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REGULATING PRISON SEXUAL VIOLENCE

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Regulating Prison Sexual Violence

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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.

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

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.

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 power⁶ 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. GENDER & L.* 185, 200 (2006) (criticizing the overregulation of prisoners' sexual activities); Alice Ristroph, *Sexual Punishments*, 15 *COLUM. J. GENDER & L.* 139, 144 (2006)

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

(“[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).

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*

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 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

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).

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

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.

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

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 resilience,²² even in light of empirical evidence that staff-perpetrated sexual violence is more common than prisoner-perpetrated sexual

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- 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, *Sexual Abuse of Women in United States Prisons*, *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.
- 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).

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 in men's facilities.²⁶ Numerous scholars have described the severe

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 (August 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. Higgins & 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).

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.

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 and sexual violence involve vilifying disabled people—particularly people with mental disabilities—as dangerous and likely to be

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- 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>.

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 Molestering: 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 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. & GENDER 357, 391 (2012).

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 acts.⁴¹ This reality is inconsistent with an image of a perpetrator of

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.”).

41 See KING ET AL., THE SENTENCING PROJECT, BIG PRISONS, SMALL TOWNS: PRISON ECONOMICS IN RURAL AMERICA 15-16 (2003), <http://prison.ppjlr>.

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 the goal of preventing sexual violence.⁴⁵ The types of carceral sexual

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).

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*

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

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

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- 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.”).

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 survivor-centered approaches, which focus attention on the opinions, experiences, and demands of people who have experienced violence.⁵³

49 Lidia Yuknavitch, *Explicit Violence*, THE 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.").

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

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.

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

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.

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

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, 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

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.

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>.

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:

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

61 Cop ‘Stops And Frisks’ African American Teen, Literally Destroying His Genitals, POLITICAL 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, and 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).

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

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 Pat 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/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

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 Durazo⁶⁹

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 ultrasound⁷²—another form of nonconsensual penetration—advocates have had some

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 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).

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 hydration⁷⁹ 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; 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,

73 See, e.g., *Texas 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).

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 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

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 Entertainment 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).

86 *Id.*

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 be collected from their bodies as they are objectified and invaded, penetrated a second time by medical intervention.”⁹⁸ A prisoner in a

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).

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

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 of sexual violence, these nonconsensual sterilizations invade people's

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

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 rape¹⁰⁷ 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

Denial of medical care¹¹² 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

105 Nara Schoenberg, *Ladies, Scientists Have Found Out Some Very Interesting Details About Your Sex Life*, CHICAGO 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*, CENTRE 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.

112 See Durazo, *supra* note 69, at 186.

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.

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 BEHAVIOR 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. State of Okla.* ex rel. Williamson, Atty. Gen. of Okla., 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 Minahal¹²²*

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.

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 534-535; 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*, THE 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, AND 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 Elliott 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

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 & NATIONAL 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 AND 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

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 AND 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 himself 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, *Rethinking Prison Sex*, *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 stud¹⁵¹ 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

150 Steven, *Letters to Our Family*, BLACK AND 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 Pascal Emmer et al., *THE HEARTS ON A WIRE COLLECTIVE, THIS IS A PRISON, GLITTER IS NOT ALLOWED: EXPERIENCES OF TRANS AND GENDER VARIANT PEOPLE IN PENNSYLVANIA’S PRISON SYSTEMS* 45 (2011).

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.

156 *Id.* at 230.

157 *See id.* at 229-30; Susan Abram, *Condoms for Prisoners and Porn Stars Debated by Legislature*, LOS ANGELES 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.

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); 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

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. Dept. 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 and 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 *supra*, note 180, at 2.

184 *Id.* at 7.

185 *Id.* at 6.

186 *Id.* at 4-5.

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

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.

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*, 132 S. Ct. at 1518.

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 COMMISSION, 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 COMMISSION, *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 searches²⁰² 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.

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.

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

217 See *Clark v. Commonwealth*, 31 Va. App. 96, 102, (1999) *vacated on reh'g en banc*, 33 Va. App. 536 (2000) *aff'd*, 262 Va. 517 (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

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 (March 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 AND 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

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

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*, (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 et al., *supra* note 152, 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

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.,* NEW YORK 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*, SRLP 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.

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 brigades (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 Affairs²⁵² 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.

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.