ARTICLES

SEXUAL ABUSE IN CALIFORNIA PRISONS:
How the California Rape Shield Fails the Most Vulnerable Populations

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Introduction

Under federal and all state rules of evidence, evidence of a person's character or character trait is generally not admissible to prove that on a particular occasion the person acted in accordance with that character or trait.[1] However, in a sexual assault case, under the common law, this type of character evidence against a complaining witness[2] is allowed, but against the defendant is not permitted. Prior to the enactment of rape shield statutes, it was common practice for defense counsel to bring up past sexual acts of a complaining witness in order to cast doubt on the assertion that the sexual act(s) with the defendant were non-consensual.[3] Additionally,

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[1] Fed. R. Evid. 404.

[2] The terms "complaining witness" and "alleged victim" are typically used to describe the complainant in a matter being prosecuted. *Id.* I generally use the term complaining witness throughout, as this is the term most commonly used in legal publications on sexual assault. *See, e.g.*, 32 N.J. Prac., Criminal Practice and Procedure § 22:15 (2013-2014 ed.); Necessity or Permissibility of Mental Examination to Determine Competency or Credibility of Complainant in Sexual Offense Prosecutions, 45 A.L.R.4th 310 (1986); Ga. Criminal Trial Practice Forms § 17:27.50 (6th ed.).

[3] Ya'ara Barnoon and Elena Sytcheva, Thirteenth Annual Gender and Sexuality Law: Annual Review Article: Rape, Sexual Assault & Evidentiary Matters, 13 Geo. J. Gender & L. 459, 460 n.7 (citing State v. Wood, 59 Ariz. 48, 52 (1942), overruled by State ex rel. Pope v. Superior Court, In & For Mohave

defense counsel often used past sexual acts as character or reputation evidence to prove that the complaining witness had an immoral character—because she had, or was alleged to have, engaged in past sexual acts with others—and therefore could not be trusted.[4] Effectively, the complaining witness herself was put on trial. If her past sexual conduct did not comport with the norms of chastity, i.e., sex only with her husband after marriage, it was presumed that she consented to sex with the defendant.[5] This defense tactic was often successful, and deterred complaining witnesses from pursuing sexual assault cases by threatening to drag their sexual histories into the public sphere.[6] Moreover, jurors frequently bought into the notion that a woman who consents once is more likely to consent again, and therefore likely consented to the sexual acts with the defendant. This tactic led to even fewer legitimate convictions.[7]

In the 1970s and 1980s, recognizing the importance of protecting complaining witnesses, all fifty states, the federal government, and the District of Columbia passed varying versions of rape shield laws.[8] Rape shield laws are designed to protect complaining witnesses[9] in sexual assault trials from this type of harassment by the defense.[10] These laws apply in both civil and criminal cases. Be-

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County, 113 Ariz. 22 (1976) ("[C]ommon experience teaches us that the woman who has once departed from the paths of virtue is far more apt to consent to another lapse than is the one who has never stepped aside from that path.")).

[4] *See* Leon Letwin, *"Unchaste Character," Ideology, and the California Evidence Laws*, 54 S. CAL. L. REV. 35, 40 (1980-1981). I use female pronouns throughout, but rape victims and perpetrators of rape can be both male and female. *See infra* Part III.

[5] *Id.* at 38, n.12.

[6] Sexual assault and rape are sometimes considered different acts: For ease of reading, these terms will be used interchangeably to mean forced or coerced sexual contact involving lack of consent by one party.

[7] *See* Ronet Bachman and Pheny Smith, *The Adjudication Of Rape Since Reforms: Examining The Probability Of Conviction And Incarceration At The National And Three State Levels*, CRIM. JUSTICE POL'Y REV. 6, 342 (1992), *available at* http://cjp.sagepub.com/cgi/content/abstract/6/4/342 ("Changes in public conceptions about what rape 'really was' and who was 'really victimized' by rape were expected to lead to more reports of rape. Concurrent with this, jurors were expected to become more sensitive to both the victimization and stigmatization of rape victims. As a result of the increased severity attached to all forms of sexual assault and a reduction in the extent to which rape victims were blamed, rape reports, arrests, convictions and rates of imprisonment were all expected to increase.").

[8] *See id*. (several U.S. Territories also have rape shield laws).

[9] *See, e.g.*, FED. R. EVID. 412.

[10] People v. Summers, 818 N.E.2d 907, 912 (2004) ("The policy underlying the rape-shield statute is to prevent the defendant from harassing and humiliating the complaining witness with evidence of either her reputation for chastity

cause past sexual conduct with people other than the defendant is usually only marginally relevant at best, because it is highly inflammatory and misleading to juries, and because it is embarrassing and prejudicial to complaining witnesses, rape shield laws are designed to either preclude, or add an extra layer of scrutiny to, this type of evidence.[11] These laws are designed to counter the notion that an "unchaste" woman must have been asking to be raped by limiting the admissibility of evidence related to her past sexual behavior.[12]

The intention of rape shield laws is to encourage victims of rape to bring their cases without fear that they will be put "on trial" for their prior sexual conduct,[13] thereby increasing the number of substantiated rape prosecutions and convictions.[14] Evidence shows these laws are successful. Following the enactment of rape shield laws across the country, research in the federal justice system and three states, including California, found a 39% increase in substantiated rape charges and convictions in California alone.[15]

Despite these promising statistics, California has intentionally excluded a group of people from the protection of the rape shield statue. So far, it is the only state to do so. Enacted in 1974,[16] California's rape shield law was amended in 1981 to deny any person access to the rape shield if she was raped while in a local detention or state carceral facility.[17] California's exclusionary rape shield law,

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or specific acts of sexual conduct with persons other than defendant, since such evidence has no bearing on whether she consented to sexual relations with the defendant.").

[11] For a collection of state rape shield statutes, many of which list the previously mentioned factors as justifications for said statutes, *see Rape Shield Statutes*, Nat'l Dist. Att'y Ass'n (Mar. 2011), *available at* www.ndaa.org/pdf/NCPCA%20Rape%20Shield%202011.pdf.

[12] *See* Barnoon and Sytcheva, *supra* note 3, at 468-70 (for an overview of the categories of current rape shield laws).

[13] *Cf. id.* at 459 (However, "intense media scrutiny in high-profile cases often emphasizes the shortcomings of many state rape shield laws and undermines their dual purposes, as evidenced in *People v. Bryant*, the Duke lacrosse case, and the most recent Dominique Strauss-Kahn case.").

[14] Bachman and Smith, *supra* note 7, at 343.

[15] *Id*. at 349 (California rape cases resulting in conviction increased 39 percent from 1976-1989, against a control group of robbery cases resulting in conviction, which increased only 5 percent).

[16] Cal. Evid. Code § 782 (West 2011); Cal. Evid. Code § 1103 (West 2011).

[17] *See, e.g.*, *Criminal Procedure,* 13 Pac. L. J. 651, 658 (1982); Cal. Evid. Code § 782; Cal. Evid. Code §1103; Act of September 24, 1981, ch. 726, 1981 Cal. Stat. 2875, SB 23 (Watson). The exclusion of persons in prisons and jails from rape shield protection did not even merit commentary upon reading in the Assembly (per conversation on May 9, 2013, with California Law Legislative Librarian) or mention in the Pacific Law Journal beyond an obscure footnote: "Compare Cal. Evid. Code §1103(b)(1) with Cal. Stats. 1974, c. 569, §2, at 1388 (if the

as I will refer to this 1981 amendment, does not seem to have been explored either in legal academia or in popular media prior to this Comment.[18]

The exclusionary law concerns more than just the residents of California. Visitors to California, should they be arrested and subjected to detention of any duration, are also at risk. Additionally, as California is often a leader in national policymaking, other states could follow suit and adopt a similar exclusionary rape shield law. Not only inmates are at risk: under California's exclusionary rape shield law, any person inside a state carceral facility or local jail,[19] whether an inmate, employee, or visitor, cannot access the protection of the rape shield.[20]

This exclusion is puzzling. Persons incarcerated in prisons and jails are at high risk for sexual abuse. The federal government acknowledged this risk in 2003 by passing the Prison Rape Elimination Act ("PREA"),[21] and California did as well by passing the Sexual Abuse in Detention Elimination Act ("SADEA").[22] In

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specified sex crime was alleged to have occurred in a local detention facility or in a state prison, evidence of the complaining witness' prior sexual conduct is admissible for the purpose of proving the victim's consent)." *Id.* at 659 n.7. SB 23 also broadened the coverage of the rape shield law from solely vaginal penetration by a penis, to include acts of sodomy, oral copulation, and penetration of the anus or vagina by a foreign object. *Id.*

[18] No articles pertaining to the adoption of California's exclusionary rape shield were found on WestLaw, LexisNexis, or Google search.

[19] *See, e.g., California Realignment*, Stanford Law School (May 16, 2013), http://www.law.stanford.edu/organizations/programs-and-centers/stanford-criminal-justice-center-scjc/california-realignment. Prisons are generally filled with persons who have been convicted of a crime and sentenced to over a year in confinement. Jails are typically used to confine persons who have been convicted and are serving a sentence of less than a year, persons who have not been convicted of any crime but are awaiting trial or arraignment, and persons who are being held and may never be charged but will be released in a couple of days. Because of prison overcrowding in California, many persons sentenced to serve more than a year are nevertheless held in jails. Although a distinction exists between prisons and jails, this comment will, for ease of reading, refer to all the above persons as 'inmates', and the facilities that house them as, 'prisons.'

[20] Cal. Evid. Code § 1103 (admissibility of such evidence is still subject to other California evidence rules). *E.g.*, People v. DeSantis, 2 Cal. 4th 1198 (1992) (modified on denial of rehearing) ("Statute limiting evidence of specific instances of complaining witness' sexual conduct to prove consent by complaining witness except where crime was alleged to have occurred in local detention facility did not mandate admission whenever act took place in local detention facility; its admissibility was still subject to court's power to exclude irrelevant evidence") (citing Evid. § 1103(c)(1); Evid. § 350) (emphasis added).

[21] Prison Rape Elimination Act of 2003, 42 U.S.C. §§ 15601-15609 (2006). Pub. L. No. 108-79, 117 Stat. 978 (2003) [hereinafter PREA].

[22] Cal. Penal Code § 2635 (2008), 2005 Cal. Stat. Ch. 303 § 3 (effective

PREA, Congress explicitly stated that rape in United States carceral facilities is an "epidemic."[23] The federal government estimated conservatively that at least 13% of inmates in the United States have been sexually assaulted while in prison.[24] Additionally, some groups of prisoners are much more at risk of assault than others and therefore are disproportionately impacted by the rape shield exclusion. These groups include lesbian, gay, bisexual and

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January 1, 2006) [hereinafter SADEA]. Stats 2005 ch 303 provides:

SECTION 1. This act shall be known and may be cited as the Sexual Abuse in Detention Elimination Act.

SEC. 2. The Legislature hereby finds and declares that the purposes of the Sexual Abuse in Detention Elimination Act include, but are not limited to, all of the following:

(a) To protect all inmates and wards from sexual abuse while held in institutions operated by the Department of Corrections and Rehabilitation.

(b) To make the prevention of sexual abuse in detention a top priority in all state detention institutions.

(c) To ensure that the Department of Corrections and Rehabilitation develop and implement protocols and procedures designed to effectively respond to sexual abuse in detention while protecting the safety of victims.

(d) To ensure that data collection concerning sexual abuse across all institutions is accurate and accessible to the public.

(e) To increase the accountability of the Department of Corrections and Rehabilitation to prevent, reduce, and respond to sexual abuse in detention.

(f) To protect the *8*th amendment right of inmates and wards to be free from cruel and unusual punishment as guaranteed by the United States Constitution.

(g) To protect the right of inmates and wards to be free from cruel and unusual punishment as guaranteed by Section *24* of Article *1* of the California Constitution.

(h) To establish an Office of the Sexual Abuse in Detention Elimination Ombudsperson to monitor the prevention of and response to sexual abuse that occurs in the Department of Corrections and Rehabilitation institutions.

(i) To increase the efficiency of state expenditure on corrections, correctional physical and mental health care, substance abuse reduction, HIV/AIDS prevention, violence prevention, and reentry programs for inmates and wards.

(j) To ensure compliance with the federal Prison Rape Elimination Act of *2003*, Public Law *108-79*.

[23] PREA, 42 U.S.C. §§ 15601, *supra* note 21, at § 2(12).

[24] *Id.* at § 2(2).

transgender ("LGBT") inmates[25] and inmates with mental or emotional disorders.[26]

The sexual assault rate of inmates in California is also high, perhaps higher than the national average.[27] This is not a new phenomenon. Sexual assault in prison was a well-known problem prior to the passage of the 1981 exclusionary amendment. For example, the *Los Angeles Times* published a series of articles about sexual assault in prisons and jail in the years leading up to the amendment's passage, including stories about inmate-on-inmate rapes, guard-on-inmate rapes, guard-on-guard rapes, and occasionally, inmate-on-guard rapes.[28]

The inescapable implication is that the California Legislature knew prison rape was a regular occurrence when it passed the exclusionary amendment. Today, one can only speculate about the purpose or motivations behind the amendment, as legislative history is difficult to find beyond the amendment's introduction and passage.[29] Questions might be asked about who might benefit from the exclusion and who had the political power to get such an amendment passed. It is possible that an organization such as a prison guards union might support an exclusionary amendment because it helps protect union members from prosecution. Such speculation is, however, wholly ungrounded in empirical evidence at this time.

It is important to keep in mind that a wide range of persons are affected by this law besides inmates, including attorneys, prison guards, prison staff, and visitors.[30] Under the current formulation of the rape shield, for example, the past sexual conduct of a prison guard raped by other prison guards may be introduced by the de-

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[25] *LGBTQ Detainees Chief Targets for Sexual Assault in Detention*, JUST DETENTION INT'L 1, 1 (Feb. 2009), http://www.justdetention.org/en/factsheets/JD_Fact_Sheet_LGBTQ_vD.pdf (citing Valerie Jenness ET AL., *Violence in California Correctional Facilities: An Empirical Examination of Sexual Assault*, CTR. FOR EVIDENCE-BASED CORR. 1, 55 (Apr. 27, 2007), http://www.wcl.american.edu/endsilence/documents/Violencein CaliforniaCorrectionalFacilities.pdf).

[26] *National Prison Rape Elimination Commission Report*, NAT'L PRISON RAPE ELIMINATION COMMISSION 1, 217 (2009), https://www.ncjrs.gov/pdffiles1/226680.pdf [hereinafter PREA REPORT].

[27] *Criminal Procedure, supra* note 17, at 658.

[28] *See supra* note 266. Several of the articles include references to California Assembly hearings on the pervasiveness of prison rape in California.

[29] *See* 1981 Cal. Stat. 2875, *supra* note 17.

[30] CAL. EVID. CODE § 708 (West 2011); CAL. EVID. CODE § 1103 (West 2011) (specifically precluding sexual assault and rape cases "where the crime is alleged to have occurred in a local detention facility [] or in a state prison[]" from access to the rape shield). Not simply prisoners, but assaults in prisons. Therefore any person in a prison or jail who is sexually assaulted would be excluded from rape shield protection. *Id.*

fense to prove consent, lack of credibility, or bad character. However, in this Comment I focus on the exclusionary rape shield law's effect on inmates as they are the group most affected by the law, spending 24 hours of every day in an environment with a high risk of sexual assault.

