty., 624 So. 2d 298 (Fla. Dis. Ct. App. 1993) (jury question as to whether a sheriff was liable for the suicide of arrestee when the officer negligently performed suicide watch); Sessums & Swaine, *supra* note 126, at 92; *see also* Thomas L. Hafemeister et. al., *Parity at a Price: The Emerging Professional Liability of Mental Health Providers*, 50 SAN DIEGO L. REV. 29, 75 n.281 (2013).

140 *See* CASA, *supra* note 28 and accompanying text; *see also Nation's Jails Struggle with Mentally Ill Prisoners*, NPR: ALL THINGS CONSIDERED (Sept. 4, 2011, 2:53 PM), *available at* http://www.npr.org/2011/09/04/140167676/nations-jails-struggle-with-mentally-ill-prisoners ("More Americans receive mental health treatment in prisons and jails than in hospitals or treatment centers.

problems known to custodians can be sufficient to impose a duty of reasonable care for that patient-prisoner.[141] Perhaps most importantly, courts have applied liability for negligence to medical professionals in the case of outpatient death by overdose.[142]

Liability under tort law can apply to public entities, such as local governments, that take on mental health care, treatment, or custody functions (barring immunity claims, which are discussed below). A New York court recently found that where a county engages in the function of providing psychiatric care, it is held to the same duty of care as private institutions.[143] Further, the court held that though the county's duty may be more limited because the patient in the case was a voluntary outpatient, "[the county] nonetheless was bound to properly monitor [the outpatient] and take whatever reasonable steps were available to prevent her from harming others."[144] One scholar makes the case for this logic to apply to self-harm as well, noting that "[c]ourts frequently distinguish a duty to provide a generally safe environment from a duty to prevent a foreseeably dangerous individual's attacks. In the matter of self-inflicted injury, courts should do the same."[145]

In fact, the three largest inpatient psychiatric facilities in the country are jails: Los Angeles County Jail, Rikers Island Jail in New York City and Cook County Jail in Illinois").

141 Tatsch-Corbin v. Feathers, 561 F. Supp. 2d 538 (W.D. Pa. 2008).

142 *See* Kockelman v. Segal, 71 Cal. Rptr. 2d 552 (Ct. App. 1998) (finding that a psychiatrist owed a duty of care to an outpatient he was treating for depression and who committed suicide by overdose after 17 months of treatment).

143 Padula v. Cnty. of Tompkins, 756 N.Y.S. 2d 664, 665–66 (App. Div. 2003).

144 *Id.* at 666; *see also* Christiansen v. City of Tulsa, 332 F.3d 1270, 1280 (10th Cir. 2003) (holding that a government's failure to protect individual against harm caused by intervening factors generally does not violate due process, except when a special relationship exists, e.g., "when the state assumes control over an individual sufficient to trigger an affirmative duty to provide protection to that individual," or under the "danger creation" exception, which holds that a government "may also be liable for an individual's safety if it created the danger that harmed the individual" (internal citations omitted) (internal quotations omitted)).

145 Peter F. Lake, *Still Waiting: The Slow Evolution of the Law in Light of the Ongoing Student Suicide Crisis*, 34 J.C. & U.L. 253, 268 (2008) (proposing that the basic duty of care should apply in equal measure to a wider institutional context, such as universities; "courts should be careful to extrapolate from individual prevention intervention situations to general environmental intervention situations…. Although [an] individual heroin overdose was not foreseeable, self-inflicted injury by drugs, alcohol, or otherwise can be foreseen").

Given that most incarcerated individuals typically go through some form of a health assessment during the intake or booking process,[146] a court may find that a correctional institution has a duty of care after an individual overdose becomes foreseeable as a result of this screening. This is especially true if the individual exhibits or attests to symptoms or prior diagnosis of substance use disorder or other risk factors for post-release overdose. This duty may be heightened by other factors, including results of drug testing, continued non-medical drug use behind bars, or the prevalence of opioid analgesic prescription by the correctional health care system.[147]

Nevertheless, according to the established public duty doctrine, public institutions have a different duty than that imposed on private entities, rooted in the public services and balancing of interests that public entities undertake, as well as "the discretionary nature of the functions of planning and allocation of resources."[148] One important case on the duty of public entities is *Riss v. City of New York*,[149] which dealt with the question of municipal tort liability after Linda Riss sued the City of New York for failing to respond to her requests for police protection from an abusive former boyfriend who ultimately hired an attacker to maim her. Over a strong dissent, the court shielded the city from liability by finding no duty to provide police protection; however, the majority still found "quite distinguishable" those cases where "police authorities undertake responsibilities to particular members of the public and expose them, without adequate protection, to the risks which then materialize into actual losses."[150] Later cases recognized such an exception in cases of special relationships or the

146 *See supra* note 46 and accompanying text.

147 Dram shop liability theory could help boost claims based on provision of prescription medication or failure to stop non-medical drug use behind bars. *See, e.g.*, Michael E. Bronfin, *"Gram Shop" Liability: Holding Drug Dealers Civilly Liable for Injuries to Third Parties and Underage Purchasers*, 1994 U. CHI. LEGAL F. 345, 353–61 (1994) (using dram shop liability theory to propose a statute holding drug dealers civilly liable to innocent victim third parties and underage purchasers for injury arising from the dealer's sale of drugs; the author excludes adult drug users from the protection of this statute because dram shop law has often barred the recovery of intoxicated bar patrons that injure themselves, but the author notes that at least one court has "observed that drug addicts do not voluntarily purchase drugs and thus are not responsible for their injuries").

148 Pratt v. Robinson, 349 N.E.2d 849, 855 (N.Y. 1976); for an overview of the public duty doctrine, *see* COOLEY ON TORTS § 300 at 385 (4th ed.).

149 Riss v. City of New York, 22 N.Y.2d 579 (N.Y. 1968).

150 *Id.* at 583 (citing Schuster v. City of New York, 5 N.Y.2d 75 (1958)).

assumption of a duty plus a victim's reliance on that duty.[151] Although New York has outlined a very narrow and limited public duty rule,[152] other jurisdictions such as New Jersey and Louisiana more liberally apply a reasonable duty of care to public entities in cases where the negligent action is a ministerial, non-discretionary task.[153] This holds true even when there is no special relationship but simply a state-created danger from which a victim's harm arose.[154] The Supreme Court of New Hampshire has gone so far as to discard the "special duty/special relationship test" and public duty rule to determine municipal liability, finding it an impermissible abrogation of common law municipal immunity, and instead adhering to traditional elements of negligence law, citing various other jurisdictions that have done the same.[155]

The fact that many formerly incarcerated individuals remain under parole or other forms of community supervision can strengthen a finding of a duty of care because the state maintains formal control over many aspects of the individual's behavior post-release, including whether or not the parolee or probationer can access MAT in the

151 These principles can be seen in 911 caller cases like De Long v. County of Erie, 457 N.E.2d 717 (N.Y. 1983) (finding an assumption of a duty to respond with due care to a victim's call for help when a 911 operator assured the victim that help would be sent "right away") and Merced v. City of New York, 551 N.E.2d 589 (N.Y. 1990) (assumption of duty of care *and* reliance by the 911 caller is required to establish the custodial relationship). *See also* Muthukumarana v. Montgomery Cnty., 805 A.2d 372 (Md. 2002) (the person at risk, rather than a third party, must have a special relationship with the governmental actor).

152 *See* Michael G. Bersani, *The "Governmental Function Immunity" Defense in Personal Injury Cases in the Post-*McLean *World*, N.Y. St. B.J., June 2013, at 37 (discussing McLean v. City of N.Y., 12 N.Y.3d 194 (2009), which held that "*discretionary* municipal acts may *never* be a basis for liability, while *ministerial* municipal acts may support liability only where a *special duty* is found." *Id.* at 202. (emphasis added)).

153 *See* Reis v. Del. River Port Auth., 2008 WL 425522 (N.J. App. 2008) (city could be held liable for 911 dispatcher's negligence in failing to carry out the required "ministerial function" of entering information on victim's abduction and victim was subsequently murdered). Further explanation of ministerial duties versus discretionary actions is found in the governmental immunity section below.

154 *See* Persilver v. La. Dep't of Transp., 592 So. 2d 1344, 1347 n.2 (La. Ct. App. 1991) (finding old public duty jurisprudence legislatively overruled by a state immunity statute and deciding the issue of the duty owed to the intoxicated and later injured motorist under "the traditional risk-duty analysis").

155 Doucette v. Town of Bristol, 635 A.2d 1387, 1390–91 (N.H. 1993).

community.[156] In addition to this control, the correctional system is also best-situated to intervene with risk-reduction measures through the community supervision framework. In other words, the state continues to play an active, quasi-custodial role after the discharge of a prisoner and may directly influence his or her overdose risk as a result of its policies, which strengthens its duty to prevent foreseeable harm. To the extent that post-release drug use may be tied to drug use during incarceration (either in issuing opioid analgesics for medical use or preventing non-medical opioid use), dram shop liability theory may also strengthen such a claim.[157]

Finally, a key element for determining liability in negligence is the customary standard of care against which a professional or institution is held. Since the kinds of programs that can prevent overdoses post-release are not currently the community standard, it will be challenging to hold institutions liable under a theory of negligence. Some form of malfeasance on the part of the correctional institution – for instance, where an institution or its officers (e.g. guards) facilitates drug use in the prison that later results in the overdose may support the imposition of a duty of care because the institution's actions or omissions actively caused the harm.[158]

2. *Challenges of Causation and Intervening Illegal Conduct*

Establishing the causal link between the acts (or omissions) of a medical professional or custodial institution and the post-release death of a patient or formerly incarcerated person is also subject to challenges. Generally, a plaintiff must prove that it would be "more probable than not" that the harm was the result of the caregiver's negligence, rather than a "preexisting condition."[159] To establish a causal connection, the law generally requires a "reasonable degree

156 *See* Glaze & Park, *supra* note 18; *see also* Jason Cherkis & Ryan Grim [Kentucky Sued In Federal Court Over Drug Treatment Practices] HUFFINGTON POST, http://www.huffingtonpost.com/2015/03/10/kentucky-sued_n_6842772.html?utm_hp_ref=tw (last accessed Mar. 11, 2015) (explaining that Kentucky is among the states that ban the use of MAT for certain classes of individuals under community supervision—a policy rationale rooted in an "abstinence" model of substance use treatment).

157 *See, e.g.*, Bronfin, *supra* note 147.

158 *See* Bersani, *supra* note 152, at 41 n.37.

159 Dickhoff *ex rel.* Dickhoff v. Green, 836 N.W.2d 321, 333 (Minn. 2013), *reh'g denied* (Sept. 9, 2013) ("Under traditional principles of tort causation, a plaintiff is required to prove that it is 'more probable than not' that the harm resulted

of medical certainty" or "reasonable probability" – i.e., more than "guesswork or speculation" – that the breach of the duty of care more likely than not was the cause of the patient's injury.[160] In addition, an individual who is the immediate cause of his injury may be intervening conduct sufficient to break the chain of causation.[161]

Aside from linking the harm to the institutional actor, the likelihood of the event does not necessarily place that risk within the *scope* of duty of a medical professional or institutional custodian. For example, a Louisiana court found that a hospital's release of a schizophrenic patient with his car keys was not the proximate cause of an accident 48 hours later resulting in the death of a third party.[162] The release of the patient with his keys was "too remote in the chain of causation" because the hospital could not know that the outpatient would subsequently "intoxicate himself, get in his car, drive recklessly and cause the death of the victim."[163] In other words, the "probability of a possibility" is not sufficient to show that the discharge of a patient fell below a customary standard of care.[164]

Additionally, medical professionals and institutional actors can use the affirmative defenses of intervening illegal acts or contributory negligence to limit the success of a claim of negligence or other tortious activity.[165] Courts have found that an intervening

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from the physician's negligence as opposed to the preexisting condition") (citing Leubner v. Sterner, 493 N.W.2d 119, 122 (Minn. 1991)).

160 Asher v. OB-Gyn Specialists, P.C., 846 N.W.2d 492, 501 (Iowa 2014); *see, e.g.*, Cannon v. Jeffries, 551 S.E.2d 777, 779 (Ga. App. 2001) ("Although it is not necessary for the plaintiff's experts to use the magic words 'reasonable degree of medical certainty' in describing the decedent's prospect of survival with appropriate treatment, such prospect must be more than a mere chance or speculation." (citing Anthony v. Chambless, 500 S.E.2d 402, 404 (Ga. App. 1998))); Ellis v. United States, 673 F.3d 367, 373 (5th Cir. 2012) (applying Texas law).

161 *See infra* notes 162-66 and accompanying text.

162 Jones v. Gaines, 978 So. 2d 522, 533–34 (La. Ct. App. 2008), *writ denied*, 983 So. 2d 1273 (La. 2008).

163 *Id.*

164 *See* Thompson v. Patton, 6 So.3d 1129, 1134–37 (Ala. 2008) (in wrongful death action, evidence was insufficient to find that physician who allegedly prematurely released a patient from a medical center proximately caused suicide of a patient; expert testimony that the likelihood of suicide would have decreased had the patient been hospitalized did not establish proximate cause to patient's death).

