

Beyond PREA: An Interdisciplinary Framework for Evaluating Sexual Violence in Prisons



Michele C. Nielsen

ABSTRACT

This Comment brings together scholarship from feminists, criminal justice reformers, and social theorists to understand sexual violence in carceral settings and to evaluate reforms to prevent rape in prisons and jails. After introducing the sexual nature of modern incarceration itself, the Comment explains a framework for understanding prison and sexual assault that emerges from social thinkers who tackled the theories of violence and the ambiguous sacred. Drawing from feminist insights on sexual assault legal force requirements, consent, sex positivity, agency, and confronting stereotypes, the Comment then discusses PREA and its limitations in light of this interdisciplinary framework. Finally, the framework yields insights into reform measures and their efficacy, including conjugal visits, condom and dental dam distribution, reporting improvements, inmate classification systems, ending regulation of consensual inmate sex, prison abolition, new approaches and programming, and Eighth Amendment doctrinal changes.

ABOUT THE AUTHOR

Michele C. Nielsen graduated from Princeton University with honors in 2012 with a bachelor's degree in anthropology and from the UCLA School of Law in 2016 with a J.D. Special thanks to Professor Frances Olsen for her invaluable insights and Professor Sharon Dolovich for her Eighth Amendment seminar.

TABLE OF CONTENTS

INTRODUCTION.....	232
I. INITIAL LINKS BETWEEN FEMINISM AND INCARCERATION	234
II. SOCIAL THEORETICAL FRAMEWORK.....	236
III. MORE POINTS OF COMPARISON: FEMINIST THEORY APPLIED TO PRISON SEX.....	246
A. Physical Violence and Force Requirements	247
B. Complicated Consent.....	248
C. Sex Positivism and Autonomy.....	254
D. Breaking Down Stereotypes	258
IV. THE PRISON RAPE ELIMINATION ACT.....	261
V. PROPOSED SOLUTIONS BEYOND PREA AND THEIR EFFICACY WHEN EVALUATED BY SOCIAL AND FEMINIST THEORISTS' UNDERSTANDINGS OF SEX, VIOLENCE, AND THE SACRED	267
A. Concrete Measures	267
1. Conjugal Visits	267
2. Condom, Dental Dam, and Latex Glove Distribution	272
3. Reporting Improvements	273
4. Body Classification Systems.....	274
5. Ending Regulation of Consensual Inmate Sex With Other Inmates	275
B. Cultural Measures.....	275
1. Generally	275
2. Prison Abolition	276
3. Other Creative Measures	277
4. Eighth Amendment Doctrinal Reform	278
CONCLUSION	280

INTRODUCTION

In a report on the Walnut Grove Youth Correctional Facility in Mississippi, run by a private contractor,¹ the U.S. Department of Justice (DOJ) found that a female correctional officer “removed her shirt and threw it on the floor while in her security post. . . .”² Video shows the officer inappropriately touching a young male inmate who climbed up to the security post over a four hour period. In another incident in April 2010, a corrections officer walked in on a nurse and youth inmate having sex in a bathroom. The report reveals the shameless resulting conversation: “The nurse, while in the sexual act, yelled ‘close the door!’ to the corrections officer who had interrupted her in the midst of sexual relations. . . . Upon returning, the corrections officer observed the nurse and the youth still having sexual intercourse. In response, the nurse called out ‘close the fucking door!’ Once finished, the nurse confronted the corrections officer asking ‘why couldn’t [he] wait until they got done before coming back?’”³ With at least monthly abusive incidents at the facility, the DOJ concluded that “[t]he Facility’s pervasive level of brazen staff sexual misconduct is stark evidence of a dysfunctional system.”⁴ More consistent with the typical prison narrative of other inmates as sexual aggressors, rather than staff, the report also found rampant sexual abuse between juveniles.⁵ The DOJ considered Walnut Grove one of the worst prisons in the nation in terms of sexual abuse.⁶

1. Although Walnut Grove was a privately run state facility, the U.S. Department of Justice announced in August 2016 that it would begin to phase out the use of federal private prison contractors. The move is estimated to affect about 14,200 federal inmates, a small but significant portion of the roughly 1.5 million people currently behind bars in American state and federal facilities. See Charlie Salvage, *U.S. to Phase Out Use of Private Prisons for Federal Inmates*, N.Y. TIMES (Aug. 18, 2016), <http://www.nytimes.com/2016/08/19/us/us-to-phase-out-use-of-private-prisons-for-federal-inmates.html>.
2. U.S. DEPT OF JUSTICE INVESTIGATION OF THE WALNUT GROVE YOUTH CORRECTIONAL FACILITY 7 (2012), https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/case/walnutgroveDOJ.pdf [<https://perma.cc/3VN7-UKGN>].
3. *Id.* at 5.
4. *Id.*
5. *Id.* at 17–18.
6. *Id.* at 1. Walnut Grove shut down on September 15, 2016. See *Barbaric Private Prison in Mississippi Closes Its Doors After SPLC Lawsuit*, S. POVERTY L. CTR. (Sept. 15, 2016), <https://www.splcenter.org/news/2016/09/15/barbaric-private-prison-mississippi-closes-its-doors-after-splc-lawsuit> [<https://perma.cc/GS6Q-JLFG>].

Much can be gleaned from bringing together feminist and social theorists' insights on violence and rape to better understand prison⁷ sexual abuse and how to evaluate reform efforts like the Prison Rape Elimination Act (PREA). By bridging the gap between criminal justice reformers within the legal field, academic scholarship on the theory of violence, and feminist organizers, a more robust coalition can be formed to address sexual violence comprehensively. Furthermore, reforming incarceration will lead to safer communities and decreased violence against women.⁸

This Comment first looks to the initial links drawn between feminist theory and prison systems to set the stage for understanding incarceration, and violence within the institution's walls, as inherently sexualized violence. Then, Part II delves into a variety of social thinkers who help to define, and therefore understand, violence and sex in terms of the theoretical concept of the sacred.⁹ Part III explores additional feminist contributions to understanding sexual violence and sexuality more generally. Part IV then evaluates the largest attempted reform measure in this area, namely PREA, in terms of these social and feminist theorists. Finally, Part V proposes and evaluates different solutions to the problem of sexual violence in prisons, all the while relying on an interdisciplinary theoretical framework to determine the likely efficacy of each solution to the horrors of prison sexual assault. First, Part V.A evaluates

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7. Although this Comment often refers to prisons, many of the concepts apply in jails, immigration detention facilities, mental health facilities, and other places of confinement as well.
 8. This Comment aims to be inclusive of all women and does not refer exclusively to cisgender women. It therefore must be acknowledged that abuse of trans* women is staggeringly high within American communities and prisons. See, e.g., Diana Tourjee, *Why Do Men Kill Trans Women? Gender Theorist Judith Butler Explains*, BROADLY (Dec. 16, 2015, 4:10 PM), https://broadly.vice.com/en_us/article/why-do-men-kill-trans-women-gender-theorist-judith-butler-explains [<https://perma.cc/V7F6-4DDV>]; *Federal Survey: 40% of Transgender Prisoners Are Sexually Abused Each Year*, NAT'L CTR. FOR TRANSGENDER EQUALITY: ADVANCING TRANSGENDER EQUALITY, <https://transgenderequality.wordpress.com/2014/12/18/federal-survey-40-of-transgender-prisoners-are-sexually-abused-each-year/> [<https://perma.cc/8CYP-PEEC>]. Furthermore, while language of gender binary is used throughout this Comment solely for readability, those with nonbinary and variant gender identities are also affected by sexual violence and incarceration. See, e.g., Alexander L. Lee, *Nowhere to Go But Out: The Collision Between Transgender & Gender-Variant Prisoners and the Gender Binary in America's Prisons*, PRISON LEGAL NEWS (2013), https://www.prisonlegalnews.org/media/publications/nowhere_to_go_but_out_gender_binary_in_american_prisons_alexander_l_lee_2003.pdf.
 9. It is important to note that all of these thinkers are white men. The original texts of their theories sometimes obviously rely on this white, cisgender male privilege in illustrations of the theories as originally conceived. In part to combat the inherently patriarchal nature of this theoretical framework, this Comment brings feminist voices into the mix before evaluating any reform measures. This Comment also includes voices of people of color, and much of the concrete subject matter of the paper involves reform measures and a critique of mass incarceration that would contribute to ameliorating racial injustice within the American criminal justice system.

concrete reforms including conjugal visits, condom and dental dam distribution, reporting improvements, inmate classification systems, and rules regarding consensual inmate sex. Second, Part V.B discusses deeper cultural shifts such as prison abolition and gradual decarceration measures; new programming like peer mentorship or kinship, yoga, and pets; and finally Eighth Amendment doctrinal changes to the deliberate indifference prison conditions legal standard and the malicious and sadistic use-of-force legal standard.

I. INITIAL LINKS BETWEEN FEMINISM AND INCARCERATION

Alice Ristroph brought feminist insights about sexual violence into dialogue with prison literature.¹⁰ In her piece, *Sexual Punishments*, Ristroph explains that the experience of modern incarceration is inherently sexual.¹¹ From the extreme regulation of bodies to the utter lack of privacy, the prison experience is one of “embodiment.”¹² Because that embodiment is also tied intimately to social hierarchies revolving around bodies and their sexuality, the prison social structure is linked to “sexual differentiation [as] a way of organizing inequality.”¹³ As feminism has long recognized, gender is a social construct that societies tie to hierarchy, and this dynamic exists within prison walls as well.¹⁴ For example, prison culture involves social rankings based on one’s sexual preferences and behaviors.¹⁵

Ristroph then applied feminist innovations around non-carceral rape to the carceral context. She pointed to five concepts, specifically that: (1) many victims¹⁶ are marginalized and ignored by a focus on physical violence; (2) potential

10. Feminists have long been involved in criminal justice reform, but American criminal justice academics have often neglected female prisoners and feminist contributions in academic works. See, e.g., ANNE LOGAN, FEMINISM AND CRIMINAL JUSTICE: A HISTORICAL PERSPECTIVE (2008).

11. Alice Ristroph, *Sexual Punishments*, 15 COLUM. J. GENDER & L. 139, 139–40 (2006).

12. *Id.* at 147. “Embodiment” is an interdisciplinary concept with many definitions. One definition is that “the body is not an *object* to be studied in relation to culture, but is to be considered as the *subject* of culture, or in other words as the existential grounding of culture.” Thomas J. Csordas, *Embodiment as a Paradigm for Anthropology*, 18 ETHOS 5, 5 (1990).

13. Ristroph, *supra* note 11, at 148.

14. *Id.* Ristroph, focusing on male inmates, notes that prisoners reassert their power over others to regain a sense of lost masculinity within the emasculating process of institutional subordination.

15. *Id.* at 151–52.

16. This paper will use the term “victim” and “survivor” interchangeably, while conscious of the ongoing dialogue about the best way to refer to those who have suffered sexual violence. Although the term “survivor” emphasizes the individual’s agency, the word “victim” also reminds the reader of the structural inequalities giving rise to the sexual violence. See, e.g., Rahila Gupta, *‘Victim’ vs ‘Survivor’: Feminism and Language*, 50.50 INCLUSIVE DEMOCRACY (June 16, 2014),

victims, with structural constraints limiting their options for safety, may be forced to endure one aggressor as a consistent attacker who will attempt to defend the victim from the attacks of other aggressors; (3) consent, as a concept and an action, is ambiguous; (4) rape law overlooks the sexual autonomy of survivors; and (5) criminal law can be ineffective at protecting sexual autonomy.¹⁷ These feminist contentions can also help to address the institutionalized world of prisons and the sexual abuse so inherent in the current process of incarceration.

Although some may judge prisoners harshly and lack interest in improving prison conditions for those already found guilty of a crime, society would receive a net benefit from decreasing violence, enacted upon and by prisoners, both inside and outside of prisons. I argue that prisoners who return to their communities after the harrowing experience of prison, especially when sexual violence has been part of that experience, are more likely to normalize, accept, and perpetuate disturbing patterns of sexual violence already present.¹⁸ Therefore, to decrease or eliminate crime, recidivism, further violence, and sexual inequality, we should

<https://www.opendemocracy.net/5050/rahila-gupta/victim-vs-survivor-feminism-and-language> [https://perma.cc/M4N2-SQFM].

17. Ristroph, *supra* note 11, at 181.

18. Sexual violence is part of American culture. See, e.g., Katie J.M. Baker, *Here Is the Powerful Letter the Stanford Victim Read Aloud to Her Attacker*, BUZZFEED: NEWS (June 3, 2016, 4:17 PM), https://www.buzzfeed.com/katiejmbaker/heres-the-powerful-letter-the-stanford-victim-read-to-her-ra?utm_term=.xq4kVLwZw#.ofzYzxAjA [https://perma.cc/5A7X-YQ6N]; Ashley Fantz, *Outrage Over 6-Month Sentence for Brock Turner in Stanford Rape Case*, CNN (June 7, 2016, 8:45 AM), <http://www.cnn.com/2016/06/06/us/sexual-assault-brock-turner-stanford> [https://perma.cc/KRE3-NQZB]; Zerlina Maxwell, *Rape Culture Is Real*, TIME: OPINION (Mar. 27, 2004), <http://time.com/40110/rape-culture-is-real> [https://perma.cc/3W6Z-77PQ].

A person's further crimes or acts of violence post-incarceration are often conceptualized in the form of recidivism statistics. Societal factors like food stamp policies, denial of the vote, and job application formats (brought to the forefront by the Ban the Box campaign), coupled with the difficult incarceration experience, often cause formerly incarcerated people to enact further violence. See David Chura, *The Real Roots of Prison Recidivism*, HUFFINGTON POST (May 22, 2014, 5:47 PM), http://www.huffingtonpost.com/david-chura/the-real-roots-of-prison-_b_5374661.html; *Ban the Box Campaign*, LEGAL SERVS. FOR PRISONERS WITH CHILDREN, <http://www.prisonerswithchildren.org/our-projects/all-of-us-or-none/ban-the-box-campaign> [https://perma.cc/6WS3-AQNE]. Notably, sex offender recidivism rates (significantly lower than for non-sex offenders) alone do not capture this phenomenon as many inmates will serve time for non-sexual crimes but still enact sexual violence before, during, and/or after their sentences are served. See Roger Przybylski, *Chapter 5: Adult Sex Offender Recidivism*, OFF. JUST. PROGRAMS: SEX OFFENDER MGMT. ASSESSMENT & PLANNING INITIATIVE, http://www.smart.gov/SOMAPI/sec1/ch5_recidivism.html [https://perma.cc/8TH8-2SE3]. For example, a person convicted of battery from a domestic violence crime, with domestic violence often linked to sexual violence, would fall outside the sex offender recidivism statistics. That person could continue to batter others upon his or her release, especially if his or her prison experience exposed him or her to further violence from correctional officers or entailed his or her use of force against other inmates.

seek efficacious reforms to the institution of prisons.¹⁹ These reforms will only be effective if gender and violence theory help to craft them.

II. SOCIAL THEORETICAL FRAMEWORK

By integrating the contributions of other social theorists with those of feminists, so vital to understanding sexual violence, prison rape and sexual abuse advocates can better evaluate reform measures. Several anthropology, sociology, philosophy, religion, and literary theorists, when read in conjunction, highlight the nature of violence and the sacred, and their theories clarify abstractly how best to halt cycles of violence, including rape and sexual coercion behind bars and in the free world. From Georges Bataille, Roger Caillois, Emile Durkheim, René Girard, and Michel Foucault, a coherent theoretical understanding of violence emerges, shedding light on what violence is, how it functions, and therefore how to contain or eradicate it.

In this framework, sex and violence are both part of the realm of the abstract sacred, a realm of abundant energy and power. The concept of the sacred encompasses all eroticism and violence. “Violence” as used by these social theorists goes beyond our commonplace definitions of concrete, physical violence to encompass virtually anything that disturbs the rhythm of daily life.²⁰ The term violence does not carry any negative connotations within the vocabulary of these theories; indeed, violence has immense social value. Conceptualized as a social energy, violence can be at once restoring, positive, and rejuvenating, but also potentially destructive, harmful, and devastating. This energy is contagious and can

19. While prisons are an easy institutional point of intervention to begin to address these social problems, other institutions should also consciously bring the issues of violence, gender, race, and other aspects of privilege and subordination to the forefront of their policy discussions. For example, schools and school policy must also intervene in cycles of poverty and sexual violence in much more robust ways than they currently do. Prisons and the criminal justice system, however, are an important site of potential reform that can address some of the most extreme forms of violence within society through more basic institutional changes.