As the federal government recognized in PREA and as California recognized in SADEA, ending prison rape is crucial. One of the core functions of law enforcement, including criminal justice, is to deter crime.[31] Rape shield laws increase the number of substantiated rape cases brought to court and successfully prosecuted.[32] Therefore, employment of rape shield laws may be an effective method of deterring rape, even in a prison setting.[33]

In this Comment, after arguing that there is no valid justification for excluding inmates from protection under California's rape shield law, I will explore potential ways to challenge or repeal the current exclusionary rape shield amendment, including constitutional challenges and legislative repeal based on the conflict with the California SADEA and the federal PREA. In Part I, I will discuss the history and rationale of rape shield laws and the types of rape shield laws currently in force in the United States. Part II then covers the history of California's rape shield law and the rape shield exclusion. In Part III, I address the multiple vulnerable populations that are disproportionately harmed by the rape shield exclusion. Finally, Part IV reviews legal and non-legal strategies to eliminate the exclusionary portion of the California rape shield law.

Primarily, I argue that the rape shield exclusion is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment, since there is no rational basis for the exclusion. Additionally, while the California rape shield exclusion is not mentioned specifically in PREA or SADEA, it is directly at odds with the purpose of both laws, namely the elimination of rape in prisons. Allowing the continuance of the rape shield exclusion, a statue that arguably leads to an increase in the rate of rape in prisons, seems antithetical to the purposes of PREA and SADEA. However, given current equal protection doctrine, lobbying the California legislature in order to repeal the law may be the most viable route to eliminate the

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[31] *See* Bachman and Smith, *supra* note 7.

[32] *Id.*

[33] The logic is as follows: denying a class of people access to the rape shield can deter those victims from bringing a case against an abuser. If abusers know persons belonging to a specific group are less likely to file charges and/or testify against them in court, they may feel freer to sexually abuse those persons, leading to more sexual assaults. The converse would also hold.

exclusion. I conclude by arguing that the exclusionary rape shield law should be challenged or repealed.

Part I : An Introduction to Rape Shield Laws

A. *Federal History*

All fifty states, the federal government, and the District of Columbia enacted some formulation of a rape shield law in the 1970s to the 1980s.[34] The rationale behind rape shield laws is not that the rape shield alone will eliminate sexual assaults. Rather, the laws aim to encourage victims of sexual assault to bring charges by eliminating the fear of questioning about their past sexual history. By encouraging more victims to step forward, more legitimate convictions will be obtained, and more rapes will be deterred. This logic was sound enough to facilitate the enactment of rape shield laws in every jurisdiction.

Prior to the enactment of rape shield laws, there were many instances where, rather than the focus of an investigation resting on the facts and circumstances surrounding the alleged crime, complaining witnesses were put on trial for potential past sexual conduct.[35] Rape shield laws limit the admissibility of the past sexual behavior of the complainant beyond the basic laws governing relevance.[36] Because the bar to admit evidence on the basis of relevance is very low,[37] rules have been adopted to preclude certain kinds of evidence that are inherently more inflammatory and misleading than relevant, especially character evidence.[38]

Rape shield laws follow this model of reasoning.[39] Evidence of past sexual conduct is excluded in part because of its inflammatory effect on jurors.[40] While such evidence may be some indication of the likelihood of consent in some cases, and may therefore be

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[34] *See Rape Shield Statutes*, *supra* note 11.

[35] *See generally* Letwin, *supra* note 4, at 35-41.

[36] Barnoon and Sytcheva, *supra* note 3, at 460.

[37] *See, e.g.,* Fed. R. Evid. 401 ("Evidence is relevant if: (a) it has any tendency to make a fact more or less probable that it would be without the evidence; and (b) the fact is of consequence in determining the action.").

[38] *See, e.g.,* Fed. R. Evid. 404(a) ("Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.").

[39] *See* Bachman and Smith, *supra* note 7, at 343 (explaining that evidence of a complaining witness's character was the only kind of character evidence not precluded under common law, and rape shield laws bring rape cases more into line with other rules governing character).

[40] Celia McGuinness, *Sliding Backwards: The Impact of California Evidence Code Section 1108 on Character Evidence, Rape Shield Laws and the Presumption of Innocence*, 9 Hastings Women's L.J. 97, 99 (1998).

somewhat relevant, "it would be highly prejudicial in its tendency to draw the attention of the jury away from the evidence dealing with the crime charged."[41]

Rape shield laws in different jurisdictions vary in the extent to which they govern the admissibility of evidence.[42] For example, Federal Rule of Evidence 412 falls in the middle of the range of the laws enacted by the states.[43] Rule 412 absolutely bars reputation or opinion evidence depicting a victim's past sexual conduct no matter how probative it may be, but only disallows other evidence relating to sexual behavior if it does not fall within one of the stated exceptions. Rule 412 allows this evidence if it is probative enough to implicate a defendant's due process rights.[44] Additionally, most states allow defendants to attempt to prove consent to the sex act at issue through evidence that the defendant and the complainant had prior consensual sexual relations.[45] And, many statutes allow defendants to rebut the state's (generally physical) evidence that a rape occurred by showing that such evidence resulted from the claimant's sexual act with someone other than the defendant.[46]

There are four general categories of rape shield laws: The Michigan model, the discretionary approach, the federal approach, and the California model.[47] First, the Michigan model is the most restrictive and the most popular, having been copied by 22 other states.[48] It gives courts the least discretion to admit evidence of a complainant's sexual history.[49] All evidence of the complaining witness's sexual history is excluded unless the court finds it constitutes either 1) evidence of the complaining witness's past sexual conduct with the defendant, or 2) specific evidence regarding the origin of any seminal fluid, pregnancy or disease.[50] Second, the discretionary

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[41] *See generally* 1 Bernard e. Witkin, *California Evidence* § 334, at 305-06 (3d ed. 1986) (discussing the universal rule against character evidence). Witkin refers to character evidence offered against a defendant, but the same is true of character evidence offered against a complainant.

[42] Pamela J. Fisher, Note, *State v. Alvey: Iowa's Victimization of Defendants Through the Overextension of Iowa's Rape Shield Law,* 76 Iowa L. Rev. 835, 840-42 (1990-1991).

[43] *Id.* at 840-41.

[44] *Id.* at 841.

[45] *Id.* at 842.

[46] *Id.*

[47] Barbara E. Bergman et. al., *1 Wharton's Criminal Evidence* § 4:41 (15th ed. 2013).

[48] *Id.* at n.48.

[49] *Id.* at n.49.

[50] *Id*. "In an effort to reduce the rigidity of this type of statute, some states have added exceptions. For example, all the states following the Michigan model permit evidence of past sexual conduct between the complainant and the

approach, implemented in nine states, "gives the trial court complete discretion whether to admit evidence of the complainant's previous sexual conduct."[51] This approach uses a traditional balancing test, weighing any unfair prejudice to the complaining witness against the probative value of the evidence.[52] Third, ten states follow the federal approach, as embodied by Federal Rule of Evidence 412 above. Finally, seven states follow the California model, described in Part II of this Comment.[53]

B. *Arguments Against Rape Shield Laws in General*

Many scholars, attorneys, and others have argued against rape shield laws. Some claim that a defendant will not get a fair trial if she cannot introduce evidence of the complaining witness's sexual history with third parties to prove consent with the defendant.[54] In *Real Women, Real Rape*, Bennett Capers argues that rape shield laws are often racially discriminatory in their application.[55] Capers proposes modification of the rape shield to require detailed jury instructions to counter the message that only chaste women should be protected from rape.[56] Capers also advocates giving juries

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defendant. Several jurisdictions, including some of those following the Michigan model, do allow the defendant to introduce evidence of sexual conduct between the complainant and others to prove the defendant was not the source of semen or other injury. Sometimes the courts take matters into their own hands to avoid unconstitutional and unfair results that could result if the defendant is forbidden from introducing obviously relevant evidence to attempt to overcome the prosecution's case. Some statutes exempt evidence of past false accusations of sexual abuse and other conduct on the part of the complainant that would rebut the prosecution's proof." *Id.* at n.51-55 (footnotes omitted).

[51] *Id.* at n.56.

[52] *Id.*

[53] *Id.* at n.57.

[54] *See, e.g.*, Shawn Wallach, Note, *Rape Shield Laws: Protecting the Victim at the Expense of the Defendant's Constitutional Rights*, 13 N.Y.L. Sch. J. Hum. Rts. 485 (1996-1997).

[55] I. Bennett Capers, *Real Women, Real Rape*, 60 UCLA L. Rev. 826, 874 (2012-2013). "The first problem [with rape shield laws] concerns the expressive message implicitly communicated by rape shield laws: that jurors should assume the complainant is a virgin, or at least notionally a good girl, and thus deserving of the law's protection. Because of rape shield laws, any suggestion that women may lead healthy sexual lives is quietly pushed to the side and corseted. In short, the concern is that in pushing for rape shield laws feminists, victim rights advocates, and prosecutors have reinscribed the very chastity requirement they hoped to abolish. The second problem is what I term expressive message failure, which occurs when a rape shield's message conflicts with preexisting rape scripts: those assumptions we have about what rapists look like, what constitutes rape, and most importantly here, what rape victims look like." *Id.* at 826.

[56] *Id*. at 872. The jury instructions would follow the following model:

instructions in "imaginative acts of cross gender/race/class/status dressing," such as pretending that the victim was white, or rich, or older, or that she was wearing more conservative clothing, in order to overcome normative assumptions about rape victims.[57] Cristina Tilley argues, in *A Feminist Repudiation of the Rape Shield Laws*, that repealing rape shield laws altogether would further a feminist agenda to educate the public about female sexuality.[58] Tilley's argument, however, requires a concomitant commitment by prosecutors to thoroughly educate juries about male and female patterns of sexuality.[59] Both Bennett's and Tilley's propositions currently seem untenable given the general controversy surrounding what constitutes appropriate sex education—indeed, we cannot even reach national consensus around teaching comprehensive sex education in high school.[60]

"Everyone deserves to have the criminal law vindicate them when they have been raped, regardless of their sexual history. Engaging in sexual behavior, whether it be once or innumerable times, does not render a person outside of the law's protection. Everyone is entitled to sexual autonomy, and no one, by merely engaging in sex, assumes the risk of subsequent rape. Put differently, before the law, it does not matter whether a complainant is a virgin or sexually active. Before the law, everyone is entitled to legal respect, regardless of his or her sexual past. Accordingly, bear in mind that in this case and in all rape cases, all rape victims are entitled to the law's protection." *Id.*

[57] *Id.* at 873 ("[O]ne way to override default assumptions or implicit biases is by encouraging decisionmakers to engage in switching exercises . . . or presence or nonpresence of consent if the complainant were imaginatively "cross dressed" as white instead of Latina or as middle-class instead of poor. Would they apply the court's instruction about all rape victims being entitled to the law's protection, regardless of their sexual history, in the same way? Jurors reaching the same conclusion would know that their decisions are not the product of bias or their reliance on default assumptions about complainants who do not fit the ideal rape victim script. By contrast, jurors who reach a different decision would be encouraged then to determine for themselves whether their different decision can be justified—for example, whether race, class, or some other difference should matter in a particular case. Using such a cross-dressing exercise can prompt jurors to acknowledge their own biases and to override those biases to apply the rape shield rule equally to all complainants.").

[58] Cristina Carmody Tilley, *A Feminist Repudiation of the Rape Shield Laws*, 51 Drake L. Rev. 45, 78 (2002) ("Repealing the rape shield laws would achieve the feminist goal of educating the public about female sexuality by providing a forum in which people from vastly different social backgrounds are required to meet as equals and engage in a meaningful debate."). However, there is a diversity of perspective among feminists regarding rape shield laws; many feminists supported the enactment of the original rape shield laws. *See infra* Part II.B.

[59] *Id*.

[60] *Sex Education*, Science Daily (Mar. 29, 2014, 11:32 AM), http://www.sciencedaily.com/articles/s/sex_ education.htm ("Although some form of sex education is part of the curriculum at many schools, it remains a controversial

While academics writing in opposition to rape shield laws make some interesting points, fully fleshing out the arguments against rape shield laws is beyond the scope of this Comment. This Comment instead aims to address the reality that all jurisdictions in the U.S. have rape shield laws, and that there is no legitimate reason for inmates in California to be the only group categorically excluded from protection under such laws.

Part II: California's Rape Shield Law

A. *The California Model*

California's rape shield law operates differently than the federal or other rape shield laws.[61] Rather than starting out with a general presumption of inadmissibility of a complaining witness's past sexual history, as in the federal model, California's rape shield asks first for what purpose the evidence is being offered.[62] If the evidence is being offered to show consent, the evidence is admissible (assuming it is admissible under the other rules of evidence) to show a complaining witness's past sexual conduct with the defendant.[63] If the evidence being used to show consent is evidence of past sexual conduct with persons other than the defendant, it is not admissible.[64]

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issue in several countries. . . . In the United States in particular, sex education raises much contentious debate. Chief among controversial points is whether covering child sexuality is valuable or detrimental; the use of birth control such as condoms and oral contraceptives; and the impact of such use on pregnancy outside marriage, teenage pregnancy, and the transmission of STDs. Increasing support for abstinence only sex education by conservative groups has been one the primary cause of this controversy. Countries with more conservative attitudes towards sex education (including the UK and the U.S.) have a higher incidence of STDs and teenage pregnancy.").

[61] Barnoon and Sytcheva, *supra* note 3, at 471-73.

[62] *Id.* at 473 ("The evidentiary purpose approach determines the admissibility of a victim's sexual history based on the purpose for which the evidence is introduced at trial. The states that apply this approach divide the evidence of sexual conduct into two categories: (1) evidence to prove consent, and (2) evidence to attack the credibility of the victim. In California . . . sexual history offered to prove the victim's *consent* is prohibited, while evidence of sexual history to attack the victim's *credibility* is admissible.") (emphasis added) (footnotes omitted).

[63] Cal. Evid. Code § 1103(c)(3) (West 2011) ("Paragraph (1) shall not be applicable to evidence of the complaining witness' sexual conduct with the defendant."). *See also* People v. Perez, 194 Cal. App. 3d 525, 529 (1987) ("[E]vidence of prior consensual intercourse between victim and defendant, should likewise extend to the reasonable, good faith defense.").

[64] *Id.* at § 1103(c)(1) ("(c)(1) Notwithstanding any other provision of this code to the contrary, and except as provided in this subdivision, in any prosecution under Section 261, 262, or 264.1 of the Penal Code, or under Section 286,

If the evidence of past sexual behavior is offered to cast doubt on the complaining witness's credibility, it may be admissible if it is relevant.[65] The defense must make a written offer of proof of the relevance of the complaining witness's past sexual conduct through a sealed affidavit.[66] If the court finds that the offer of proof is sufficient, the defense will then be allowed to question the complaining witness at an *in camera* hearing.[67] After the hearing, if the court finds the proposed evidence relevant, it may make an order stating what evidence may be introduced by the defense and the nature

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288a, or 289 of the Penal Code, or for assault with intent to commit, attempt to commit, or conspiracy to commit a crime defined in any of those sections, except where the crime is alleged to have occurred in a local detention facility, as defined in Section 6031.4, or in a state prison, as defined in Section 4504, opinion evidence, reputation evidence, and evidence of specific instances of the complaining witness' sexual conduct, or any of that evidence, is not admissible by the defendant in order to prove consent by the complaining witness.").

[65] CAL. EVID. CODE § 782 (West 2011). *See also* CAL. EVID. CODE § 1103.

[66] CAL. EVID. CODE § 782 (a)(1)-(5):

(*1*) A written motion shall be made by the defendant to the court and prosecutor stating that the defense has an offer of proof of the relevancy of evidence of the sexual conduct of the complaining witness proposed to be presented and its relevancy in attacking the credibility of the complaining witness.