165 *See* Restatement (Third) of Torts: Phys. & Emot. Harm § 34, cmt. (b) (intervening illegal acts) & §29, cmt.(s) (contributory negligence) (2010).

illegal act may supersede an original cause of harm in cases looking at criminal third party actions after the original breach of duty and before the ultimate injury.[166] To be considered a "supervening" cause, however, an intervening act that causes harm must generally be: "(1) independent of the original negligent act; (2) adequate by itself to bring about the injury; and (3) not reasonably foreseeable."[167] The third element is key: an intervening intentional tort or crime does not necessarily constitute a superseding cause if it is readily foreseeable. Therefore, "the proper focus is not on the criminal nature of the negligent act, but instead on whether the act was so extraordinary as not to be reasonably foreseeable."[168] Insofar as the correctional institution and its staff are informed about the risk factors for overdose post-release, a case may still turn on whether an overdose by a formerly incarcerated individual in the weeks after discharge is reasonably foreseeable.

The law has also recognized that each person has a duty of self-care and that the defense of contributory negligence can cut off a medical professional's liability.[169] Thus, an individual's drug consumption, especially if used non-medically, between the time in custody and the resulting harm or death, may extinguish or diminish professional or institutional liability. One limit to the use of this defense is when an intervening act is itself the foreseeable harm that shapes a defendant's duty, such that a defendant who fails to guard against the act will not be relieved from liability when the act occurs.[170] Once again, courts will determine the limitations of

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166 *See, e.g.*, Sergent v. City of Charleston, 549 S.E.2d 311, 320 (W. Va. 2001); *see also* Gaines-Tabb v. ICI Explosives, USA, Inc., 160 F.3d 613, 620 (10th Cir. 1998) (under Oklahoma law, "when the intervening act is intentionally tortious or criminal, it is more likely to be considered independent" of the original negligent act).

167 *Gaines-Tabb*, 160 F.3d at 620.

168 57A AM. JUR. 2d *Negligence* § 631 ((citing Powell v. Drumheller, 653 A.2d 619, 624 (Pa. 1995)).

169 *See* Hobart v. Shin, 705 N.E.2d 907 (Ill. 1998) (holding physician was entitled to raise contributory negligence of patient as a defense in a wrongful death suit brought by estate of patient who committed suicide while under physician's treatment for mental health).

170 *See* Weathers v. Pilkinton, 754 S.W.2d 75, 78 (Tenn. Ct. App. 1988) (holding that an outpatient's suicide was not an intervening independent cause because the physician-defendant did not involuntarily commit the patient, despite three recent suicide attempts, instead releasing on a recommendation to seek treatment at a prior clinic; the court also found that the physician owed a

liability on a case-by-case basis, but the strongest case will be one in which there is evidence of institutional malfeasance and a negligent institutional policy or misconduct in the carrying out of institutional policies.

3. Litigation Barriers

In addition to proving the existence of a duty of care, making a causal link between institutional actions or omissions and overdose, and demonstrating the foreseeability of the resulting harm, immunity limits on the liability of governmental actors and entities will also constrain successful tort claims. As one court put it, the finding of a special relationship and accompanying duty of care is "the threshold to a discussion of government immunity."[171] State tort claims acts – correlates to public duty limitations – could present an impediment to holding governmental entities responsible for overdose deaths that closely follow release from a correctional setting.

A recent case out of California demonstrates how state tort claims acts can cut off the liability of governmental actors. In *Lum v. County of San Joaquin*, the decedent inmate had been "under psychiatric care for a bipolar disorder" and had a "history of psychotic episodes" that had resulted in hospitalization several times.[172] The day of the decedent's death, he had been walking around apparently hallucinating and was off of his normal medication.[173] Police officers arrested the decedent for being "under the influence in public," despite no evidence of alcohol use and knowledge that the decedent was on medication for bipolar disorder. The decedent was released from jail six hours later, without medical attention and "without successful family notification, transportation, money, phone, or shoes;"[174] he drowned accidentally in the hours following his release. His family

specific duty of care to take adequate precautions to protect the patient from foreseeable self-harm where the patient was not a rational or "responsible human agency").

171 Lum v. Cnty. of San Joaquin, 756 F. Supp. 2d 1243, 1256 (E.D. Cal. 2010); *see, e.g.*, Poss v. Georgia Reg'l Hosp. of Augusta, Ga., 676 F. Supp. 258 (S.D. Ga. 1987), *aff'd without published opinion*, 874 F.2d 820 (11th Cir. 1989) (immunity under Ga. Code Ann. § 37–3–4, for doctors, attorneys, peace officers, and health officials who discharged a patient, who later overdosed, in good faith).

172 *Lum*, 756 F. Supp. 2d at 1246.

173 *Id.* at 1246–47.

174 *Id.* at 1247.

sued the County of San Joaquin, the City of Lathrop, and multiple city and county employees under several claims, including a claim of wrongful death alleging negligence on the part of the officers for releasing the decedent under the circumstances.

The court first found that a special relationship was created when the arresting officers took the decedent into custody, pointing out that there is a "well-established special relationship between jailers and prisoners that is equally applicable to officers of the law who take arrestees into custody," which established a duty of care.[175] The court also noted that it was "reasonably foreseeable that an arrestee who is in need of medical attention would be at risk in a custodial environment or upon release into a situation made dangerous by his medical condition, or without first having received proper medical attention."[176]

The court then reviewed several sections of the California Tort Claims Act related to the liability of public entities and employees for the release of prisoners to determine if the county, city, and arresting officers were in fact entitled to immunity.[177] The court noted that though state actors had immunity as to *basic decisions* to release a

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175 *Id.* at 1254.

176 *Id.* at 1255. As to the vulnerability of prisoners in the correctional environment, the court said that "[b]oth prisoners and arrestees are equally vulnerable and dependent on officers and jailers for safety and security. 'Prisoners are vulnerable. And dependent. Moreover, the relationship between them is protective by nature, such that the jailer has control over the prisoner, *who is deprived of the normal opportunity to protect himself*.' In this case, the purpose of arresting decedent, who was 'just off of his meds,' on a 'kickout' charge, was at least partially for decedent's own self protection, making the restraint used by the arresting officers just as 'protective in nature' as the custodial relationship that exists between jailer and prisoner." *Lum*, 756 F. Supp. 2d at 1255 (citation omitted) (quoting Giraldo v. Cal. Dep't of Corr. & Rehab., 85 Cal. Rptr. 371, 385-86 (Cal. Ct. App. 2008)).

177 The court held that Cal. Gov. Code § 845.8(a), which provides, in part, "[n] either a public entity nor a public employee is liable for: (a) Any injury resulting from determining whether to parole or release a prisoner or from determining the terms and conditions of his parole or release or from determining whether to revoke his parole or release," did not bar liability because the decedent was not a prisoner and because the provision does not provide absolute immunity. *Lum*, 756 F. Supp. 2d at 1255–56. The court also rejected immunity under § 846 (immunity for "failure to retain an arrested person in custody") as inapposite and § 855.6 (immunity for "failure to make a physical or mental examination") as not extending "to a situation where the defendant fails to provide medical care for a prisoner in obvious need of such care." *Id.* at 1256–57.

prisoner or arrestee, they would not have immunity for *ministerial acts* carrying out the decision to release.[178] The court also found that Cal. Gov. Code § 855.8(a), which provides immunity for a public entity's "diagnosing or failing to diagnose that a person is afflicted with mental illness or addiction or from failing to prescribe for mental illness or addiction," did immunize the officer's "failure to diagnose," but not their failure to render medical attention to the decedent, who had suffered a seizure while in holding and was in "obvious need of medical care."[179]

This case illustrates the structure of qualified immunity for harm to individuals formerly within their care: that a public official or entity's discretionary decisions made during custody and as to discharge are often immune under state tort claims acts, but that "careless or wrongful behavior subsequent to a decision respecting confinement" is not protected by immunity laws and liability for ministerial-operational negligence is often a question of fact for the jury.[180] The Michigan Supreme Court explained the fact-specific nature of the inquiry: "Many individuals are given some measure of discretionary authority in order to perform their duties effectively. To determine the existence and scope of immunity from tort liability in a particular situation, the specific acts complained of, rather than the general nature of the activity, must be examined. The ultimate goal is to afford the officer, employee, or agent enough freedom to decide the best method of carrying out his or her duties, while ensuring that the goal is realized in a conscientious manner."[181] In applying these principles of limited immunity, a Michigan court found that two psychiatrists, a psychologist, and a social worker who treated a schizophrenic patient at a psychiatric hospital prior to the patient's discharge and subsequent death by a drug overdose could

178 The court explained, "there is an important distinction between basic or discretionary decisions on the one hand and ministerial decisions implementing the basic decision on the other hand. That is, actions implementing the basic policy decision are outside the scope of the immunity." *Lum*, 756 F. Supp. 2d at 1256; Johnson v. Cnty. of L.A., 191 Cal. Rptr. 704, 714-15 (Ct. App. 1983) (addressing same principles under several sections of the California Tort Claims Act).

179 *Id.* at 1257-58.

180 Tarasoff v. Regents of Univ. of Cal., 551 P. 2d 334, 352-53 (Cal. 1976); *see Johnson*, 143 Cal. Rptr. at 714-15..

181 Ross v. Consumers Power Co., 363 N.W. 2d 641, 668 (Mich. 1984), *superseded by statute*, MICH. COMP. LAWS ANN. § 691.1407.

be held individually liable for failing to follow procedures *after* the discretionary decisions to discharge the patient were made.[182]

An attempt to attach tort liability to post-release overdoses would likely have the best chance of success if the duty could be established (through a special relationship/special duty or implied public policy via a statute),[183] the harm is foreseeable (the deceased individual was known to suffer from opioid dependency – knowledge gained from medical screenings, institutional intake, and other institutional examinations and observations, – and stated or implied intention to engage in opioid abuse upon release), and the customary standard of care was breached (the incarcerated person had not been given the proper treatment and support services while in custody, in violation of formal policies or other stated standards, policies, or procedures).

In sum, the strongest torts claim will have elements of timing (proximity to release), continuing supervision, reasonably foreseeable risk (from health screenings, intakes, and observations in custody), a showing of particularized harm to the plaintiff or plaintiff class, knowledge of drug use while in custody, and a failure to intervene that substantially contributes to the harm, ideally to a point of malfeasance on the institution's part. Even with all of these elements, depending on the jurisdiction, individual litigants or mass tort suits may face considerable barriers, such as the public duty doctrine, the lack of a customary standard of care, intervening acts that break the chain of causation, and governmental immunity.[184] Other constitutional and statutory claims may be available to a litigant outside of traditional tort claims and the following section will briefly address the relative strength of those claims, including those that may be brought under the Federal Tort Claims Act.

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182 Brown v. Northville Reg'l Psychiatric Hosp., 395 N.W.2d 18, 22–23 (Mich. Ct. App. 1986) ("For example, if the decision is made to discharge a patient with medication, a subsequent discharge without medication is a ministerial act which is not protected by governmental immunity").

183 *See* Gipson v. Kasey, 150 P. 3d 228, 232 (Az. 2007) (holding that public policy in Arizona statutes prohibiting the distribution of prescription drugs to a unauthorized parties created a duty of care when a defendant provided narcotic pills to a coworker, who then supplied them to her boyfriend for recreational use and the boyfriend later died from the toxic combination of alcohol and narcotic pills).

184 Class action barriers are discussed *infra*, notes 242-45 and accompanying text.

B. Constitutional and Statutory Theories

In addition to individual or mass tort actions, advocates may motivate change within correctional systems through lawsuits based on constitutional or statutory provisions. This section will discuss theories available under federal and state constitutions, as well as federal statutes such as federal civil rights legislation and its state analogs.

1. Federal Constitution

Claims for injury or wrongful death could conceivably be made under the Eighth and Fourteenth Amendments and civil rights laws, but these theories only apply while individuals remain incarcerated.[185] Claims under these provisions require demonstration of an intentional action or omission in view of the incarcerated individual's suffering or apparent medical need.[186] These legal remedies have been used to impose liability on prison officials for failure to prevent overdoses experienced behind bars.[187] Some advocates contend that the state bears a "carceral burden" to provide care for individuals who, on account of being incarcerated, are "wholly dependent on the state for the means of their survival and deeply vulnerable to harm."[188]

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185 U.S. Const. amend. VIII, XIV.

186 *See, e.g.*, Cramer v. Iverson, CIV. 07-725(DWF/SRN), 2008 WL 4838715 (D. Minn. Nov. 5, 2008) (stating that "even if such allegations could suffice to state a claim for negligence, such claims are not redressable under the Eighth Amendment").

187 In action by survivors of man arrested after automobile accident for drunk driving who overdosed on barbiturates and who died because he did not receive medical treatment for overdose, of which officials were not aware, though they knew him to be unconscious, and who would have lived except for officials' failure to transport him to hospital in accordance with written policy for treatment of unconscious prisoners, survivors could recover against government where unwritten policy was shown to be that officials ignored written policy. Such indifference to medical needs violated decedent's Eighth Amendment rights and action was therefore cognizable under § 1983, and attorneys fees were available under § 1988. Garcia v. Salt Lake Cnty., 768 F.2d 303 (10th Cir. 1985).