20. This short definition does not actually capture what violence means within these theories, but is meant as a starting place for the further definitions that follow in this section. To provide an example that takes these theories to a facetious extreme *solely* for clarity's sake, violence could occur if one were walking down the street and one's shoelace broke, provoking sadness, annoyance, or some other emotional disruption in one's life. While violence is a more serious experience that actually jars a person out of the functional, daily world of work and leisure (for example when one is physically or sexually assaulted), this shoelace example is meant only to make the theory and concepts more accessible to the reader and not to make light of the weighty, deeply felt, and gravely traumatic types of violence discussed in the rest of this Comment. I am *not* comparing sexual violence with a broken shoelace, but rather creating an over-simplified, somewhat frivolous example only to help convey the theories on violence and the sacred in terms of a neat, relatable, and common event.

spiral out of control and pollute a community, threatening social order and harming individuals such as when a coercive act is committed;²¹ however, the energy can also be contained, allowing for ritual purification,²² as when sex serves a restorative role or when the criminal justice system leads to rehabilitation.

Georges Bataille understood the sacred, the umbrella term under which sex and violence fall, as the realm of continuity and the profane as the realm of discontinuity. Discussing conception, he explains that we begin life as a continuous being only when the discontinuous sperm and ovum unite.²³ Throughout most of our lives, “[w]e are discontinuous beings, individuals who perish in isolation in the midst of an incomprehensible adventure, but we yearn for our lost continuity,” or for the sacred realm in which we find connection to others through love, sex, social meaning, and our passions.²⁴ Only in certain moments can we experience the sacred, that continuity with other people around us or that tapping into something deeper and more profound than banal, everyday life. For example, eroticism and death²⁵ both provide access to the sacred. Bataille explains that

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21. To continue the potentially poor taste of the broken shoelace example, the violence of the sundered lace could spiral beyond one’s control if it subsequently compelled the walker to yell or snap at a co-worker or family member for some minor transgression that would usually provoke no response. The spiral could continue if then the co-worker or family member spoke curtly to another, who in turn did the same to other people. Such terse words could provoke more damaging behaviors if a given co-worker or family member was already having a bad day with violence of their own (perhaps a spilled cup of coffee or a fight with a significant other). From the tiny original violence of one broken shoelace could flow the unhappiness and disruption of an entire on-edge workplace or home. The contagious pollution of violence can spread and escalate quickly.
22. The tale of the broken shoelace might end happily if the walker or those around the walker found a way to ritually purify the violence of the tearing fabric. Such rituals might include religion, if the walker whispered a daily prayer in response to the disruption or later attended a church service; a relaxing hot shower or bath after work (the ritual of choosing one’s favorite bath product, turning the heat to just the right setting, and engaging in one’s unique sequence of cleaning behaviors); or a quick call or text message from a loved one that could allow the walker to vent his pedal frustrations and receive an oft-repeated supportive remark in response (the ritual of supporting one’s friends and family by routinely lending an ear and providing comforting words). While ritual is usually more extensive and complex than these tongue-in-cheek examples, as it must be imbued with social power and meaning to be effective, repetitive behaviors, even those not obviously religious, can form a purifying ritual that relieves the dislocating effects of violence.
23. GEORGES BATAILLE, *EROTISM: DEATH & SENSUALITY* 13–14 (Mary Dalwood trans., City Lights Books 1986) (1962).
24. *Id.* at 15.
25. *Id.* at 22 (“This sacredness is the revelation of continuity through the death of a discontinuous being to those who watch it as a solemn rite. A violent death disrupts the creature’s discontinuity; what remains, what the tense onlookers experience in the succeeding silence, is the continuity of all existence with which the victim is now one.”); *id.* at 24 (“[B]eyond the intoxication of youth, we achieve the power to look death in the face and to perceive in death the pathway into unknowable and incomprehensible continuity—that path is the secret of eroticism and eroticism alone can

“the domain of eroticism is the domain of violence, of violation.”²⁶ Achieving continuity with another being through eroticism, thereby accessing the sacred realm, is itself an act doing violence to the discontinuous entities involved. Therefore, all eroticism is violence and both are always sacred.²⁷

In contrast to the sacred, the profane world is the realm of work, social order, and everyday life in which we function as discontinuous beings. Arising from the need to maintain communities and perform work, tools are “the nascent form of the non-I”²⁸ and therefore establish a discontinuity. Our mundane world, filled with work and the rules that entails, derives from the development of tools and the necessity for social order. Bataille explains that this profane world is defined in opposition to the sacred, and “[w]ork set up the distinction between the sacred and the profane.”²⁹

The relationship between the sacred and profane culminates in understanding the sacred as contagious and dangerous. Sacred and profane time must alternate in a society, as discussed below by Caillois, in order for the society to rejuvenate and allow the social order to endure. Bataille explains that “[t]he sacred is that prodigious effervescence of life that, for the sake of duration, the order of things holds in check, and that this holding changes into a breaking loose, that is, into violence. . . . The divine world is contagious and its contagion is dangerous.”³⁰ Because the sacred threatens the ordered world of work with its excess—its ecstatic continuity—the sacred contagion must be ritually contained and purified. If a society failed to purify the sacred, the sacred would abound unchecked, and no rules or social order would remain.

Roger Caillois further elaborates on the relationship between the sacred, the profane, and ritual. He defines the sacred in terms of its social effects and its potentially restorative or destructive nature, namely that it at once “emanates from the dark world of sex and death, but it is the principle essential to life and the source of all efficacy.”³¹ Describing further the give-and-take between the profane world and sacred contagion, Caillois writes

reveal it. . . . Eroticism opens the way to death. Death opens the way to the denial of our individual lives.”).

26. *Id.* at 16.

27. *Id.* at 17 (“We cannot imagine the transition from one state to another one basically unlike it without picturing the violence done to the being called into existence through discontinuity. . . . The whole business of eroticism is to destroy the self-contained character of the participators as they are in their normal lives.”).

28. GEORGES BATAILLE, *THEORY OF RELIGION* 27 (Robert Hurley trans., MIT Press 1989) (1973).

29. BATAILLE, *supra* note 23, at 114.

30. BATAILLE, *supra* note 28, at 52–53.

31. ROGER CAILLOIS, *MAN AND THE SACRED* 151 (Meyer Barash trans., 1959) (1950).

that “[o]n the one hand, the contagiousness of the sacred causes it to spread instantaneously to the profane, and thus to risk destroying and dissipating itself uselessly. On the other hand, the profane always needs the sacred, is always pressed to possess it avidly, and thus to risk degrading the sacred or being annihilated by it.”³² Ritual performs an important mediating function between the sacred and profane, at once establishing boundaries between the two and changing their limits based on a society’s needs.³³

The ambiguity of the sacred also aids in understanding its shifting nature. The sacred can be both pure and impure, holy and evil, based on context.³⁴ For example, sex can be both life affirming if consensual and traumatically defiling in the case of rape. In either case, the social effects of sacredness conferred on an object³⁵ are the same—namely, the object is untouchable and powerful, regardless of its defilement or holiness.³⁶ He observes that “[t]he divine and the accursed, consecration and defilement, have exactly the same effects upon profane objects”: the objects’ removal from the profane world.³⁷ Caillois also applies this contextual distinction between the pure and impure sacred to separate sin from encouraged religious observance.³⁸

32. *Id.* at 23. Furthermore, the nature of the sacred and profane is more complex, since the sacred morphs based on its context: “[The sacred] implies good or evil according to the particular circumstances of its respective manifestations.” *Id.* at 34.

33. *Id.* at 23. (“First, the positive function of the ritual is to transform the nature of the profane or the sacred according to the needs of the society. Second, the negative function of ritual is, on the contrary, to keep the profane and the sacred as they are, lest they destroy each other by coming into improper contact.”).

34. EMILE DURKHEIM, *THE ELEMENTARY FORMS OF RELIGIOUS LIFE* 412–15 (Karen E. Fields trans., The Free Press 1995) (1912).

35. This sentence specifically discusses objects, not people.

36. *Id.* at 36 (“[Some] civilizations do not separate linguistically the taboo caused by awe of sanctity from that inspired by fear of defilement.”).

37. *Id.* at 42.

38. Caillois equates the impure with the violent, disorderly, and evil side of the sacred. *Id.* at 55. The pure promotes cohesion and is essentially everything “good” in the world. He repeatedly creates lists to emphasize the differences, claiming morality for the pure and “damnation” for the impure. *Id.* at 57. He writes that “[t]he pact with the devil is no less consecrating than divine grace. The one who has signed it and the one burdened by it are equally separated forever from the common lot” *Id.* at 59. While he acknowledges that the distinctions between the sacred and profane depend upon culture and social need, he fails to apply the same cultural relativist lens to the pure and impure sacred. Caillois instead relegates the impure sacred to an inferior rung in his theory as compared to the pure sacred, emphasizing that the impure sacred is evil. He unfortunately enforces a Christian framing repeatedly, while ignoring the positive potential in the perhaps more graphic violence of the impure sacred. Because the pure and impure sacred are context-specific, their contours can change based on the culture one is working within. *Id.* at 73 (“The distinction between the sacred and the profane reproduces and imitates that of social groups.”). Caillois, however, tries to apply a Christian framing for sin to all societies. Conceptually mingling the pure and impure sacred himself, Caillois acknowledges that power itself confers sacredness, whether it is

Caillois further improves the theoretical framework by emphasizing the role of festivals and ritual. He explains that “[i]t is necessary to recreate the world, to rejuvenate the system. Taboos [or ritual boundaries that demarcate the line between the sacred and profane] can only prevent [society’s] accidental end. . . . A positive act must assure a new stability to the order. A facsimile of creation is needed to restore nature and society.”³⁹ Festivals and ritual are the site of sacred access that reaffirms the social order and provides a restorative, rebirthing function.⁴⁰ He describes a society’s collective need to experience catharsis, to gain a sacred reprieve from the profane world of work. He writes that:

The affirmations of excessive vitality, intoxication, violence, ecstasy, feasts and orgies, prodigality, and games of chance—severely repressed during the static period because they distract men’s arms from collective labor and their minds from communal pursuits and the accumulation of wealth in the public interest—become, on the contrary, during periods of crisis, a means of exalting communion.⁴¹

The role of ritual is therefore imperative to renew and sustain social order, and the festival is one such expression of positive, bounded sacredness that is restorative to participants and the collective at large. Society’s survival relies on this temporal alternation between positively bounded ritual access to the sacred, and profane work.

Emile Durkheim’s work with the Aborigines in Australia also elaborates on the theoretical conceptualization of the sacred. He observed smaller groups operating farms or hunting and fishing throughout the year, but with their social life punctuated by religious, communal rituals.⁴² Durkheim explained that, due to the need to work and gather food, “[t]he demands of life do not permit [society] to stay in congregation [or sacred continuity] indefinitely,” referring to Bataille’s

freely given (the pure sacred) or seized (the sinful impure sacred). *Id.* at 92 (“[P]ower confers new qualities upon the person. It sanctifies him no less than the priesthood. The one who accepts or seizes it becomes pure.”). Bataille also discusses the pure and impure sacred, but unlike Caillois, he simply links the historical condemnation of the impure sacred to Christianity without drawing that judgment himself. BATAILLE, *supra* note 23, at 123 (“The [condemning] merging of sacred uncleanness [the impure sacred] and the profane seems to have been for some long time contrary to the feeling about the true nature of things persisting in man’s memory, but the inverted religious structure of Christianity demanded [that the impure sacred be removed from the sacred realm, relegated to profane sin].”).

39. CAILLOIS, *supra* note 31, at 96.

40. *Id.* at 99 (“If the festival is the time of joy, it is also the time of anguish. Fasting and silence are required before the festival starts. Habitual taboos are reinforced, and new restrictions are imposed. Debauchery and excess of all kinds, the solemnity of the ritual, and the severity of the previous restrictions are equally united to make the environment of the festival an exceptional world.”).

41. *Id.* at 131.

42. DURKHEIM, *supra* note 34, at 331.

link between tools, work, and the profane.⁴³ Therefore, the collective “disperses, only to reassemble anew when it again feels the need. It is to these necessary alternations that the regular alternation of the sacred and profane time responds.”⁴⁴ Therefore, a society’s need for a sacred rejuvenating ritual, and the timing of such a ritual, is the direct result of a balance between the profane world of work and a need for periodic renewal.⁴⁵ It was at the religious moments where the collective assembled to reaffirm common values and perform ritual that the sacred realm was created. He explained that “the faithful are not mistaken when they believe in [sacredness]. . . . That power exists, and it is society.”⁴⁶ He termed this sacred experience of the society’s energy, when members simultaneously felt power both outside themselves but within themselves during rituals,⁴⁷ “collective effervescence.”⁴⁸ Society is therefore *sui generis*,⁴⁹ both a result of this collective energy and sustained by it in periodic revitalizing rituals.

Durkheim describes the sacred and the profane as entirely “separate,” with “a kind of logical void between them,” calling the two a “radical duality.”⁵⁰ Despite this rigid dichotomy, however, bleeding over of the sacred into the profane realm is a constant threat. This potential for contamination, for the breaking loose of sacred energy into the more ordered, profane world is the “contagiousness of the sacred.”⁵¹ Just as the process of sanctifying an object in Catholicism confers sacred properties on the previously profane item, sacred energies can be transmitted to new objects and people.⁵² Accordingly, “a whole system of measures to keep the two worlds at a respectful distance apart becomes indispensable” to social stability.⁵³ Durkheim also noted the ambiguity of the sacred, aligning himself with Caillois and Bataille’s understandings of the pure and impure sacred.⁵⁴

43. *Id.* at 353.

44. *Id.*

45. *Id.*

46. *Id.* at 226–27.

47. *Id.* at 410–11.

48. *Id.* at 220 n.31.

49. *Id.* at 15.

50. *Id.* at 37–39.

51. *Id.* at 324.

52. *See id.* at 326.

53. *Id.* at 324.

54. *See, e.g., id.* at 413–14 (“An impure thing or an evil power often becomes a holy thing or a tutelary power—and vice versa—without changing in nature, but simply through a change in external circumstances.”); *id.* at 415 (“The impure is made from the pure, and vice versa. The possibility of such transformations constitutes the ambiguity of the sacred.”).

René Girard similarly linked the sacred to violent, sacrificial rituals.⁵⁵ In his mimetic thesis, societies will always face conflict as members' desires converge on the same object, due to the similarities amongst members and their exposure to one another.⁵⁶ In order to mediate that violence, society must create structures to purify the violent urges, or to prevent the contagion of the violent sacred realm from bleeding into the profane world.⁵⁷ Once conflict or violence occurs, vengeance becomes a threat to social order.⁵⁸ To contain the threat of reciprocal violence, societies use ritual or sacrifice. Girard explains that "[t]he function of sacrifice is to quell violence within the community and to prevent conflicts from erupting."⁵⁹ During the ritual, societal members can project their violent urges onto the sacrificial victim, thereby expunging any violent emotions and finding purification through the contained sacred within the ritual.

Girard notes that societies often choose sacrificial victims, or scapegoats, that share some qualities with the society, but who are also marked as clearly different from the onlookers.⁶⁰ For example, goats are like us because they are social creatures who live together, but goats are still clearly not human and therefore different enough from society's members. In that vein, typical sacrificial victims must be similar, but not too similar, to onlookers who would otherwise fear becoming victims themselves, destroying the ritual boundary erected around the sacred sacrifice.⁶¹

For Girard, the criminal justice system is the modern form of sacrificial ritual, in which the social deviant is marked as different and sacrificed at the altar of public condemnation. He explains that during properly bounded ritual, "the vicious circle of reciprocal violence, wholly destructive in nature, is replaced by the vicious circle of ritual violence, creative and protective in nature."⁶² By erecting ritual boundaries through religious sacrifice or festival, the danger of the sacred can be fenced in, protecting the profane realm from the sacred's destructive potential even while renewing the society and restoring order. He claims that "for us the circle [of reciprocal violence] has been broken. We owe our good fortune

55. RENÉ GIRARD, *VIOLENCE AND THE SACRED* 19 (Patrick Gregory trans., Johns Hopkins University Press 1979) (1972).

56. RENÉ GIRARD, *DECEIT, DESIRE, & THE NOVEL: SELF AND OTHER IN LITERARY STRUCTURE* (Yvonne Freccero trans., Johns Hopkins University Press 1976) (1961).

57. GIRARD, *supra* note 55, at 36 ("All concepts of impurity stem ultimately from the community's fear of a perpetual cycle of violence arising in its midst.").

58. *Id.* at 14 ("Vengeance, then, is an interminable, infinitely repetitive process.").

59. *Id.*

60. *See generally* RENÉ GIRARD, *THE SCAPEGOAT* (Yvonne Freccero trans., Johns Hopkins University Press 1986) (1982).