(*2*) The written motion shall be accompanied by an affidavit in which the offer of proof shall be state the affidavit shall be filed under seal and only unsealed by the court to determine if the offer of proof is sufficient to order a hearing pursuant to paragraph (*3*). After that determination, the affidavit shall be resealed by the court.

(*3*) If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, if any, and at the hearing allow the questioning of the complaining witness regarding the offer of proof made by the defendant.

(*4*) At the conclusion of the hearing, if the court finds that evidence proposed to be offered by the defendant regarding the sexual conduct of the complaining witness is relevant pursuant to Section *780*, and is not inadmissible pursuant to Section *352*, the court may make an order stating what evidence may be introduced by the defendant, and the nature of the questions to be permitted. The defendant may then offer evidence pursuant to the order of the court.

(*5*) An affidavit resealed by the court pursuant to paragraph (*2*) shall remain sealed, unless the defendant raises an issue on appeal or collateral review relating to the offer of proof contained in the sealed document. If the defendant raises that issue on appeal, the court shall allow the Attorney General and appellate counsel for the defendant access to the sealed affidavit. If the· issue is raised on collateral review, the court shall allow the district attorney and defendant's counsel access to the sealed affidavit. The use of the information contained in the affidavit shall be limited solely to the pending proceeding.

[67] *Id.*

of the questions the defense may ask of the complaining witness.[68] California's rape shield law is not impermeable. Multiple cases have shown that, if seen as relevant to the case at bar, judges will allow evidence of past sexual conduct to reach the factfinder.[69]

In any California sexual assault trial, if the prosecution introduces evidence of the complaining witness's past sexual conduct, the defense may cross-examine or introduce relevant evidence to rebut.[70] Evidence of past sexual conduct may also be used to impeach credibility.[71]

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[68] *Id.*

[69] People v. Chandler, 56 Cal. App. 4th 703, 707 (1997) ("[T]he credibility exception [to the rape shield statutes] has been utilized sparingly, most often in cases where the victim's prior sexual history is one of prostitution."). *See, e.g.*, People v. Varona, 143 Cal. App. 3d 566 (1983) (involving charges of rape and oral copulation). The appellate court concluded that while not every rape case where the 'prosecutrix' is a prostitute will involve allowing that evidence into court, the trial court in this case committed reversible error by not admitting evidence of the complaining witness's prior sexual conduct. *Id.* at 569. The disputed evidence was that the alleged victim was on probation for prostitution and typically worked in the area where the crimes were supposedly committed. *Id.* at 570. Such evidence should have been admitted for the defense to attempt to prove consent on the part of the complainant. *Id. See also, e.g.*, People v.Rioz, 161 Cal. App. 3d 905, 905 (1984) (involving alleged request for payment by complaining witness in exchange for a sex act). The appellate court made a clear distinction between the evidence that the victim was a prostitute to impeach her credibility and evidence that she had made statements of price for certain acts. *Id.* at 918. The first was viewed as impermissible character evidence, the second was viewed as permissible impeachment of the complaining witness's denial of consent. *Id.* The court said:

> We emphasize again the necessity that a defendant advancing a defense of consent bears the burden of affirmatively offering to prove, under oath, the relevance of the complaining witness' sexual conduct to attack her credibility in some way other than by deprecating her character. It is not enough that a defendant alleges the complaining witness is a prostitute, has been convicted of prostitution, or engages in any particularized aspects of that profession unless the complaining witness has testified she did not consent to sex with that defendant and the defendant has presented evidence by his own testimony or otherwise which directly challenges the complaining witness' denial of consent and the defendant offers to prove, by sworn affidavit, that her prior sexual conduct is sufficient to attack her credibility as distinguished from her character.

Id.

[70] Cal. Evid. Code § 1103(c)(4) (West 2011) ("If the prosecutor introduces evidence, including testimony of a witness, or the complaining witness as a witness gives testimony, and that evidence or testimony relates to the complaining witness' sexual conduct, the defendant may cross-examine the witness who gives the testimony and offer relevant evidence limited specifically to the rebuttal of the evidence introduced by the prosecutor or given by the complaining witness.").

[71] Cal. Evid. Code § 1103(c)(5).

California courts have found that the California rape shield law is constitutional under the California Constitution.[72] The California rape shield balances the defendant's Sixth Amendment right to confrontation of witnesses with judicial concerns about achieving justice untainted by prejudicial, and only marginally relevant, evidence.[73]

B. *History of California's Rape Shield*

Plenty of information exists about the enactment of the original California rape shield law in 1974.[74] There is, however, a dearth of information about the history of the 1981 rape shield exclusion amendment. Historical information shows the sponsor of the amendment,[75] but does not show who brought the bill to the California Legislature, the parties that supported it, or what their rationale was.[76] Although it is uncertain what motivated the amendment, it is still important to examine the amendment's lasting legacy.

Until 1974, California had no protections in place for complaining witnesses in sexual assault cases.[77] Indeed, as late as 1965, the California legislature explicitly expressed that a "lack of

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[72] *Criminal Procedure*, *supra* note 17, at 660 ("The constitutionality of statutes that restrict the admissibility of evidence of a victim's sexual conduct to prove the victim's consent in sex-related crimes, however, has been upheld by California courts."). *See also* Morales v. Scribner, 621 F. Supp. 2d 808, 824 (N.D. Cal. 2008) ("As a matter of public policy, the rape shield provisions of California Evidence Code § 1103 were enacted to 'avoid the harassment which has traditionally plagued complaining witnesses' in rape cases" (citing Rioz, 161 Cal. App. 3d at 916). *Id*. ("The statute 'properly prevents the victim of sexual assault from being herself placed on trial.'") *Id*.

[73] *Criminal Procedure*, *supra* note 17, at 660 ("As an alternative to mandatory exclusion, recent commentary has suggested that evidence concerning a victim's sexual conduct, offered to show the victim's consent, should be determined to be either admissible or inadmissible in the discretion of the court only after it balances the defendant's need for the evidence with the state's interest in excluding it. This would preserve the defendant's sixth amendment right to a fair opportunity of defense by allowing the admission of evidence of the victim's sexual conduct when its probative value outweighs the state's interest for exclusion.").

[74] *See, e.g.*, Letwin, *supra* note 4, at 35-41 ("[P]ressure for this legislation came from two directions. First, it came from feminist critics who saw the rape victim's prior sexual activity as irrelevant to the issue of her character.").

[75] *Id.* (noting the name of SB 23's sponsor, Diane Watson).

[76] No legislative history regarding the basis for the exclusionary rape shield was found after an exhaustive search, including through: WestLaw, LexisNexis, Google, California State Law Library (Telephone Interview with librarian, California State Law Library (May 9, 2013), and the California Correctional Peace Officer's Union (refused to comment when contacted)).

[77] Letwin, *supra* note 4, at 39.

chastity"[78] on a complaining witness's part was relevant both to evidence of consent and to the complaining witness's credibility.[79] In California, pressure to pass rape shield laws came from two different directions: feminists and law enforcement advocates.[80] Law enforcement support came from the California District Attorneys' and police officers' associations, and was motivated by a goal of making rape cases easier to prosecute.[81] Feminist support came from groups such as the National Organization for Women under the theory that women were deterred from filing valid rape claims because a woman's sexual history was put on trial, rather than the defendant's culpable actions.[82] In 1981, the California rape shield law was amended to specifically exclude persons assaulted in California state prisons or local jails from the rape shield law's protection.[83] While evidence of a complainant's sexual history would still be subject to rules of evidence governing relevance,[84] the bar for relevance is low compared to the protections of the California rape shield law.[85]

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[78] *Id*. at 38 n.12 (defining lack of chastity as non-marital sexual relations by a woman).

[79] *Id.* at 38.

[80] *Id.* at 40-1.

[81] *Id.* at 41, incl. n.22.

[82] *Id.* at 40-41.

[83] Cal. Evid. Code § 1103(c)(1) (West 2011) ("Notwithstanding any other provision of this code to the contrary, and except as provided in this subdivision, in any prosecution under Section 261, 262, or 264.1 of the Penal Code, or under Section 286, 288a, or 289 of the Penal Code, or for assault with intent to commit, attempt to commit, or conspiracy to commit a crime defined in any of those sections, except where the crime is alleged to have occurred in a local detention facility, as defined in Section 6031.4, or in a state prison, as defined in Section 4504, opinion evidence, reputation evidence, and evidence of specific instances of the complaining witness' sexual conduct, or any of that evidence, is not admissible by the defendant in order to prove consent by the complaining witness.").

[84] People v. DeSantis, 2 Cal. 4th 1198, 1248–49 (1992) ("Contrary to defendant's view, Evidence Code section 1103's limitation on cross-examination '*except where the crime is alleged to have occurred in a local detention facility*' does not mean that because the act took place in county jail the evidence was per se admissible. Its admissibility would still be subject to the court's power to exclude irrelevant evidence." (emphasis added)).

[85] Cal. Evid. Code § 210 (West, Westlaw through 2014 portion of 2013-2014 Legis. Sess.) ("'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, *having any tendency* in reason to prove or disprove *any disputed fact* that is of consequence to the determination of the action." (Stats. 1965, c. 299, § 2, operative Jan. 1, 1967). This definition restates existing law. *E.g.*, Larson v. Solbakken, 221 Cal. App. 2d 410, 419 (1963); People v. Lint, 182 Cal. App. 2d 402, 415 (1960). Thus, under Section 210, 'relevant evidence' includes not only evidence of the ultimate facts actually

One item of note is that California runs one of "the largest correctional system[s] in the Western World,"[86] affecting the rights and safety of a large number of incarcerated persons. The United States as a whole incarcerates its population[87] at a higher rate[88] than any other country in the world,[89] at 716 per 100,000 persons.[90] The United States also has the largest number of person incarcerated in absolute terms,[91] with over 2 million people behind bars.[92] California is the most populous U.S. state,[93] and its incarceration rate is similar to the overall U.S. incarceration rate.[94] California incarcerates a staggering

in dispute *but also evidence of other facts from which such ultimate facts may be presumed or inferred*." (emphasis added)).

[86] Valerie Jenness, *Pluto, Prisons, and Plaintiffs: Notes on Systemic Back-Translation from an Embedded Researcher*, 55 Soc. Problems, No. 1 1, 8 (2008).

[87] Bonnie Kavoussi, *U.S. Population Reaches 314,159,265, Or Pi Times 100 Million: Census*, Huff. Post, Aug. 14, 2012, http://www.huffingtonpost.com/2012/08/14/us-population-pi-times-100-million_n_1776613.html.

[88] The Sentencing Project, Research and Advocacy for Reform, http://www.sentencingproject.org/map/map.cfm#map (illustrating that the U.S. holds 2,253,705 people in prisons and jails, a total of .7% of the total population) (last visited May 16, 2013).

[89] Tyjen Tsai & Paola Scommegna, *U.S. Has World's Highest Incarceration Rate*, Population Reference Bureau (Aug. 2012), http://www.prb.org/Articles/2012/us-incarceration.aspx (citing Paul Guerino, Paige M. Harrison, & William J. Sabol, *Prisoners in 2010* (*Revised*)).

[90] Nick Wing, *Here Are All Of The Nations That Incarcerate More Of Their Population Than The U.S.*, Huff. Post, Aug. 13, 2013, http://www.huffingtonpost.com/2013/08/13/incarceration-rate-per-capita_n_3745291.html (citing the International Centre for Prison Studies) (last visited Oct. 29, 2013).

[91] Cecil Adams, *Does the United States lead the world in prison population?*, The Straight Dope (Feb. 6, 2004), http://www.straightdope.com/columns/read/2494/does-the-united-states-lead-the-world-in-prison-population (citing the International Centre for Prison Studies at King's College London) (last visited Oct. 29, 2013).

[92] Wing, *supra* note 90.

[93] Anthony York, *California's population grows to nearly 37.7 million*, L.A. Times Blog, May 1, 2012, http://latimesblogs.latimes.com/california-politics/2012/05/california-population-nears-38-million.html (California's population is about 12% of the U.S. population) (last visited May 15, 2013). *See also List of U.S. states and territories by population*, Wikipedia, http://en.wikipedia.org/wiki/List_of_U.S._states_and_territories_by_population (this page is based on the 2010 U.S. Census) (last visited May 15, 2013). *See also California Statistics & Trends*, visit California, http://industry.visitcalifornia.com/Find-Research/California-Statistics-Trends/ (last visited June 30, 2013) ("California was the destination for 208.6 million domestic person-trips in 2011 . . . [and] 13.6 million international visitors traveled to California in 2010.").

[94] Adam Liptak, *1 in 100 U.S. Adults Behind Bars, New Study Says,* N.Y. Times (Feb. 28, 2008), http://www.nytimes.com/2008/02/28/us/28cnd-prison.html (last visited May 15, 2013) (California incarcerates about .6% of its total population, which is consistent with the national carceral average of .7%).

number of people: over 213,900 persons are held in its state prisons[95] and jails,[96] not including the 20,000 plus federal prisoners[97] held in California.[98] These figures include many people who are only in jail for a day or two[99] and who may never be charged with or convicted of any crime.[100] However, because many inmate-on-inmate rapes occur within twenty-four hours of entering a facility,[101] the inclusion of such persons in these statistics is appropriate.[102]

As mentioned above, the risk of sexual assault does not only exist for inmates. One-ninth of California's government employees work in corrections,[103] and hundreds of thousands[104] of Californians

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[95] *Fall 2012 Adult Population Projections*, CAL. DEP'T OF CORR. AND REHAB. 1, 3 (2013), http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Projections/F12pub.pdf (as of June 31, 2012, there were 135,238 incarcerated persons in California state prisons).

[96] *Jail Profile Survey 2012, 2nd Quarter Survey Results*, BD. OF STATE AND CMTY. CORRS. 1, 3 (2012), http://www.bscc.ca.gov/programs-and-services/fso/resources/jail-profile-survey (follow "Jail Profile – 2012 2nd Quarter Survey Results PDF" hyperlink) (showing that between April and June 2012, there were an average of 78,662 persons per day in California state jails).

[97] Press Release, Cal. Dep't of Fin., New Report: California Added More than a Quarter Million in 2011; Total State Population Nearly 37.7 Million 1, 2 (May 1, 2012) http://www.dof.ca.gov/research/demographic/reports/ estimates/e-1/documents/E-1_2012_Press_Release.pdf (stating Federal prison population in California in 2011 was 20,774 inmates statewide).

[98] In addition to the over 20,000 persons in federal prisons in California, *id.*, the United States also has community correction centers, juvenile facilities, lockups, and carceral facilities run by the Immigration and Naturalization Service. Because these federal facilities are not covered under California's exclusionary rape shield, they are beyond the scope of this comment.

[99] MICHAEL SINGER, PRISON RAPE: AN AMERICAN INSTITUTION? 19 (2013).

[100] *See* Mac Taylor, *California's Criminal Justice System: A Primer*, LEGISLATIVE ANALYST'S OFFICE 4, 42 (Jan. 2013), http://www.cdcr.ca.gov/Reports/docs/External-Reports/criminal-justice-primer-011713.pdf (stating that in 2011, 70% of the population in California's jails had not been sentenced by the court).

[101] *Prison Rape Elimination Act Regulatory Impact Assessment,* UNITED STATES DEP'T OF JUSTICE 1, 35 (May 17, 2013), http://www.ojp.usdoj.gov/programs/pdfs/prea_ria.pdf [hereinafter RIA].

[102] SINGER, *supra* note 99. *See also* RIA, *supra* note 101, at 47 & 157 n.9 (citing testimony of Donaldson at Massachusetts's Legislative Hearing) (as an example of how quickly and how brutally prison rape can occur: in 1973, a peace activist was arrested at a pray-in in Washington D.C., and over the course of his two-day stay in a D.C. jail, was gang-raped approximately sixty times).