188 Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. Rev. 881, 891, 913 (2009). Dolovich explains, "The state, when it puts people in prison, places them in potentially dangerous conditions while depriving them of the capacity to provide for their own care and protection. The state therefore has an affirmative obligation to protect prisoners from serious physical and

Nevertheless, even in the circumstances when the victim remained in custody and under supervision of the correctional personnel, most courts have refused to impose liability in absence of intentional, deliberate or egregiously negligent conduct.[189] Therefore, claims involving ex-prisoner post-incarceration overdose on Eighth Amendment grounds face substantial hurdles, as discussed below.

To the extent that the provision of effective drug treatment and overdose education services is protective against post-incarceration overdose, an analysis of legal measures to improve access to such services is relevant. To gain access to evidence-based treatment behind bars, incarcerated individuals could bring claims under Section 1983 of the Civil Rights Act for violations of the

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psychological harm. This obligation, which amounts to an ongoing duty to provide for prisoners' basic human needs, may be understood as *the state's carceral burden*." *Id.* at 891 (emphasis in original). Dolovich notes that prisons provide and control the medical care that prisoners have access to, regardless of the outside resources a prisoner may have at his disposal. *Id.* at 912–13, n.124. She goes further in detailing the harm brought by incarceration: "But the state, by incarcerating, does not only deprive offenders of the capacity to provide for their own needs. It also compels them to remain under affirmatively dangerous circumstances, thus making them vulnerable to serious harms arising from the incarceration itself." *Id.* at 915. This understanding of harm applies not only in the context of the Eighth Amendment, but also in tort claims against state institutions by overdose victims and their survivors. *See supra*, Section IIIA1 ("Duty of Care"). In fact, Dolovich argues that the application of a heightened negligence standard in Eighth Amendment cases best protects prisoners from violations of their health and safety. Dolovich supra, at 948–54.

189 *See* Reynosa v. Schultz, 282 Fed. App'x. 386, 389–90 (6th Cir. 2008) (incarcerated individual suffered no adverse consequences as a result of any delay in medical treatment for an overdose of pain medication attributable to a correctional officer's actions, nor did the officer have the requisite culpable intent to support any claim of an Eighth Amendment violation in the individual's § 1983 suit; the officer's actions resulted in the incarcerated person receiving prompt medical attention; *see also* Estate of Crouch v. Madison Cnty., 682 F. Supp. 2d 862, 871–77 (S.D. Ind. 2010) (incarcerated individual did not show signs of an objectively serious need for medical attention prior to 3:00 a.m. on the day of his death from a drug overdose, at which time he was found unresponsive, thus defeating a § 1983 claim that corrections officers were deliberately indifferent to the incarcerated person's serious medical needs in violation of the Eighth Amendment; while a resident testified that he saw the person's eyes rolling around in different directions and another resident testified that bubbles or foam were at one point coming out of the incarcerated person's nose, there was no indication that the officers were made aware of those observations).

Eighth and Fourteenth Amendments.[190] The Eight Amendment requires that prisons provide adequate medical treatment to incarcerated individuals,[191] and applies to state facilities through the Fourteenth Amendment.[192] The Supreme Court has stated that the "treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment."[193] An individual states a cognizable claim under the Eighth Amendment by alleging that a prison official acted with "deliberate indifference to serious medical needs;" when this indifference offends "evolving standards of decency," the inaction violates the Eighth Amendment.[194] Given the serious and potentially life-threatening physical and mental symptoms associated with substance use disorders, especially in the context of withdrawal, the Eighth Amendment may be an appropriate vehicle for arguing that affected individuals are entitled to treatment while incarcerated.[195] Further, the Supreme Court has stated that the protections of the Eighth Amendment encompass both present and likely *future* health harm and suffering.[196]

To establish liability under the Eighth Amendment framework, a plaintiff must first demonstrate that his substance use disorder constitutes a "serious medical need" and that officials showed "deliberate indifference" in addressing that need.[197] Courts have defined a "serious medical need" as one "diagnosed by a physician as requiring treatment or one that is so obvious that a lay person would easily recognize the necessity for a doctor's attention."[198] In several cases, courts have recognized that opioid

190 *See* 42 U.S.C. § 1983.
191 Estelle v. Gamble, 429 U.S. 97, 103 (1976).
192 Wilson v. Seiter, 501 U.S. 294, 296–97 (1991).
193 Helling v. McKinney, 509 U.S. 25, 31 (1993).
194 *Estelle*, 429 U.S. at 106.
195 For a detailed discussion of this theory, see David Lebowitz, *Proper Subjects for Medical Treatment? Addiction, Prison-Based Treatment, and the Eighth Amendment*, 14 DePaul J. Health Care L. 271, 288 (2012).
196 *Helling*, 509 U.S. at 33–34 (allowing an inmate to mount an Eighth Amendment violation claim alleging future harm from second-hand smoke); *see also* Cherkis & Grim, *supra* note 156 (covering equal protection-based litigation challenging restrictions on MAT recently initiated in Kentucky).
197 *Estelle*, 429 U.S. at 106; Brock v. Wright, 315 F.3d 158, 162 (2d Cir. 2003); Hill v. DeKalb Reg'l Youth Detention Ctr., 40 F.3d 1176, 1187 (11th Cir. 1994).
198 Monmouth Cnty. Corr. Inst'l. Inmates v. Lanzaro, 834 F.2d 326, 347 (3d Cir. 1987).

withdrawal is a serious medical need.[199]

Once a serious medical need is established, a plaintiff must also demonstrate "deliberate indifference" on the part of prison officials. To do so, a plaintiff must show that he was objectively at risk of serious harm on account of his medical condition or need and that prison officials subjectively knew of and disregarded this risk.[200] To access the liability of future harm under *Helling v. McKinney*, [201] the litigant should also be prepared to show that concrete measures that include MAT and pre-release prevention activities are crucial to averting such future harm or death as a result of overdose.

Plaintiffs have had mixed results in bringing claims against prison officials for inadequate drug treatment of withdrawal symptoms; the results are highly contingent on the facts in each case. In several instances, courts have held that plaintiffs could state a constitutional violation where correctional personnel disregarded serious signs of distress in individuals withdrawing from opioids or methadone. For example, in *Foelker v. Outagamie County*, the Seventh Circuit found that the conduct of jail personnel could constitute "deliberate indifference" where an individual's withdrawal symptoms went untreated for three days, despite the personnel's observations that the individual was confused, disoriented, was experiencing auditory hallucinations, and had defecated on himself.[202] On the third day, the individual was given thiamine, a medication used for alcohol withdrawal, but in the court's assessment this course of treatment was insufficient.[203]

In *Davis v. Carter*, the same court examined similar facts. In *Davis*, an individual receiving MAT at the time of his arrest was incarcerated and not provided with methadone in spite of his requests.[204] He subsequently died of a brain aneurysm apparently

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199 *See, e.g.*, Quatroy v. Jefferson Parish Sheriff's Office, 2009 WL 1380196, at *9 (E.D. La., May 14, 2009); Foelker v. Outagamie Cnty., 394 F.3d 510, 513 (7th Cir. 2005); Sylvester v. City of Newark, 120 Fed. App'x. 419, 423 (3d Cir. 2005); Gonzales v. Cecil Cnty., Md., 221 F. Supp. 2d 611, 616 (D. Md. 2002).

200 Benshoof v. Layton, 351 F. App'x. 274, 277 (10th Cir. 2009) (citing Farmer v. Brennan, 511 U.S. 825, 834, 837 (1994)); *see also* Bradley v. Puckett¸ 157 F.3d 1022, 1025 (5th Cir. 1998).

201 Helling v. McKinney, 509 U.S. 25, 33–34 (1993).

202 *Foelker*, 394 F.3d at 513.

203 *Id.* at 512.

204 Davis v. Carter, 452 F.3d 686, 688 (7th Cir. 2006).

unrelated to his methadone treatment.[205] The court found that the jail personnel had observed his withdrawal symptoms, that they were severe, and that he nonetheless did not receive treatment.[206] The court held that a jury might determine that those facts supported a finding of deliberate indifference by the county and remanded the case.[207] In preceding cases, several courts have reached similar conclusions to those in *Foelker* and *Davis*.[208] Conversely, other courts have also found that plaintiffs did not raise a question of whether correctional personnel acted with "deliberate indifference" where facilities substituted medications in place of methadone;[209] as far as we are aware, no litigant has yet made a claim implicating failure to provide adequate overdose education and naloxone distribution services.

In light of these diverging canons, plaintiffs bringing claims for Eighth Amendment violations on the basis of failure to provide adequate drug treatment and overdose prevention while in custody would be more likely to prevail on their claims where no intervention or education whatsoever was provided. Courts appear more inclined to dismiss claims where some service is provided, including

205 *Id.*

206 *Id.* at 689.

207 *Davis,* 452 F.3d at 696.

208 *See* Norris v. Frame, 585 F. 2d 1183 (3d Cir. 1978); U.S. ex rel. Walker v. Fayette Cnty., 599 F.2d 573, 574 (3d Cir. 1979) (per curiam); Messina v. Mazzeo, 854 F. Supp. 116, 116 (E.D.N.Y. 1994).

209 *See, e.g.*, Holly v. Rapone, 476 F. Supp. 226, 229–31 (E.D.Pa. 1979) (court found there was no showing of deliberate indifference where the plaintiff addicted to heroin was unable to post bond and was told that methadone was not available at the prison correctional facility. In spite of severe symptoms of withdrawal, including vomiting, body pain, and confusion, he was taken to the prison corrections hospital and given medications ill-suited to address opioid withdrawal, including Mylanta and Vistaril. The case was dismissed on the basis that "plaintiff's allegations have not approached the repugnancy of those acts prescribed by the Eighth Amendment"); Boyett v. Cnty. of Washington, No. 2:04CV1173, 2006 WL 3422104, at *27 (D. Utah Nov. 28, 2006) *aff'd*, 282 F. App'x 667, 674 (10th Cir. 2008) (finding no Eighth Amendment violation where decedent received Clonidine to treat his withdrawal from methadone and stating that "[plaintiffs' decedent] had no constitutional right to Methadone treatment"); McNamara v. Lantz, 3:06-CV-93 (PCD), 2008 WL 4277790 (D. Conn. Sept. 16, 2008) (finding no Eighth Amendment violation where the plaintiff received substitute medication for methadone).

medications meant to be substitutions for methadone or other MAT medications.[210]

2. State Constitutions

State constitutions may afford individuals greater protections than the federal constitution, and in such circumstances, may provide more additional grounds for compelling prisons and jails to provide treatment to incarcerated individuals. It is beyond the scope of this article to provide an overview of all fifty state constitutions, but we use Massachusetts and New York as illustrative examples.

A review of case law in both Massachusetts and New York revealed that most cases brought in state court assert Eighth Amendment violations as applied to the states through the Fourteenth Amendment. Cases brought under state provisions[211] fared similarly to those brought under the Eighth Amendment.[212]

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210 *See, e.g.*, Cramer v. Iverson, No. CIV. 07-725(DWF/SRN), 2008 WL 4838715 (D. Minn. Nov. 5, 2008) ("[T]he Eighth Amendment does not guarantee prisoners 'unqualified access to health care'") (quoting Dulany v. Carnahan, 132 F.3d 1234, 1239 (8th Cir. 1997) (quoting Hudson v. McMillian, 503 U.S. 1, 9 (1992)).

211 See Article 26 of the Massachusetts Declaration of Rights and Article 1, § 5 of the New York Constitution, both of which protect against cruel and unusual punishment.

212 *See, e.g.*, Smith v. Maloney, 996210, 2001 WL 755849, n.29 (Mass. Super. Apr. 3, 2001) (finding no Eighth Amendment or Article 26 violation where the plaintiff contested his course of medical treatment and stating that "Claims of medical malpractice do not rise to the level of cruel and unusual punishment merely because the victim is a prisoner, [] and courts are reluctant to find deliberate indifference to a serious need where the dispute concerns the choice of a certain course of treatment"); Ladetto v. Comm'r of Corr., 385 N.E.2d 273, 275 (Mass. App. Ct. 1979) (court flatly refused to rule that an individual was entitled to be transferred to a facility that offered a drug rehabilitation program and declined to extend the reasoning of *Estelle v. Gambl*e, stating that there is no "constitutional right to treatment to help [the incarcerated individual] overcome drug addiction." However, the court based this ruling on the fact that the plaintiff failed to allege "any drug related physical ailments that have risen to the level of 'serious medical needs' to which the prison authorities have been deliberately indifferent." Given the advances in the science of addiction and its treatment that have occurred since this case was decided, it is possible that that a well-pleaded complaint could demonstrate the serious medical need calling for MAT. However, if any substitute treatment were provided, the court may not find an Article 26 violation); People *ex rel*. Sandson v. Duncan, 761 N.Y.S.2d 379, 381 (2003) (finding no deliberate indifference where prison did

State courts appear equally reluctant to rule that the denial of access to MAT constitutes cruel and unusual punishment. Parallel mootness challenges would likely bar suits alleging harm for post-incarceration overdose.