61. *Id.*

62. GIRARD, *supra* note 55, at 144.

to one of our social institutions above all: our judicial system, which serves to deflect the menace of vengeance. . . [and to avert] the danger of escalation.”⁶³ Just as Caillois was restrained by his Christian worldview, Girard’s blind faith in the judicial system and criminal justice represents a limited understanding of the empirical realities of modern life. Girard failed to grasp that the intervention of our current justice system serves only to perpetuate cycles of reciprocal violence, failing to ritualistically contain or purify any of the sacred violence inherent in most crimes and affecting all prisoners. Instead, the prison system further enacts systemic violence against those who come into contact with it.⁶⁴

Unlike Girard, Michel Foucault’s work recognized the harsh reality of prison life. His theories take into account the social factors, such as poverty and race, that provide an excuse for many to turn a blind eye to appalling prison conditions that do not touch more privileged communities to the same extent.⁶⁵ Foucault takes up the subject of prisons and modern incarceration through his theories of societal structuring and discipline.⁶⁶ Beginning with a historical perspective, *Discipline and Punish* describes the early stages of punishment in which a sovereign enacted violence directly onto the bodies of social deviants. Later, reformers pushed through a shift from corporeal punishment to incarceration, in

63. *Id.* at 15–16.

64. See generally Sharon Dolovich, *Foreword: Incarceration American-Style*, 3 HARV. L. & POL’Y REV. 237, 237–38 (2009) (“[American incarceration] is a distinct cultural practice with its own aesthetic and technique, a practice that has emerged in recent decades as a catch-all mechanism for managing social ills. The aesthetic of incarceration—orange jumpsuits, cell blocks, bars, barbed wire—has become a cultural referent so familiar it may be readily exploited for political and even comedic purposes. As for the technique definitive of the practice, although perhaps less widely recognized, its key features have become the default way for maintaining custodial control over imprisoned populations: greatly restricted movement; limited media access to the facility; strict limits on visits and communication with family and friends on the outside; minimal access to or control over personal effects; a lack of privacy vis-à-vis staff or other prisoners; limited access to meaningful work, education, or other programming; little if any concern for the self-respect of the incarcerated; an ‘us’ versus ‘them’ dynamic between the incarcerated and custodial staff; and increased reliance on solitary confinement for the purpose of punishment or control.” (footnotes omitted)).

65. Poverty is a direct cause of America’s modern mass incarceration state, and one’s race can also dramatically increase the likelihood of incarceration. See, e.g., KAREN DOLAN WITH JODI L. CARR, *THE POOR GET PRISON: THE ALARMING SPREAD OF THE CRIMINALIZATION OF POVERTY* (2015), <http://www.ips-dc.org/wp-content/uploads/2015/03/IPS-The-Poor-Get-Prison-Final.pdf>; Bill Quigley, *40 Reasons Why Our Jails Are Full of Black and Poor People*, HUFFINGTON POST (June 2, 2015, 10:17 AM), http://www.huffingtonpost.com/bill-quigley/40-reasons-why-our-jails-are-full-of-black-and-poor-people_b_7492902.html [<https://perma.cc/ZMW9-4Y26>].

66. MICHEL FOUCAULT, *DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON* (Alan Sheridan trans., Vintage Books 1995) (1975).

an effort to act on the minds and souls of inmates rather than their bodies. Despite these intentions, modern incarceration remains largely corporeal.⁶⁷

Foucault also describes how this prisoner-delinquent class is created by larger social and human sciences, as their disciplines “train[] the moving, confused, useless multitudes of bodies and forces into a multiplicity of individual elements Discipline ‘makes’ individuals. . . .”⁶⁸ This making occurs through hierarchical observation, normalizing judgment, and examination, often taking place at institutional sites like schools, hospitals, the military, and prisons. Socialization creates docile bodies marked into socially defined classes and groups.⁶⁹ In Foucault’s conceptualization, elites determine social norms and then fit bodies into those norms in a top-down process. Unlike the other theorists, who focus on the sacred and social formation from the bottom up, Foucault’s world begins at the established continuity and purposefully creates discontinuity by sorting bodies into their social boxes. Once society’s docile bodies have been sorted, their access to the sacred comes only from the defiance of that profane structure. Namely, when individuals are perceived as abnormal, it is usually because they defy their assigned symbols and roles by tapping into continuity themselves.

From all of these theories emerges a better understanding of the role of vital, rejuvenating, purifying criminal justice in society. Current mass incarceration hampers this role, and prison rape serves only to propagate impure sacredness with inadequate ritual boundaries that are insensitive to the complexities inherent in any sexual interaction within such a totalizing institution. Like women on the stand in rape trials who are symbolically raped again during their testimony or during initial reporting,⁷⁰ inmates and their experiences with the apparatus of the justice system parallel this institutional violation. Incarceration now enacts further institutionalized, unrestrained violence upon inmates,⁷¹ who are symbolically

67. See *supra* Part I.

68. FOUCAULT, *supra* note 66, at 170.

69. *Id.* at 135–94.

70. See 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, 140–42 (2009) (“Indeed the term ‘second rape’ was coined to describe the experience that women endured as they engaged in the criminal justice process to press a complaint of rape. Law enforcement’s treatment of rape victims was notorious. . . . Courts continued and amplified the process of mistreatment by allowing it in a public forum. Judges often treated rape victims with a degree of callousness.”).

71. See, e.g., Philip Ellenbogen, Note, *Beyond the Border: A Comparative Look at Prison Rape in the United States and Canada*, 42 COLUM. J.L. & SOC. PROBS. 335, 338–39 (2009) (“The trauma of being raped in prison transcends the physical pain and embarrassment associated with this sexually violent treatment. Prison rape can increase the rate of post-traumatic stress disorder and depression, and can worsen existing mental illness among both current and former inmates. Prisoners who worry and are constantly on alert to being assaulted and victimized are at a high risk

and sometimes actually raped in prison. Such unfettered violence is an unleashing of the sacred, leading to further institutional oppression, a greater likelihood of recidivism, and, in turn, more violence within communities and against women.⁷²

For example, when rape becomes normalized in prison, inmates returning to communities are likely to continue to treat sexual violence as an acceptable form of organizing hierarchies, likely by committing violent acts against women.⁷³ While broader society still tolerates sexual violence as an ordering force to oppress women,⁷⁴ the process of condemning rape and sexual assault should begin, at the latest, within prison walls. Furthermore, failing to prevent sexual assault in prison can also facilitate the spread of sexually transmitted diseases to ex-inmates' future partners, many of whom will be women.⁷⁵ Beyond the dangers

of suffering from psychophysiological conditions that include asthma, ulcers, colitis, and hypertension. These conditions can also lead to rape trauma syndrome ("RTS"), a disease that while typically associated with non-incarcerated women occurs in men as well. When untreated, sufferers of RTS can experience feelings of helplessness, shame, nightmares, self-blame, suppressed rage, violent behavior, and social and sexual dysfunction. These symptoms can last anywhere from a few days to decades, or even to life. Furthermore, recovery from RTS is severely hindered, as victims remain incarcerated and 'unable to withdraw from the setting of their victimization.' As a result of the systemic under-reporting of rapes in prison, psychological treatment is often not requested, or is simply unavailable, thereby worsening the length and extent of the effects. In the most extreme cases, some inmates would rather take their own lives than subject themselves to the continuous pain and suffering of sexual assault." (footnotes omitted)).

72. See, e.g., Dolovich, *supra* note 64, at 252–53 ("[I]ncarceration in the American prison is not a practice designed to achieve the successful social reintegration of the people who have served their time. What is effected instead is a process of dehumanization whereby incarcerated persons, through repeated humiliations, come to occupy a degraded position in the eyes of both prison officials and the public at large. . . . The degradation of prisoners, an integral part of the prison culture itself, no doubt helps maintain the system of sexual violence that is often met with indifference and inaction by correctional officers. . . . [T]hose who have been incarcerated and subsequently deprived of any meaningful social or psychological support are sure to become ever more marginalized from the body politic, and the more marginalized they become, the more likely they are to wind up back in prison." (footnotes omitted)).

73. See Thompson, *supra* note 70, at 165–68 ("[In prisons,] rape is 'normalized' and used as a tool of aggression, domination, and enslavement of others. . . . Some, who have examined prison rape, suggest that without treatment, both the victims and perpetrators of this violence may likely carry it back into their communities. . . . The findings included in the [Prison Rape Elimination Act] emphasize the ways in which sexual assaults in prisons increase the dangerousness of the prison environment; that prison rape impedes offender reentry; and further, that without treatment, rape in prison *decreases* public safety." (footnotes omitted)).

74. See *supra* note 18.

75. See, e.g., Ellenbogen, *supra* note 71, at 339 ("Aside from the physical, mental, and emotional effects, the spread of HIV/AIDS, tuberculosis, hepatitis B and C, and other sexually transmitted diseases threaten prisoners within correctional facilities. In the United States in 2005, over 20,000 prisoners (1.7% of the male prison population) were diagnosed with HIV/AIDS. In Canada, as of 1997, there were 158 known cases of HIV and [twenty] cases of AIDS, which translates to an infection rate of more than [ten] times that of the general Canadian population. The risk of spreading these

around sex that can result from such harsh and sexualized prison conditions, ex-inmates may be stunted in their ability to create and maintain constructive, non-abusive social relationships.⁷⁶ All of these represent the effects of the sacred unleashed inside prisons, and how that contagious violence is then carried back into our communities, ultimately bringing harm to women and other community participants who may not have served time behind prison bars.

III. MORE POINTS OF COMPARISON: FEMINIST THEORY APPLIED TO PRISON SEX

Professor Ristroph began the dialogue between feminist and prison scholarship with her five points of comparison, specifically comparing the following feminist topics to the prison system: (1) physical violence, (2) protective pairings, (3) ambiguous consent, (4) sexual autonomy, and (5) criminalization in relation to sexual autonomy. In this Part, I expand on these topics and further explore the role of physical violence, consent, and sexual autonomy in relation to sex positivism. I also discuss how feminist theory attempts to break down stereotypes about sexual violence. From a discussion of these common concepts between feminist and criminal justice literature, I hope to further support the shared goals of reformers in both areas. This discussion will also develop a more comprehensive understanding of sex in prison to inform later discussions of solutions that incorporate the social theorists given this complicated, yet somewhat familiar to feminists, carceral landscape.

diseases has consequences that extend far beyond prison walls. Infected prisoners who are released risk transmitting viruses or deadly diseases to their partners or spouses. Christopher Hensley, in his book entitled *Prison Sex: Practice and Policy*, describes this potential outcome as a 'death sentence for both the inmates and their significant others.' (footnotes omitted). While HIV/AIDS is no longer a death sentence, and can even be prevented with medications taken prior to contraction (called pre-exposure prophylaxis), the potential spread of disease affects communities and women outside of the prison context.

76. Gabriel Arkles, *Regulating Prison Sexual Violence*, 7 NE. U. L.J. 69, 98–99 (2015) (“[P]rohibitions 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?’ 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?’” (footnotes omitted)).

A. Physical Violence and Force Requirements

Feminists have long argued against rape statutes that require force or the serious threat of bodily harm, while excluding other forms of coercion like verbal extortion.⁷⁷ Even Model Penal Code § 213.1(1)(a) includes the following as part of its gendered definition of rape: “[H]e compels her to submit by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone. . . .”⁷⁸ These requirements ignore less physical means of coercion that can be no less forceful to victims, as when a victim, perhaps wisely, chooses to submit, or simply freezes, to avoid further violence. Stephen Schulhofer argues for an evaluation of whether whatever kind of force or tactic used is illicit or unacceptable.⁷⁹ He proposes a new crime, in place of the contentious issues of force in rape statutes, of “any sexual imposition without valid consent,” which raises the question to be taken up in Part III.B on defining and understanding the idea of consent.⁸⁰

Paralleling force requirements for rape, a unique procedural vehicle applied a similar screening mechanism to all inmate claims, including sexual violence. The Prison Litigation Reform Act (PLRA) required physical injury before a claim for emotional or mental violation could be heard. This created a loophole for some sexual assault cases in which the victim could not prove physical injury, since the court defined injury not to include penetration, thereby blocking a claim even for emotional or mental damages. An amendment to the Violence Against Women Act (VAWA), however, eventually closed this loophole, barring courts from defining sexual violence as less than physical injury by explicitly listing sexual acts as injury.⁸¹

This history illustrates lawmakers’ urge to require—usually physical—force or injury before sexual claims even deserve to be heard or acknowledged. From both feminist and criminal justice perspectives, the force and injury requirements serve to screen out valid claims for systemic reasons related to culture and judicial efficiency. This emphasis on physicality or extreme violence fails to acknowledge other aspects of the sacred that can be just as polluting, like verbal or otherwise socially significant acts that do violence to one’s sense of self. The reticence of courts and lawmakers to acknowledge the harms of sexual violence outside of

77. See Stephen J. Schulhofer, *The Feminist Challenge in Criminal Law*, 143 U. PA. L. REV. 2151, 2171–80 (1995).

78. MODEL PENAL CODE § 213.1(1)(a) (1980).

79. See Schulhofer, *supra* note 77, at 2175.

80. *Id.* at 2184, 2177.

81. See Giovanna Shay, *PREA’s Peril*, 7 NE. U. L.J. 21, 35 (2015).

physical force, or to recognize a sexual act as physical injury, is a problem faced by both criminal justice and feminist reformers. The two should compare notes on effective strategies for moving beyond such restrictive, insensitive, and concerning definitions of rape and injury, even as they expand on legislation like VAWA that has begun to address such problems.

B. Complicated Consent

Discussions of rape and rape law, whether in prison or outside the institution's bars, usually involve consent as a central topic. "Yes means yes" reformers have advocated for enthusiastic, affirmative, verbal consent as the baseline requirement for sexual activity.⁸² In response, others have pointed to the lack of cultural support for understanding consent in a strictly verbal manner. Aya Gruber has noted the risk of jury nullification and non-enforcement for laws that do not comport with jurors', law enforcement officers', or prosecutors' prevailing ideas about what consent actually means to them and society at large.⁸³ Therefore, rape laws that define consent in the black-and-white verbal way discussed above may miss the mark when it comes to measurable effects for rape survivors. Accordingly, social conceptualizations about consent are more nuanced than purely verbal, clearly communicated affirmative or negative words. Because the social understanding of consent does not map onto the "yes means yes" concept, more work must be done to define consent in a way that makes sense within our sociocultural environment, in the hopes that survivors will receive better systemic treatment as a result.⁸⁴

82. See, e.g., Jennifer Medina, *Sex Ed Lesson: "Yes Means Yes," But It's Tricky*, N.Y. TIMES (Oct. 14, 2015), http://www.nytimes.com/2015/10/15/us/california-high-schools-sexual-consent-classes.html?_r=0 [<https://perma.cc/RW28-66A6>]; William M. Welch, *California Adopts "Yes Means Yes" Law*, USA TODAY (Sept. 29, 2014, 8:35 AM), <http://www.usatoday.com/story/news/usanow/2014/08/28/california-bill-yes-means-yes-sex-assault/14765665> [<https://perma.cc/U3DD-XDUK>].

83. Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 629 (2009) ("Such laws may also be subject to non-enforcement and jury nullification. Theorist Dan Kahan suggests that, given the reality of 'sticky norms,' criminal law should 'gently nudge' rather than 'shove through' new norms. Thus, criminal prohibitions should be only slightly more progressive than prevailing norms, such that police power will tip the cultural scale." (footnotes omitted)).

84. If we fail to do so, jury nullification, reporting, and other aspects of the criminal justice system will continue to fail survivors. For example, a jury may acquit a rapist whose victim did not say "yes," simply because juries do not view consent as necessitating that verbal affirmation. They may look instead to testimony about body language and nonverbal social cues. Likewise, police officers may disregard the lack of affirmative verbal consent when a woman attempts to report a rape. Conversely, a woman who says "no" is sometimes characterized as "playing hard to get," a problematic social interpretation that persists and can affect jury decisions despite the older "no means no" concept. As a result, we must acknowledge that consent is a more complex concept and

So the question remains: What is consent? Margo Kaplan's piece on BDSM⁸⁵ and sex positivism helps to tease out some of the difficulties inherent in the concept, including sexual autonomy.⁸⁶ Because BDSM groups have long negotiated the difficult and complex idea of consent, in an area that can itself be more complex than "vanilla"⁸⁷ sex, the language used within this community reveals a reflective approach to defining consent.⁸⁸ The insights and uniqueness of this context help to illuminate the underlying, more universal aspects of what consent means. Furthermore, BDSM serves as an example of a practice that can be a very violent but often positive and life-affirming activity for participants. In other words, BDSM communities have erected ritual barriers that contain the sacred violence inherent in these sexual, social, and violent activities. Those ritual barriers are primarily made up of the more nuanced understanding of consent.⁸⁹ Accordingly, BDSM can serve a renewing, sometimes healing, function as it purifies violence for its participants.⁹⁰

attempt to propose an understanding that more closely fits with people's current conceptualizations. This may be a small step, as opposed to the big step asked of society by the "yes means yes" reformers, but it may also be helpful in the short term for survivors.

85. Acronym for bondage, discipline or dominance, submission, sadism, and masochism.

86. See generally Margo Kaplan, *Sex-Positive Law*, 89 N.Y.U. L. REV. 89 (2014).

87. "Vanilla" is an adjective used to describe non-BDSM contexts and activities.