[103] Liptak, *supra* note 94. *See also* Paige St. John, *Prison misconduct cases are detailed by state inspector general*, L.A. TIMES, Apr. 4, 2013, http://www.latimes.com/news/local/political/la-me-pc-ff-inspector-general-prison-misconduct-20130403 ("Over 46,000 people are employed by the California Department of Corrections and Rehabilitation.").

[104] If, for example, each inmate receives an average of only two visitors per year, that would be 400,000 visitors alone.

visit carceral facilities through legal work or visitation with a friend or loved one.[105] All of these people are at some risk for sexual assault inside the carceral facility (though prisoners are by far at the highest risk.)[106] In California especially, the additional risk factors of violence in prisons and extreme overcrowding increase the likelihood of sexual assault beyond that faced by persons in other states' prisons.[107] In short, a large number of people have no access to rape shield protection if sexually assaulted on California prison grounds.

People sexually assaulted in California prisons and jails exist in a time warp. Just like sexual assault victims prior to the 1970s, they have no rape shield protection from embarrassment and harassment by defense counsel while testifying, and juries are distracted by inflammatory evidence about them that has marginal probative value at best. The overall result is likely a reduction in the number of complaints that could lead to legitimate prosecutions and convictions of persons who sexually abuse persons in California prisons.

Part III: Why the California Exclusion Particularly Fails Vulnerable Inmates

As discussed in the Introduction, there are important reasons for rape shield laws. Giving its proponents the benefit of the doubt, at the time of its passage the California exclusionary rape shield may have seemed like a good idea. However, we now have evidence that the exclusion law has a deleterious effect on some of the most vulnerable members of our society.[108]

Rape shield laws are important for inmates for all of the same reasons that they are important for victims in other parts of our

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[105] *Cf. Visiting a Friend or Loved one in Prison,* Cal. Dep't of Corr. and Rehab., http://cdcr.ca.gov/ Visitors/docs/InmateVisitingGuidelines.pdf (last visited May 27, 2014).

[106] *See* PREA, 42 U.S.C. §15601 (2012).

[107] *Prison Overcrowding State of Emergency Proclamation,* Governor of the State of Cal (Oct. 4, 2006), http://gov.ca.gov/news.php?id=4278 (Illustrating that in the fall of 2006, California Governor Arnold Schwarzenegger declared a "Prison Overcrowding State of Emergency," noting that "overcrowding creates an "increased, substantial risk of violence, and greater difficulty controlling large inmate populations."). *See also* Dep't of Corr. and Rehab., California Prisoners and Parolees 2010, Summary Statistics on Adult Felon Prisoners and Parolees, Civil Narcotic Addicts and Outpatients and Other Populations 11, table 4 (2011), *available at* http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/CalPris/CALPRISd2010.pdf (showing the inmate population in some California prisons was up to 230% of rated capacity).

[108] *See infra* Part III.B.

communities, but such laws are especially critical in a prison environment.[109] Both male and female inmates face sexual assault from staff and other inmates, who use the assault as a form of domination.[110] The high rate of sexual assault in prison,[111] the reduced freedom for prisoners to protect themselves or flee a hostile situation, and the extraordinary power imbalance between prisoners and guards, means that rape shield protection is even more important for prisoners than for unincarcerated persons.[112]

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[109] It bears emphasizing again that California has the only rape shield law in the country that specifically precludes persons in prison from access.

[110] *See generally No Escape: Male Rape in U.S. Prisons,* Human Rights Watch (2001) (documenting the sexual abuse of male inmates in U.S. prisons).

[111] Singer, *supra* note 99, at 39 (citing testimony of Allen Beck in U.S. Dep't of Justice, Office of Justice Programs, Review Panel on Prison Rape: Hearings on Rape and Sexual Misconduct in U.S. Jails 58-59 (2011) (amended copy), http://ojp.gov/reviewpanel/pdfs_sept11/transcript_091511.pdf. (explaining that many activists hoped that the passage of PREA in 2003 would reduce the incidence of prison rape: but unfortunately, the overall rate of prisoner sexual abuse has not shifted since PREA's passage). This is in large part because the 2003 PREA only required the Department Of Justice to investigate and recommend ways to reduce prison rape. *See* PREA, *supra* note 21. The implementation of the DOJ's final recommendations in May of 2012 as legally binding on federal prisons and as required for full federal funding for state prisons may bring a reduction in prison rape over the next few years, as facilities implement the standards. *See id.* at §15601 (Supp. 2013). *See also* 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, 124 (2009) (citing PREA, 42 U.S.C. § 15601(2) (Supp. IV 2005)) ("[E]xperts have conservatively estimated that at least 13 percent of the inmates in the United States have been sexually assaulted in prison. Many inmates have suffered repeated assaults. Under this estimate, nearly 200,000 inmates now incarcerated have been or will be the victims of prison rape. The total number of inmates who have been sexually assaulted in the past 20 years likely exceeds 1,000,000."). *Cf.* Bureau of Justice Statistics National Crime Victimization Survey, Criminal Victimization 1, 2 table 1 (2012), *available at* http://www.bjs.gov/content/pub/pdf/cv12.pdf. The rate of rape/sexual assault in the U.S. in 2010 was approximately .0000735 (188,380 rapes/sexual assaults in a 12+ population of 254,105,610. *Id.* While the result is comparing lifetime sexual assault in prison (13%) vs. one year of sexual assault in the general population (.00735%), it is illustrative to note that the prison rape rate is 1768 times the general population rate, while the average length of incarceration is only three years. Bureau of Justice Statistics, Criminal Sentencing Statistics (2003), http://www.policyalmanac.org/crime/archive/criminal_sentencing_statistics.shtml.

[112] For an introduction to the concept of the state's 'carceral burden,' *see* Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. Rev. 881, 921-22.

> Viewed as a whole, the state's obligation to its incarcerated offenders may be understood as that of ensuring the minimum conditions for maintaining prisoners' physical and psychological integrity and well-being--those basic necessities of human life, including protection from

Sexual activity between staff and inmates is considered sexual abuse in all fifty states and in the federal system, regardless of consent. The extreme power imbalance between the parties makes true "consent" difficult or impossible to know.[113] Because sexual contact of any kind between inmates and staff is classified as sexual abuse,[114] proving lack of consent is not necessary to convict a guard of this lesser crime.[115] This would seem to diminish the importance of inmate testimony about consent. However, penalties for "consensual" sexual abuse are much lower than penalties for rape.[116] Furthermore,

> assault, without which human beings cannot function and that people in prison need just by virtue of being human. . . . I refer collectively to this set of minimum requirements as 'basic human needs.' . . . [T]he state's obligation to meet the basic human needs of its prisoners stems from a very particular source: the state's own decision to incarcerate those it has convicted of crimes. By virtue of this decision, the state acquires distinct duties toward members of this group that it may not owe to other people, however deserving those others might be. . . . When the state opts to incarcerate convicted offenders as punishment, it is committing itself to providing for prisoners' basic human needs in an ongoing way as long as they are in custody. This is the state's carceral burden.
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> *Id.*

[113] SINGER, *supra* note 99, at 21.

[114] *Id.* at 89.

[115] *Operations Manual*, CAL. DEP'T OF CORR. & REHAB., § 54040.3 (2013), *available at* http://www.cdcr.ca.gov/Regulations/Adult_Operations/docs/DOM/DOM%202013/2013%20DOM.PDF. Article 44, Prison Rape Elimination Policy, defines sexual misconduct as:

> Any threatened, coerced, attempted, or completed sexual assault or non-consensual sexual conduct between offenders. As it relates to employees, any sexual behavior by a departmental employee directed toward an offender, as defined in California Code of Regulations (CCR) Section *3401.5* and Penal Code (PC) Section *289.6*. The legal concept of "consent" does not exist between departmental employees and offenders; any sexual behavior between them constitutes sexual misconduct and shall subject the employee to disciplinary action and/or to prosecution under the law.
>
> *Id.* at § 54040.3.

[116] SINGER, *supra* note 99, at 91. *See also* CAL. PENAL CODE § 261 (West 2012).

> (a) Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under any of the following circumstances:
>
> (*1*) Where a person is incapable, because of a mental disorder or developmental or physical disability, of giving legal consent, and this is known or reasonably should be known to the person committing the act. Notwithstanding the existence of a conservatorship pursuant to the provisions of the Lanterman-Petris-Short Act (Part *1* (commencing with Section *5000*) of Division *5* of the Welfare and Institutions Code), the prosecuting attorney shall prove, as an element of the crime, that a mental disorder or developmental or physical disability rendered the alleged victim incapable of giving consent.

in a complaint against a guard for "consensual" sexual abuse, any past sexual behavior can be used by the defense to impeach the complaining witness's credibility.[117] It seems incoherent to have a statutory scheme that requires staff to be prosecuted for both "consensual" and non-consensual sex with prisoners, but simultaneously makes it less likely that charges will be brought or legitimate convictions will be achieved for "consensual" sex, sexual assault, or rape.[118] Thus, the exclusionary rape shield serves as a formidable barrier that inmates must overcome in seeking justice for abuse.

A. *Additional Barriers to Inmate Justice*

In addition to the exclusionary rape shield law, there are multiple legal and institutional impediments to a prisoner's ability to obtain a judgment against an abuser or rapist. For example, prison law, including federal legislation such as the Prison Litigation Reform Act and Supreme Court jurisprudence, is designed to defer to prison officials.[119] Public apathy is another hurdle; some people feel that we ought not be too concerned about prison rape, that we have more pressing social issues, or that offenders are getting their "just desserts."[120] However, as the Supreme Court has clearly stated, "rape is never the sentence for a crime."[121]

(*2*) Where it is accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another.

Id. "Except as provided in subdivision (c), rape, as defined in Section 261 or 262, is punishable by imprisonment in the state prison for three, six, or eight years." *Id.* at § 264(a).

[117] CAL. EVID. CODE § 782 (West 2011); CAL. EVID. CODE § 1103 (West 2011).

[118] *See* Bachman and Smith, *supra* note 7.

[119] Kim Shayo Buchanan, *Beyond Modesty: Privacy in Prison and the Risk of Sexual Abuse*, 88 MARQ. L. REV. 751, 754 (2005) ("[U]ncritical judicial deference, which abandons prisoners' well-being almost entirely to the discretion of guards and wardens, effectively privatizes the abuse of prisoners: prisoners, and their treatment, have been removed from the public realm.").

[120] *See, e.g.*, Charles M. Sennott, *Poll Finds Widespread Concern About Prison Rape; Most Favor Condoms for Inmates*, BOST. GLOBE, May 17, 1994, at 22 ("The U.S. public holds an indifferent or retributive attitude toward victims of prison sexual assault. According to a Boston Globe survey in 1994, fifty percent of those polled agreed with the statement, 'society accepts prison rape as part of the price criminals pay for wrongdoing.'"*); Child Molester Sues Over Rape in Eastern Washington Jail*, KOMONEWS, August 14, 2014, comments, *available at* http://www.komonews.com/news/local/Child-molester-sues-over-rape-in-Eastern-Wash-jail-271260261.html ("He got exactly what he deserved."; I would have done him a few more times than(sic) cut his head off."; "He deserved every second of what was done to him.")

[121] Farmer v. Brennan, 511 U.S. 825, 834 (1994).

The challenge faced by abused prisoners in the face of judicial deference to prison officials (in administering the prisons) is quite high. The Prison Litigation Reform Act,[122] passed in 1996, added an exhaustion requirement to inmate complaints, including complaints against staff and other inmates. Inmates must exhaust all administrative remedies before bringing a case to court.[123] Prison administrators and legislatures are able to create complex administrative procedures often involving very short time frames and complicated paperwork to deter inmate actions. Once an inmate misses a deadline, for any reason at all, including an extended hospital stay, illiteracy, or deliberate interference from prison guards, her claim for relief is dead.[124] Complaints of sexual assault, therefore, rarely reach a court,[125] for the above legal reasons as well as other factors, including a very real fear of reprisal from inmate or staff perpetrators, a code of silence amongst fellow inmates, embarrassment, and general distrust of prison staff.[126]

When allegations by inmates are made against prison staff, the inmate is generally perceived to be not credible,[127] whereas the guard's account is generally held to be true.[128] Once it becomes

[122] Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, § 802, 110 Stat. 1321 (codified at 18 U.S.C. § 3626 (2006)); *see also* 28 U.S.C. § 1915 (2012); *see also* 42 U.S.C. § 1997e (2012).

[123] Just Detention International, The Prison Litigation Reform Act Obstructs Justice for Survivors of Sexual Abuse in Detention (Feb. 2009), *available at* http://www.justdetention.org/en/factsheets/Prison_Litigation_Reform_Act.pdf.

[124] *Id.*

[125] *See* Anthea Dinos, *Custodial Sexual Abuse: Enforcing Long-Awaited Policies Designed to Protect Female Prisoners*, 45 N.Y.L. Sch. L. Rev. 281, 284–85 (2000) (citing several decisive factors that keep female inmates from reporting sexual abuse: the inmate's own lack of credibility, the specter of "protective segregation" from the rest of the prison population, fear of the accused's retaliation, and the unlikelihood of a favorable outcome in litigation).

[126] Allen J. Beck & Candace Johnson, U.S. Dept. of Justice, Bureau of Justice Statistics , Sexual Victimization Reported by Former State Prisoners (2008), NCJ 237363 31 (2012), *available at* http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4312.

[127] This is despite the fact there is evidence of high rates of sexual abuse by staff. Paul Guerino & Allen Beck, U.S. Dept. of Justice, Bureau of Justice Statistics, Sexual Victimization Reported by Adult Correctional Authorities, 2007–2008, NCJ 231172 1 (2011), *available at* http://www.bjs.gov/index.cfm?ty=pbdetail&iid=2204 (finding that 46% of substantiated sexual assault incidents involved staff assaulting inmates). *See also* Nancy Wolff et al., *Sexual Violence Inside Prisons: Rates of Victimization*, 83 J. Urb. Health 835, 841 (2006) (finding that 7.6 percent of male inmates reported sexual victimization by staff).

[128] *See, e.g.*, Hum. Rts. Watch, Nowhere to Hide: Retaliation Against Women in Michigan State Prisons (July 1998), *available at* http://www.hrw.org/legacy/reports98/women/.

known that an inmate has been sexually abused, the likelihood that she will be abused again goes up dramatically as she is marked as a victim by predators in the facility, be they inmate or staff.[129] Additionally, in smaller jurisdictions where the correctional facility is a major employer, a company town mentality may predominate, with local prosecutors reluctant to pursue claims in which the defendant is a corrections officer who may also be a neighbor, relative or friend.[130]

Despite the fact that 46% of substantiated sexual assault incidents involve staff assaulting inmates,[131] corrections officers are rarely criminally prosecuted or sued for sexual assault.[132] In fact, rapes in prison are charged and prosecuted at a lower rate than in the general community, despite the high rate of prison rape.[133] For example, in Los Angeles, a ten-year veteran Deputy District Attorney in the sex crimes unit said she had never heard of a single sexual assault case coming out of a prison or jail in California.[134]

Another problem prisoners face is the lack of public knowledge about and concern for their well-being.[135] The pervasiveness of prison rape jokes and references in popular culture exemplify

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[129] *See* PREA Report, *supra* note 26, at 8.

[130] Singer, *supra* note 99, at 89.

[131] *See* Guerino & Beck, *supra* note 127.

[132] Singer, *supra* note 99, at 93 (explaining that only a few thousand inmates sexual assaults are prosecuted each year nationwide, out of over one-hundred fifty thousand (a conservative estimate)).