3. Statutory

The Federal Tort Claims Act, the Americans with Disabilities Act and the Rehabilitation Act may also provide redress to individuals denied access to MAT while incarcerated.

a. The Federal Tort Claims Act

In federal court, challenges to conditions of confinement may provide another avenue of relief for incarcerated individuals suffering from substance use disorders. Individuals can generally challenge conditions of confinement under the Federal Tort Claims Act (FTCA).[213] Litigants may bring claims under the FTCA to challenge inadequate substance abuse treatment care in federal prisons.

The FTCA waives governmental immunity in circumstances where plaintiffs have been injured by the negligence, wrongful acts, or omissions of federal employees acting within the scope of their employment.[214] The statute requires individuals to exhaust administrative remedies prior to bringing a claim in court.[215] To properly state a claim under the FTCA, a plaintiff must allege

> negligence (1) by officers or employees of a[ ] federal agency, which includes executive departments [] but which does not include contractors, (2) by persons acting on behalf of a federal agency in an official capacity, or (3) by a government contractor over whose day-to-day operations the government maintains substantial supervision[.][216]

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not provide individual with methadone because individual failed to comply with order to complete a substance abuse treatment program); Scott v. Smith, 961 N.Y.S.2d 596, 597 *leave to appeal denied*, 21 N.Y.3d 860 (2013) (holding that a delay in treatment, without any showing of harm, does not rise to the level of cruel and unusual punishment).

213 28 U.S.C. § 2675.

214 28 U.S.C. § 1346 (1949).

215 28 U.S.C. § 2675(a).

216 Valadez-Lopez v. Chertoff, 656 F.3d 851, 858 (9th Cir. 2011).

The FTCA only applies to claims where, "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."[217] Such claims would be subject to the same negligence analysis as described in the previous section. The Supreme Court has held that the FTCA only applies where local law would make a "*private person*" liable in tort, and that waiver of sovereign immunity may not be based on a finding of state or municipal liability.[218] Therefore, claims under the FTCA would only redress injuries sustained by individuals incarcerated under the jurisdiction of the Federal Bureau of Prisons (FBOP).

Liability for medical malpractice is controlled by state law.[219] Typically, in tort claims alleging medical malpractice, a plaintiff must establish the applicable standard of care, that the standard was breached, and the causal connection between the breach and the resulting injuries.[220] Because MAT or overdose prevention programming are not currently the standard of care in most prisons, it may be difficult to succeed on FTCA claims.[221]

Therefore, to increase the chances of a successful suit, plaintiffs would need to offer ample expert testimony to establish that MAT is the standard of care in correctional settings, and that substitute medications are not appropriate treatment. Given the courts' reluctance to make such a ruling in Eighth Amendment cases, it would likely be difficult to prevail on FTCA claims until medical literature and correctional practice more definitively establishes that MAT is the standard of care for opioid-dependent incarcerated individuals.

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217 28 U.S.C. § 1346(b)(1).

218 United States v. Olson, 546 U.S. 43, 44 (2005).

219 Ayers v. United States, 750 F.2d 449, 452 n.1 (5th Cir. 1985).

220 *See, e.g.*, Gaddis v. United States, CIV.A. 06-2377, 2008 WL 2858722, at *3 W.D. La. July 24, 2008).

221 *See id.* at *4 (Finding that: "[neither] the VA or its staff breached a standard of care when they replaced Gaddis's methadone with Lortab in June 2004. Selecting the appropriate medication for a patient and determining whether the patient's pain is managed effectively with a particular drug is clearly a decision that requires medical expertise. [The treating physician] concluded that the decision to replace the methadone treatment with Lortab was an appropriate decision under the circumstances. Gaddis offered no expert testimony to the contrary. Accordingly the Court concludes that Gaddis has not proven that the VA breached any standard of care when it replaced the methadone medication with Lortab").

b. Americans with Disabilities Act and Rehabilitation Act

Incarcerated individuals may also bring claims under the Americans with Disabilities Act (ADA) and the Rehabilitation Act where there is a denial of MAT. The ADA[222] and the Rehabilitation Act[223] both prohibit discrimination on the basis of a disability. Discrimination by state and local governments is prohibited under Title II of the ADA,[224] and Section 504 of the Rehabilitation Act makes it illegal for programs that are federally operated or receive federal assistance to discriminate against individuals with a disability.[225] Therefore, state and local governments may also be subject to the Rehabilitation Act if they receive federal funding. The Supreme Court has held that the ADA applies to state prison settings.[226] These claims likely must be predicated on either blanket policies that prohibit MAT, or where the denial of access to MAT occurs without an objective and individualized medical evaluation.[227]

An individual demonstrates he has a disability within the meaning of the ADA by showing a current physical or mental impairment that substantially limits one or more major life activities; a record of such impairment; or that he is regarded as having such impairment.[228] While courts have held that substance use disorders constitute disabilities,[229] an individual must plead sufficient facts to demonstrate a disability under one of the three prongs articulated above.[230] Furthermore, the claimant must demonstrate that he was denied MAT on account of his disability, rather than

222 42 U.S.C. §§ 12101 et seq.
223 29 U.S.C. §§ 701 et seq.
224 42 U.S.C. § 12132.
225 29 U.S.C. § 794.
226 Pennsylvania Dep't of Corr. v. Yesky, 524 U.S. 206, 210 (1999).
227 For a more detailed discussion of these types of claims, *see* Legal Action Center, *supra* note 114. *See also* Cherkis & Grim, *supra* note 156 (identifying ADA-based litigation challenging restrictions on MAT recently initiated in Kentucky).
228 42 U.S.C. § 12102(1).
229 *See, e.g.*, MX Group, Inc. v. City of Covington, 293 F.3d 326, 336 (6th Cir. 2002); Start, Inc. v. Baltimore Cnty., 295 F. Supp. 2d 569, 577 (D. Md. 2003).
230 *See Gaddis*, *supra* note 219 and accompanying text.

because of a non-discriminatory reason.[231] An individual may demonstrate discrimination by establishing he is subject to either disparate treatment, disparate impact, or was denied a reasonable accommodation.

Disparate treatment occurs where an individual is treated differently on account of his disability. An individual may be able to establish disparate treatment in incarceration settings that have a blanket policy prohibiting the use of controlled substances to treat opioid dependence.[232] Disparate impact, on the other hand, could only be established by showing that the process used for determining whether an individual was eligible for services "screen[s] out or tend[s] to screen out" individuals who have otherwise established they have a disability[233] under the ADA—in this case substance abuse disorder. Finally, an individual might demonstrate that corrections personnel failed to provide a "reasonable accommodation" as required by the ADA, although government agencies are excepted from this requirement if modifications would "fundamentally alter the nature of services, program, or activity."[234]

Individuals are not protected under the ADA if the services pose a "significant risk to the health or safety of others by virtue of the disability that cannot be eliminated by reasonable accommodation."[235] Although various studies have demonstrated the efficacy and safety of MAT, as discussed above in Section II. A., many prisons and jails counter with the largely unfounded claim that the risk of diversion outweighs the benefits of providing MAT.[236] Therefore, where blanket policies prohibiting controlled substances are in place, a prison or jail may be able to demonstrate that permitting MAT would be a fundamental alteration of services already provided.

Furthermore, although policies prohibiting any use of controlled substances to treat individuals with substance use disorders may violate Title II of the ADA and the Rehabilitation

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231 *See, e.g.*, Nunes v. Massachusetts Dep't of Corr., 766 F.3d 136 (1st Cir. 2014) (finding that plaintiffs were unable to challenge non-discriminatory reasons offered by prison for discontinuing to provide HIV medication).

232 LEGAL ACTION CTR., *supra* note 115, at 14.

233 28 C.F.R. § 35.130(b)(8).

234 28 C.F.R. § 35.130(b)(7).

235 Start, Inc. v. Baltimore Cnty., 295 F. Supp. 2d 569, 577–78 (D. Md. 2003) (quoting Doe v. Univ. of Md. Med. Sys. Corp., 50 F.3d 1261, 1264–65 (4th Cir. 1995)).

236 LEGAL ACTION CENTER, *supra* note 115, at 12.

Act, where some (even if not evidence-based) treatment is provided, courts may find no violation.[237] As noted above, several courts have stated that there is no right to a specific course of treatment, such as MAT, for opioid-dependent individuals.[238] Therefore, as was the case for Eighth Amendment claims, plaintiffs would be most likely to prevail on ADA and Rehabilitation Act claims where no treatment is provided whatsoever; where treatment is provided so belatedly that an individual suffers serious injury or death; or where there was a clear facially discriminatory reason why treatment was not provided.

4. Limitations of Statutory and Constitutional Approaches

Despite the potential opportunities, relief related to custodial treatment under the Eighth Amendment is substantially limited by the fact that courts often find a claim moot once an individual has been released.[239] Although a detailed discussion of exceptions to the mootness doctrine is beyond the scope of this article, as a practical matter, litigants would likely need to bring constitutional challenges while incarcerated, or at least under community supervision.[240] Notwithstanding the normative recognition by the courts of the ability of plaintiffs to allege future harm,[241] mootness doctrine likely creates a substantial barrier for Federal Constitutional claims by those seeking relief for post-incarceration injury. One possible approach to overcome this is to impose something akin to strict liability on prison officials who fail to provide adequate conditions and protections, including MAT and overdose prevention activities.[242]

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237 *See supra* notes 222-35 and accompanying text.

238 *See supra* note 215-16 and accompanying text.

239 *See, e.g.*, Cobb v. Yost, 342 F. App'x 858, 859 (3d Cir. 2009) (stating that "[Plaintiff's] case was mooted by his release from prison. A federal court does not have the power to decide moot questions."); Munoz v. Rowland, 104 F.3d 1096, 1097–98 (9th Cir. 1997) ("Because [plaintiff] has been released from the [facility where he was being treated], we can no longer provide him the primary relief sought in his habeas corpus petition. Munoz's Fifth and Eighth Amendment challenges to the 'debriefing' process and the conditions of confinement in the [facility] are therefore moot, and must be dismissed.").

240 *See Cobb* 342 F. App'x at 859; *Munoz*, 104 F.3d at 1097–98.

241 *See generally* Helling v. McKinney, 509 U.S. 25, 31 (1993).

242 *See id.* at 964–72 (calling for a modified strict liability approach to Eighth Amendment as a sort of "irrebuttable presumption of official culpability" in cases whether prisoners are subjected to substantial risks of serious harm).

Furthermore, claims against correctional institutions and public actors may face particular hurdles, at least in federal courts. The Prison Litigation Reform Act creates a number of limitations for litigation against such parties using a number of mechanisms.[243] These include provisions such as the requirement of exhaustion of administrative remedies before the case can be filed,[244] as well as a rational basis test for any relief sought by the court's judgment.[245] Though the constitutionality of some of these provisions has been challenged,[246] they remain largely in place.[247]

Class certification may provide a mechanism to avoid dismissals for mootness.[248] However, given the highly-fact specific inquiries undertaken by the courts in determining whether an Eighth Amendment violation has been stated, as well as broader limitations on class action litigation,[249] it may be difficult for litigants to define a class that a court would certify. A case may move forward even if the named plaintiff's claim has been mooted by release,[250] but it would likely be difficult to meet the commonality requirement set forth in Rule 23 of the Federal

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This would, however, require a reframing of the appropriate standard of care for individuals suffering from opioid dependency.

243 42 U.S.C. § 1997e (1994 ed. & Supp. II).

244 42 U.S.C. § 1997e(a).

245 Lyon v. Krol, 940 F. Supp. 1433, 1438 (S.D. Iowa 1996) (dismissed on other grounds by Lyon v. Krol, 127 F.3d 763 (8th Cir. 1997)); *but see* Madrid v. Gomez, 190 F.3d 990, 996 (9th Cir. 1999); Gavin v. Branstad, 122 F.3d 1081, 1090 (8th Cir. 1997) (applying rational basis analysis to PLRA claims).

246 *See, e.g.,* Jones v. Bock, 549 U.S. 199 (2007) (addressing differing approaches of circuit courts as to whether plaintiff must affirmatively plead exhaustion of administrative remedies to gain entry to court; level of detail required for each grievance to put officials on notice; and whether a suit may proceed when it contains both exhausted and unexhausted claims).

247 The PLRA applies only to current prisoners, not the formerly incarcerated.

248 *See* Clas v. Torres, 549 F. App'x 922, 923–24 (11th Cir. 2013) ("Absent class certification, an inmate's claim for injunctive and declaratory relief under § 1983 generally becomes moot once the inmate is transferred. Thus, where a prisoner has been released from custody, no case or controversy is presented because the chance of a repeated injury due to a prisoner's return to an offending facility is too speculative") (internal citations and quotations omitted).