88. See generally Megan Lief & Caroline O'Grady, *Safe Words: The History of Anti-Abuse Activism in BDSM*, BITCH MEDIA (July 31, 2013), <https://bitchmedia.org/article/safe-words> [<https://perma-archives.org/warc/UN24-XN9J>]/<https://bitchmedia.org/article/safe-words>] ("[O]ne thing that the BDSM community has always been great at is having frank conversations about consent. These conversations were standard for many in the BDSM scene long before 'Consent is sexy' became the stuff of slogans. . . . BDSM activists developed strong standards for consent in their communities. Activists in the early '80s showed a strong sensitivity toward positive affirmation and negotiation during sex, years before 'Yes Means Yes.' . . . Just two years ago, activists Kitty Stryker and Maggie Mayhem created a project specifically to promote antirape activism in kink. Both Mayhem and Stryker are sex workers who are active within BDSM—and both had experiences with consent violation and sexual assault. They created the website ConsentCulture.com in hopes of 'encouraging communities to cast a critical eye on their own practices around reports of sexual assault.' They also developed a workshop called Safe/Ward, which they describe as 'a free, public workshop for community members and leaders who are looking to understand and address sexual, physical, and emotional abuse within their communities'"); Jade Orion, *How I Reconciled Feminism With My First Step Into the 'Dark Side' of BDSM*, VICE MEDIA (Feb. 5, 2016), http://www.vice.com/en_ca/read/how-i-reconciled-feminism-with-my-first-step-into-the-dark-side-of-bdsm?utm_source=vicefbca [<https://perma.cc/8XVX-4VGD>] (discussing BDSM's longstanding consent insights and situating a dominant-submissive interaction within a feminist framework).

89. Other ritual barriers are also likely to be present for BDSM activities. For example, the time and place for a scene, the clothing worn, the verbal exchanges, any written agreements, and other aspects of a given interaction may be ritualistic. Ultimately, however, consent alone should erect a strong enough ritual barrier to transform the sacred BDSM activity into a purifying, rather than polluting, experience.

90. See, e.g., Catherine Scott, *Thinking Kink: Moving Beyond Abuse With BDSM*, BITCH MEDIA (July 25, 2012, 10:04 AM), <https://bitchmedia.org/post/thinking-kink-bdsm-abuse-rihanna-lisbeth>

By highlighting a specific type of sexuality and comparing its consent structure to other activities, Kaplan helps to illuminate how sexual consent is, often to its detriment, differentiated from other types of social consent. Kaplan discusses how lawmakers may have shied away from developing a working theory of consent in the case of BDSM behaviors, rather than simply criminalizing the behaviors, because consent seems more complicated in the kink⁹¹ context.⁹² She counters these concerns by discussing two other arenas that similarly challenge the line between coercion and consent: sports and cosmetic surgeries. In both of these examples, incentives and power imbalances can motivate one to legally, and with social acceptance, consent to violent behavior. For athletes, scholarships, social pressure, and monetary incentives can coerce consent. Similarly, “[p]hysicians financially profit from expensive surgeries that individuals, particularly women, may be coerced into to please partners,” even while certain mental disorders can distort the consent process, like body dysmorphic disorder.⁹³

More specifically, Kaplan discusses how in the BDSM context submissive partners are not more vulnerable to dominants exceeding their boundaries of consent than athletes who push boundaries of their sports,⁹⁴ perhaps by exploiting ambiguities in the rules or committing personal fouls when the referees look away. She explains that, in contrast to the fears of lawmakers, “the collaborative nature of BDSM poses less risk of this [consent violation] because partners must discuss the parameters of consent beforehand and employ a safe word.”⁹⁵

The concept of a safe word is revealing and also somewhat controversial. By its very nature, the safe word accepts the idea that consent can be instantly withdrawn at any time during a sexual or BDSM⁹⁶ encounter. BDSM’s clear acceptance of the underlying principle, potentially debated in the context of date

salander-feminist-magazine-sexuality [https://perma.cc/THB7-TNJ3]; Catherine Scott, *Thinking Kink: Is BDSM Therapy “A Dangerous Method”?*, BITCH MEDIA (July 23, 2012, 1:17 PM), <https://bitchmedia.org/post/thinking-kink-bdsm-therapy-a-dangerous-method-feminist-magazine-knightley-fassbender-bondage-sex-sexuality> [https://perma.cc/KN6U-HLFX]. Whether one would consider BDSM activities as falling within the pure or impure categories of the sacred, that ambiguity does not change the restorative role that even impure sacred activities can have on practitioners (as long as the ambiguous sacred is properly ritually bounded by consent).

91. “Kink” is a widely used synonym for BDSM that is not considered derogatory, but it may encompass more activities than BDSM.

92. Kaplan, *supra* note 86, at 131.

93. *Id.* at 131–32.

94. *Id.* at 132.

95. *Id.* at 133.

96. Some BDSM practitioners do not consider every BDSM interaction to be sexual. Rather, an interaction may be purely about sensation, power dynamics, simple education, or some other objective.

rape or the mens rea of a criminal defendant accused of rape who misperceives continued consent, is valuable to understanding all consent as temporally bound, always subject to change, and never requiring an explanation.

The safe word, however, is a somewhat contentious BDSM concept.⁹⁷ Since consent must be clearly established before and throughout scenes, or BDSM acts, a safe word seems unnecessary. The safe word's value becomes clear, however, when considering a particular form of kink called consensual non-consent, in which the parties act out rape-like fantasies, often including verbal and nonverbal protestations.⁹⁸ When screaming "no" is simply part of the consensual interaction, some sort of differentiation is required to make the revocation of consent clear, and this need gives rise to the safe word.⁹⁹ In virtually all other contexts, however, a simple "no" or nonverbal withdrawal of consent should suffice, just as in the world of vanilla intimacy.

Some BDSM practitioners have argued that the use of safe words, and their popularization in the media,¹⁰⁰ serves only to further marginalize and other-ize BDSM practitioners and their sex lives. These practitioners argue that consent is consent, regardless of the type of sexual act(s) involved. Others may argue that, partially to avoid other-izing BDSM practitioners, the use of the safe word should be expanded to other contexts. Since it embodies already the temporally bounded aspects of consent, it may be useful in contexts where this is contested, as in a date rape case or when mens rea is at issue. As the media prevalence of safe-wording has gained attention, it is possible that safe words will become a new social norm that is widely understood. Accordingly, people may feel comfortable establishing safe words prior to engaging in any sexual behavior. This may run afoul of similar concerns over jury nullification and reporting, however, since the "no means no" idea, which is so much clearer than a safe word, still faces opposition and lacks power within courtrooms. Still, for some who may desire to

97. See, e.g., *Safeword*, SUBMISSIVE GUIDE, <http://www.submissiveguide.com/encyclopedia/safeword> [<https://perma.cc/T383-U5T7>].

98. The term "consensual nonconsent" may also describe other types of scenes or relationships, but this Comment uses its "rape play" definition. See *Grappling With Consensual Nonconsent, Part 1*, DULCINEA PITAGORA, MA, LMSW (Feb. 2, 2015), <http://www.dulcineapitagora.com/grappling-with-consensual-non-consent-part-1> [<https://perma.cc/J7K2-SQ3W>].

99. See, e.g., Kate H., *An Essay on Consent, From a Woman Who Hosts Huge Sex Parties*, HUFFINGTON POST (Aug. 11, 2016, 7:22 PM), http://www.huffingtonpost.com/entry/consent-explained_us_57acdedce4b0e7935e04755a [<https://perma.cc/C5ZP-LPCT>].

100. See, e.g., E.L. JAMES, *50 SHADES OF GREY* (2011); Jackie Adams, *Battle of the BDSM Novels: Master of O vs. 50 Shades of Grey*, L.A. MAGAZINE (Mar. 9, 2015), <http://www.lamag.com/culturefiles/battle-bdsm-novels-master-o-vs-fifty-shades-grey/> [<https://perma.cc/7FRJ-QQVQ>]; Emanuella Grinberg, *Explaining 'Fifty Shades' Wild Success*, CNN (July 17, 2012), <http://www.cnn.com/2012/07/13/living/fifty-shades-buzz-50-shades-success> [<https://perma.cc/Q9WB-H2RD>].

appear or be more passive¹⁰¹ during a sexual interaction, a safe word may be easier to assert than a bold “no.” Until safe words are more prevalent, however, they may simply confuse participants in vanilla contexts who misunderstand one another. For example, a rapist who thinks a sexual interaction is consensual might consider a safe word as “part of the fun,” perhaps even horrifyingly interpreting a safe word as encouraging more violent behavior, whereas a “no” is much clearer. Therefore, until safe words are more widely understood, until every juror knows exactly what safe words mean and expects defendants to know as well, safe words’ potential may be limited.

The principle that consent is universally required in almost all situations, which therefore negates the need for a safe word,¹⁰² serves to highlight some of the useful aspects of looking at consent within BDSM communities. Since practitioners have long debated the topic of consent, and have developed a vocabulary for it that exceeds vanilla terms,¹⁰³ studying kink conceptualizations of consent can shed light on how to define consent more broadly. Beyond safe words and external pressures, BDSM consent also includes terminology for more complex types of consent. For example, edge play is a type of BDSM practice in which one consents to have one’s boundaries pushed by the other participant(s). In other words, one can consent to have one’s consent gradually and safely pushed and

101. While sexual passivity is generally part of the oppression of women, and as such a woman’s reluctance to say “no” may be tied intimately to structural processes, the submissive person in an interaction may be of any race, gender, or sexual orientation. Furthermore, all participants’ privileges would also need to be understood to evaluate any structural implications of a given interaction.

102. The one exception to this is consensual nonconsent.

103. See, e.g., *Learn More About Consent Counts*, NAT’L COAL. FOR SEXUAL FREEDOM, <https://ncsfreedom.org/get-involved/act/itemlist/category/109-learn-more-about-consent-counts.html> [<https://perma.cc/R9SC-UMFV>] (“The following ‘best practices’ have been developed by our communities to ensure that the standard of ‘safe, sane and consensual’ is met by all BDSM participants: Guiding Principles ‘SAFE’ [—] All participants are knowledgeable about the techniques and safety concerns involved in what they are doing, and all act in accordance with that knowledge. ‘SANE’ [—] Knowing the difference between fantasy and reality, and acting in accordance with that knowledge. ‘CONSENSUAL’ [—] All participants understand the nature of the activity in which they will be engaged, and the limits imposed by each participant, and respect such limits at all times. Best Practices [—] Each participant should fully understand both the desires and the limits of each other participant. Such understanding may be based on long familiarity with the other participant(s) or, where participants are new to each other, on a full discussion in advance of the BDSM activity. Consent must be clearly given to all aspects of planned BDSM activity and such consent must be freely given. Each participant in a BDSM activity is free to withdraw previously given consent at any time. Each participant should fully understand any limitations on another participant’s ability to understand and consent fully to the planned BDSM activity, such as age, diminished mental capacity or use of drugs or alcohol. A means should be provided—normally a ‘safe word’—for the ‘bottom’ to signal clearly her/his desire to terminate the activity.”).

challenged.¹⁰⁴ Consent is therefore understood as a more malleable and complex concept, with some gray areas, rather than a rigid, only-clearly-communicated, verbal act.¹⁰⁵

Such a conceptualization more closely adheres to sociocultural understandings of consent. People often use nonverbal cues to discern a sexual partner's consent or nonconsent. For example, a person may ratchet up a sexual encounter's intensity based on the bodily responses of the other person, rather than based on any formal, verbal consent. While this can lead to violations of the more passive person's sexual and bodily autonomy, social norms have accepted such behavior as sufficient for consent. In this scenario, society has defined the absence of evidence of nonconsent as consent. Of course, when substances like drugs or alcohol are introduced into the equation—in other words, when bodily responses are not entirely sober and voluntary—nonverbal sexual escalation is *exceedingly* questionable. As the campus sexual assault narratives demonstrate,¹⁰⁶ this idea is gaining purchase amongst wider society.

Within the BDSM context, the absence of nonconsent is insufficient to establish consent. Even in the case of edge play, explicit verbal, or sometimes written, arrangements define the boundaries of consent before the interaction begins. Therefore, while BDSM conceptualizations allow for gray area and understand the shifting, complex nature of consent, they never allow for the simple lack of nonconsent to suffice.¹⁰⁷ Parties must negotiate the gray areas of consent, and

104. For a more concrete example, take the person who consents to no more than three lashes with a flogger. If that person also consents to edge play, then the dominant/sadist may strike the person a fourth time with the flogger, but perhaps with less force or in a slightly different location to ease the person into the transitional boundary between the expressly defined consent and its edges. Inherent in this conceptualization is the idea that the consenter does not wish to be struck ten times with the flogger; the boundary pushing must be gradual. Consent is therefore still a boundary, but one that is gray rather than exceedingly stark as in many black-and-white conceptualizations.

105. For BDSM practitioners, however, one could argue that this framework already always includes clearly verbal affirmative consent. In order to know if a partner consents to edge play, the partner must be informed of the term's meaning and provide verbal or written consent beforehand. Still, during the act itself, the partner's consent is pushed beyond a strictly delineated boundary.

106. See, e.g., THE HUNTING GROUND (The Weinstein Company 2015); Lydia O'Connor & Tyler Kingkade, *If You Don't Get Why Campus Rape Is a National Problem, Read This*, HUFFINGTON POST (June 24, 2016, 7:39 AM), http://www.huffingtonpost.com/entry/sexual-assault-explainer_us_5759aa2fe4b0ced23ca74f12 [<https://perma.cc/U2QQ-HN9V>].

107. See Jillian Keenan, *The Foggy Edge of Sexual Consent*, PAC. STANDARD (Nov. 7, 2014), <https://psmag.com/the-foggy-edge-of-sexual-consent-e5c90d07732a#bhc15fgjm> [<https://perma.cc/5P6L-HPEN>] (“In our [BDSM] subculture, ‘no’ may not always mean no. But there’s a flip side to that, and it’s what both consent violators in the BDSM community and the national debate about vanilla sexual consent have missed: ‘Yes’ doesn’t always mean yes, either. Responsible BDSM practitioners realize, perhaps more acutely than anyone else, that ‘yes’ is not enough. When I consent to a spanking, it doesn’t necessarily mean that I consent to being flogged with a cane. If a man consents to being tied up, it doesn’t necessarily mean he consents to sex. If

they must become more conscious of the need to make consent the central focus prior to and during sexual encounters. Allowing for a more nuanced understanding of consent, while still requiring that the consent be negotiated clearly, may resonate better with courts and law enforcement, potentially allowing the avoidance of the sticky norms problem.¹⁰⁸

C. Sex Positivism and Autonomy

Inherent in the idea of consent is the concept of sexual autonomy and the assumption that one can freely consent. Kaplan acknowledges this limitation when she discusses critiques of BDSM that fret over the reproduction of inequalities within BDSM relationships.¹⁰⁹ She also explains, however, that the same destructive forces can underlie socially acceptable decisions on cosmetic surgery, when one embraces racism or sexism to conform more closely to societal standards of beauty, and on sports, often played by people of color who experience poor health as a result and who may be economically or socially pressured into playing.¹¹⁰

Catharine MacKinnon's work on dominance feminism leaves little room for agency, making consent a dubious idea.¹¹¹ Because men construct the meaning of sexuality, they must also construct the meaning of consent and even women's experience of consent. This approach, however, places too little value on the experience of women and their sexual autonomy. While much of the world is constructed by men, women can still maintain some autonomy within the warped system. In other words, women experience constrained agency when

someone consents to exchanging graphically kinky emails and text messages...it doesn't necessarily mean that she consents to being hit in the face. And if someone in a college dorm room explicitly consents to intercourse, it doesn't necessarily mean the conversation can end there. It might mean the conversation has just begun.").

108. See *supra* note 83 (explaining the sticky norms problem).

109. Kaplan, *supra* note 86, at 133 ("Cheryl Hanna suggests that BDSM and its focus on slave-master relationships, bondage, and domination may be rooted in America's history of slavery and a collective cultural consciousness that assumes women and racial minorities should be subservient to white men.").

110. *Id.* at 134.