[133] *See* U.S. Dep't of Justice, Off. of the Inspector Gen., Deterring Staff Sexual Abuse of Federal Inmates 3 (2005), *available at* http://www.usdoj.gov/oig/special/0504/final.pdf (noting that sexual abuse of female inmates is both underreported and alarmingly prevalent); *see also* Amnesty Int'l USA, Abuse of Women in Custody: Sexual Misconduct and Shackling of Pregnant Women 15 (2001); U.S. Gov't Accounting Office (GAO), *Women in Prison: Sexual Misconduct by Correctional Staff, Report to the Honorable Eleanor Holmes Norton, House of Representatives* 1, 8 (1999), http://www.wcl.american.edu/faculty/smith/0303conf/gao_ggd99104.pdf (finding that despite increasing legislation, inmates in the jurisdictions studied made at least 506 allegations of staff-on-inmate sexual misconduct between 1995 and 1998, of which only eighteen percent resulted in even administrative sanctions, the least form of discipline available).

[134] Interview with Los Angeles County Deputy District Attorney (Nov. 13, 2013).

[135] *See* U.S. Dep't of Just., National Standards to Prevent, Detect, and Respond to Prison Rape: Executive Summary 1 (2012), *available at* http://www.ojp.usdoj.gov/programs/pdfs/prea_executive_summary.pdf [hereinafter PREA Executive Summary]. "In passing PREA, Congress noted that the nation was 'largely unaware of the epidemic character of prison rape and the day-to-day horror experienced by victimized inmates.'" There is no evidence that the situation has changed in the past ten years (citing 42 U.S.C. § 15601(12) (2003)).

that disregard.[136] It seems commonplace to hear district attorneys talking to the press about how the defendant is going to have a new "boyfriend" in prison if he does not cooperate with the prosecution, implying that the defendant will be providing sexual services against his will. Especially in child molestation cases, defendants may be covertly threatened with prison rape, i.e., the prosecution will make sure that the prison population is informed of the defendant's charges, eliciting jailhouse "justice" in the form of rape of the defendant, and the general public seems to perceive these outcomes as deserved.[137] For example, during the California energy crisis of 2001, California Attorney General Bill Lockyer made front page news when he stated during a press conference that he wanted to "escort [Enron CEO Kenneth Lay] to an 8-by-10 cell that he would share with a tattooed dude who says, 'Hi, my name is Spike, honey.'"[138] Although intended to be a jab at white-collar criminals who often escape punishment, it was perceived as an implicit endorsement of prison rape as part of the penalty that criminals pay.[139]

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[136] *See, e.g.*, Karl Rove Joke, About.com http://politicalhumor.about.com/od/bushadministration/a/karlrovejokes.htm (last visited May. 15, 2013) (making light of the subject: In 2005, Jay Leno observed on the Tonight Show that Karl Rove was facing criticism about his role in leaking to the press the identity of former CIA agent Valerie Plame. Leno then stated: "I think Karl Rove is getting a little worried. Like today he said the biggest problem facing Americans is prison rape.").

[137] *See* PREA Executive Summary, *supra* note 135 ("In popular culture, prison rape is often the subject of jokes; in public discourse, it has been at times dismissed by some as an inevitable - or even deserved - consequence of criminality."). *See also, e.g.*, Joanne Mariner, *Body and Soul: The Trauma of Prison Rape*, *in* Building Violence 125, 126 (John P. May ed., 2000) ("Judging by the popular media, rape is accepted as almost a commonplace of imprisonment, so much so that when the topic of prison arises, a joking reference to rape seems almost obligatory."); *supra*, note 120.

[138] Angela Okamura, Note, *Equality Behind Bars: Improving the Legal Protections of Transgender Inmates in the California Prison System*, 8 Hastings Race & Poverty L.J. 109, 115-16 (2011) (citations removed) ("This lack of reaction to and implicit acceptance of prison rape is caused partly by the myth of the 'unsympathetic victim.' Many members of society believe that abuse in prison is simply the price that criminals pay for breaking the law."). *See also* Thompson, *supra* note 111, at 119 (suggesting that the acceptance of prison rape stems from society's notions of deterrent and retributive punishment). If prison poses threats and dangers and is therefore undesirable, individuals will more likely conform to social norms in order to avoid going to prison. *Id.* at 135. Similarly, the lack of sympathy toward victims of sexual abuse in prison is consistent with this notion of just desserts. *Id.* Victims are merely being punished for their crimes to society, and whatever happens in prison is simply a part of that punishment. *Id.* Further, these victims' lack of visibility may make it easier for society to turn a blind eye: if you don't see it, it doesn't exist. *Id.*

[139] Okamura, *supra* note 138, at 115.

These are telling words from the head of one of the largest prison systems in the western world. To be sure, PREA and SADEA are important acts of legislation, but without the will of the people to change the status quo, prison rape will continue to be treated as a mere joke. With all of these obstacles to bringing a criminal complaint to court, it does not make sense for the California rape shield law to make it even more difficult for an inmate to pursue a legitimate complaint against an assailant.

B. *Who Is in California Prisons? Overrepresentation of Vulnerable Groups*

Rape is an especially significant problem in California prisons and jails for vulnerable populations of inmates, whom experience a disproportionate amount of sexual abuse.[140] Further, when multiple marginalized identities[141] exist in one inmate, there is an increased risk of incarceration and abuse (for example, a transgender identified person of color who lives in poverty may experience heightened discrimination based on the unique intersection of the different aspects of her marginalized identities).[142]

1. *LGBT People Are at Much Higher Risk for Sexual Assault*

LGBT people in the United States are incarcerated at a rate two-to-three times that of the general population.[143] This high rate

[140] PREA Report, *supra* note 26, at 217 (among the criteria known to increase the vulnerability of male inmates are "mental or physical disability, young age, slight build, first incarceration in prison or jail, nonviolent history, prior convictions for sex offenses against an adult or child, sexual orientation of gay or bisexual, gender nonconformance (e.g., transgender or intersex identity), [and] prior sexual victimization. . .").

[141] *See* Dean Spade, A Normal Life 13 (2011) ("The most marginalized trans populations have the least protection from violence, experience more beatings and rapes, are imprisoned at extremely high rates, and are more likely to be disappeared and killed.").

[142] *Id.* at 11 (For persons dealing with transgender status, as well a mixture of poverty, racism, and immigration status issues, "[m]ost had no hope of finding legal employment because of the biases and violences they faced, and therefore turned to a combination of public benefits and criminalized work – often in the sex trade – in order to survive. This meant constant exposure to the criminal punishment system, there they were inevitably locked into gender-segregated facilities that placed them according to birth gender and exposed them to further violence.").

[143] *Cf.* Jerome Hunt & Aisha C. Moodie-Mills, *The Unfair Criminalization of Gay and Transgender Youth: An Overview of the Experiences of LGBT Youth in the Juvenile Justice System*, Ctr. for Am. Progress 1, 1 (June 29, 2012), http://www.americanprogress.org/wp-content/uploads/issues/2012/06/pdf/juvenile_justice.pdf ("Though gay and transgender youth represent just 5 to 7 percent of the nation's overall youth population, they compose 13 percent to 15 percent of those currently in the juvenile justice system.").

is due in large part to the discrimination faced by members of the LGBT community at all levels of the criminal justice system.[144] The risk is particularly severe for transgender individuals. For example, in California, as in the rest of the United States, harassment and discrimination create barriers for transgender individuals to gain and retain employment.[145] These barriers create a prison pipeline: economic hardship causes many transgender individuals to resort to survival crimes, which results in arrest, conviction, and ultimately incarceration.[146] The high rate of homelessness in the transgender population, as well as police profiling, also contribute to the disproportionate percentage of transgender persons in prison.[147]

Once incarcerated, LGBT persons are at extreme risk for sexualized violence.[148] Transgender prisoners again are particularly at risk.[149] For example, transgender women are almost always assigned housing based upon their genitalia rather than their gender identity and gender presentation, despite it being a Department of Justice "best practice" not to do so.[150] Since most transgender persons

[144] *E.g.,* Joey L. Mogul, Andrea J. Ritchie & Kay Whitlock, Queer (In) Justice: The Criminalization of LGBT People in the United States 76 (Michael Bronski ed., 2011) (explaining that sentencing patterns are stricter for homosexual offenders than for heterosexual offenders). One case involved a (female to male) transgender man who was prosecuted for sexual assault on the theory that consensual sex acts were automatically involuntary because the complainants did not know of the defendant's trans background. *Id.* at 77. The judge at sentencing stated (as a justification for the punishment of incarceration), "[w]hat this case is about is deceit," e.g., the trans person pretended to be a man and so deserved to be locked up solely for that "crime." *Id.*

[145] Okamura, *supra* note 138, at 113.

[146] *Id*. at 113-14.

[147] *Id*. at 133-34.

[148] *See LGBTQ Detainees Chief Targets for Sexual Assault in Detention*, *supra* note 25.

[149] As a general matter, transgender women were born with a male sexual assignment but possess a female gender identity. Transgender men were born with a female sexual assignment but possess a male gender identity.

[150] Federal prisons also used genitalia-based classification when determining whether to house an individual in a male or female institution, and house "preoperative transsexuals with prisoners of like biological sex." Farmer v. Brennan, 511 U.S. 825, 829 (1994). This was in direct opposition to the Department of Justice's recent report, listing as a best practice that prisons "[s]egregate and, subject to staffing limitations, provide enhanced security for transgendered inmates, but with the same programming and privileges of general population inmates." Steven T. McFarland & Carroll Ann Ellis, *Report on Rape in Federal and State Prison in the U.S.*, Dep't of Justice 1, 40 (2008), http://www.ojp.usdoj.gov/reviewpanel/pdfs/prea_finalreport_080924.pdf. However, federal prisons are now directly regulated by PREA, and so may in the future follow PREA guidelines requiring facilities to make individual safety determinations, rather than simply assigning housing based on genetalia.

cannot afford, or may not want, genital conformation surgery, the vast majority of transgender prisoners are placed according to their birth sexual assignment.[151] Once transgender individuals are incarcerated, they face high levels of sexual assaults by fellow inmates and guards, neglect, and inadequate health care including denial of necessary hormones.[152]

Most California prisons and jails do not have specialized housing units for LGBT prisoners, and former Governor Schwarzenegger vetoed a bill that would have instructed prison officials to consider a prisoner's LGBT status in housing assignments to reduce the risk of sexual assault.[153] As a result, transgender women in California are almost always placed into men's prison facilities where they are at heightened risk for sexual abuse and rape;[154] and transgender men are also at risk, especially if assigned to male facilities.[155] For example, in San Quentin State Prison (a California men's carceral facility), an official warned a female transgender prisoner that she would almost certainly be a victim of sexual violence, and that officials were incapable of doing anything about it.[156] In another well-documented incident, an official deliberately placed a transgender inmate in a cell with a convicted sex offender, with the intent that she would be raped—an intent which was realized.[157]

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[151] *See* Sydney Tarzwell, Note, *The Gender Lines Are Marked with Razor Wire: Addressing State Prison Policies and Practices for the Management of Transgender Prisoners*, 38 Colum. Hum. Rts. L. Rev. 167, 189 (2006-2007).

[152] Okamura, *supra* note 138, at 117-18.

[153] *Final List of LGBT-Related Bills - 2009 Legislation,* California Legislative Lesbian, Gay, Bisexual and Transgender Caucus (Eric Astacaan ed., Oct. 19, 2009), http://lgbtcaucus.legislature.ca.gov/2009-legislation ("AB 382 (Ammiano) – Require[s] the California Department of Corrections and Rehabilitation (CDCR) to consider sexual orientation and gender identity when classifying inmates in order to prevent sexual violence. *Status*: Passed the California Legislature. Vetoed by the Governor (10/11/2009).").

[154] *See* Eumi K. Lee, *An Overview of Special Populations in California Prisons*, 7 Hastings Race & Poverty L.J. 223, 227-28 (2010) ("The vulnerability of the transgender population to sexual assault and rape in prison is caused in large part by the prison system's classification of transgender individuals and the repercussions of that classification on their housing placements.").

[155] *See, e.g.,* Spade *supra* note 133, at 7-8 (discussing Jim, a 25 year old transgender man with an intersex condition.) Jim was placed into a men's jail but denied access to his hormone therapy causing him to menstruate. *Id.* When Jim was strip searched while menstruating, his condition was outed to staff and other inmates, and Jim faced threats of rape. *Id*.

[156] Alex Coolman, Lamar Glover & Kara Gotsch, *Still in Danger: The Ongoing Threat of Sexual Violence Against Transgender Prisoners*, Stop Prisoner Rape & ACLU Nat'l Prison Project 1, 3 (June 2009), http://www.justdetention.org/pdf/stillindanger.pdf.

[157] PREA Report, *supra* note 26, at 73. The report also documents other

Some institutions do take adequate steps to safeguard their vulnerable gay and transgender prisoners.[158] The Los Angeles County Jail maintains a segregated unit for gay men and transgender women, which provides a measure of protection at least for those groups.[159] Most prisons, however, either place these vulnerable inmates into administrative segregation[160] (also known as "the hole,"[161] solitary confinement, or the SHU standing for Secured Housing Unit,)—a placement which does little to ensure prisoner safety when almost half of prisoner rapes are committed by prison staff to whom segregated prisoners are particularly vulnerable[162]—or they do nothing.[163]

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incidents of sexual abuse of transgender persons while incarcerated. *Id.* at 73-74.

[158] *See Robertson v. Block,* No. 82-1442 WPG Px (C.D. Cal. Jul. 22, 1985) (order granting dismissal), http://www.clearinghouse.net/chDocs/public/JC-CA-0064-0001.pdf.

[159] *See, e.g.*, Sharon Dolovich, *Strategic Segregation in the Modern Prison*, 48 Am. Crim. L. Rev. 1, 4 (2011) ("In the Los Angeles County Jail--the biggest jail system in the country--officials have found a way to increase the personal security of gay men and trans women detainees without forcing them to choose between safety and community. For more than two decades, the L.A. County Sheriff's Department (the Department), which runs the County's jail system, has been systematically separating out the gay men and trans women admitted to the L.A. County Jail (the Jail) and housing them wholly apart from GP. As a consequence of this segregated unit--long known as 'K11' but recently officially rechristened 'K6G'--gay men and trans women detained in the Jail are relatively free from the sexual harassment and forced or coerced sexual conduct that can be the daily lot of sexual minorities in other men's carceral facilities.") (footnotes omitted). *But see* Russell K. Robinson, *Masculinity as Prison: Sexual Identity, Race, and Incarceration,* 99 Cal. L. Rev. 1309, 1314 (2011) ("[B]y removing gay and transgender inmates - but not attending to hegemonic masculine norms in [General Population or] GP - the Jail simply shifts victimization, making it more likely that heterosexual and bisexual inmates in GP will assume the subordinated roles that otherwise would have been occupied by K6G inmates.").

[160] Karri Iyama, "*We Have Tolled the Bell for Him": An Analysis of the Prison Rape Elimination Act and California's Compliance as It Applies to Transgender Inmates,* 21 Tul. J.L. & Sexuality 23, 29 (2012) (citing Tarzwell, *supra* note 151, at 194 ("[T]ransgender prisoners [are placed] in the general population until a security problem arises, at which point the prisoner may be transferred to administrative segregation.").

[161] Kirsten Weir, *Alone, in 'the hole': Psychologists Probe the Mental Health Effects of Solitary Confinement,* 43 Monitor on Psychol. 54 (2012), *available at* http://www.apa.org/monitor/2012/05/ solitary.aspx.