249 *See* FED. R. CIV. P. 23(a) requirements of numerosity, commonality, typicality, and adequate representation. Under the Supreme Court's recent interpretation of the commonality requirement in Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2554 (2011), litigants would likely have great difficulty demonstrating they meet this requirement.

250 *See* U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 398 (1980).

Rules of Civil Procedure.[251] Perhaps a class could be defined where a facility—or system-wide agency—maintained a blanket policy against providing any treatment for withdrawal or overdose symptoms.

IV. Programmatic and Policy Approaches

To the extent that recently released individuals face a substantially higher likelihood of dying from overdose in the two-to-four weeks after exiting prison or jail, that heightened risk is substantially attributable to the actions—or the lack thereof—of the criminal justice system. This system almost uniformly shirks from its moral obligation to protect the lives and well-being of those under its care. Rehabilitation is the theoretical cornerstone of correctional practice. Experts have noted, however, that there is little reason to believe that incarceration leads to rehabilitation.[252]

Our examination of the legal mechanisms for motivating correctional institutions to address the elevated post-incarceration overdose risk suggests that, although a number of possible avenues do exist, multiple factors could complicate such litigation. Whether or not impact litigation is ultimately successful in the courtroom, however, it can be used to bring public attention to what is essentially an invisible crisis among our society's most vulnerable and disenfranchised individuals.

Either separately from or in conjunction with litigation, improving post-release overdose outcomes can be accomplished by advancing programmatic and policy change through direct advocacy with corrections systems, taking advantages of new funds made available through the ACA, as well as law reform. Indeed, advocacy efforts have already resulted in the cutting edge interventions highlighted above—pre-release naloxone in San Francisco and Rhode Island, in addition to the long-standing models like the methadone maintenance at Rikers Island, for example. The next section provides an overview of the specific steps that should be taken to motivate

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251 Fed. R. Civ. P. 23.

252 The Rehabilitation of Criminal Offenders: Problems and Prospects (Lee Sechrest et al. eds., 1979); Michelle Phelps, *Rehabilitation in the Punitive Era: The Gap Between Rhetoric and Reality in U.S. Prison Programs*, 45 Law & Soc'y Rev. 33, 33–68 (2011).

positive changes that prevent overdose deaths among newly released individuals.

A. Advocacy

1. Jails and Prisons

Advocates should educate corrections officials and criminal justice decision makers in their jurisdictions to increase access to MAT behind bars and in the community upon release. While buprenorphine can be prescribed by any doctor (including those employed by jails and prisons) who meets certain minimal requirements and registers with the Drug Enforcement Administration,[253] methadone is subject to a more complicated regulatory framework.[254] Nevertheless, implementing methadone is possible in correctional settings,[255] as evidenced by the Rikers Island program.[256]

A key advocacy issue is overcoming inaccurate perceptions among corrections staff regarding drug misuse and the efficacy of medications as a treatment.[257] Indeed, studies have demonstrated that correctional staff regard drug use—including medication-assisted care—as a moral failing; correspondingly, preference is placed on abstinence-based models.[258] These attitudes are a direct result of national policies that treat drug use as a crime in need of punishment rather than a public health issue. Advocates accordingly need to engage corrections officials in formal trainings and education on substance use disorder, recovery, and relapse, as well as the benefits of MAT.[259] These efforts can range from formal presentations to informal discussions to maintaining a regular presence at various corrections staff meetings.[260] One study also noted that establishing

253 *See* 21 U.S.C. § 823; *see also* Collins & McAllister, *supra* note 56, at 514–16.
254 *See* 21 U.S.C. § 823(g); 42 C.F.R. §§ 8.1-8.34 (2007).
255 *See* Fiscella, *supra* note 75, at 651 (explaining that there are several approaches that jails and prisons can use to implement methadone for incarcerated individuals, including 1) seeking certification as an accredited opioid treatment program (OTP), 2) becoming a satellite site of a community-based OTP, or 3) contracting with a local OTP for dosing).
256 *See supra* note 77 and accompanying text.
257 *See generally* Rich et al., *supra* note 32.
258 *See* McKenzie et al., *supra* note 19, at 1; Nunn et al., *supra* note 71, at 87; *see also* Cherkis & Grim, *supra* note 156.
259 Nunn et al., *supra* note 72, at 87.
260 *See id.*

a consistent presence within the facilities was crucial to gaining acceptance from prison staff.[261]

Further, it is critical that advocates help link MAT providers in the community with the jails and prisons in their area. Community providers should work with correctional institutions to help establish evidence-based treatment protocols for patients during incarceration or prior to release. Forging such relationships also helps ensure a continuity of care upon release, which can be highly effective in preventing overdose during the crucial re-entry period.[262]

Advocates and community organizations can also partner with jails and prisons to provide overdose prevention education and pre-release naloxone directly to incarcerated individuals. This work can draw on models forged by the San Francisco County Jail Naloxone Pilot, the Staying Alive program in Rhode Island, and Prevention Point Pittsburgh, for example, to ensure that re-entering individuals are equipped with the knowledge necessary to protect their life upon reentry to the community.[263] To facilitate this, Congress included a provision in its 2015 "CRomnibus" bill directing the Substance Abuse and Mental Health Services Administration (SAMHSA) to make competitive grants available to support overdose prevention programs aimed at the incarcerated and recently released individuals.[264]

Beyond direct education and prevention measures like naloxone access, interventions that address the broader risk environment among re-entering individuals can also help reduce

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261 *See id.*

262 *See* Binswanger et al. 2007, *supra* note 5, at 162–65.

263 *See supra* notes 48, 96-108 and accompanying text. None of these programs required litigation or policy reform.

264 *Division G - Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2015*, 64, *available at* http://docs.house.gov/billsthisweek/20141208/113-HR83sa-ES-G.pdf, which provides:
"SAMHSA is directed to make Criminal Justice funding available for competitive grants to community-based providers through the Offender Reentry Program to implement overdose prevention programs for incarcerated and recently released individuals. The Administrator is directed to ensure an equitable amount of grant opportunities are available to grantees that serve those currently in custody, prior to release from incarceration, and continue for at least two months post-release into community-based services as part of a transition plan. Overdose prevention programs should include an educational component that includes SAMHSA's Opioid Overdose Prevention Toolkit. Additionally, grant award decisions should give particular weight to overdose prevention programs that collaborate with community corrections and law enforcement entities as well as judges."

overdose morbidity and mortality. Meeting the basic health and housing needs of formerly incarcerated individuals can establish much-needed stability and simultaneously provide the opportunity for service providers to deliver opioid overdose training and education. Ongoing peer relationships between formerly incarcerated individuals successfully act as a support system post-release, and an overdose prevention program referral might perhaps be taken more seriously when the suggestion is made by someone the recently incarcerated person trusts.[265]

Taken together, providing MAT (in both custodial and community settings), overdose prevention education, and pre-release naloxone behind bars, in conjunction with supportive reentry services can help stem the tide of post-release overdoses.[266] As we have discussed,[267] promising models for offering these services already exist. Programmatic change may be facilitated by changing perceptions among key decision makers within the corrections sector and beyond about the need, benefit, and ease of these interventions. Building relationships between correctional institutions, community supervision providers, and community organizations is critical to the overall effort to provide services to incarcerated individuals as well as ensure a continuum of care once individuals are released.

2. *Community Supervision*

Formerly incarcerated individuals who are under parole or probation supervision are often required to attend regular meetings with their case manager/supervisor.[268] For individuals who are placed on community supervision because of charges involving substance use, submission to drug testing is often a condition of probation or parole; at times, this even includes bans on MAT utilization.[269]

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265 This peer-to-peer relationship is enacted in the *Staying Alive on the Outside: Opioid Overdose Prevention and Response for People Leaving Prison* video, Green et al., *supra* note 47.

266 *See generally* Jeannia J. Fu, et al., *Forced Withdrawal from Methadone Maintenance Therapy in Criminal Justice Settings: A Critical Treatment Barrier in the United States*, 44 J. SUBST. ABUSE TREATMENT 502, 503–5 (2013) (noting that not providing MAT inside is a barrier for MAT uptake in the community because of fear of unmanaged withdrawal).

267 *See supra* notes 48, 96-108, 120 and accompanying text.

268 *See generally Parole and Probation Overview*, JUSTIA, https://www.justia.com/criminal/parole-and-probation/ (last visited Feb. 17, 2015).

269 18 U.S.C. § 3563(a)(5) (1998); *see also* Cherkis & Grim, *supra* note 156.

Although some outdated policies in this context are certainly in need of reform, even in absence of any legal change community supervision provides an untapped opportunity to convey information about the risks of overdose and referrals to prevention programs.

Public health advocates should take stock of the reality that parole and probation officers, at a minuscule cost to the public, could provide everyone under their supervision with basic opioid overdose prevention information and training. Outreach can target both the individual parolee or probationer as well as their families and social networks. We know of no current effort to engage community supervision officers in overdose prevention activities, however. By taking full advantage of this opportunity, law enforcement can reduce the risk of opioid mortality among their supervisees, as well as other opioid users with whom parolees or probationers interact.[270]

Community supervision and other law enforcement personnel should also provide re-entering individuals with information about applicable "9-1-1 Good Samaritan;" such laws are designed to reduce barriers to seeking emergency help in the event of an overdose.[271] Given that fear of prosecution can prevent bystanders in an overdose situation from calling for professional help, [272] a parole/probation officer may be one of the few people able to effectively communicate information to the friends and families of formerly incarcerated individuals about whom to call and what to do in the instance of overdose.

Home visits provide another intervention opportunity for community supervision officers. In light of the insular nature and pernicious social stigmatization of substance users,[273] community supervision officers who visit with formerly incarcerated individuals

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270 *See* Tara Lagu et al., *Overdoses Among Friends: Drug Users Are Willing to Administer Naloxone to Others*, 30 J. Substance Abuse Treatment 129, 129 (2006) (finding opioid users willing to help train other opioid users on how to identify overdoses).

271 For an updated list of these laws, *see* Good Samaritan Overdose Prevention Laws Map, http://lawatlas.org/query?dataset=good-samaritan-overdose-laws#.U99HIagdXYQ (last visited July 12, 2014).

272 Mass. Org. for Addiction Recovery, *Help Save Lives in the Commonwealth: Massachusetts 911 Good Samaritan Campaign Factsheet* 1 (Nov. 25, 2012), http://www.moarrecovery.org.

273 For an illustration of these pernicious effects, *see* Christopher Kolb, The Lives of Race and Destiny: The Drug War, Nothingness, and the Cultural Violence of Neoliberalism in the Crack Landscape (BiblioBazaar 2011) (2009).

are uniquely situated to implement education, referral and other interventions in the critical period following release.[274] Community supervision officers who, in the course of conducting their duties, visit the residences of probationers and parolees who are at risk of overdose could be trained in overdose reversal, with the potential to save lives.

In this same vein, to fully capitalize on the opportunity to intervene, community supervision officers must have a comprehensive understanding not only of the risks associated with opioid use, but also of the full roster of the types of community programs available to provide overdose prevention training and access to naloxone to persons under their supervision. Indeed, there are many examples of community-based treatment programs addressing opioid overdose that are successfully reducing harm right now in the United States.[275] Officers should instruct all individuals deemed at risk of opioid overdose to be educated about overdose and receive emergency doses of naloxone. Law enforcement could partner with these community-based organizations to make available information about their services so that community supervision officers could easily refer individuals to existing harm reduction programs.[276]

As was the case in correctional settings, some barriers may exist to successfully implementing the above strategies. For example, community supervision officers, as members of the law enforcement community, may feel that overdose prevention education and naloxone access "sends the wrong message" to formerly incarcerated individuals. These concerns could be overcome by framing such programming as designed to equip individuals to serve a life-saving function in their social circles and by highlighting data that overdose trainings and naloxone access do not encourage substance abuse.[277] Further, community supervision officers may misunderstand the nature of substance use disorder, and education and training on opioid misuse and harm reduction approaches in general may be a

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274 Binswanger et al. 2012, *supra* note 11, at 7–11.

275 *See supra* notes 85, 87 and accompanying text.

276 The Roxbury/Jamaica Plain Substance Use Coalition serves as a useful model of law enforcement and community-based overdose education and naloxone education programs. *See* DOE-SIMKINS & CORTÉS, *supra* note 55.

277 For an example of such training materials for law enforcement officials, *see* DOE-SIMKINS & CORTÉS, *supra* note 55; Bureau of Justice Assistance, U.S. Dep't of Justice, Law Enforcement Naloxone Toolkit, *available at* https://www.bjatraining.org/tools/naloxone/Naloxone%2BBackground (2014).

necessary prerequisite to initiating a new program. These efforts may in turn help shift the perception of community supervision personnel as focused exclusively on law enforcement, rather than support and assistance—a view that is currently pervasive among parolees and probationers.[278]

3. *Federal Financial Assistance for Drug Treatment and Overdose Prevention Programming*

Perhaps the most formidable barrier to the implementation of simple measures to reduce the risk of reentry-related overdose is the lack of resources. The implementation of the Affordable Care Act (ACA) presents unprecedented opportunities to reduce overdose risk by improving the continuum—or initiation—of appropriate care either during or in the days and months after re-entry.[279] Several specific components of this wide-reaching legislation offer promise.