111. Catharine A. MacKinnon, *Sexuality, Pornography, and Method: "Pleasure Under Patriarchy"*, 99 ETHICS 314, 316–17 (1989) ("A theory of sexuality becomes feminist to the extent it treats sexuality as a social construct of male power: defined by men, forced on women, and constitutive in the meaning of gender. Such an approach centers feminism on the perspective of the subordination of women to men as it identifies sex—that is, the sexuality of dominance and submission—as crucial, as a fundamental, as on some level definitive, in that process. . . . [I]nterests of male sexuality construct what sexuality as such means in life, including the standard way it is allowed and recognized to be felt and expressed and experienced, in a way that determines women's biographies, including sexual ones.").

they simultaneously exercise their own free will but within acknowledged bounds created by external forces like deeply embedded social inequalities.¹¹²

This same theoretical posturing can apply within the prison institution. Inmates experience deep subordination and dehumanization from the totalizing institution of the prison. They also experience strong social hierarchies that can lead to further inequality. For this reason, many have been unwilling to consider any sex within prisons as consensual.¹¹³ For example, Joanna E. Saul writes that “[f]ully consensual relationships may not exist in the inherently coercive environment of the prison, especially in light of the high rates of mental health disorder symptoms among women in state prisons.”¹¹⁴

Others simply hold no space for consensual sex between correctional officers and inmates, a pairing that reproduces the institutionalized power structures and social hierarchies that are already problematic without a sexual element. Staff-inmate sex is usually a crime.¹¹⁵ Here, the discussion of constrained agency is applicable but is slightly more nuanced. Inmates lack control over the most basic of bodily needs, including food, healthcare, and hygiene. The power of the prison is virtually absolute with respect to these needs, given the low constitutional requirements of the Eighth Amendment.¹¹⁶ While women in the free world also experience such totalizing control, it is at the hands of abusers and is often characterized as domestic violence. In other words, the practice of that level of control in the free world is, at least facially, societally shunned. In the prison context, however, it is simply a fact of the institution, and the extreme control serves to circumscribe personal autonomy to a greater extent than inequality and social forces do outside the prison walls. This is only a distinction of degrees, given the socioeconomic forces affecting access to

112. Schulhofer, *supra* note 77, at 2182 (“Autonomy cannot mean freedom from all constraints upon choice, but it does entail freedom from those constraints that our culture identifies as illegitimate. The scope of that freedom is marked by the rights to bodily integrity and personal independence that existing legal principles already protect. This modest conception of personal autonomy offers boundaries that are specific and, yet, far reaching.” (footnote omitted)).

113. Ristroph, *supra* note 11, at 183 (“Prisoners are denied almost every opportunity for agency, which is why some commentators are reluctant to call any prisoner sex consensual.”).

114. Joanna E. Saul, *Of Sexual Bondage: The ‘Legitimate Penological Interest’ in Restricting Sexual Expression in Women’s Prisons*, 15 MICH. J. GENDER & L. 349, 354 (2009).

115. *See generally* Kim Shayo Buchanan, *Engendering Rape*, 59 UCLA L. REV. 1630, 1684–85 (2012). Most states and the federal system make staff-inmate consensual sex a felony or misdemeanor. *See* U.S. DEPT OF JUSTICE, DETERRING STAFF SEXUAL ABUSE OF FEDERAL INMATES (2005), <https://oig.justice.gov/special/0504>.

116. For a discussion of Eighth Amendment doctrine, see *infra* Part V.B.4.

food,¹¹⁷ shelter,¹¹⁸ and other necessities. Still, staff-inmate sex includes a hierarchy much starker than that faced by most women in free society, BDSM practitioners, athletes, and cosmetic surgery patients. It is also worth noting that for female inmates, who simultaneously experience the same totalizing institutional control as well as the inequalities of gender, agency may be further constrained. While it is important to acknowledge each prisoner's sexuality, sexual autonomy, and ability to give consent, that consent should not extend to correctional officers, given the policy risk of rampant abuse. Because of the extreme power differentials and the abusive culture already present between correctional staff and inmates,¹¹⁹ the potential for exploitation and further polluting violence and coercion is too great to permit staff-inmate consensual sex.

Many states criminalize sex between inmates as well, even when consensual,¹²⁰ although California must now provide state prisoners with condoms as of January 2015.¹²¹ While the institution plays an undeniable role in creating inequality amongst inmates, just as it creates inequality between inmates and staff, the power differentials are not as stark and are therefore less concerning in this context. Therefore, this restraint on prisoners' sexual autonomy should not be tolerated and, in fact, serves to devalue inmates' consent.¹²² Inmates' choices are

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117. See, e.g., Jeremy Bowman, *Food Deserts: Where Have All the Inner-City Grocery Stores Gone?*, AOL FIN. (Apr. 4, 2012, 6:00 AM), <http://www.dailyfinance.com/2012/04/04/food-deserts-where-have-all-the-inner-city-grocery-stores-gone> [https://perma.cc/983V-9C83] (explaining the lack of access to groceries in many American inner-city neighborhoods).
118. See, e.g., Brentin Mock, *Redlining Is Alive and Well—and Evolving*, ATLANTIC: CITYLAB (Sept. 28, 2015), <http://www.citylab.com/housing/2015/09/redlining-is-alive-and-welland-evolving/407497> [https://perma.cc/AA88-PYBZ] (explaining the continuing practice of racially restricting access to housing).
119. See, e.g., Tom Robbins, *Spotting the 'Red Flags' of Abusive Prison Guards*, MARSHALL PROJECT (Dec. 20, 2015, 12:00 PM), <https://www.themarshallproject.org/2015/12/20/spotting-the-red-flags-of-abusive-prison-guards#bratzlkjQ> [https://perma.cc/2NAH-XXU9] (discussing abuses within the New York state system).
120. Arkles, *supra* note 76, at 94 (“Almost all U.S. prisons prohibit consensual sexual relationships between prisoners. Many prisons also prohibit other forms of affectionate physical contact, like kissing, hugging, or handholding, as well as solitary expressions of sexuality, like masturbation. Courts have consistently upheld these restrictions against challenge. 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” (citations omitted)).
121. See George Lavender, *California Prisons Aim to Keep Sex Between Inmates Safe, If Illegal*, NAT'L PUB. RADIO (Jan. 21, 2015, 6:53 PM), <http://www.npr.org/2015/01/21/378678167/california-prisons-aim-to-keep-sex-between-inmates-safe-if-illegal> [https://perma.cc/KJL6-EFJT].
122. Arkles, *supra* note 76, at 94–96 (“[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.’ 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. . . . The enforcement of prohibitions

definitively constrained by the institution when prisoners choose to engage in consensual sex with one another, given the need for protection, gang hierarchies, lack of access to needed resources, and other factors. This constraint, however, is more analogous to women's everyday constraints, often involving economic concerns and freedom from further violence. Because mutually consensual inmate sex is more similar to non-incarcerated women's consent to sex, the concept of constrained agency applies within both contexts. In terms of the social theorists, the line between consensual sex—which has the potential to be life affirming, restorative, and rejuvenating as it revels in the sacred within clearly defined boundaries—and nonconsensual sex—which unleashes sacred violence without the defined boundary of consent—makes all the difference in containing the contagion of sexuality.

Consent itself is the ritual drawing of a line that changes the nature of the sacred interaction from damaging to purifying, from potentially devastating to positive and rejuvenating.¹²³ As discussed above, defining consent is a difficult task, but a more nuanced understanding of consent as inclusive of some gray areas better reflects our sociocultural, but perhaps somewhat ineffable, definition. Therefore, sex between prisoners must be evaluated in terms of this less stark understanding of consent, as a temporally bounded, easily revocable, and pre-discussed concept.

Furthermore, sex positivism has a role to play in discussions of female and inmate sexuality, as well as female inmates' sexuality. As Margo Kaplan notes, "sexual pleasure is a good thing [and] [i]t is a valuable source of happiness and personal fulfillment."¹²⁴ The law's neglect of sex's positive potential, or even the implicit assumption in law that sexual pleasure is negative, leads to nonsensical legal standards ignoring human experience. Similarly, feminism has often focused on the rape of women and neglected the pleasure women can derive from sexual intimacy. In the prison context, rape has similarly dwarfed any attention to the positive aspects of sexuality. Kim Shayo Buchanan writes that "since the 1970s, academic research on sex in men's prisons has focused on rape and

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." (quoting Hazel/Cedar Troost, *Reclaiming Touch: Rape Culture, Explicit Verbal Content, and Body Sovereignty*, in YES MEANS YES! VISIONS OF FEMALE SEXUAL POWER AND A WORLD WITHOUT RAPE 171, 171 (Jaclyn Friedman & Jessica Valenti eds., 2008)).

123. Brenda V. Smith, *Rethinking Prison Sex: Self-Expression and Safety*, 15 COLUM. J. GENDER & L. 185, 186 (2006) (finding that prisons should direct limited resources towards preventing nonconsensual or abusive sex, rather than trying to regulate inmate sexual expression).

124. Kaplan, *supra* note 86, at 90.

disregarded consensual sex, to the point that rape has become the ‘primary’ representation of male prison sex.”¹²⁵ Given that sex is part of the sacred, the neglect of ritually bounded, therefore consensual, sex in discussing women and rehabilitation distorts the conversation and ignores sex’s potential for healing. One way to ensure better societal integration when inmates leave prison is to make space for such healthy relationships within the institution, to encourage positive sacred interactions to help heal the violence that permeates our current carceral system. While detractors may suggest that decriminalizing inmate consensual sex will further enforce ties to others in prison, and therefore gang structures and criminal networks, it would also encourage the development of healthy social skills. Furthermore, this detractor’s argument assumes that the parties in the relationship will continue to recidivate, an occurrence that is less likely if such relationships occur without threat of punishment.

Given the potential violent pollution and abuse that can result from staff-inmate sex, this sacred violence is too difficult to ritually contain. For consensual relationships and sexual encounters between inmates, however, sacred violence can easily be ritually contained through consent, even if it comes from a place of constrained agency. This concept of consent must be more nuanced but always present for the duration of the interaction.

D. Breaking Down Stereotypes

Additionally, feminists have helped to break down stereotypes about what constitutes rape. From racially charged historical, stereotypical rape narratives like the African American male stranger who attacks a white woman and rapes her,¹²⁶ to the more nuanced discussion of campus sexual assault, feminists have moved the conversation about rape forward by acknowledging intersectionality, other critical theories, and new sociological phenomena.

125. Buchanan, *supra* note 115, at 1682 (quoting REGINA KUNZEL, CRIMINAL INTIMACY: PRISON AND THE UNEVEN HISTORY OF MODERN AMERICAN SEXUALITY 188–89 (2008)).

126. See I. Bennett Capers, *The Unintentional Rapist*, 87 WASH. U. L. REV. 1345, 1386–87 (2010) (explaining the entrenchment of the stereotypical, racialized rape encounter into the criminal law: “First, our rape laws—at least as applied—have not operated to regulate the autonomy of ‘women,’ but rather only certain types of women. Second, our rape laws—at least as applied and informed by the white letter law—have also operated to regulate the autonomy of black men. Black men are given unconscionable latitude when it comes to access to black women, and a leash when it comes to access to white women. Third, our rape laws, though color-neutral, have always operated in tandem with other laws to entrench power in ways that are color-coded. At first, these rape laws operated in tandem with black letter laws (such as laws criminalizing interracial marriage or cohabitation) to make certain rapes easier to prosecute *and* to police the autonomy of white women and black men.” (footnotes omitted)).

Criminal justice reformers need to do the same, moving the narrative forward from stereotypical rapes by large, powerful, and often also African American inmate-aggressors against smaller, more feminine, and often white, victims.¹²⁷ Results from recent data collection, mandated by PREA, reveal stereotype-defying sexual practices within prisons. Specifically, “neither racial tropes nor heterosexist assumptions about romance can easily reconcile women employees’ sexual abuse of male inmates with conventional gender expectations. In prison rape discourse, male inmates’ self-reported vulnerability to female staff is largely ignored—even though it seems to be the most common form of prison sexual abuse.”¹²⁸ Only by acknowledging the changing dynamics of rape in prison can the problem be adequately addressed. Furthermore, female staff perpetrate 85 percent of male prisoners’ reported sexual interactions with staff, although much of this can be explained by the reporting bias discussed below.¹²⁹ For the female guards who do engage in sexual acts with prisoners, the women are reproducing the dominant hierarchies and power structures of the institution. Like men who rape in society outside of the prison walls, female guards utilize their privilege within the institution to abuse the incarcerated. This is another example of the rampant inequality of the prison system, since it is strong enough, in at least some instances, to turn entrenched sex or gender dynamics on their head. The totalizing nature of prisons, and the extreme levels of control and subordination, redefines social hierarchies and privilege to some extent, as evidenced by this particular statistic.

Within female prisons, the dynamics of the new reports are also revealing and help to emphasize that stereotypes about prison rape sometimes do not reflect the realities of this complex problem. Buchanan describes that:

In women’s prisons, too, the [PREA-mandated] data suggest that women are more likely than men to perpetrate sexual abuse. Although the staff members who have sex with women inmates are overwhelmingly male, incarcerated women report much higher rates of sexual abuse by other women inmates than by male staff. Moreover, incarcerated women also reported much higher rates of sexual coercion by fellow inmates than imprisoned men did.¹³⁰

127. Although research does reflect this racial split, focus on white victims, a familiar refrain in rape narratives, is detrimental to inmates of other races who also face sexual victimization in prison. *But cf.* Ristoph, *supra* note 11, at 157–58 (noting the studies that have found such racial disparities in reported prison rapes).

128. *See* Buchanan, *supra* note 115, at 1684–85.

129. *Id.* at 1647.

130. *Id.*

While this may also be a reflection of powerful reporting bias, it is worth noting that the female prison may induce more predatory behavior between women than is common in wider society. Once again, because of the violent and dehumanizing nature of the institution, traditionally gendered processes are interrupted. Women's interactions with one another in free society, usually defined at least in part by patriarchy and male domination, changes when that domination is enacted by a totalizing institution with many fewer men. Additionally, the economic and emotional desperation created by such a heartless and inhumane system, in other words the institutionalized violence of the prison, simply causes more violence among its inhabitants once the contagion spreads. This pattern of female correctional officers exploiting their positions of power in male prisons, along with the trends amongst female inmates in women's prisons, initially suggest a very different picture of what sexual coercion looks like within prison walls.

Importantly, however, reporting bias may affect all of these statistics, as male inmates may proudly report interactions with female staff as a kind of supposed conquest, while under-reporting male same-sex interactions out of shame or other internalized constructs of the hyper-masculine culture of prison life. This may explain why male inmates report such high rates of sexual interaction with female guards, even if such interaction is actually less or equally as common as male guard abuses. Furthermore, female inmates may be more willing to report their sexual activities with one another than male inmates because of a perceived lesser stigma when compared to same-sex male inmate interactions. This may lead to increased reports of sexual assault between female inmates, especially compared to sexual assaults between male inmates, helping to explain what initially appears to be a large difference. Furthermore, there is likely a general underreporting bias since this is such a sensitive topic.

Despite the potential for reporting error, the numbers alone tend to suggest a pattern substantial enough that ignoring it would do a disservice to those living within these daily experiences. If sexual abuse between inmates is more prevalent in female prisons, then reform measures should focus more on the realities of women's experiences in prison. As noted above, much of the discourse around prison rape involves only male inmates, neglecting the harm happening to incarcerated women who are more often the victims of sexual assault while in custody. Also, if male inmates are facing more sexual assault at the hands of female guards, then this must be reflected in reform measures and correctional officer training. The feminist move away from catering to stereotypes when developing legislative and policy strategies should guide criminal justice reformers' discourse around prison rape, as they heed the data that becomes available, even while recognizing its limits given potential reporting bias.