[162] *See* Guerino & beck, *supra* note 127.

[163] Iyama, *supra* note 160, at 28 (citing Sydney Tarzwell, *The Gender Lines Are Marked with Razor Wire: Addressing State Prison Policies and Practices for the Management of Transgender Prisoners*, 38 Colum. Hum. Rts. L. Rev. 167, 190-92 (2006) (stating that "most states do not have individual housing

The Bureau of Justice Statistics publishes prison sexual assault data based on surveys required by PREA. The results of some of these surveys are telling. In a 2007 academic study funded by the California Department of Corrections and Rehabilitation and conducted at six California men's prisons, "67% of inmates who identified as LGBTQ reported having been sexually assaulted by another inmate during their incarceration, a rate that was fifteen times higher than for the inmate population overall."[164]

Nationally, an estimated 3.5% of adult heterosexual male inmates report being sexually victimized by another inmate.[165] In comparison, among males who are bisexual, 34% report being sexually victimized by another inmate.[166] And among male inmates who are homosexual or gay, 39% report being victimized by another inmate.[167] In general, the rate of inmate-on-inmate sexual victimization is at least three times higher for females (13.7%) than males (4.2%).[168] Among lesbian inmates, the rate of inmate-on-inmate sexual victimization was similar to that for female heterosexual inmates (13%), but the rate of staff sexual victimization of lesbian inmates (8%) was at least double that of female heterosexual inmates (4%).[169] Among female bisexual inmates, the rate of inmate-on-inmate victimization was the highest at (18%) and staff sexual assault was similar to lesbian inmates (8%).[170]

2. *Other Inmates at High Risk for Abuse: Youth, Survivors of Prior Sexual Assault and Inmates with Mental Illness*

LGBT prisoners are not the only inmates at heightened risk for sexual assault. Young-looking inmates and inmates with a history of mental illness can be targets of sexual abuse as well.[171]

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for transgender prisoners, most also do not have written policies as to how to manage and house transgender inmates.").

[164] *LGBTQ Detainees Chief Targets for Sexual Assault in Detention*, *supra* note 25.

[165] Allen Beck, *PREA Data Collection Activities*, 2012, Bureau of Justice Statistics, NCJ 238640 1, 2 (Jun. 2012), *available at* http://www.bjs.gov/content/pub/pdf/pdca12.pdf.

[166] *Id*.

[167] *Id*.

[168] *Id*. at 1.

[169] Beck & Johnson, *supra* note 126, at 5.

[170] *Id*.

[171] *E.g.*, Dolovich, *supra* note 106, at n.21 (quoting Stop Prisoner Rape, PREA Update: Unique Opportunity To Stimulate Reform 6 (2008), http://www.justdetention.org/pdf/PREA_Update_June_2008.pdf) ("[M]arginalized and special needs populations are at heightened risk [of sexual abuse in prison]. Among women, typical survivors of sexual abuse [in prison] are non-violent, young, and mentally ill inmates. Among men, non-violent, young inmates, and

Additionally, persons who have been sexually abused in the past have a greater chance of being preyed upon again in prison. One study showed that "once a prisoner is sexually assaulted, he or she will suffer an average of eight more sexual assaults."[172] Another found that nearly 75% of prison rape survivors in men's facilities and 57% of survivors in women's facilities were sexually abused more than once, and 30% of all prisoner rape survivors were sexually assaulted six or more times while incarcerated.[173] California recently recognized the vulnerability of previously abused inmates by requiring that past history of sexual assault be considered when making cell assignments,[174] though it is unclear at this time whether the policy has been implemented in a way that has reduced sexual assaults. Nonetheless, since the above populations remain disproportionately at risk for sexual assault in prisons, they remain disproportionately burdened by the exclusionary rape shield law.

C. *Juries May Be Less Likely to Find for Inmates in Cases of Sexual Assault*

While it is difficult to find published empirical studies showing that juries find inmates unsympathetic, and thus are less likely to convict those accused of abusing them,[175] anecdotal evidence suggests that juries are less likely to find in favor of inmates who bring complaints of sexual assault.[176] One such example follows.

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gay and transgender prisoners have the highest rates of victimization."). *See also* CAL. PENAL CODE § 2636 (West 2012) (requiring prisons to consider mental illness when making housing decisions in order to prevent sexual violence).

[172] Thompson, *supra* note 111, at 126, n.46 (citing Cindy Struckman-Johnson et al., *Sexual Coercion Reported by Men and Women in Prison*, 33 J. SEX RES. 67, 75 (1996)).

[173] *LGBTQ Detainees Chief Targets for Sexual Assault in Detention*, *supra* note 25 (citing Cindy Struckman-Johnson & David Struckman-Johnson, *A Comparison of Sexual Coercion Experiences Reported by Men and Women in Prison*, 21 J. OF INTERPERSONAL VIOLENCE 1531, 1599 (2006)).

[174] Lee, *supra* note 154, at 228 (citing *Article 46 Inmate Housing Assignments, in Department Operations Manual*, CAL. DEP'T OF CORR. & REHAB., §§ 54064.4, 54064.5 (2009), *available at* http://www.cdcr.ca.gov/Regulations/Adult_Operations/docs/DOM/NCDOM/2009NCDOM/09-05/Text%20-%20NCDOM%2009-05%20Inmate%C20Housing%Ässignments.pdf) ("CDCR recently amended its Department Operations Manual in April of 2009, to require consideration of whether the prisoner has been a victim of sexual assault in initial and subsequent assignments to double-cell housing.").

[175] Sennott, *supra* note 120.

[176] *See, e.g.*, Margo Schlanger, *Inmate Litigation*, 116 Harv. L. Rev. 1555, 1611 (2003) (stating that inmates have a "natural lack of jury appeal"), *available at* http://www.savecoalition.org/pdfs/Inmate_Litigation.pdf.

Roderick Johnson, a black gay man, was repeatedly raped while in a Texas prison.[177] After the first rape, Johnson was denied medical attention on the grounds that his injuries were not "life threatening," and the rape was never investigated.[178] Roderick repeatedly reported his abuse and asked for protective custody or a transfer, appearing before the Unit Classification Committee at his prison seven times.[179] His reports were ignored and his requests denied.[180] Roderick was lucky that the ACLU heard of his story and represented him in an action against prison officials.[181] His complaint alleged that authorities not only knew that he was being raped by other inmates and allowed the violence to continue, but also facilitated such assaults on at least one occasion, when a guard let another inmate into his cell for that purpose.[182] Despite substantial evidence of the above incidents, a Texas jury found in favor of the prison.[183]

Juries, being representatives of our larger culture, are likely already prejudiced against inmates.[184] Requiring California inmates to defend prior sexual history as well, likely creates more juror prejudice and further diminishes the chances an abused inmate would gain relief.

D. *The Cost to Society*

The Department of Justice ("DOJ") uses the PREA Regulatory Impact Assessment ("RIA") to collect data about prison sexual abuse under PREA.[185] The RIA utilizes uncompensated, anonymous self-reporting, which the DOJ considers the most reliable measure of inmate sexual assault. The RIA is conducted and analyzed in such a manner as to reduce any false reporting by utilizing a blind computer survey, and by informing inmates that their responses are completely anonymous, therefore removing any incen-

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[177] *See* MOGUL ET AL., *supra* note 144, at 92.

[178] *Id.*

[179] *Id.*

[180] *Id.*

[181] *Id*. at 93.

[182] *Id.*

[183] *Id.*

[184] *See* Walker v. Bain, 257 F.3d 660, 670 (6th Cir. 2001) (calling inmates a politically unpopular group). *See also* Lucia Mouat, *Prisoners Do Time – And Pick Up the Tab for Room and Board*, CHRISTIAN SCI. MONITOR (1996), *available at* http://www.csmonitor.com/1996/0813/081396.us.us.9.html (discussing growing anti-prisoner sentiment in the United States).

[185] PREA, *supra* note 21; *see* 42 U.S.C. § 15603(a)(1) ("The Bureau of Justice Statistics of the Department of Justice . . . shall carry out, for each calendar year, a comprehensive statistical review and analysis of the incidence and effects of prison rape.").

tive for the inmates to either exaggerate or diminish their claims. A RIA study reports that "[b]etween 69% and 82% of inmates who reported sexual abuse in response to the survey stated that they had never reported an incident to correctional managers."[186] These data also only capture number of persons abused, not the number of abuse incidents, undercounting the financial and moral cost of prison rape to prisoners and society.[187]

Estimating the cost to society of prison rape is an "imperfect endeavor" given that there are multiple costs to rape that are difficult to put into dollar amounts.[188] RIA enumerates the benefits of reducing the prevalence of prison rape based on the costs to society of each act of sexual violence.[189] Considered in the cost analysis are things "difficult or impossible to quantify" such as "equity, human dignity, fairness, and distributive impacts."[190] The RIA economic analysis does not capture the non-quantifiable costs of prison rape.[191] While recognizing the limits of utilizing economic measurements to quantify sexual violence, the RIA utilizes extrapolations from "existing economic and criminological literature regarding rape" to monetize the quantifiable costs per person.[192] The quantifiable costs include pain, suffering, physical and psychological injuries experienced by sexually abused inmates, the average cost of medical and mental health care and other necessary services, and costs to the victim and to society of criminal victimization.[193] On that basis, the RIA estimates the "monetizable benefit to an adult of avoiding" either "nonconsensual sexual acts involving injury or force," or nonconsensual acts with "no injury or force but high incidence" at $310,000 to $480,000 per victim.[194] The RIA estimates that the annual maximum monetizable cost to the society of rape and sexual abuse of persons in U.S. prisons and jails is about $46.6 billion.[195] As California incarcerates 12% of the nation's prisoners, the estimated cost to California of prisoner rape is about $5.6 billion dollars annually.[196]

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[186] RIA, *supra* note 101, at 17-8.

[187] *Id.* at 20-2.

[188] PREA Executive Summary, *supra* note 135, at 10.

[189] *Id.* at 9.

[190] *Id.* at 10.

[191] *Id.* at 11.

[192] *Id.* at 10.

[193] RIA, *supra* note 101, at 39.

[194] PREA Executive Summary, *supra* note 135, at 10.

[195] *Id.* at 10 (this cost estimate does not include an additional $5.2 billion annually for persons sexually abused nationwide in juvenile facilities).

[196] Estimated by taking the total cost of prison rape of adults and multiplying by the percentage of the prison population California houses in its state

In addition to the financial cost of prisoner rape, prisoner rape victims also demonstrate a significantly higher incidence of mental health problems than non-victims, including depression, post-traumatic stress disorder (PTSD), and substance abuse.[197] HIV/AIDS in particular, being a sexually transmitted disease, flourishes in prisons with high rates of sexual assault. The rate of confirmed AIDS cases in U.S. prisons is more than three times higher than in society overall, potentially making rape behind bars an unadjudicated death sentence[198] because many jurisdictions, including California, struggle to provide even basic healthcare to inmates,[199] let alone expensive HIV medications. Upon release, survivors often return to their communities with emotional scars, deadly diseases, and violent behavior learned while incarcerated.[200]

Following their release from prison, 72% of victims of inmate-on-inmate sexual assault indicated they felt shame or humiliation, and 56% said they felt guilt.[201] Seventy-nine percent of unwilling victims of staff sexual assault said they felt shame or humiliation, and 72% said they felt guilt.[202] The following anecdote is illustrative.

When he was seventeen, T. J. Parsell, a non-transgender male, was convicted of robbing a convenience store with a toy gun, and was sentenced to prison for a term of four to fifteen years. On his first night, an inmate spiked his drink with Thorazine and raped him. At a hearing in front of the National Prison Rape Elimination Commission, Mr. Parsell testified that what he experienced went beyond sex: "They'd stolen my manhood, my identity, and part of my soul." When he was released from prison five years later, Mr. Parsell became a drug addict to "drown out the memories and pain." Similarly, Congress found that because "[v]ictims of prison

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prisons. This is a rough estimate, especially given some evidence that the violence due to prison overcrowding in California increases the rate of sexual assault as well.

[197] *Call for Change: Protecting the Rights of LGBTQ Detainees*, Stop Prisoner Rape 1, 1 (May 2007), http://www.justdetention.org/pdf/Call_for_Change1.pdf.

[198] *Id*.

[199] *See, e.g.*, Lee, *supra* note 154, at 223 (citing *Coleman v. Schwarzenegger*, No. CIV S-90-0520 LKK JFM P, 2009 U.S. Dist. LEXIS 67943, at *39-40 (E.D. Cal. Aug. 4, 2009)) (describing the "woefully and constitutionally inadequate" medical and mental health care, and the "unprecedented overcrowding" and its everyday effects).

[200] *Call for Change: Protecting the Rights of LGBTQ Detainees*, *supra* note 197.

[201] Beck, *supra* note 165.

[202] *Id*.

rape suffer severe physical and psychological effects that hinder their ability to integrate into the community and maintain stable employment . . . [t]hey are thus more likely to become homeless and/or require government assistance."[203]

When prisons cut corners on staffing, supervision, training, and surveillance equipment to save money, and thereby decrease prisoner safety, the true cost to California is externalized to the general population. This cost is concentrated most heavily in the persons, households, and communities of prisoners and former prisoners.[204] Those entities have to pay the ongoing costs of mental health and medical care, reduced employability, mental health challenges, broken families, and persons unable to be productive members of their local community as a result of the rape.

A strong argument can be made that inmates, as an especially vulnerable population containing even more vulnerable sub-populations, need access to rape shield protection even more than the average person. Instead they are being categorically excluded from such needed protection.[205]

Part IV: Challenging the California Rape Shield Exclusion

To date, there is no indication in public records that anyone has attempted to challenge or repeal California's exclusionary rape shield amendment.[206] However, there are a number of potential ways to change the law. A statute can be challenged in court on the grounds that it violates either the federal or a state constitution. The only viable constitutional challenge to California's rape shield exclusion must be made under the federal Equal Protection Clause, but I will also briefly note other constitutional claims and discuss why they are not colorable.

Another option for reform is using pressure from the administrative branch of the federal government—specifically through

[203] Okamura, *supra* note 138, at 115 (citing 42 U.S.C. § 15601(11)).

[204] *C.f.*, PREA Executive Summary, *supra* note 135, at 11 ("[B]enefits will be received by victims who receive proper treatment after an assault" as well as persons who are never victimized. Treating those who are sexually assaulted "will in turn enhance their ability to re-integrate into the community and maintain stable employment upon their release from prison. Furthermore, making prisons safer will increase the general well-being and morale of staff and inmates alike. Finally, non-quantifiable benefits will accrue to society at large, by ensuring that inmates re-entering the community are less traumatized and better equipped to support their community.").

[205] *See generally* Dolovich, *supra* note 112.

[206] Indeed, there is no public information at all available about this amendment beyond the reading of the bare words into the record during the Assembly hearing on SB 23.

allocation of DOJ prison funds—to pressure California to change its exclusionary rape shield law. However, this argument is likely to fail because no federal law—including PREA—requires California to reform the exclusionary rape shield in order to qualify for federal funding.

Finally, the legislature can be lobbied to change the statue. Often in the course of legislative lobbying there is a "trial" in the court of public opinion that may sway legislators. The passage of the California SADEA and the national PREA, both incompatible in spirit with the exclusionary rape shield amendment, may assist in convincing legislators that the time is ripe to abandon this law.