First, the law's provisions build on previous "parity" legislation[280] to close existing gaps in covering mental health, substance abuse treatment, and other essential behavioral health benefits under federal (Medicaid and Medicare) as well as private insurance plans.[281] The law classifies these services as "essential health benefits" (EHBs), potentially increasing their availability and scope.[282] This can especially boost the capacity at community health

278 Binswanger et al. 2012, *supra* note 11, at 6.

279 Rich et al., *supra* note 48, at 462–64 (noting that the ACA "opens the door to enormous reforms in the continuum of care between correctional and community-based [health care] providers").

280 The Mental Health Parity and Addiction Equity Act of 2008. *See generally* U.S. Dep't of Labor, Emp. Benefits Security Admin., [Fact Sheet, The Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA)] (Jan. 29, 2010), *available at* http://www.dol.gov/ebsa/pdf/fsmhpaea.pdf..

281 Kirsten Beronio et al., *ASPE Issue Brief, Affordable Care Act Expands Mental Health and Substance Use Disorder Benefits and Federal Parity Protections for 62 Million Americans* (2013), *available at* http://aspe.hhs.gov/health/reports/2013/mental/rb_mental.cfm (noting that before the implementation of the ACA, "about one-third of those who were covered in the individual market [had] no coverage for substance use disorder services and nearly 20 percent [had] no coverage for mental health services"). Medicaid coverage of these services also varies from program to program. *See* Justice Ctr., Medicaid and Financing Health Care for Individuals Involved with the Criminal Justice System 7 (2013), *available at* http://csgjusticecenter.org/wp-content/uploads/2013/12/ACA-Medicaid-Expansion-Policy-Brief.pdf.

282 *See* ACA Title I §1302(b) and §2001(c)(6).

centers and medical homes, which focus their care on under-resourced communities.[283] Since individuals with substance use and mental health issues are at a highly disproportionate risk of incarceration, expansion of treatment capacity and reach has the additional potential to reduce criminal justice involvement and recidivism.[284]

Second, the ACA's mechanisms for increasing health insurance availability and affordability may help close the coverage gap for many criminal justice-involved individuals.[285] After a period of incarceration, as many as 90% of individuals lack health insurance coverage.[286] For the great majority of recently released people, the ACA's Medicaid expansion provisions increase access to publically-financed health insurance, at least in the states that have chosen to accept federal funds for this purpose.[287] Resources made available by the ACA for community outreach may help facilitate better education among this population and affected communities, including active identification and enrollment of eligible individuals while under custody in correctional facilities. [288]

Among those who are newly-eligible for Medicaid under the ACA, an estimated 17-35% may be criminal justice-involved.[289] As a rule, Medicaid (as well as other federal and state benefit) funds cannot be used to support services inside correctional institutions.[290]

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283 DEP'T OF HEALTH & HUMAN SERVS., *HHS Awards* $54.6 *Million In Affordable Care Act Mental Health Services Funding*, *available at* http://www.hhs.gov/news/press/2014pres/07/20140731a.html; *see also* Dep't of Health & Human Servs., *The Affordable Care Act and Health Centers Factsheet*, at 2, *available at* http://bphc.hrsa.gov/about/healthcenterfactsheet.pdf ("health centers … promote[] reductions in health disparities for low-income individuals, racial and ethnic minorities, rural communities and other underserved populations").

284 S*ee* ANDREA A. BAINBRIDGE, THE AFFORDABLE CARE ACT AND CRIMINAL JUSTICE: INTERSECTIONS AND IMPLICATIONS (Bureau of Justice Assistance, 2012) *available at* https://www.bja.gov/Publications/ACA-CJ_WhitePaper.pdf (last visited Dec. 12, 2014).

285 Erica Goode, *Little-Known Health Act Fact: Prison Inmates Are Signing Up*, N.Y. TIMES, March 9, 2014, at A1.

286 Emily A. Wang et al., *Discharge Planning and Continuity of Health Care: Findings from the San Francisco County Jail*, 98 AM. J. PUB. HEALTH 2182 (2008).

287 Judith Solomon, *The Truth About Health Reform's Medicaid Expansion and People Leaving Jail*, CENTER ON BUDGET AND POLICY PRIORITIES (June 25, 2014), http://www.cbpp.org/cms/index.cfm?fa=view&id=4157.

288 *See* JUSTICE CTR., *supra* note 281, at 2–3; *see also* Goode, *supra* note 285.

289 *See* JUSTICE CTR., *supra* note 281; *see also* Solomon, *supra* note 287, at 6.

290 §1905 of the Social Security Act (prohibiting "payments with respect to care or services for any individual who is an inmate of a public institution").

One notable exception to this rule is the availability of such funds to reimburse for services provided off-site, even while the individual is in custody.[291] This has direct implications for how drug treatment, overdose education and training, and mental health services can be restructured to take advantage of substantial new funds available for these services through the ACA, for example by creating new partnerships between correctional institutions and drug treatment programs or community health centers. Specifically, services provided by these health care institutions to persons outside the walls of the correctional facility would be eligible for ACA coverage.

Third, the ACA is designed to increase care integration across the healthcare sector and between substance abuse and mental health treatment on the one hand and mainstream primary health care on the other.[292] This means that individuals with substance use and mental health issues could be more easily engaged to appropriate treatment and services, decreasing their risk of incarnation in the first place. Within the re-entry context, gaps in medication adherence, counseling, and many other care modalities can transform the process of reentry into healthcare crises.[293] Currently, there is seldom functional integration between correctional and community service providers. Electronic health records (EHR) and other health information technology incentivized by the ACA[294] can operationalize such integration and improve the continuum of care for the newly released.

Fourth, the ACA includes a set of provisions directed at quality improvement. This incorporates the development of key quality measures, pilot prevention programs, clinical guidelines and other initiatives designed to boost the impact and reduce the costs of health care.[295] These provisions promise to refine the design and implementation of substance abuse and mental health services, including those that would impact individuals at risk of incarceration or recently released persons. These efforts can be informed by state-

291 *Id.*; *see also* Justice Ctr., *supra* note 281, at 2.
292 SEC. 399V-1, 42 U.S.C. 280g–12, Primary Care Extension Program.
293 *See* Binswanger et al. 2007, *supra* note 5, at 161–65.
294 *Hearing before the before Committee on Finance U.S. Senate*, U.S. Dep't of Health & Human Servs. (2013) (statement of Patrick Conway M.D.), *available at* http://www.hhs.gov/asl/testify/2013/07/ t20130717c.html.
295 *See generally* 42 U.S.C. tit. III; *see also* 42 U.S.C. §§ 290bb–33 ENHANCED Act of 2009.

level needs assessments of at-risk communities, which specifically include substance abuse as one of the key focus areas.[296]

B. Policy Reform

In addition to legal and advocacy efforts aimed at instituting programmatic changes (or, to the extent those efforts are only partially successful), advocates should also pursue a federal and state-level legislative agenda focused on decreasing overdose among recently released individuals. This might include mandating that individuals who enter an institution under a prescribed medication to treat opioid dependence be allowed to continue that medication throughout the duration of their incarceration, providing newly-diagnosed opioid-dependent individuals with comprehensive MAT services while incarcerated, providing state Medicaid coverage for medications used to treat opioid dependence, establishing programs for the provision of naloxone prior to release, funding naloxone access and overdose prevention programs in jails and prisons, and improving the continuum of care by establishing special healthcare facilities that facilitate re-entry by providing a continuum of care. As discussed, recent federal activity[297] and provisions of the ACA can incentivize such efforts.[298]

As with corrections officials, advocates will need to educate legislators about the need for these interventions, address common concerns, and explain their potential health, economic, and societal benefits. Even more fundamentally, advocates should appeal to a sense of duty to correct a life-threatening problem of the state's own making. Indeed, by advancing punitive policies of incarceration for drug use and failing to provide adequate treatment and support services, the state is responsible for substantially exacerbating the risk that someone who leaves a government-run institution will die.

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296 42 U.S.C § 2951 ("Not later than 6 months after the date of enactment of this section, each State shall, as a condition of receiving payments from an allotment for the State under section 502 for fiscal year 2011, conduct a statewide needs assessment (which shall be separate from the statewide needs assessment required under section 505(a)) that identifies …the State's capacity for providing substance abuse treatment and counseling services to individuals and families in need of such treatment or services").

297 *See supra* note 264 and accompanying text; *see also* SAHMSA, *supra* note 80.

298 Rich et al., *supra* note 48, at 462–66.

On the institutional level, federal consent decrees, grants and contracts, and other indirect mechanisms can also motivate reform on the state and local levels. As a result of pervasive problems within state and local custodial systems, a number of consent decrees are currently in place or pending throughout the United States,[299] with several additional agreements currently being negotiated.[300] Mandating provision of effective drug treatment and overdose prevention services, linkages to community-based care pre-release, and other key overdose prevention initiatives we have highlighted should be considered for inclusion in such agreements.

Conclusion

Overdose prevention programming is critically needed to mitigate the high risk of overdose among the recently incarcerated. Although the legal mechanisms to assert the state's obligation to mitigate this risk are subject to challenges, several theories do hold promise. In light of the normative, programmatic and policy approaches outlined, state actors can and should be spurred to reduce the risk of opioid mortality among those re-entering society from custodial settings. As sentencing reform and other efforts to end mass incarceration gain momentum, overdose prevention is critical to ensure that re-entry does not result in the additional death of thousands of vulnerable Americans.

299 For a list of current consent decrees, *see Special Litigation Section Cases and Matters*, U.S. Dep't of Justice, *available at* http://www.justice.gov/crt/about/spl/findsettle.php (last visited July 14, 2015).

300 *Id*.

Educational Obligations to Delinquent Youth: The Role of Public Schools

Leah Porter[1]

Introduction

Education and juvenile justice reformers in Massachusetts are rejoicing over the passing of Massachusetts Session Law Chapter 222, also known as *An Act Relative to Student Access to Educational Services and Exclusion from School*.[2] The Act (more commonly known as Chapter 222) and its regulatory scheme, which took effect on July 1, 2014, are intended to discourage disciplinary practices that deny students an education, close the school-to-prison pipeline, reduce drop-out rates, and counter overbearing zero tolerance policies. The main thrust of the Act is to set minimum procedural requirements public school administrators must follow before a student can be suspended or expelled for non-violent or non-criminal offenses.[3] One of the more remarkable parts of the Act is that principals must develop education service plans to be utilized in the event a student is suspended or expelled for longer than ten consecutive school days.[4]

In a memorandum to the members of the Board of the Department of Elementary and Secondary Education (DESE), the

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1 *Juris Doctor Candidate, Northeastern University School of Law Class of 2015. Thank you to the Honorable Judge Jay Blitzman of the Middlesex Juvenile Court for his invaluable assistance. Thanks must also be given to Maggy Hansen, and the entire Northeastern Law Journal Staff. All errors within this piece are my own .

2 Act Relative to Student Access to Educational Services and Exclusion from School, ch. 222, 2012 Mass. Acts 222 (codified at Mass. Gen. Laws ch. 71, §§ 37H, 37H ½, 37H ¾) (effective July 1, 2014).

3 Mass. Gen. Laws ch. 71, § 37H ¾ (c) (2014); *see also* 603 Mass. Code Regs. 53.01(2)(a) (2014).

4 603 Mass. Code Regs. 53.13(3) (2014); Mass. Gen. Laws ch. 18A, § 7 (2014).

Board of Education Commissioner Mitchell D. Chester stated that "where exclusion from classroom or school is necessary for *any type* of disciplinary misconduct, [Chapter 222 would] require school districts to make education services available."[5] This statement from Commissioner Chester is not entirely true. He overlooked an entire class of youth who are excluded from school for disciplinary purposes, and who are not entitled to the newly implemented education service plans - juveniles detained by the state for delinquency.

The reason why the education service plan is not for the benefit of detained juveniles is because the education of juvenile delinquents in Massachusetts has been the responsibility of the Department of Youth Services (DYS).[6] Delinquent youth who are excluded from school do not need an education service plan when an education is already being provided. Suspended or expelled youth, on the other hand, are prohibited from receiving an education, unless they relocate or enroll elsewhere. Although DYS is legally obligated to provide for the learning of delinquent youth, this duty has not always been adequately met in practice. Many scholars nationwide have addressed the pervasive dilemma of properly educating delinquent youth.[7] Even attempts by the federal government to improve the learning and rehabilitation of juveniles are considered toothless due to a lack of oversight and enforcement.[8] Due to a lack of adequate education within juvenile detention

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5 Memorandum from Mitchell D. Chester, Comm'r, Mass. Dep't of Elementary & Secondary Educ. to the Bd. of Elementary and Secondary Educ. (Apr. 23, 2014) (on file with author, and also available at http://www.doe.mass.edu/boe/docs/2014-04/item6-memo.html).