IV. THE PRISON RAPE ELIMINATION ACT

In addition to providing another point of comparison between feminist policy agendas and prison reformers, PREA and its shortcomings help to reveal some of the weaknesses in feminism's persistent criminalization goals.¹³¹ In 2003, Congress unanimously voted for PREA to address the rampant sexual abuse occurring behind bars.¹³² A far cry from the earlier PLRA with its difficult administrative hurdles designed to procedurally limit prison litigation despite underlying meritorious claims,¹³³ PREA sought to improve prison conditions by ending carceral sexual assault and streamlining administrative exhaustion procedures.¹³⁴ The law does not create a private right of action, but it has played a role in litigation for the accused and accusers in prison rape cases.¹³⁵ To accomplish the goal of eliminating prison rape, PREA:

declares a "zero tolerance" standard for prison rape, requires data collection and analysis of prison rape, provides grants "to prevent and

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131. See generally Victoria Law, *Against Carceral Feminism: Relying on State Violence to Curb Domestic Violence Only Ends Up Harming the Most Marginalized Women*, JACOBIN (Oct. 17, 2014), <https://www.jacobinmag.com/2014/10/against-carceral-feminism> ("While its adherents would likely reject the descriptor, carceral feminism describes an approach that sees increased policing, prosecution, and imprisonment as the primary solution to violence against women. This stance does not acknowledge that police are often purveyors of violence and that prisons are always sites of violence. Carceral feminism ignores the ways in which race, class, gender identity, and immigration status leave certain women more vulnerable to violence and that greater criminalization often places these same women at risk of state violence.").
 132. *Prison Rape Elimination Act*, NAT'L PREA RES. CTR., <http://www.prearesourcecenter.org/about/prison-rape-elimination-act-prea> [<https://perma.cc/HFG5-4NKB>].
 133. The PLRA's hurdles include the requirement of physical injury before a recovery for emotional or psychological damages becomes possible, as discussed in Part III.A. Additionally, the PLRA includes restrictive and devastating administrative exhaustion requirements. See Gabriel Arkles, *Prison Rape Elimination Act Litigation and the Perpetuation of Sexual Harm*, 17 N.Y.U. J. LEGIS. & PUB. POL'Y 801, 809–10 (2014) ("The Prison Litigation Reform Act (PLRA) presents major barriers to prisoner plaintiffs, even if they have meritorious constitutional or state law claims. One of the provisions of the PLRA requires prisoners to exhaust administrative remedies prior to bringing a case in federal court. In *Woodford v. Ngo*, the Supreme Court interpreted the PLRA to require 'proper exhaustion,' which means that prisoners must follow all of the procedural rules that detention agencies have developed for internal grievances before suing. *Woodford's* holding increases the barrier presented by the PLRA, in part because many detention systems have extremely short timelines for filing a grievance. If a prisoner does not file a grievance within that timeframe, which may be two weeks or less, she has lost her opportunity to sue for as long as she is incarcerated (which, if the statute of limitations expires prior to release, means she has permanently lost her opportunity to sue). This limitation applies even when the case concerns an abuse as serious as rape." (footnotes omitted)).
 134. See *id.* at 802; Jennifer Wedekind, *Prison Rape, the PREA, and the PLRA*, SOLITARY WATCH (Mar. 7, 2011), <http://solitarywatch.com/2011/03/07/prison-rape-the-prea-and-the-plra> [<https://perma.cc/C2V7-TXD3>].
 135. See Arkles, *supra* note 133, at 802.

prosecute prisoner rape,” and directs the United States Attorney General (AG) to adopt “national standards for the detection, prevention, reduction, and punishment of prison rape.” PREA addresses not just forcible rape but also other forms of sexual abuse, whether perpetrated by prisoners or staff. PREA also addresses sexual abuse that takes place in forms of detention other than prisons, including jails, police lockups, juvenile detention facilities, and immigration detention facilities.¹³⁶

Despite the aspirations of PREA, its text and enforcement fall short of adequately addressing violence, sex, and the sacred in prisons. First, PREA embodies the same ideals promoted by many feminists before it: the increased surveillance and criminalization of rape. It calls for more policing within prison walls to prevent rape, even though policing is part of the overall infliction of institutionalized violence by the state on inmates.¹³⁷ Some point to the weaknesses in this approach, as it calls for bolstering the surveillance system that already marginalizes and dehumanizes inmates, while simultaneously failing to correct the administrative problems with reporting and prison policies on consensual sex and rape.¹³⁸ For example, the PREA approach parallels the panopticon,¹³⁹ convincingly critiqued by Foucault, in that supporters called for glass doors and altering architecture to ensure constant and uninterrupted spatial surveillance.¹⁴⁰ PREA

136. *Id.* at 804–05.

137. Ristroph, *supra* note 11, at 176 (PREA “proposes that we police this form of sexual violence in the ways we police most crime: more punishment and more surveillance. . . . Indeed, much of the literature on prison rape takes the same approach: build more, and better, panopticons.”).

138. See David W. Frank, *Abandoned: Abolishing Female Prisons to Prevent Sexual Abuse and Herald an End to Incarceration*, 29 BERKELEY J. GENDER L. & JUST. 1, 13 (2014) (“PREA is not only unlikely to abate sexual abuse in female prisons, but could also compound the problem by simultaneously expanding the penal system while teeing up hopes for relief in a bureaucracy unable to effectively respond to the problem.”).

139. The panopticon is a theoretical building that Jeremy Bentham suggested for prisons. It is circular with pods off of a main tower, such that the guard in the tower can see every inmate completely, all of the time, utterly destroying all privacy. See Jeremy Bentham, *Proposal For a New and Less Expensive Mode of Employing and Reforming Convicts* (1798), in REPORTS FROM COMMITTEES OF THE HOUSE OF COMMONS 349 (Vol. XXVIII 1798) (U.K.).

140. Spearlt, *Gender Violence in Prison & Hyper-masculinities in the Hood: Cycles of Destructive Masculinity*, 37 WASH. U. J.L. & POL’Y 89, 140 (2011) (“Among the common calls are use of clear glass for cell construction, elimination of ‘blind spots’ in prisons, and fewer prisoners/more oversight. One of the constant refrains is for better classification for incoming inmates to prisons. Some researchers report that both inmates and correctional officers agree that better intake screening and classification, better supervision by staff, and better training for inmates and staff can help reduce violence. For example, education for inmates on topics like the spread of AIDS and other sexually transmitted diseases might help decrease victimization, whereas better intake screening might consider non-traditional indices for housing including how young and inexperienced an inmate is, whether he is a first time offender, and his physical appearance, size, strength and weight.” (citations omitted)).

“seek[s] to expand [prisons’] control [of prisoner sexuality],”¹⁴¹ even while ignoring other reform measures proposed by advocates.¹⁴²

One inherent flaw in this model, as revealed by the PREA statistics, is that correctional officers are often themselves the abusers. Although increasing staffing could prevent some instances of sexual abuse between inmates, given usually skeleton staff levels, hiring more correctional employees also adds to the potentially exploitative aggressor population, of whatever gender.¹⁴³ Therefore, increasing staffing could exacerbate the problem of prison rape. Furthermore, another flaw involves PREA’s emphasis on surveillance and bodily control which only further violates inmates’ autonomy and sense of self. For example, the use of solitary confinement to punish aggressors and reporters of sexual assault in prison can lead to serious, long-lasting mental health issues¹⁴⁴ that clearly worsen recidivism rates that are already staggeringly high.¹⁴⁵

Feminists can also use the inherent contradictions in PREA’s approach to evaluate their advocacy for increased criminalization. In pointing out the contradictions between feminist goals and modern incarceration, Aya Gruber writes: “Women should not ‘walk the halls of power’ in the criminal justice system but should rather begin the complicated process of disentangling feminism and its important anti-sexual coercion stance from a hierarchy-reinforcing criminal system that is unable to produce social justice.”¹⁴⁶

Second, the noble aspects of PREA that sought to streamline the complaint process have been met with resistance from courts, just as rape reporting is often difficult or nearly impossible for women outside of prison. For example, under the PLRA, prisoners must administratively exhaust their options before they can

141. Ristroph, *supra* note 11, at 182.

142. Namely, PREA does not include provisions for “opportunities for conjugal visits; condom distribution; the elimination of regulations against ‘non-assaultive’ sexual relations among prisoners; and most generally, ‘any measures which can give prisoners a feeling of more control over their own life’ without breaching institutional security.” *Id.*

143. *See* Buchanan, *supra* note 115, at 1688.

144. *See Reassessing Solitary Confinement: The Human Rights, Fiscal, and Public Safety Consequences: Hearing Before the Subcomm. on Constitution, Civil Rights and Human Rights of the Comm. on the Judiciary*, 112th Cong. 80–81, 86, 88 (2012) (prepared statement of Craig Haney, Professor of Psychology, University of California, Santa Cruz).

145. According to the CDCR’s own statistics for those released in 2008–2009, California’s recidivism rate after three years is 61 percent. *See* CAL. DEP’T OF CORR. & REHAB., 2013 OUTCOME EVALUATION REPORT (2014), http://www.cdcr.ca.gov/Adult_Research_Branch/Research_Documents/ARB_FY_0809_Recidivism_Report_02.10.14.pdf [https://perma.cc/29SK-XXKH]. Nationally, after five years, the rate is 76.6 percent. *See Recidivism*, NAT’L INST. OF JUSTICE (June 17, 2014), <http://www.nij.gov/topics/corrections/recidivism/pages/welcome.aspx> [https://perma.cc/29SK-XXKH].

146. Gruber, *supra* note 83, at 653 (citing JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM 20–21 (2006)).

file a claim in federal court.¹⁴⁷ Prisons set their own standards for administrative exhaustion, which can be arduous and can often include tight deadlines of two weeks or less to file a complaint.¹⁴⁸ Given the trauma of rape, meeting such administrative requirements is too heavy a burden and PREA sought to lighten it by creating more reporting sites for prisoners.¹⁴⁹ Unfortunately, PREA only contributed to a more complex bureaucratic maze and allowed courts and prison officials to raise failure to administratively exhaust when rape victims reported to a PREA avenue instead of an “official” administrative channel, even if their report was timely.¹⁵⁰

Additionally, other reporting and administrative response problems continue to plague the enforcement of PREA. Kim Shayo Buchanan points to disturbing statistics about prison responses to staff sexual assaults: “41.2 percent of victims who reported staff sexual misconduct were placed in solitary confinement, 35.2 percent were confined to their cells, and 26.6 percent were reassigned to a more restrictive custody level,” with these categories potentially overlapping and excluding other administrative responses.¹⁵¹ For example, an inmate could experience an increasingly restrictive custody level as well as being forced to do a stint in solitary confinement, all in response to reporting a sexual assault.¹⁵²

147. See Prison Litigation Reform Act of 1995, 42 U.S.C. § 1997e(a) (2012).

148. See Arkles, *supra* note 76, at 102–03.

149. See Arkles, *supra* note 133, at 819 (“PREA regulations call on detention agencies to create multiple means to report sexual abuse. Some detention agencies began to respond to these recommendations well before promulgation of the final rule, disseminating to prisoners information about means of reporting sexual abuse. The PREA regulations do not explicitly direct detention agencies on how these alternatives ought to interact with existing grievance systems or impact exhaustion of administrative remedies. However, NPREC and the DOJ acknowledged that the PLRA exhaustion requirements can impose a serious and frequently insurmountable obstacle to bringing meritorious claims about sexual abuse in detention and sought to mitigate this harm.” (footnotes omitted)).

150. See *id.* at 830 (“[F]or at least some prisoners, PREA has worsened conditions. It has provided a route for prison officials to trick prisoners into filing complaints about sexual abuse one way, then keep them from bringing a lawsuit because they didn’t do it in another.”).

151. Buchanan, *supra* note 115, at 1652.

152. Another administrative punishment is “bus therapy.” Within the California state prison system, prison officials who are unhappy with an inmate may assign the inmate to be bussed to several prisons. When the inmate arrives, each prison will insist that there is no room for the inmate at the new facility, causing the inmate to be bussed to the next prison in the state. This can continue for days, with inmates shackled by the hands and feet the entire time they sit on the bus. Furthermore, inmates usually only receive a peanut butter and jelly sandwich to eat while on the bus each day, with nothing to drink. Because of the shackling, inadequate food and drink, and constant travel, prison officials can use this tactic to punish those inmates who cause trouble for them. Reporting a sexual assault could give rise to such an administrative punishment. See Interview With Anonymous Former California Inmate, in Laguna Beach, Cal. (May 15, 2016).

Staggeringly, Buchanan explains that “14.5 percent of inmates who reported staff sexual victimization received no institutional response at all.”¹⁵³

The hyper-masculinity within prison culture further disincentivizes reporting, as men may fear that their masculinity will be questioned if they report or admit to sexual abuse, leading to further victimization. Like women who choose not to report for fear of victim blaming or social isolation and judgment, inmates might choose to forego reporting even if it were an effective route to protection. Furthermore, many inmates will choose not to report because officials can falsely describe the abuse as consensual, and thereafter punish the inmate under prison policy forbidding such activity.¹⁵⁴

Third, PREA creates other ripple effects in litigation that can work to the disadvantage of survivors. As women in rape cases experiencing the effects of the rape shield exception know,¹⁵⁵ the letter of the law does not always work to the victim’s advantage. Because PREA lacks a private right of action, survivors who attempt to use its text persuasively are often ignored by courts.¹⁵⁶ When prisoners bring claims against prison officials and government entities under the Eighth Amendment for sexual abuse, as cruel and unusual punishment, courts may construe PREA such that it actually harms the plaintiff inmate’s case.¹⁵⁷ Alarmingly, “at times courts have seemed more receptive to arguments about PREA when offered by defendants rather than plaintiffs.”¹⁵⁸ For example, prison administrators have invoked PREA to justify discrimination against lesbian, gay, bisexual, trans*, and queer or questioning (LGBTQ) inmates by

153. Buchanan, *supra* note 115, at 1652.

154. See *Morales v. Pallito*, No. 2:13 CV 271, 2014 WL 1758163, at *11 (D. Vt. Apr. 30, 2014), *appeal withdrawn* (Dec. 29, 2014); Russell K. Robinson, *Masculinity as Prison: Sexual Identity, Race, and Incarceration*, 99 CAL. L. REV. 1309, 1316 (2011) (“[Prison] policies—which may be reflected in state law, administrative codes, or unwritten ‘house rules’—often fail to draw sharp distinctions between consensual and coerced sex, implying that they are equally reprehensible. Such bans may deter inmates from reporting sexual assault because prison officials can recharacterize a claim of rape as consensual activity, which is forbidden.”).

155. Rape shield laws, in theory but often not in practice, exclude evidence of a victim’s prior sexual history in criminal rape trials. See Dahlia Lithwick, *The Shield That Failed*, N.Y. TIMES (Aug. 8, 2004), http://www.nytimes.com/2004/08/08/opinion/the-shield-that-failed.html?_r=0 [https://perma.cc/8ANN-P2MR]; T.J. Greaney, *Case Shows Rape Shield Only Goes So Far*, COLUMBIA DAILY TRIBUNE (Apr. 1, 2010), http://www.columbiatribune.com/opinion/columnists/case-shows-rape-shield-only-goes-so-far/article_4a58a93e-ca59-59c1-9d0b-2f66664d4fd6.html [https://perma.cc/RC2E-LT7K].

156. See Arkles, *supra* note 133, at 811 (“Courts seem to construe even pro se arguments about PREA quite narrowly, as if the lack of private right of action automatically means that PREA could not have any possible relevance to Eighth Amendment or other claims.”).

157. See *id.* at 833–34.

158. *Id.* at 814.

more strictly enforcing no-sex rules on them,¹⁵⁹ or to justify more invasive strip searches, or to warehouse more inmates in oppressive solitary confinement conditions.¹⁶⁰ Defendants have also used PREA to argue that an assault was non-sexual, taking the claim out of PREA's purview such that administrative exhaustion and time bars again apply to all of the claims.¹⁶¹

Fourth, PREA lacks adequate enforcement mechanisms, incentivizing state systems to promise to comply with its terms in exchange for maintaining minimal federal funding.¹⁶² For example, complying with PREA is shockingly optional for state and local facilities, where the vast majority of female inmates are housed.¹⁶³ Further, state governors can certify their own compliance with PREA's terms, precluding any external evaluation of compliance or any form of accountability, given the barriers to inmate litigation discussed earlier with the passage of the PLRA.¹⁶⁴ PREA also does not require any change to prison budgets, effectively minimizing its goals as not even important enough to mandatorily receive funds.¹⁶⁵ As a result, virtually no enforcement mechanism exists, especially given the lack of a private right of action in the statute.

Finally, PREA's framework dooms the reform measure from the outset. By emphasizing increased surveillance and further dehumanization, PREA enacts more institutional violence and fails to adequately cabin it within ritual boundaries. The threat of prosecution and more incarceration only serves to compound the contagion of violence already so tied to our current criminal justice system. Rather than focusing on enhancing the systems that created the harsh environment that enforces prison rape as a cultural reality of the institution, PREA should have taken a more comprehensive and holistic view of the problem of prison rape. It should have emphasized more the reforms discussed below and considered any others put forth by reformers.

159. See Shay, *supra* note 81, at 21 ("PREA has been used as a sword rather than a shield, to justify harassment and abuse of incarcerated people who are or who are perceived to be LGBT.").

160. See Arkles, *supra* note 133, at 830.

161. See *id.* at 832–34.

162. Frank, *supra* note 138, at 14 ("Facilities that do not comply with the Act risk the loss of only 5 percent of their federal funding.").

163. See *id.*

164. See *id.*

165. See *id.*

V. PROPOSED SOLUTIONS BEYOND PREA AND THEIR EFFICACY WHEN EVALUATED BY SOCIAL AND FEMINIST THEORISTS' UNDERSTANDINGS OF SEX, VIOLENCE, AND THE SACRED

Given the deeply entrenched nature of sexual violence, both inside and outside of prisons, this Comment will evaluate two layers of reforms that may be necessary to begin to tackle the problem. First, it will evaluate more manageable, surface-level or concrete reform measures proposed by others under the framework of the social and feminist theorists to determine their likely success. Second, it will assess reforms more deeply embedded in cultural shifts necessary for reforming incarceration and decreasing, or eliminating, sexual violence in carceral settings.

A. Concrete Measures

Ristroph pointed to reformers who recommended conjugal visits, condom distribution, and eliminating bans on inmates' mutually consensual sexual relations.¹⁶⁶ Other reformers, including those who worked on PREA, attempted to improve reporting and classification systems. As concrete measures for potential advancement in the arena of halting prison sexual violence, Part V.A will evaluate: (1) conjugal visits, (2) condoms and dental dams, (3) reporting, (4) inmate classification systems, and (5) consensual sexual relationships between prisoners, already briefly discussed in Part III. The next section, Part V.B, will focus on cultural shifts including: (1) prison abolition, (2) other creative techniques, and (3) changes to Eighth Amendment jurisprudence.