A. *Litigation: Constitutional Challenges Under Section 1983*

In an environment where at least 95% of rapists will never be punished for their crimes against inmates,[207] any existing rule of law that contributes to this environment of impunity is suspect from a constitutional standpoint. Civil rights challenges to the exclusionary rape shield law could potentially be brought in state or federal court under 42 U.S.C. § 1983.[208] Section 1983 prohibits deprivation of any rights guaranteed by the federal constitution, law, or ordinance by a person acting under color of state laws.[209] "Agencies, city officials and individual correctional staff are persons acting under color of state law for purposes of 1983 . . . [t]his protection is aimed at protecting vulnerable citizens from the power of the state."[210] However, there are several potential hurdles to bringing such a claim.

1. *Standing*

In order to bring a claim under § 1983, a plaintiff must meet certain requirements. Standing is one such hurdle. To gain injunctive relief under § 1983, Supreme Court jurisprudence requires, inter alia, that a plaintiff have a "substantial chance" of being harmed by the government policy in the future.[211] This doctrine, established

[207] SINGER, *supra* note 99, at 93.

[208] 42 U.S.C.A. § 1983 ("[E]very person who under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.").

[209] *Id.*

[210] Brenda V. Smith, *Sexual Abuse of Women in United States Prisons: A Modern Corollary of Slavery*, 33 FORDHAM URB. L.J. 571, 588-89 (2006) (footnotes omitted).

[211] City of Los Angeles v. Lyons, 461 U.S. 95, 111 (1983).

in *City of Los Angeles* v. *Lyons*, requires that plaintiffs seeking injunctive relief prove that they will very likely be harmed again if an injunction is not granted.[212]

In *Lyons*, the plaintiff Lyons was pulled over by the Los Angeles Police Department ("LAPD"). During the stop, police applied a chokehold, injuring Lyons.[213] Statistical evidence demonstrated that while black men made up only 9% of the city population they were the victims of over 75% of the chokeholds applied by police.[214] Lyons, a black man, believed that he needed an injunction against the LAPD to protect him from injury from future chokeholds.[215] The Supreme Court disagreed, stating that Lyons did not have standing to ask for an injunction, because he did not have a "substantial chance" of future harm by the LAPD.[216] The Court stated that there were millions[217] of people living in Los Angeles, but in the past five years, only sixteen people had been killed by police chokeholds in Los Angeles.[218] Sixteen out of three million was, in the Court's eyes, too tenuous a chance of Lyons being harmed or killed by a police chokehold in the future, and the risk to Lyons was therefore too "speculative" for the court to grant relief.[219]

In addressing the *Lyons* standing issues, one potential litigation strategy would be to retain as a client a transgender woman housed in a men's prison, serving a sentence of sufficient duration to stretch over the amount of time expected to appeal a case all the way to the Supreme Court. The appeals process can drag on from a few years to over twenty in a complex case. Given empirical data from California prisons showing that 59% of transgender female prisoners are sexually assaulted while in California prisons,[220] and that more than 50% of persons sexually assaulted once in men's prison will be sexually assaulted again, such a plaintiff could potentially meet the *Lyons* requirement of "substantial chance" of future harm[221] and thus be found to have standing to seek injunctive re-

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[212] *Id.*

[213] *Id.* at 97-8.

[214] *Id.* at 115-16 (J. Marshall dissenting) (noting that 12 of the 16 killed by police with chokeholds during that time were black men).

[215] *Id.* at 98.

[216] *Id.* at 111.

[217] *Historical Resident Population City & County of Los Angeles, 1850 to 2010,* Los Angeles Almanac, *available at* http://www.laalmanac.com/population/po02.htm (the 1980 Census shows approximately three million people residing in Los Angeles).

[218] *Lyons*, 461 U.S. at 115-16 (J. Marshall dissenting).

[219] *Id*. at 109.

[220] Jenness et al., *supra* note 25, at 27.

[221] *Lyons*, 461 U.S. at 111 ("The equitable remedy is unavailable absent a

lief.[222] However, there is a concern that a prisoner could either be paroled or transferred to a private facility out of state in order to undermine her ability to seek injunctive relief, as once an inmate is no longer in a state prison, her claim for injunctive relief is likely moot.[223]

Another, and perhaps more efficacious, course of action would be to file a class action lawsuit on behalf of all transgender inmates currently incarcerated, or potentially incarcerated in the future, who have been or are likely to be sexually assaulted, with several named transgender plaintiffs who have already experienced sexual assault.[224] Because the individuals comprising this group of plaintiffs are all at a high risk of being raped while incarcerated,[225] this strategy would meet the *Lyons* threshold, and also would address the very real concern that officials might, when faced with a legitimate Section 1983 claim, parole a prisoner so that her case is dismissed for lack of standing.[226] Although the following case was brought by a plaintiff pursuing an individual claim under the California Constitution rather than the U.S. Constitution, it is illustrative because the same elements of a constitutional violation and standing are implicated.[227]

In *Giraldo* v. *California Department of Corrections & Rehabilitation*, a female transgender prisoner housed in a men's facility filed suit in California state court for, inter alia, violating section 17, article I of the California constitution, the state equivalent to the Eighth Amendment of the U.S. Constitution, prohibiting cruel and unusual punishment.[228] The plaintiff alleged that she had been "sold" to two different inmates as a cellmate, both of whom then beat and raped her daily for a period of two months. This sexual slavery was allegedly accomplished with the full knowledge of

showing of irreparable injury, a requirement that cannot be met where there is no showing of any real or immediate threat that the plaintiff will be wronged again – a 'likelihood of substantial and immediate irreparable injury") (citing O'Shea v. Littleton, 414 U.S. 448, 502 (1974)).

[222] Such a client would be more likely than not to be harmed again (over 50%), versus Lyons' 16 in 3 million chance of future harm.

[223] *See, e.g.*, Giraldo v. Cal. Dep't of Corr. & Rehab., 168 Cal. App. 4th 231, 240 (2008).

[224] *See* Purver & Hageman, *supra* note 192, at §5 Class Actions ("Counsel should consider bringing a class action suit whenever appropriate, as having numerous plaintiffs will assist counsel in obtaining useful testimony and assist in ensuring that at least some of the named plaintiffs remain incarcerated at the offending institution at the time of trial.").

[225] *See* Jenness ET AL., *supra* note 25, at 27.

[226] *See,e.g., Giraldo,* 168 Cal. App. 4th at 240-44.

[227] *See* City of Los Angeles v. Lyons, 461 U.S. 95 (1983).

[228] *Giraldo*, 168 Cal. App. 4th at 237-40.

certain prison guards.[229] The plaintiff complained of the abuse several times to various prison staff, asking to be assigned to different housing, but no action was taken to protect her until a final incident where her cellmate raped her again but this time also attacked her with a box cutter.[230] The plaintiff was then assigned to segregated housing.[231]

The plaintiff's Section 17 claim for injunctive and declaratory relief survived defendants' demurrer[232] and was inevitably heading to trial on July 2, 2007.[233] The defendants then motioned for removal to Federal court with a continuance, which delayed the trial until July 16, 2007.[234] On July 13, 2007, the defendants advanced the plaintiff's parole date and released her.[235] That same day, the defendants filed a motion to dismiss the plaintiff's declaratory and injunctive relief claims on the basis of mootness, as she was no longer incarcerated.[236] The California appeals court found that the trial court had not erred in granting the defendants' motion and upheld the dismissal.[237] If the plaintiff had been part of a class action with several named plaintiffs, others of whom had been sexually assaulted and who were still incarcerated, the claim for injunctive relief could not have been dismissed as being moot.[238]

A final standing hurdle a potential plaintiff class may face is the possibility that the courts may find the plaintiffs' injuries are not fairly traceable to the exclusionary rape shield, and that an injunction will not likely lead to relief, i.e. protection from sexual assault.[239] In *Allen* v. *Wright*,[240] one question the court asked was if the "line of causation between the illegal conduct and the injury [was] too attenuated" for plaintiffs to have standing.[241] The Court found that the harm plaintiffs faced as a result of racial discrimination perpetuated by the existence of tax-exempt schools that their children

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[229] *Id*. at 239.
[230] *Id.*
[231] *Id.*
[232] *Id.* at 242.
[233] *Id*. at 241.
[234] *Id.* at 243.
[235] *Id.*
[236] *Id.*
[237] *Id.* at 260.
[238] *See* Purver and Hageman, *supra* note 192, at § 8 ("Remedies available to prisoner civil rights litigants under 42 USCA § 1983—Permanent injunctive relief. Inmates' request for injunctive relief may often become moot because the inmate is released.").
[239] *See* Allen v. Wright, 468 U.S. 737, 751 (1984).
[240] *Id.* at 737-95.
[241] *Id.* at 752.

did not, and would not attend, was too abstract to give plaintiffs standing to challenge the schools' tax-exempt status.[242] However, it is likely that the courts could find a more substantial connection between the exclusionary rape shield and increased rates of sexual assault than the Court found in *Allen*, under the theory that prosecution and conviction are meant to, and do, deter crime. Therefore, increasing the likelihood of substantiated convictions for people actually abused while incarcerated in California prisons and jails has a strong connection to deterrence of rape: an injunction would likely lead to relief.

2. *Potential Constitutional Claims*

Potential federal constitutional claims may include those brought under the Fifth Amendment Due Process Clause, the First Amendment right to free speech, and the Eighth Amendment prohibition against cruel and unusual punishment. However, none of these have a likelihood of success.[243] Thus, instead of looking

[242] *Id.* at 755-56.

[243] For example, claims could be made under, first, the Due Process Clause of the Fifth Amendment, inferred into the Fourteenth Amendment to apply to states as well. The Supreme Court has held that prisoners have a fundamental right to access the courts: it could be argued that by creating a disincentive to pursue a valid rape complaint, the legislature is interfering with that access. However, since *Lewis v. Casey*, 518 U.S. 343 (1996), restricts the right to access to civil rights a habeas claims, rather than the broader right to access articulated under *Bounds v. Smith*, 430 U.S. 817 (1977), it is unlikely that the right to more ably pursue a rape claim would be seen by the court as falling under the fundamental 'right to access' umbrella. Second, under the Eighth Amendment, a carceral facility may be sued for inflicting 'cruel and unusual punishment' on a prisoner. An argument could be made, that by reducing the reporting and prosecution of sexual assault of prisoners, the exclusionary rape shield creates an environment where rape occurs more often. However, under current Eighth Amendment jurisprudence, the inmate must prove that the legislature was aware of, and deliberately indifferent to, a "substantial risk of serious harm" to the inmate. Farmer v. Brennan, 511 U.S. 825 (1994). It would be challenging for an individual plaintiff to prove that the legislature knew she was at substantial risk of serious harm due to the lack of deterrence created by the rape shield exclusion. Finally, another potential argument is that the plaintiffs' First Amendment right to free speech is being 'chilled' by government action. Because of the painful and often traumatizing nature of being cross examined about one's past sexual behavior in open court, in front of one's alleged rapist, many unincarcerated people prior to the national rape shield laws' enactment chose not to pursue a case against their abuser. Lack of access to the rape shield law for persons in carceral facilities might have the same 'chilling' effect of deterring victims from pursuing a complaint. However, a leading First Amendment scholar has said that this would likely not support a claim, there having been no related precedent, and prisoners First Amendment rights being limited by courts in any case under the deferential *Turner v. Safely*, 482 U.S. 78 (1987), standard. Email with University of California School of Law professor, May 12, 2013.

broadly at all claims that could be raised, I will focus my analysis on the most likely avenue for reform: the Equal Protection Clause.[244]

Under the federal Equal Protection Clause,[245] classifications based on race receive strict scrutiny because such classifications historically have been used to disadvantage persons of color.[246] For gender-based classifications, heightened scrutiny is the standard.[247] If no race or gender classification is found to exist, then rational basis review is used.[248]

African Americans and Latinos are overrepresented in California state prisons,[249] and are therefore also disproportionately

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[244] U.S. CONST. amend. XIV, § 1 ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

[245] CAL. CONST. art. I, § 7, cl. b (the California Equal Protection Clause may also be a basis for relief) ("A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens.").

[246] City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) ("[W]hen a statute classifies by race, alienage, or national origin[] [t]hese factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy. . . . For these reasons and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest."). Additionally, the U.S. Supreme Court has held that prisoners are entitled to strict scrutiny for race based classifications under equal protection doctrine, rather than the more deferential *Turner* standard. *See* Johnson v. California, 543 U.S. 499 (2005).

[247] *See*, *e.g.*, United States v. Virginia, 518 U.S. 515, 533 (1996). There is controversy over whether heightened scrutiny would apply, or whether courts should apply the deferential *Turner* standard to gender based claims. The U.S. Supreme Court has yet to rule on this issue.

[248] Under rational basis review, the plaintiff needs to prove that the challenged law is not rationally related to a legitimate government interest. *E.g.*, Cleburne, 473 U.S. at 440-41. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 1571-1573 (3d ed. 2009). In the prison context, the deferential *Turner* standard is generally used, asking whether the regulation affecting prisoners is "reasonably related" to "legitimate penological interests." Johnson, 543 U.S. at 1149. However, this standard is only applied to "rights that are 'inconsistent with proper incarceration,'" and not to rights "that need [not] necessarily be compromised for the sake of proper prison administration." *Id.* It is unclear in the case of a challenge to the exclusionary rape shield amendment whether the courts would apply *Turner* or *Cleburne*, because the challenge is not to a prison regulation, but to a legislative enactment. Both standards of review are highly deferential to government officials and are therefore somewhat interchangeable. For the sake of simplicity, I will use regular rational basis review when discussing the hypothetical challenge to the exclusionary rape shield amendment.

[249] Joseph M Hayes, *California's Changing Prison Population*, PUB. POLICY INST. OF CAL. (Apr. 2012).

> African Americans are dramatically more likely to be imprisoned than are other groups. More than half of California's adult male population

impacted by the rape shield exclusion. However, current equal protection doctrine requires proof of government intent to disadvantage someone based on race,[250] which is very difficult to prove under the existing jurisprudential framework.[251] If rape is motivated by gender, then there is a potential argument that a gender classification is being utilized in selecting which prisoners are likely to be raped and therefore which prisoners are disproportionately being denied the protection of a rape shield law. Indeed, at least one court has found that all rapes are motivated by the gender of the rape victim.[252] However, the fact that the rape shield exclusion on its face applies to each gender equally means that government intent to disadvantage one gender must be shown (regardless of whether it impacts one gender more than another),[253] and again, such proof of intent is very hard to prove.

Thus the only remaining option is rational basis review, the least exacting standard of scrutiny, which presumes that the legislature or government official has acted legitimately.[254] Very few plaintiffs win under rational basis review because the burden is on the plaintiff to show that a challenged statute is not "rationally related to a legitimate government purpose."[255] The government purpose need not be explicitly stated in the legislative record.[256] In-

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is Latino or nonwhite (*55*%), but three of every four men in prison are Latino or nonwhite: *41*% are Latino, *29*% are African American, and *6*% are of another race. Among adult men in *2010*, African Americans were incarcerated at a rate of *5*,*525* per *100*,*000*, compared to *1*,*146* for Latinos, *671* for non-Latino whites, and *43* for Asians. Among women, African Americans were incarcerated at a rate of *342* per *100*,*000*, compared to *57* for Latinas, *66* for non-Latina whites, and *5* for Asians. *Id.*

[250] Washington v. Davis, 426 U.S. 229, 239 (1976) (requiring more than discriminatory impact to prove a racial classification; there must be proof of discriminatory purpose).

[251] Intent to discriminate must be present on the face of the statute, or else be clear from the legislative history. Washington, 426 U.S. at 238-245.

[252] Schwenk v. Hartford, 204 F.3d 1187, 1203 n.14 (9th Cir. 2000) ("[P]rison rapists commit assaults in part to establish and maintain a masculine gender. According to the psychological literature . . . [male] prison rapists strongly resist the characterization of their activities as homosexual. Instead, they conceive their [male] sexual partners as female members of the prison social order. Thus, as with rape in general, all prison rape occurs 'because of' gender—both that of the rapist and that of his victim.").