6 MASS. GEN. LAWS ch. 18A, § 7 (2014).

7 *E.g.*, Jennifer A.L. Sheldon-Sherman, *The IDEA of an Adequate Education for All: Ensuring Success for Incarcerated Youth with Disabilities*, 42 J.L. & EDUC. 227, 234-35 (2013); Elizabeth Cate, *Teach Your Children Well: Proposed Challenges to Inadequacies of Correctional Special Education for Juvenile Inmates*, 34 N.Y.U. REV. L. & SOC. CHANGE 1, 11 (2010); Katherine Twomey, *The Right to Education in Juvenile Detention Under State Constitutions*, 94 VA. L. REV. 765, 771-73 (2008).

8 Title I Part D of the Elementary and Secondary Education Act, or No Child Left Behind (NCLB) provides grants to state education agencies, who in turn would issue sub-grants to local education agencies that seek to establish or upgrade the education to delinquent, neglected, or at-risk youth. 20 U.S.C. § 6421(b) (2002). *See generally* Katherine Burdick et al., *Creating Positive Consequences: Improving Education Outcomes for Youth Adjudicated Delinquent*, 3 DUKE FORUM FOR L. & SOC. CHANGE 5, 22-3 (2011).

facilities, youth detained by the state are almost always in a worse position when they leave the system.

Now that public school districts have newly added responsibilities, why was the line not moved further so that these districts would be responsible for delinquent youth in addition to the expelled or suspended students? The Act is, after all, titled *An Act Relative to Student Access to Educational Services and Exclusion from School*. Many could argue that putting such a duty on public school districts would be misplaced, or overbearing. However, the education of detained youth should not be a complete mystery to school districts. Under Massachusetts state law, public school districts do not forfeit their responsibility to students with disabilities once said students enter DYS custody for criminal activity.[9] Data nationwide shows a substantial number of juvenile delinquents are youth with learning disabilities.[10] Still many others, who may not have been previously flagged as needing additional educational assistance, are found to be behind in their academic development and in need of additional aids when DYS steps in to educate.[11] Public schools must be able to screen their students to determine whether they have special education needs, even after the student enters a detention facility.[12] Thus, public school districts should have means in place already to provide for the educational needs of many delinquent juveniles.

Who should be responsible for providing an education to delinquent youth? In the wake of Chapter 222's extension of public school responsibility to disciplined youth, and given the very small

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9 603 Mass. Code Regs. 28.06(9)(a) (2014).

10 Cate, *supra* note 6, at 9-11; Andrea J. Sedlak & Karla S. McPherson, *Youth's Needs and Services: Findings from the Survey of Youth in Residential Placement*, U.S. Dep't of Justice Office of Juvenile Justice & Delinquency Prevention, Juvenile Justice Bull. (Apr. 2010), 6, *available at* https://syrp.org/images/Youth_Needs_and_Services.pdf; Twomey, *supra* note 7, at 772.

11 *See* UMass Donahue Institute, Evaluation of the Dep't of Youth Servs. Educ. Initiative: Final Report 4 (2008), http://www.mass.gov/eohhs/docs/dys/eval-education-initiative.pdf.

12 603 Mass. Code Regs. 28.06(9)(a) (2014) ("Decisions about admission to and discharge from [DYS] are within the authority of institution administrators, not the school district. However…[s]chool districts are responsible for students in institutional settings in accordance with 603 CMR 28.10. Such students have the same rights for referral, evaluation, and the provision of special education in accordance with state and federal law as students in public schools."); *see also* Mass. Gen. Laws ch. 71B, § 3 (2014).

role that public school districts play in providing for delinquents, should their duties be extended to all youth in DYS custody as well? This note does not necessarily propose that school districts should take on this task alone, that a drastic shift in responsibility would be wise, or that intervention should come in the education service plans backed by Chapter 222. After all, not all youth attend public school. However, the truth of the matter is that public schools must be ready to accommodate and serve all youth, at-risk or otherwise. As long as Massachusetts and other states feel that there are situations where it is necessary to put children in detention facilities, then the effort to provide that class of youth with appropriate educational means should continue.

I. Chapter 222's School-Wide Education Service Plans

As of July, 2014, school-wide education plans are to be utilized in the event a student is suspended or expelled from public school for more than ten school days, no matter how severe the offense.[13] According to Massachusetts Department of Elementary and Secondary Education Commissioner Mitchell Chester, the opportunities that will now be mandatorily offered have never been a school district's legal duty before.[14] These education service plans cannot be vague, miniscule, or applied halfheartedly and must be designed pursuant to state set testing standards necessary for graduation.[15] These plans act as a bridge allowing students to earn credits, make-up assignments, and make academic progress while barred from the school environment.[16] In spite of these education service plans meant to benefit students "excluded from school," students who are committed to detention facilities (and perhaps need these services the most) are excluded from benefitting from

13 603 MASS. CODE REGS. 53.12(2)-(3) (2014) (entitling students that have committed select offenses subject to an expulsion exceeding 90 days to education service plans).

14 *See* MASS. GEN. LAWS ch. 71, § 37H ½ (2010) (prior to July 1, 2014 amendment) (upon expulsion of students charged or convicted of felonies, "no school or school district shall be required to provide educational services to such student."); *see also* Shannon Young, *New Mass. Law Gives Expelled Students More Options*, ASSOCIATED PRESS, (Aug. 10, 2012), http://www.boston.com/news/local/massachusetts/articles/2012/08/10/new_mass_law_gives_expelled_students_more_options.

15 *See* 603 MASS. CODE REGS. 53.13(3) (2014).

16 *See* MASS. GEN. LAWS ch. 76, § 21 (2014).

these education service plans. Although these education service plans are another means of keeping at-risk youth from becoming lost to the school-to-prison pipeline, they do not attempt to reach the detained youth who have already been swept into it.[17]

An interesting thing to note is that even though this piece focuses on youth who are located in secure juvenile facilities, DYS has the option to have youth in its custody remain at home with periodic monitoring.[18] The juveniles placed at home may be provided counseling, therapy, vocational training, and education through a private contractor.[19] Now that Chapter 222 has taken effect, youth in DYS custody held at home will be provided a different education than their peers who remain at home for long-term suspensions or expulsions. In other words, delinquents in this quasi house-arrest would receive education that differs from a peer who is also excluded from school, yet is eligible for the school district's education service plan.

II. Education Currently Offered by the Massachusetts DYS

Throughout the first decade of the 2000's, the DYS was assessed based on the quality of the educational policies and practices the agency offered to the youth in its custody, which eventually manifested into reform efforts.[20] In the wake of the DYS reform, researchers at the University of Massachusetts Donahue Institute conducted, what they called, a third-party assessment and compiled findings into a report, expressing improvements and continued areas of concern for DYS's education programs for delinquent youth. One study noted commendable improvements in problem areas, such as a reduction of the high teacher turnover rates, improved materials and resources provided to youth, better curricular plans, and improved means to transition youth back into school once their sentences had been served.[21] However, because the Donahue Institute's analysis was done before the dust from the

17 *See* Mass. Gen. Laws ch. 18A, § 7 (2014) (DYS's Bureau of Education Services is responsible for establishing curricula and educational services for each of institution under DYS control); *see also* ch. 76, § 21(2014); 44 Roderick L. Ireland, Juvenile Law Mass. Practice Series § 6.2 (2d ed. 2013).
18 Ireland, *supra* note 17.
19 *Id.*
20 UMass Donahue Inst., *supra* note 11, at i.
21 *Id.* at ii-iv.

DYS reform had settled, the study was only able to assess mainly short-term and some mid-term improvements, rather than longer lasting effects.[22] The study also noted areas that were not covered by the study, as certain policies had not yet gained use in practice or were outside the scope of the study.[23] Therefore, the strengths noted in the Donahue Institute's report on the DYS and its education services provided to incarcerated youth in Massachusetts remain questionable.

Detained youth are difficult to educate for several reasons. Their ages, abilities, needs, and learning styles vary, and they are often underperforming when they enter DYS custody.[24] There is a strong correlation between juvenile delinquency, and poor literacy levels.[25] There are also high percentages of detained youth with mental health, emotional, or behavioral needs.[26] Complicating matters further, arrivals and departures at facilities occur intermittently throughout the year.[27] The wide needs of different students, and the need to bring new students up to speed, are some of the reasons why educators at DYS facilities feel that they need to instruct across several subject areas with a lack of depth in the curriculum.[28] Given these impediments, learning is not individualized, and DYS youth receive a one-size-fits-all education.

There are also many players involved including DYS personnel, private third-party contractors, and, at times, schools partnering with the agency to facilitate re-entry to mainstream schooling or educational placements.[29] Proper communication, collaboration, and oversight of every party involved in providing or continuing the education of incarcerated youth are difficult to establish.[30] Of-

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22 *Id.* at 52-61 (DYS began its reform in 2003, the study was conducted in 2006, and was published in February of 2008).

23 *Id.* at 40-41 (noting a lack of outcomes data for the utilization of the Uniform Student Transcript, and other school transition initiatives).

24 *Id.* at 4-5.

25 Sheldon-Sherman, *supra* note 7, at 238; Peter E. Leone et al., *Special Education Programs for Youth with Disabilities in Juvenile Corrections*, 16 J. OF JUV. CT., COMMUNITY & ALTERNATIVE SCH. ADMINS. OF CAL. 31-32 (2003).

26 Sheldon-Sherman, *supra* note 7, at 238.

27 UMASS DONAHUE INST., *supra* note 11, at 14-15.

28 *Id.* at 5.

29 *Id.* at 43; Michelle A. Dantuono, *The Right to Reenter School: A Proposal for Comprehensive State Legislation*, 14 HOLY CROSS J.L. & PUB. POL'Y 41, 57 (2010).

30 UMASS DONAHUE INST., *supra* note 11 at 43; Dantuono, *supra* note 29, at 57.

ten times, it is challenging for school administrators to be prepared to offer appropriate programs seamlessly to returning students. The issue of unsteady transitions from DYS schooling back to mainstream schooling prior to becoming detained is important to resolve for several reasons. Scholars have noted that the relocation of youth can have several detrimental effects on their well-being, particularly in adjusting to new school settings.[31] Youth exiting DYS custody are likely to have a more positive outlook on leaving detention, and less of the negative emotional or social effects associated with youth who face familial relocation due to poverty or familial issues such as divorce or domestic violence.[32] However, former delinquents would be subject to what some call the "classroom turnover theory." This theory highlights a lag in school services and learning while school districts sort out the needs of new students, and attempt to sync them into the setting as quickly as possible.[33] Youth who need to readjust to new settings must also do so socially in addition to any academic issues that arise from relocating.[34]

This fact could result in administrators overlooking key ancillary needs of the student, such as counseling or special education needs. The classroom turnover theory, as applied to residential relocation, is comparable to the transitional concerns for delinquent youth. Lower test scores and grade point averages have been noted as correlative to youth who go through multiple school transitions.[35] Even when a student becomes delinquent a single time in their childhood, that still constitutes two transitions within their sentencing period. Even Massachusetts' minimum sentencing period of four months transcends at least a half of a grade level, while other sentences can be an indefinite length that may reach until youth hit the age of 18 or 19.[36]

But how can one argue that school districts are in the best

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31 Edward Scanlon & Kevin Devine, *Residential Mobility and Youth Well-Being: Research, Policy, and Practice Issues*, 28 J of Soc. & Soc. Welfare 119, 121 (Mar. 2001) (discussing relocation of youth in the context of residential mobility).

32 *Id.*

33 *Id.* at 124.

34 *Id.* at 129.

35 *Id.* at 125; David Kubrow, Ctr. for Research on the Educ. of Students Placed at Risk, Patterns of Urban School Mobility and Local School Reform, 16 (1996).

36 109 Mass. Code Regs. 4.05 (1993); Mass. Gen. Laws ch. 119, § 58 (2014).

position to provide education services to delinquent youth, when the mandate to provide education service plans to suspended and expelled youth are so new? Truthfully, schools are not completely in the dark when it comes to providing similar services to youth in custody. The Individuals with Disabilities Education Act (IDEA) is a federal statute with procedures for school districts to provide individualized and free appropriate public education to students with special needs.[37] In Massachusetts, regulations made pursuant to IDEA require districts and the state Department of Education to continue to educate their students with disabilities, even after they have been removed to a juvenile detention facility.[38] Likewise, a number of Massachusetts school districts have implemented transitional school settings and programs for youth who have left DYS custody, and are on the verge of returning to the public school.[39] In Holyoke, Massachusetts in particular, district educators and administrators directly manage the education of the newly released youth in its transitional program.[40]

Data from the Department of Justice shows that in 2010, Massachusetts had 694 youth offenders committed to juvenile detention facilities.[41] Compare this statistic to The United States Census Bureau's 2013 estimate of just over 1 million school-aged children in Massachusetts.[42] Therefore, bolstering school district involvement and responsibility should hardly seem radical or implausible. Of course, a single, centralized agency like the Department of Youth Services is necessary as the basis for serving delinquent youth, but perhaps the role of school districts should be re-examined. Under Massachusetts law, public school committees representing entire districts have the option to provide services through a mechanism known as an education collaborative

37 20 U.S.C. § 1400 (2010).
38 603 Mass. Code Regs. 28.06(9)(a) (2014).
39 UMass Donahue Inst., *supra* note 11, at 41.
40 *Id*.
41 Sarah Hockenberry et al., *Juvenile Residential Facility Census, 2010: Selected Findings*, Juvenile Offenders & Victims: Nat'l Report Series Bull., Sept. 2013, http://www.ojjdp.gov/pubs/241134.pdf.
42 *State and County Quick Facts: Massachusetts*, US Census Bureau (Dec. 4, 2014), http://quickfacts.census.gov/qfd/states/25000.html (20.8% of Massachusetts's population was under the age of 18 and subtract the 5.5% under the age of 5. Multiply the difference to the gross population total).