1. Conjugal Visits

Reformers have suggested several benefits to be derived from allowing conjugal visits,¹⁶⁷ or increasing them where they are already

166. See Ristroph, *supra* note 11, at 182.

167. Jails generally do not allow conjugal visits. Federal prisons also do not currently allow conjugal visits. See *General Visiting Information*, FED. BUREAU OF PRISONS, <https://www.bop.gov/inmates/visiting.jsp> [<https://perma.cc/Y3JS-6XPM>]; see also Rachel Wyatt, *Male Rape in U.S. Prisons: Are Conjugal Visits the Answer?*, 37 CASE W. RESERVE J. INT'L L. 579, 598-99 (2006) ("There is evidence that many countries, including the U.S., have successfully used conjugal visits programs to lower rates of inmate sexual assault. Preliminary studies indicate that conjugal visitation programs lessen the tension and aggravation many inmates experience in prison, which causes them to lash out against other prisoners with sexually violent behavior.").

allowed.¹⁶⁸ Conjugal visits¹⁶⁹ may reduce the need for prisoners to act in a hyper-masculine or violent manner, given their access to the healing sacred through consensual sexual encounters with non-incarcerated partners.¹⁷⁰ Such visits, however, serve a more important function, beyond the deprivation thesis.¹⁷¹ America's prisons are closely tied to gang structures,¹⁷² and sometimes involve "prison families" in women's prisons.¹⁷³ Gang or quasi-familial structures often supplement or replace lacking familial structures outside prison by providing access to resources, protection, comradery, and emotional support within the prison. With increasing social ties to gang structures for male inmates while incarcerated, prisoners are more likely to stay involved with gang structures and criminal activities when they are released from prison, further increasing the likelihood of recidivism. Likewise, strong emotional ties within female prison families can increase links to incarcerated women even after release, although a prison family likely would not create analogous rules forbidding one's choice to disassociate, as gangs usually do. If ties to families on the outside are facilitated by allowing conjugal visits, a prisoner's entrenchment into gang structures or prison families may be suspended or lessened, thereby decreasing recidivism rates and encouraging positive ties to outside communities.

Theoretically, conjugal visits could provide access to the sacred, with the potential to heal and purify the inmate of some of the violence, structural and otherwise, experienced behind bars. The access to continuity and sacredness

168. See Ronald G. Turner, *Sex in Prison*, 36 TENN. B.J. 12, 26–28 (2000) (explaining the benefits of conjugal visits and impliedly backing the deprivation thesis that without consensual sex, inmates will be more likely to sexually assault one another or create unhealthy social tension).

169. See generally Afarin Majidi, *Sex Behind Bars: A Look at Conjugal Visits in Prison*, FIRST TO KNOW (Jan. 14, 2016), <http://firsttoknow.com/sanctioned-love-in-prisons-a-look-into-conjugal-visits> [<https://perma.cc/F8RC-PTWL>].

170. See SpearIt, *supra* note 140, at 142–43.

171. See generally Turner, *supra* note 168 (explaining the deprivation thesis); Wyatt, *supra* note 167, at 598–99 (discussing and critiquing the deprivation thesis).

172. See Graeme Wood, *How Gangs Took Over Prisons*, ATLANTIC (Oct. 2014), <http://www.theatlantic.com/magazine/archive/2014/10/how-gangs-took-over-prisons/379330> [<https://perma.cc/A45P-67GL>].

173. Female prisoners often organize their social hierarchies into quasi-familial structures, rather than gang hierarchies. These families help to provide economic resources to one another and often also create an emotionally supportive social structure for women members. They can include traditional roles like the "mother" and "father," for the most dominant female inmate of the group, so can reproduce problematic social roles. See, e.g., Saul, *supra* note 114, at 353 (explaining that in women's prisons, "prison families' serve as an important source of emotional support and may defuse tension"); Laura E. Bedard, *The Pseudo-Family Phenomenon in Women's Prisons*, CORRECTIONS ONE (Oct. 20, 2009), <http://www.correctionsone.com/jail-management/articles/1956587-The-pseudo-family-phenomenon-in-womens-prisons> [<https://perma.cc/8ZFK-UVAS>].

with someone who is not part of the carceral system can decrease emotional ties to prison and other prisoners. The sacred of such visits can be ritually bounded by the procedures governing the allowance of the visits, the limited duration of the visits, the frequency of the visits, the clothing allowed during visits, the food allowed during visits, and other aspects setting the visit apart from everyday prison life. Like a festival of rejuvenation and restoration, conjugal visits could assist prisoners in healing, making them less likely to continue to enact violence on others.

Prison administrators would likely argue that conjugal visits increase security risks, as contraband, or forbidden items, can be brought into the prison, and external street gang members can privately pass information to incarcerated gang members. Subjecting visitors to harsh institutional controls and searches, however, would only perpetuate the system's contagious violence. While all prison visitors are already subjected to some level of search, depending on the facility's procedures, increased searches of non-prisoners at conjugal visits would be too intrusive. Rather, an overall improvement in prison conditions, for example with regards to food and hygiene, would reduce incentives to bring in contraband. If inmates had easier access to nutritious food or desired hygiene products, whether through distributions from the administration or even for purchase at prison commissaries for reasonable prices,¹⁷⁴ the need for outside spouses or family members to bring in such items would be greatly diminished. The risk of being caught with unauthorized items, for visitors and the inmate, would be too great in relation to the easy route of purchasing such items or receiving them for free. Further, more problematic contraband, such as drugs and weapons, would also be in lower demand if overall prison conditions were less violent and provided adequate access to substance abuse treatment and medical care. While information may be exchanged during such visits, information can already reach inmates through coded letters and phone calls, or even illegal phone calls on contraband cell phones often found in facilities.

174. While making more items available for purchase is a good first step, especially when the items are essentials like healthy food, commissary systems are overpriced, with large built-in markups. Used as a profit center, commissaries usually overcharge for items, to such an extent that many inmates cannot afford to purchase basic necessities due to exorbitant costs, the inability to earn more than a miniscule wage at prison jobs, and often inadequate financial resources from family members putting money in an inmate's account, or "on an inmate's books." See generally Max Reinhart, *What Can Inmates Buy in Jail?*, NEWS-HERALD (Aug. 5, 2012, 12:01 AM), <http://www.news-herald.com/article/HR/20120805/NEWS/308059970> [<https://perma-archives.org/warc/UMH3-8BNJ/http://www.news-herald.com/article/HR/20120805/NEWS/308059970>].

Additionally, much prison contraband is brought into facilities by prison employees themselves.¹⁷⁵ Given that guards can easily smuggle forbidden items in and out of facilities already, without facing the dehumanizing searches enacted on visiting friends and family,¹⁷⁶ the problem of prison contraband is one that would not be solved by intensely regulating conjugal visits. Employers can easily regulate officers more, as far as searches upon entering facilities for shifts or perhaps altered recruitment and interview strategies to avoid poor hiring decisions.¹⁷⁷ If administrators truly desire to stymie the flow of contraband into prisons and jails, looking to staff first would be an efficacious first step.

Even without conjugal visits, facilities are unable to control the flow of contraband into prisons and jails. In the federal system, which does not currently allow conjugal visits, contraband remains a major problem. Lax staff search

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175. See, e.g., Pamela Brown & MaryLynn Ryan, 'Staggering Corruption': 46 Correctional Officers Charged in Years-Long Drug Trafficking Sting, CNN: POLITICS (Feb. 12, 2016, 12:21 PM), <http://www.cnn.com/2016/02/11/politics/fbi-georgia-correctional-drug-trafficking> [https://perma.cc/MU4Z-Y5GP]; Matthew Clarke, *Contraband Smuggling a Problem at Prisons and Jails Nationwide*, PRISON LEGAL NEWS (Jan. 15, 2013), <https://www.prisonlegalnews.org/news/2013/jan/15/contraband-smuggling-a-problem-at-prisons-and-jails-nationwide> [https://perma.cc/JB49-XNYK]; Ashley Fantz, *Drugs, Money, Love and Cell Phones: How Prison Guards Go Bad*, CNN (June 27, 2015, 9:51 AM), <http://www.cnn.com/2015/06/25/us/new-york-prison-break-contraband-smuggle> [https://perma.cc/8C3D-MWAZ]; Ben Kochman, *Rikers Corrections Officers, Jail Cook, Inmates Busted for Smuggling Contraband Into Jail*, N.Y. DAILY NEWS (May 19, 2016, 6:44 PM), <http://www.nydailynews.com/new-york/nyc-crime/17-busted-smuggle-contraband-rikers-article-1.2642762> [https://perma.cc/XMD9-DM9P]; Leticia Ordaz, *CA Prisons Finding New Ways to Prevent Drug Smuggling*, KCRA NEWS (Nov. 25, 2013, 10:30 AM), <http://www.kcra.com/news/local-news/news-sacramento/prisons-finding-new-ways-to-prevent-drugsmuggling/23097832> [https://perma.cc/CVQ2-SVAT]; Rina Palta, *California Prison Officials Try High-Tech Approach to Contraband Cell Phones*, S. CAL. PUB. RADIO (Oct. 22, 2012), <http://www.scpr.org/blogs/news/2012/10/22/10634/prison-officials-try-high-tech-approach-contraband> [https://perma-archives.org/warc/A2GX-PM9G].
176. See Kevin Rector et al., *Feds Indict 80 People Including 18 Corrections Officers in "Massive" Maryland Prison Corruption Case*, BALTIMORE SUN (Oct. 5, 2016), <http://www.baltimoresun.com/news/maryland/crime/bs-md-prison-corruption-20161005-story.html> ("Prosecutors said the 'going rate' for corrections officers to smuggle contraband into [the state prison] was \$500 per package. The drugs—including heroin, cocaine, buprenorphine, and MDMA, more commonly known as 'molly'—were then sold for far more than their value on the streets, prosecutors said. Inmates used contraband cellphones to make payments through PayPal. One inmate admitted to paying corrections officers \$3,000 a week to smuggle in contraband, prosecutors said. . . . Despite increased security measures at state prisons following [a similar] 2013 case, officers were able to conceal items in their crotches, hair, underwear or in sanitary napkins, prosecutors said. . . . Lax hiring standards were singled out as a major factor in the [2013] Baltimore City Detention Center case.").
177. See Todd Gilchrist, *3 Ways to Prevent COs From Smuggling Contraband*, CORRECTIONS ONE (Jun. 3, 2014), <http://www.correctionsone.com/contraband/articles/7252128-3-ways-to-prevent-COs-from-smuggling-contraband> [https://perma.cc/5GWQ-SKEQ] (acknowledging correctional officers are sources of contraband and advocating (1) more thorough hiring interviews for officers; (2) better supervisor-officer relations; and (3) more accountability amongst officers).

policies and spotty implementation of staff searches are a central cause of contraband in federal facilities.¹⁷⁸ The federal system even lacks a data collection system to track seizures of contraband, according to the Justice Department's Inspector General.¹⁷⁹ Without data on what contraband is seized and where it comes from in facilities that do not provide for conjugal visits, there is no baseline from which to evaluate any argument on contraband, including one that conjugal visits could jeopardize the security of a facility. Additionally, the president of the American Federation of Government Employees' Council of Prison Locals stated that "most contraband enters by being thrown over prison fences."¹⁸⁰ In local jail systems that also usually do not allow conjugal visits, a myriad of contraband smuggling routes already exist.¹⁸¹ For example, during a normal visitation, not a conjugal visit, a mother could slip her son drugs during a quick kiss.¹⁸² Since conjugal visits would not affect the vast majority of these routes through which contraband enters prisons, and since contraband is a pervasive problem even in facilities without conjugal visits, any increase in contraband from conjugal visits may be minor. While the visits would pose some risk of contraband smuggling and illicit information exchange, prison administrators' actions and policies reveal a lack of genuine measures to tackle the easiest steps towards eliminating contraband, like searching staff more

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178. See Joe Davidson, *Weak Staff-Search Policy Aids Federal Prison Smuggling, Report Says*, WASH. POST (July 6, 2016), <https://www.washingtonpost.com/news/powerpost/wp/2016/07/06/weak-staff-search-policy-aids-federal-prison-smuggling-report-says> [<https://perma.cc/HX4C-P8CG>].
179. See Kevin Johnson, *Justice Department Review: Federal Prisons Struggle to Track Contraband*, USA TODAY (June 29, 2016, 6:38 PM), <http://www.usatoday.com/story/news/nation/2016/06/29/federal-prisons-contraband-justice-department-review/86532402> [<https://perma.cc/CNN9-44PA>] ("Federal prisons cannot effectively track seizures of weapons, drugs, cellphones and other contraband because officials lack a fully functional data collection system, an internal Justice Department review concluded Wednesday. The Justice Department's inspector general also found that the Federal Bureau of Prisons has for 13 years operated without a universal policy on searches of staff members for possible contraband.").
180. Eric Young, *The Federal Bureau of Prisons' Fight Against Contraband*, WASH. POST (July 14, 2016), https://www.washingtonpost.com/opinions/the-federal-bureau-of-prisons-fight-against-contraband/2016/07/14/d33c1e02-4912-11e6-8dac-0c6e4acc5b1_story.html?utm_term=.8a951ae789d9 [<https://perma.cc/C3Y5-YUFE>].
181. Allie Robinson, *Contraband Finds Its Way Into Regional Jails in a Variety of Ways*, BRISTOL HERALD COURIER (Aug. 19, 2011, 8:00 AM), http://www.heraldcourier.com/news/contraband-finds-its-way-into-regional-jails-in-a-variety/article_f5ebe884-46be-5d75-b38c-55a5ac616299.html ("Suboxone strips hidden under stamps or in the seal of an envelope. Necklaces made out of garbage bags. Toothbrushes and plastic spoons sharpened into weapons. Tobacco or drugs smuggled in bodily cavities, thrown over the prison fence, or left at a public location where prisoners can pick it up while at the doctor's office or on work detail.").
182. See, e.g. Crimesider Staff, *Mother Passed Drugs to Jailed Son in Kiss, Upstate NY Police Say*, CBS NEWS (Feb. 7, 2013, 3:00 PM), <http://www.cbsnews.com/news/mother-passed-drugs-to-jailed-son-in-kiss-upstate-ny-police-say> [<https://perma.cc/8S8T-6SBN>].

thoroughly and frequently, hiring staff more carefully, or even simply tracking contraband seizures.

2. Condom, Dental Dam, and Latex Glove Distribution

Given the prevalence of sexual abuse in prisons, condoms and other reproductive health care should be easily accessible to inmates.¹⁸³ Although male abusers may not always use condoms, many abusers might be willing to use condoms due to the protective façade some abusers prefer to ascribe to their behaviors within the prison hierarchy. Characterizing themselves as owners and protectors of victimized inmates, aggressors might feel condom use aligns with their supposed protective role. Additionally, HIV rates may encourage abusers to use condoms to safeguard their own health. Since any condom use at all is better than none, given the spread of sexually transmitted infections,¹⁸⁴ prison facilities should make condoms and other reproductive technology readily available.

From a violence perspective, sexually transmitted infections and diseases are slightly more complex than the concept of violence.¹⁸⁵ Still, they can lead to psychological distress that can be dislocating, upsetting, and work violence on the individual, through physical medical procedures and more symbolic or psychological effects. The diseases are also contagious, mirroring the conceptualization of sacred contagiousness and further reinforcing that their impure sacredness must be ritually contained through reproductive healthcare. Therefore, preventing the spread of disease within this theoretical framework is halting the spread of violence, this time through the ritual use of condoms and other reproductive items like dental dams.

Critics of allowing condoms in prison point to their value as contraband, for example for their ability to hide other items or create weapons. The same critiques could apply to dental dams and latex gloves, used to protect cut hands from vaginal and menstrual fluids.¹⁸⁶ These concerns, however, fail to recognize that

183. See, e.g., Leslie R. Ramos, Comment, *Beyond Reasonable: A Constitutional and Policy Analysis of Why It Is Necessary and Prudent to Allow Nonprofits or Health Care Agencies to Distribute Sexual Barrier Protection Devices to Inmates*, 39 MCGEORGE L. REV. 329, 330–31 (2008).

184. See e.g., Adam L. Beckman et al., *New Hepatitis C Drugs Are Very Costly and Unavailable to Many State Prisoners*, 35 HEALTH AFFAIRS 101893 (2016) (“In the forty-one states whose departments of corrections reported data, 106,266 inmates (10 percent of their prisoners) were known to have hepatitis C on or about January 1, 2015. Only 949 (0.89 percent) of those inmates were being treated.”).

185. See generally SUSAN SONTAG, *ILLNESS AS METAPHOR* (1978) (discussing the nature of cancer and the complicated way that people conceptualize disease).

186. See Lorraine Yap et al., *Sexual Practices and Dental Dam Use Among Women Prisoners—A Mixed Methods Study*, 7 SEXUAL HEALTH 170 (2010).

other objects permitted to inmates can just as easily hide contraband or be modified into weapons. Since prisoners can make weapons out of toothbrushes, pillow cases, socks, Jolly Rancher candy, and a myriad of other materials, there is no basis for the banning of such a useful item as condoms. Furthermore, many objects allow inmates to hide other objects within them. Take, for example, a blanket, pillow, clothing, or other essentials. Security measures should not strip inmates of their basic health and human needs.

Others may also argue that condom distribution and access could lead to increased sexual interactions, including an uptick in coercive interactions. Such arguments, however, have been disproven by empirical studies in non-incarcerated populations, in which condom distribution did not correlate with frequency of sex, number of sexual partners, or a shift towards becoming sexually active when previously inactive.¹⁸⁷ Although the carceral environment is no doubt different from wider society, especially with respect to sexual dynamics, such studies likely indicate that condoms, and by extension other reproductive health tools and techniques, do not affect rape rates. Additionally, studies on Australian and Canadian prisons found no increase in sexual assaults as a result of condom distribution.¹⁸⁸ If condom and dental dam distribution did increase consensual sexual activity, that result would still align with the goal of facilitating humanizing, ritually bounded, sacred healing activities in prisons and jails.

3. Reporting Improvements

Given the reporting difficulties faced by inmates even after PREA, further reform in this area is necessary.¹⁸⁹ All methods of reporting, including reporting contacts created specifically under PREA implementing regulations and policies, should satisfy the PLRA and allow for the excusal of administrative exhaustion and any time barriers to lawsuits. Alternatively, the PLRA should be repealed in its entirety.¹⁹⁰

187. *Condoms Do Not Lead to Earlier Sex, More Sex, or More Partners*, SEXUALITY INFO. & EDUC. COUNCIL OF THE U.S., <http://www.siecus.org/index.cfm?fuseaction=Feature.showFeature&featureID=1324> [<https://perma.cc/FN8L-D5VV>].

188. Tony Butler et al., *Condoms for Prisoners: No Evidence That They Increase Sex in Prison, But They Increase Safe Sex*, 89 SEXUALLY TRANSMITTED INFECTIONS 377 (2013); Lorraine Yap et al., *Do Condoms Cause Rape and Mayhem? The Long-Term Effects of Condoms in New South Wales Prisons*, 83 SEXUALLY TRANSMITTED INFECTIONS 219 (2007); Yap *supra* note 186, at 170; Lorraine Yap et al., *The Decline in Sexual Assaults in Men's Prisons in New South Wales: A "Systems" Approach*, 26 J. INTERPERSONAL VIOLENCE 3157, 3157–58 (2011).

189. *See infra* Part IV.

190. *See, e.g.*, Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1559 (2003).

The administrative and procedural barriers in place further victimize prisoners experiencing sexual assault. Although the barriers seem at first glance to perform a ritual function to contain violence, with their sterile rules and strict requirements, the opposite is true. Because the barriers are simply another manifestation of institutional violence, dehumanization, and oppression for prisoners, following on the heels of unfettered violence in the form of the sexual assault, these barriers serve only to further contaminate and spread sacred violence.

4. Body Classification Systems

Some have gone so far as to suggest an inmate classification system designed around groupings of height and weight to combat prison sexual assault.¹⁹¹ Serious administrability problems arise under this proposal, as such drastic spatial segregation will not only socially isolate inmates from one another, but will also require intense surveillance. Furthermore, prisons would likely need to be torn down and rebuilt with new architectural designs, creating separate spaces for each size-weight group and converting all dormitory-style housing units¹⁹² into more restrictive cells to control exposure to differently sized inmates. Such an architectural plan is reminiscent of disturbing panopticons.¹⁹³ Furthermore, the

191. See Ellenbogen, *supra* note 71, at 367 (“In order to incorporate the potential risk of violence, inmates will be categorized in three groups according to their history of violence. Level I for the least dangerous, Level III for the most dangerous. Once classified by level of potential violence, inmates will then be classified by height and weight. Imagine a graph whereby the x-axis is represented by weight, and the y-axis is represented by height. Each section of the graph will correspond to a different size classification. Where the inmate’s height intersects with the inmate’s weight is the size classification the inmate will be assigned. While the number of size classifications will be a function of the size of the prison, there should be at least three (A for the smallest, B for medium build, and C for the largest). Therefore, if an inmate is classified as level I for violence, and level B for size, his classification would be IB. Prison officials could then adopt a rule whereby inmates with different size classifications cannot share a cell, shower at the same time, or occupy any unsupervised area at the same time. In other words, this proposal would limit contact as much as possible between the different classifications. To account for the fact that body types change over time, the weighing and measuring could be recalculated every year.”).

192. Dormitory housing is usually for inmates with lower security classifications. It consists of a large room with rows of bunkbeds, often housing hundreds of prisoners at a time in cramped quarters. Given the rows of stacked bunks, guard visibility and control in the middle of the rows is low. Therefore, dorms would house too many inmates to separate such height-weight classification groups. Additionally, guards would be unable to monitor groups if multiple inmates were within the same space, given the lack of surveillance and limited visibility in dorm settings. See, e.g., Christopher Zoukis, *Inmate Housing in the Federal Bureau of Prisons*, PRISON LAW BLOG (May 19, 2013), <http://www.prisonlawblog.com/blog/inmate-housing-federal-bureau-prisons#.VnPRHfkLIU> [<https://perma.cc/C9JE-Z3EV>].

193. See *supra* note 139.

proposal fails to grasp that taller heights and heavier weights do not translate into increased likelihood or ability to rape. Practical considerations aside, this classification of inmates like chattel will only serve to further dehumanize and institutionally violate. By infringing on inmate bodies even further by measuring and classifying them, prison officials would be required to treat inmates as simply warehoused bodies of different sizes.

5. Ending Regulation of Consensual Inmate Sex With Other Inmates

The concrete measure most closely tied to a deep cultural shift, allowing or encouraging consensual inmate sexual relationships, would dramatically alter life for many incarcerated individuals. First, inmates would have fewer fears when reporting sexual violence because the report could not be used against them to pin them for an infraction for being involved in inmate sex.¹⁹⁴ Although these relationships already take place, often with the knowledge of prison officials, changing legal standards and prison policies will prevent officials from using the prohibitions capriciously and unjustly. Practically, such a policy shift would allow prison officials to focus their scarce resources on coercive sex behind bars.¹⁹⁵

Second, sex positivism and feminism reveal that recognizing and legitimizing a person's sense of autonomy is empowering, healing, and leads to positive results. Specifically, encouraging inmate access to the sacred within positive relationships, ritually bounded by consent, creates an important avenue for healing and purifying violence behind bars, one with which the institution should no longer interfere.

B. Cultural Measures

1. Generally

Prison culture must shift from its punitive, bodily, sexual, and dehumanizing emphasis on retribution and punishment to rehabilitation to protect communities from further violence. Guided by the role of the sacred, institutional policies must seek to stop enacting further violence upon prisoners. Instead, policies should serve to humanize, heal, and purify the violence already inherent in the criminal justice system, crime, and the deprivation of liberty. Most inmates

194. Robinson, *supra* note 154, at 1316; Shay, *supra* note 81, at 21–22.

195. Smith, *supra* note 123, at 234.

are people of color¹⁹⁶ often from backgrounds that include further contaminating violence like domestic violence, substance abuse, and poverty. Given this early and consistent exposure to the sacred without ritual boundaries,¹⁹⁷ many prisoners require a system that will help to purify this violence and heal old wounds. New policies addressing prison violence must seek to intervene in the reproduction of sexual violence amongst inmates and staff by shifting prison culture to remove the harsh conditions of confinement and hierarchies that gave rise to the current predatory gang and social structures behind bars. Policies should focus on purifying the sacred by erecting positive ritual boundaries around healing processes.

2. Prison Abolition

Allegra McLeod suggests the reform of abolishing prisons, save for perhaps the terrible few inmates who are beyond redemption and too much of a threat to society to ever be released. She suggests instead that America invest resources in alternatives to criminalization.¹⁹⁸ She describes a project of gradual decarceration, coupled with a multifaceted approach based on preventive justice to resolve systemic problems that give rise to crime.¹⁹⁹ She explores community self-care through groups, organizations, and physical locations that can de-escalate situations and create safe harbors for community members. For example, community self-care could involve providing resources for domestic violence survivors. She also advocates alternative livelihoods, or the concept that crime can be prevented through job creation and small business development that respects and works within a community's economy.²⁰⁰ By shifting work away from drug dealing, for example, and towards some other employment area, the community can begin to move beyond criminal economic activity it may now rely on to survive. Her measures further include universal design, or considering adequate lighting and susceptibility to theft when building and designing community spaces.²⁰¹ Finally, she discusses green spaces and community investment, or urban redevelopment, to help create healing spaces within urban communities

196. See Leah Sakala, *Breaking Down Mass Incarceration in the 2010 Census: State-by-State Incarceration Rates by Race/Ethnicity*, PRISON POLY INITIATIVE (May 28, 2014), <http://www.prisonpolicy.org/reports/rates.html> [<https://perma.cc/XW5N-M3FW>].

197. Ritual boundaries in communities could include prevalent safe spaces with access to adequate education, nutrition, health care, and mental health services.

198. See Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1158–72, 1218–19 (2015).

199. See *id.* at 1227–28.

200. See *id.* at 1228–29.

201. See *id.* at 1229–30.

serving as pipelines to prisons.²⁰² Such projects have the potential to bring community members together while investing in the community and improving quality of life for community members.²⁰³

All of these measures decrease the need for incarceration by improving on some of the deeper causes of crime, such as disconnected or under-resourced communities. Because incarceration is inherently dehumanizing, as it deprives the individual of liberty and autonomy to at least some extent, McLeod advocates deeper social change to eliminate drivers of crime and thereby reduce or abolish prisons almost entirely. Additionally, these measures themselves often represent purifying rituals, with community members binding together in sacred continuity to provide protection, safe harbors, and beautiful and secure spaces. Their continuity is limited, or ritually bounded, however, by the community's abstract common goals and concrete projects, channeling the sacredness into healing activities.

3. Other Creative Measures

Innovations that can help to address the violence of incarceration generally, and the violence of prison sexual assault more specifically, include newer models of peer mentorship. Homeboy Industries, a gang rehabilitation center in Los Angeles, pioneered a groundbreaking model for prisoner re-entry based around the concept of kinship. A perhaps more accessible term for sacred continuity, kinship is the recognition of social equality and inclusion. Father Gregory Boyle, the founder of Homeboy Industries, advocates for society to view gang members and those previously affiliated with gangs, many of whom have been incarcerated, as family members, as kin who are equal in their humanity to all others.²⁰⁴ Much of the organization is run by ex-gang members, making it easily accessible to currently affiliated gang members and those recently released from prison, who quickly feel kinship with staff and instructors. Grounding its services in a variety of religions, the center provides classes in general education, domestic violence, parenting, meditation, reading, art, solar panel installation, and other subjects. The assortment of services available parallels the concepts of inclusion and sacred healing, in theory providing space for many belief systems and many rituals designed to purify the violent contagion of gang affiliation and prison time.

202. *See id.* at 1230–32.

203. *See id.*

204. *See generally* GREGORY BOYLE, *TATTOOS ON THE HEART: THE POWER OF BOUNDLESS COMPASSION* (2011).

Other innovations include introducing yoga into prisons, a physical practice that allows one to exercise while tapping into the sacred continuity of the activity that is bounded by the constraints of the class and the instructor's directions.²⁰⁵ Some prisons and organizations have also experimented with giving prisoners, or parolees, animals that require the prisoners to care for another being, consider another's needs, and reciprocate love and support.²⁰⁶ Just as conjugal visits and decriminalizing consensual sex would increase access to healthy relationships, giving inmates an animal to care for also fosters social skills. Still more innovative measures can be developed to tap into the sacred continuity, while bounding it through positive ritual, all while undermining the violent control of the carceral state over imprisoned bodies.

4. Eighth Amendment Doctrinal Reform

Finally, a shift in Eighth Amendment doctrine is necessary. As the *Farmer v. Brennan* Court stated, “[b]eing violently assaulted in prison is simply not ‘part of the penalty that criminal offenders pay for their offenses against society.’”²⁰⁷ The Eighth Amendment prohibits “cruel and unusual punishments.”²⁰⁸ This is the primary vehicle used by inmates to bring claims challenging conditions of confinement, including sexual assault and the use of force. The U.S. Supreme Court has defined punishment under the clause to require a subjective intent, namely deliberate indifference.²⁰⁹ Therefore, for prison conditions to violate the U.S. Constitution, the condition or the action creating the condition must be “punishment,” which requires deliberate indifference, defined as subjective intent at the recklessness level on the part of the prison official.²¹⁰

Thus, correctional officers who negligently permit a rape to occur, or who negligently fail to fix a water system for days no matter what the harm might be, or who negligently fail to provide an inmate with food, or who negligently fail to provide an inmate with access to vital emergency medical care, all cannot be held liable. This legal standard ignores the realities of prison life, the suffering of

205. See, e.g., PRISON YOGA PROJECT, <http://prisonyoga.org> [<https://perma.cc/X9BD-DEYF>].

206. See *About Pit Bulls and Parolees*, ANIMAL PLANET, <http://www.animalplanet.com/tv-shows/pitbulls-and-parolees/about-this-show/about-pit-bulls-and-parolees> [<https://perma.cc/BAU8-HEHF>]; Hilary Hanson, *Rescued Cats Transform Inmates' Lives With Love at Pendleton Correctional Facility*, HUFFINGTON POST (Apr. 13, 2015, 12:17 PM), http://www.huffingtonpost.com/2015/04/13/pendleton-correctional-facility-shelter-cats-inmates_n_7055384.html [<https://perma.cc/RV7H-BEY9>].

207. 511 U.S. 825, 834 (1994) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)).

208. U.S. CONST. amend. VIII.

209. See *Wilson v. Seiter*, 501 U.S. 294, 303 (1991); *Estelle v. Gamble*, 429 U.S. 97, 106 (1976).

210. See *Estelle*, 429 U.S. at 104.

prisoners, and the systemic nature of carceral violence. Furthermore, this subjective standard sets the intent requirement for prison officials at too high a level. Requiring deliberate indifference, or recklessness, means sexual abuse goes unaddressed on a systemic level as long as individual officials are too ignorant to acknowledge it or too clever and convincing to get caught when denying knowledge.

Additionally, the Supreme Court established an intent requirement of acting “maliciously and sadistically for the very purpose of causing harm,” to create liability for use-of-force cases.²¹¹ The Court’s reasoning includes deference to prison officials in situations that may present time constraints and intense pressure. Despite these factors, use of force cases should enjoy a lower subjectivity requirement than normal conditions-of-confinement cases because the use of force is a greater imposition on the individual prisoner. Guards shooting inmates in the leg, which happened to the plaintiff Albers during a prison riot situation in which he was attempting to keep other inmates and guards safe, is a greater violation than other conditions of confinement, such as overcrowding and extreme temperatures. Rather than malicious and sadistic requirements on the part of officials, who under this doctrine do argue that they used even deadly force purposely for a legitimate punitive reason, use of force should require only negligent states of mind.

Alternatively, punishment should be redefined to include all of the conditions of confinement, since they naturally flow from the judge’s sentence. Because the sentence, recognized by the court as the punishment, is a proximate and but-for cause of subsequent prison conditions, the word “punishment” should encompass everything that happens within prison walls. Furthermore, courts should use a purely objective standard to determine if a prison official’s action or a prison policy is objectively reasonable, without looking to the intent on the part of the correctional officer. The current doctrine allows for prisons to create objectively unreasonable conditions, such as a systemic failure to provide emergency medical attention or to prevent rape, as long as the officials can defend their subjective lack of awareness of the conditions, rendering the abuses outside of the ambit of the court’s conceptualization of punishment. These changes to the legal doctrine would help prisoners to vindicate their Eighth Amendment rights to be free from cruel and unusual punishments, allowing the currently cruel, unjust system to evolve into a more humane and purifying system by way of constitutional litigation.

211. *Whitley v. Albers*, 475 U.S. 312, 320–21 (1986) (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973)).

CONCLUSION

Incarceration is an inherently sexualized process involving the intense regulation and oppression of inmates' minds and bodies. From sexual assaults by officers, to consensual sexual encounters between inmates, sex and its associated social hierarchies define the institution. By better understanding violence, the sacred, and the profane, and by bringing these concepts into dialogue with feminists, the efficacy of various reform measures designed to reduce or eliminate the sexual violence of prisons becomes clearer. Feminists, social theorists, and prison reformers' ideas all work together and bring valuable insights to the table that should steer policy, advocacy, and future legislation. From condom and dental dam distribution, to decriminalizing consensual sex, to potentially abolishing prisons, the goal of eliminating sexual violence within prisons can only be reached by listening to interdisciplinary voices and contributions. Reform efforts must acknowledge PREA's flaws and move beyond this piece of legislation to consider new, innovative measures to address the persistent problem of prison sexual violence. In considering new measures, these interdisciplinary voices must all be part of the conversation.