(EDCO).[43] EDCOs allow various public school district staff and administrators to collaborate "provided that a primary purpose of such programs and services shall be to complement the educational programs of member school committees and charter schools in a cost-effective manner."[44] EDCOs are considered public entities, and can employ teachers that are fully licensed by the state.[45] EDCOs are particularly useful for school districts that must provide educational services long distance to students placed outside of the district. In Massachusetts, EDCOs are popularly utilized by school districts to satisfy their duties to detained delinquents under special education statutes.[46] However, these same EDCOs are only required to educate the youth who have been identified as needing special education. Delinquent youth are provided an education from the private vendors who contract with DYS.[47] Perhaps the already existing Massachusetts EDCOs can be expanded to address the educational needs of all juvenile delinquents.

As noted, DYS had the Donahue Institute of UMass independently measure any improvements and shortfalls of the education reform implemented, or in the process of being implemented, by the state agency.[48] Progress that was noted included the development of minimum education standards, described as a multi-factor assessment to help DYS measure and track education quality.[49] The Donahue Institute study also noted that Massachusetts Comprehensive Assessment System (or MCAS) scores for incarcerated youth had increased dramatically, with a passing rate in math going from 17% in 2002 to 42% in 2006.[50] Tenth Grade level English Language Arts MCAS scores also increased from 51% in 2005 to 71% just one year later.[51] But even with these improvements, a 42% passing rate in math is still a disappointing number. DYS has not proven that it can effectively educate with its current system and use of private contractors.

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43 Mass. Gen. Laws ch. 40, § 4E (2014).
44 Mass. Gen. Laws ch. 40, § 4E(b) (2014).
45 Mass. Gen. Laws ch. 40, § 4E(f) (2014).
46 UMass Donahue Inst., *supra* note 11, at 43; *see also* Mass. Gen. Laws ch. 71B, § 3 (codifying the purpose of education collaboratives generally).
47 Ireland, *supra* note 17; UMass Donahue Inst., *supra* note 11, at 4.
48 UMass Donahue Inst., *supra* note 11, at 5-6.
49 *Id.* at 44.
50 *Id.* at vii.
51 *Id.*

Youth at risk of being placed in juvenile facilities are often impeded by intermingled and complicated circumstances deriving from a lack of resources, wealth, and stability.[52] Yet all too often, these kids are not the focus of the state until they are in need of rehabilitation by DYS, or are treated as adults in criminal matters.[53] Rather than putting the academic obligation in the hands of the agency that takes youth after they have already been found delinquent, put the duty on a public agency that has the very purpose to educate, and that can have the incentive to be the force to step in and prevent institutionalization in the first place. Of course, this task is far from easy, but public school districts are a logical buffer to be included in closing the school-to-prison pipeline.

III. Comparative View

Other jurisdictions are pushing for innovative ways to keep public school districts involved with the education of youth kept in state detention facilities. The State of Oregon, for example, is moving to incorporate virtual schooling in its Juvenile Corrections Facilities.[54] The Oregon Youth Authority and Oregon Department of Education are collaborating to provide education to incarcerated youth through the Oregon Virtual School District (OVSD).[55] Virtual education is analogous to homeschooling, but incorporates learning almost solely via the internet, and is often publicly funded.[56] OVSD is a resource for properly licensed, public school teach-

52 *E.g.* Elizabeth Moore et al., *Childhood Maltreatment and Post-Traumatic Stress Disorder Among Incarcerated Young Offenders*, 37 CHILD ABUSE & NEGLECT 861, 867-69 (2013) (study conducted in Australia); Tamar R. Birckhead, *Delinquent by Reason of Poverty*, 38 WASH. U. J. L. & POL'Y 53, 58-60; Kate Rhudy & Jess Sucherman, *Breaking the Cycle of Offending and Poverty: A Symposium on the Intersection of Juvenile Justice and Poverty*, 16 GEO J. ON POVERTY L. & POL'Y 461, 461-63 (2009).

53 In Re Gault, 387 U.S. 1, 15-16 (1966); Catherine R. Guttman, *Listen to the Children: The Decision to Transfer Juveniles to Adult Court*, 30 HARV. C.R.-C.L. L. REV. 507, 507-10 (1995).

54 NAT'L EVALUATION & TECHNICAL ASSISTANCE CTR. FOR THE EDUC. OF CHILDREN & YOUTH WHO ARE NEGLECTED, DELINQUENT, OR AT RISK, JUVENILE CORRECTIONS FACILITIES CONNECT TO THE OREGON VIRTUAL SCHOOL DISTRICT (2014), *available at* http://www.neglected-delinquent.org/sites/default/files/NDTAC_Virtual%20School%20District_032814.pdf

55 *Id.*

56 MASS GEN. LAWS ch. 71, § 94 (2013).

ers to use in order to build interactive lessons or entire courses through web-accessible virtual media.[57] Educators have a wide array of tools to utilize such as podcasts, the ability to access one document from multiple devices in order to foster easier collaboration, and the ability to upload videos or audio links.[58] In Oregon, the obligation to provide education to delinquents in state facilities rest on both Oregon's equivalent to the Massachusetts DYS, and a public (albeit, virtual) school running on the lessons developed by public school teachers.

Although it is an often criticized form of education[59] for the average child due to presumed risks of child abuse, social and physical education underdevelopment, and a perceived lack of academic integrity, the same system may be ideal for delinquent juveniles. Many criticisms that put the validity of virtual schooling into question do not apply to youth in detention facilities. Overbearing helicopter parents will not be present to improperly influence or undermine the integrity of the academic performance of this population of youth when accessing the virtual school.[60] Virtual schooling and other forms of home-schooling are also criticized for circumventing oversight against child abuse that school personnel are able to provide through mandatory reporting.[61] However, virtual schooling as applied to delinquent youth in secure facilities would not be a tool that could lead to abuse, relative to the risks for children insulated at home.

Virtual schooling would also keep youth from falling behind their tech-savvy peers, a skill that has gained much more respect in

57 Or. Rev. Stat. § 329.840(1)-(2) (2012).

58 Nat'l Evaluation & Technical Assistance Ctr., *supra* note 53.

59 *See, e.g.*, Jack Schneider, *Cyber Skepticism: Let's Press the Pause Button on Virtual Schools and Consider Whether They Will Really Deliver a Quality Education to Students*, 95 Phi Delta Kappan 80 (2013); Office for Standards in Educ., Children's Services and Skills, The Impact of Virtual Schools on the Educational Progress of Looked-after Children, 7 (2012); Robin L. West, *The Harms of Homeschooling*, Phil. & Pub. Pol'y Q., Summer/Fall 2009, at 7, 7-12 (discussing homeschooling generally).

60 Katie Ash, *Virtual Educators Work to Protect Academic Integrity*, Education Week, Sept. 11, 2013, http://www.edweek.org/ew/articles/2013/09/11/03online_ep.h33.html.

61 MassGen.Lawsch.119,§21(2014)(definingmandatedreportersinMassachusetts and including public and private school teachers, and education administrators).

the current day of age.[62] Virtual schooling may also help make the learning of delinquent youth much more individualized, remedying a flaw noted by the Donahue Institute's assessment of the DYS educational services.[63] Conversely, the ability to collaborate with peers through cloud-based documents, accessible to multiple users, may keep learning from becoming overly solitary. Virtual schooling would also be cost-effective by reducing the need for the transportation of educators, as well as costs saved from hardcopy learning materials.

Another approach has been implemented in San Francisco area, which offers youth services with the Legal Education Advocacy Program (or LEAP). LEAP is provided by the San Francisco Public Defenders Office, arming delinquent youth with advocates in the form of an attorney and a social worker.[64] Although LEAP does not directly provide the education these juveniles need, the program is a mechanism to keep school districts honest in their duties to educate their excluded students.[65] Advocates of LEAP meet with educators to develop concrete strategies to provide an appropriate education.[66] The program has gained substantial popularity since its inception in 2012, and has been noted as the source of decreased recidivism and drop-out rates for formerly detained juveniles.[67] Lawmakers in Massachusetts should consider similar means to trigger positive school district intervention in educating all youth held in detention facilities, perhaps something akin to the

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62 *See, e.g.*, Nicky Hockly, *Tech-Savvy Teaching: BYOD*, MODERN ENGLISH TEACHER, Oct. 2012, at 44-45; Joshua Bolkan, *Report: Principal Support for BYOD Initiatives Nearly Doubled Since 2010*, THE JOURNAL, (June 4, 2014), http://thejournal.com/articles/2014/06/04/report-principal-support-for-byod-initiatives-nearly-doubled-since-2010.aspx; Norman Rozenberg, *When Should Children Be Exposed to Technology?*, TECH PAGE ONE, (June 26, 2014), http://techpageone.dell.com/industries2/education/when-should-children-be-exposed-to-technology/#.U7HsP5RdUuc.

63 UMASS DONAHUE INSTITUTE, *supra* note 10, at 5 ("Students arrive and depart from programs at irregular intervals, in some instances with minimal notice, complicating the development of definitive start and end points for units of instruction").

64 Laura Dudnick, *Unique SF Program Aims to Keep Troubled Kids in School*, SAN FRANCISCO EXAMINER, June 26, 2014, *available at* http://www.sfexaminer.com/sanfrancisco/unique-sf-program-aims-to-keep-troubled-kids-in-school/Content?oid=2832497.

65 *Id.*

66 *Id.*

67 *Id.*

education service plans of Massachusetts' new Chapter 222.

IV. What Juvenile Justice Reformers can Salvage from Chapter 222

Although Chapter 222 does not extend to youth adjudicated delinquents, it is a small step in a positive direction. It represents a force to counter the very school-to-prison pipeline that many of these delinquent youth are subject to. The statute's alternatives to exclusionary school discipline are founded in recognition of the harms associated with barring youth from an education.[68] Chapter 222 also expressly recognizes the disparate impact that suspensions and expulsions have on youth of color and youth with learning disabilities.[69] The regulations that accompany the statute actually require principals to record and report suspension and expulsion rates annually to the Department of Education.[70] The data collection must include statistics on specific demographics such as race, ethnicity, socio-economic background, and other characteristics of youth.[71] This is in clear recognition that certain groups of youth are at an exponentially higher risk of being excluded from school for disciplinary purposes than their peers.

There is no question that this subgroup of our population, at-risk youth with a history of transgressions, have not always been seen as the type of children deserving of state aid. They are obviously a group that primarily cannot vote. Therefore, it is eye opening for lawmakers, representing the popular majority, to develop a statute on behalf of youth excluded from school, and even more so that the statute is not shy about its notion that such issues stem from institutionalized discrimination based on race, ethnicity, ability, and so forth. Rather than being regarded as youth who are a risk to fellow peers who deserve to be shunned, the statute recognizes the additional harm caused by such an approach, and sees alternative forms of discipline which have a much greater potential to benefit those involved.[72] This rationale could certainly attach to

68 *See* Mass. Gen. Laws ch. 71, § 37H ¾(b) (2014); 603 Mass. Code Regs. 53.05 (2014).
69 603 Mass. Code Regs. 53.14(2)-(4) (2014).
70 603 Mass. Code Regs. 53.14 (2014).
71 603 Mass. Code Regs. 53.14(3) (2014).
72 Mass.Gen.Lawsch.71,§37H¾(b)(2014);603Mass.CodeRegs.35.05,11(2014).

challenges to state facilities detaining youth as well.

Conclusion

Chapter 222 represents an inspiring sign for juvenile justice reformers, who may have wanted the benefits of the Chapter 222 education plans, or similar structures, to reach delinquent youth. It is an interesting legislative step in recognizing those children who are more at risk for becoming delinquent. While Chapter 222 seems to show a lack of trust in our state institutions (public school districts), it also recognizes a broad *system* causing at-risk youth to be pushed into the school-to-prison pipeline. However, it needs to apply not only to youth expelled or on suspension from school, but also to juveniles adjudicated as delinquent. It is simply detrimental to the ongoing push for juvenile educational success for the Commonwealth to implement two separate juvenile education models. Moreover, by taking a closer comparative look at other jurisdictions developing innovative ways to keep public school districts involved with youth kept in state detention facilities, Massachusetts may be able to move in a similar direction applying Chapter 222 to juveniles found delinquent. While Chapter 222 is not a complete solution to the education of juveniles excluded from the school system, it demonstrates the willingness of Massachusetts to recognize the importance of an education that can advance and enrich youth who are being disciplined.