[253] Personnel Administrator of Massachusetts v. Feeny, 442 U.S. 256, 274 (1979) (recognizing that gender classification statutes require more than discriminatory impact; there must also be proof of discriminatory purpose).

[254] CHEMERINSKY, *supra* note 248, at 720.

[255] *See, e.g.,* Romer v. Evans, 517 U.S. 620 (1996).

[256] McLaughlin v. Florida, 379 U.S. 184, 191 (1964).

deed, any legitimate reason a government attorney or the court can suggest will suffice for legitimate government purpose.[257] Generally the court will not investigate the proffered purpose, but may only if the policy seems particularly arbitrary.[258] This standard is very deferential to the legislative body,[259] but it is not an automatic sanction of government activity.[260]

In evaluating the relationship of the government's action to the purported legitimate purpose, the Supreme Court "focuses on the degree to which a law is under-inclusive and/or over-inclusive."[261] A law is under-inclusive if it fails to apply to individuals who are substantially similar to those to whom the law does apply.[262] A law is over-inclusive if it applies to more people than necessary to achieve the purported government purpose.[263] However, under- and over-inclusiveness do not automatically invalidate a law, especially under rational basis review, because almost all laws are over- and under-inclusive to some degree.[264] The court will simply look to see if the law at issue lacks any legitimate purpose, or is so arbitrary as to be unreasonable.[265]

i. Rationale for Rape Shield Exclusion for Rapes in Prisons and Jails: Legitimate Government Interests and Counterarguments

In the years leading up to the passage of the rape shield exclusion amendment in California, *Los Angeles Times* ran a series of articles illuminating the issue of sexual abuse in carceral facilities.[266] Many of these article featured prison staff as culpable in the

[257] Federal Communications Commission v. Beach Communications, Inc., 508 U.S. 307, 315 (1993) (quoting Lehnhausen v. Lake Shore Auto Parts, Ins., 410 U.S. 356, 364 (1973)) ("[T]hose attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it.'").

[258] *See, e.g.*, Romer, 517 U.S. 620.

[259] *See* McGowan v. Maryland, 366 U.S. 420, 425-26 (1961) ("[s]tate legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality").

[260] *See, e.g.*, Romer, 517 U.S. 620.

[261] Chemerinsky, *supra* note 248, at 721.

[262] *Id.*

[263] *Id.* at 722.

[264] *Id.*

[265] *Id.* at 725.

[266] *See*, *e.g.*, Mike Goodman, *Juvenile Hall: Powder Keg of Rage, Racism: Youths Subjected to Sexual Degradation, Beatings and Rat-Pack Struggle to Survive*, L.A. Times (May 17, 1974) at 3A (a story on pervasive violence and rape inside Central Juvenile Hall). In 1975, Joan Little, an African American woman, was charged with first-degree murder for killing her North Carolina jailer while he was sexually assaulting her. Wolfgang Saxon, *Joan Little, Tried for Killing Jailer In 1974, Is Arrested in New Jersey*, N.Y. Times (Feb. 26, 1989)

assault or as the rapist; others showed female prison staff assaulted by inmates and guards. Given this laundry list of articles, several of which describe testimony before the California Assembly on the pervasiveness of prison rape in California, it seems unlikely that the California State Legislature in 1981 was unaware of the risks people in prisons face regarding sexual assault.

One justification for the rape shield exclusion may be to protect prison guards from false allegations of sexual assault.[267] For example, legislators may have been concerned that inmates routinely lie to get staff into trouble.[268] It is possible that because prisoners

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at 34. An attorney for Ms. Little came to Los Angeles to raise money for her defense, after the case gained national attention. Francis B. Kent, *Trial to Begin Today for Woman Who Killed Jailer*, L.A. Times (July 14, 1975) at B5. In 1976, former Los Angeles County Jail inmate John Sandage testified in front of the Assembly Committee on Criminal Justice, describing Los Angeles County Jail as a place "inmates are raped or otherwise sexually molested by stronger inmates who operate with apparent impunity." Tendayi Kumbula, *Rape, Robbery, Homosexuality Charged: Ex-Inmates Hit County Jail Conditions*, L.A. Times (Sept. 17, 1976) at B1. In 1977, members of the Assembly Select Committee on Corrections heard testimony about [male-to-male] inmate rape in Orange County Jail, including a youth who testified that "he had been raped by several other inmates in full view of guards who did nothing to stop it." Evan Maxwell, *Charges Aired on Conditions in County Jail*, L.A. Times (Feb. 12, 1977) at OC1. In 1979, the San Diego County Grand Jury released a report criticizing the San Diego County Jail for the estimated one [male-to-male] rape per week in that facility. Robert Welkos, *Jury Critical of Jail Staffing*, L.A. Times (Mar. 15, 1979) at SD_A1. In 1979, an inmate at the Federal Correctional Institution at Lompoc was convicted in Los Angeles federal court of raping a female prison guard. *Inmate Convicted on Charge of Rape*, L.A. Times (Apr. 26, 1979) at D4. In 1980, the Los Angeles Times reported on the problem of imprisoning children with adults: one juvenile justice specialist claimed that "[t]he cases of assault and rape of juveniles are too many to be enumerated and too common to be denied." *The Victimizing of Juveniles*, L.A. Times (Mar. 28, 1980) at C6. In 1981, four female guards and a teacher at a men's prison filed grievances with the Department of Corrections charging male staff with sexual harassment and sexual assault. Larry Stammer, *Prison Workers on Guard in Fear*, L.A. Times (June 7, 1981) at C1.

[267] Additionally, the prisons could have an interest in administrative convenience, in having fewer cases brought out of prisons, and therefore having to expend fewer resources on transporting prisoner complainants and witnesses to court for testimony. However, saving on transportation costs to court seems like a poor excuse for not prosecuting such a heinous crime as rape.

[268] *See* Brenda V. Smith, *Sexual Abuse of Women in United States Prisons: A Modern Corollary of Slavery,* 33 Fordham Urb. L.J. 101, 126 n.130 (2006) (referencing Bud Allen & Diana bosta, Games Criminals Play: How You Can Profit By Knowing Them 7-10, 33-37 (1971) ("discussing essential conflict between the 'keeper' and the 'kept,' and identifying inmate techniques for setting up professionals who deal with them"); Gary Cornelius, The Art of the Con: Avoiding Offender Manipulation 13-18, 25-30, 43-69 (2001) ("describing

have so little control over their lives, many try to exert some control through false allegations.[269] Such reasoning could imply that inmates are therefore less credible in their sexual assault claims, so courts need more tools to root out fraud and false claims against prison guards. Prison officials in particular have operated under the assumption that all prisoners lie.[270] A related argument is that prisoners often trade sex for favors,[271] making the prisoner less trustworthy in any allegation of lack of consent. The counterargument is that sex workers who are not incarcerated are allowed to use the rape shield law,[272] and they are similarly situated to inmates who might perform sex work in prisons. Additionally, there are comparable mechanisms to the rape shield exclusion already in place to root out fraud.[273] In all cases where the rape shield is applicable, the defendant can petition the court to admit probative evidence of past sexual behavior of the complaining witness to prove consent.[274]

Some may argue that all sexual assault claims should be handled internally by prison officials. Prison staff would be in the best position to do so, because officials understand the institutionalized mentality of prisoners better than any court. Indeed, rape by prisoners is generally handled administratively and not through the

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sociopathic personalities in the general and inmate populations, how inmates cope with incarceration through a process known as 'prisonization,' and the several methods inmates use to manipulate officers"). These texts have formed the basis of many prisons' staff training programs.).

[269] *See* Gary F. Cornelius, *Avoiding Inmate Manipulation*, *in* THE CORRECTIONAL OFFICER: A PRACTICAL GUIDE, available at http://www.correctionsone.com/correctional-psychology/articles/3328579-Avoiding-inmate-manipulation/ ("Correctional institutions are regimented places with schedules, the lack of comforts that offenders enjoy on the street, a lack of privacy, and people that an inmate may not want to have to deal with, including staff. Inmates want the environment to be more to their liking and to do time on their terms. To meet the needs of activity, privacy, emotional feedback and safety, inmates may lie, scheme, cheat, steal or play 'head games' with COs.").

[270] *See* Sharon Dolovich, *Two Models of the Prison: Accidental Humanity and Hypermasculinity in the L.A. County Jail*, 102 J. CRIM. L. & CRIMINOLOGY 965, 1043 (2012) (noting that prison staff commonly view all inmates as liars).

[271] *Id.* at 1092 (noting that inmates in the L.A. County Jail sometimes exchange sex for items purchased from the facility's canteen).

[272] *See* CAL EVID. CODE § 782 (West 2011); CAL EVID. CODE § 1103 (West 2011) (no specific carve out for those who practice sexual economics in sections 782 or 1103 of the California Evidence Code).

[273] U.S. Dep't of Agriculture v. Moreno, 413 U.S. 528, 533-34 (1973) (finding that the presence of alternative mechanisms to root out fraud can contribute to the unreasonableness of a statue purporting to be for the purpose of rooting out fraud). Also, "a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate government interest." *Id.* at 534.

[274] *See* CAL. EVID. CODE §§ 782, 1103.

courts, though the two are not mutually exclusive.[275] California Department of Corrections and Rehabilitation regulations require that any crime for which there is substantiated evidence for each element be referred out to the local district attorney for potential prosecution.[276] However, the local district attorney has the authority to determine which cases she will prosecute; even having the authority to prospectively inform the prison which types of cases it will refuse to prosecute if they are referred.[277] Generally, only rapes by facility staff would ever be referred out to prosecutors.[278] Because the rape shield exclusion is a rule of evidence applicable only in a court of law but not in a prison administrative hearing,[279] it would potentially only benefit guards who are accused of raping inmates or other staff, since those are the only cases that would be likely to reach a court.[280]

Another potential government interest is evading increased penalties for sexual assault. A prison guard having any sexual contact with a prisoner, consensual or not, would be subject to criminal prosecution, therefore there is no need to allow a prisoner to avail of the rape shield where consent is irrelevant to achieving a

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[275] CAL. CODE REGS. tit. 15, § 3315 (2012). (a) Inmate misconduct reported on a CDC Form 115 shall be classified serious if:

(*1*) It is a serious disciplinary offense not specified as administrative in section *3314*(a)(*3*), an offense punishable as a misdemeanor, whether or not prosecution i[s] undertaken, or is a felony, whether or not prosecution is undertaken.

(*2*) It involves any one or more of the following circumstances:

(a) Use of force or violence against another person. . .

(b) In addition to the disciplinary hearing, the inmate may be subject to segregation from the general population pursuant to sections *3312* and *3335* through *3345*; and referral for prosecution when the misconduct is a criminal offense.

[276] *Id*. at § 3316. "(a) Except as provided in subsection (b), all criminal misconduct by persons under the jurisdiction of the department or occurring on facility property shall be referred by the institution head or designee to appropriate authorities for possible investigation and prosecution when there is evidence substantiating each of the elements of the crime to be charged." *Id.*

[277] *Id*. "(b)Notwithstanding evidence substantiating each of the elements of the crime to be charged, criminal misconduct shall not be referred to the local district attorney if the local district attorney has submitted written notification to the institution head including criteria determining that specified crimes shall not be prosecuted if the crime involved meets such criteria."

[278] Telephone Interview with a Public Defender, Ventura County (May 16, 2013) ("Very few inmate crimes are referred out for prosecution because generally prisons handle inmate crime through administrative hearings.").

[279] *C.f.,* CAL. EVID. CODE § 12 (2012) (stating "that the Evidence Code governs all trials").

[280] Telephone Interview with a Public Defender, *supra* note 278.

conviction. The counterargument is that while any sexual contact between prison staff and inmates is already a crime regardless of consent,[281] the penalties for non-consensual sexual abuse are much higher.[282] Allowing a guard to evade increased penalties for sexual assault seems like an illegitimate government purpose.[283]

ii. Arguments Against a Rational Basis for the Rape Shield Exclusion

a. No Rational Relationship

The rape shield exclusion is under-inclusive because it fails to apply to persons raped anywhere outside California State prisons and jails who may have a motive to lie. The law is also over-inclusive because the rape shield exclusion applies not only to sexually abused prisoners, but to sexually abused guards, visitors and attorneys as well, where any potential justification only applies to prisoners. There is no rational reason to think that a prison employee

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[281] *Fall 2012 Adult Population Projections*, *supra* note 95.

[282] *Compare* CAL. PENAL CODE § 264 (2012) (Rape; punishment. (a) Except as provided in subdivision (c), rape, as defined in Section 261 or 262, is punishable by imprisonment in the state prison for three, six, or eight years), *with* CAL. PENAL CODE § 289.6. ((3) An employee with . . . [California] Department of Corrections and Rehabilitation, who, during the course of his or her employment . . . engages in sexual activity with a consenting adult who is an inmate, ward, or parolee, is guilty of a public offense. . .

(d) As used in this section, "sexual activity" means:

(*1*) Sexual intercourse.

(*2*) Sodomy, as defined in subdivision (a) of Section *286*.

(*3*) Oral copulation, as defined in subdivision (a) of Section *288*a.

(*4*) Sexual penetration, as defined in subdivision (k) of Section *289*.

(*5*) The rubbing or touching of the breasts or sexual organs of another, or of oneself in the presence of and with knowledge of another, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of oneself or another. . .

(g) Any violation of paragraph (*1*) of subdivision (a), or a violation of paragraph (*2*) or (*3*) of subdivision (a) as described in paragraph (*5*) of subdivision (d), is a misdemeanor.

(h) Any violation of paragraph (*2*) or (*3*) of subdivision (a), as described in paragraph (*1*), (*2*), (*3*), or (*4*) of subdivision (d), shall be punished by imprisonment in a county jail not exceeding one year, or in the state prison, or by a fine of not more than ten thousand dollars ($*10,000*) or by both that fine and imprisonment.).

[283] It is likely not a legitimate purpose of the government to help a defendant avoid liability for crimes committed, unless in the context of a presidential pardon. See, e.g., Josh Clark, How Presidential Pardons Work, HOWSTUFFWORKS, *available at* http://people.howstuffworks.com/presidential-pardon.htm (explaining that the presidential pardon is a "unique power" "left solely to the discretion of the [P]resident" where she has the "unique ability to override the justice system.")

is any more likely to lie than any other state employee. The very inclusion of other groups, namely prison staff and visitors, undermines any rational basis for the exclusionary law. Therefore the exclusion is not rationally related to any of the above potential legitimate government rationales. There is no circumstance in which all the disparate excluded groups likely to be inside a carceral facility could be seen to rationally require exclusions from the rape shield.

For example, the *Los Angeles Times* articles documenting prison sexual abuse in the years leading up to the passage of the exclusionary rape shield amendment included both inmates and female staff alleging sexual abuse at the hands of prison staff.[284] It is difficult to imagine that female prison guards and staff are less trustworthy or deserving of justice than any other victims of sexual assault. Nor is it rational to assume that the sex lives of attorneys who are assaulted inside a prison are somehow more relevant than the sex lives of attorneys assaulted outside of prison walls. While preventing fraudulent claims of rape against prison guards may be a legitimate government interest, the rape shield exclusion amendment is too broad to be rationally related to that interest.[285] It therefore could be argued that the rape shield exclusion is so arbitrary that it does not support a broad classification that denies protection to all victims of sexual assault that occur in prisons.

1. *Policy Arguments*

There are also substantial policy arguments for why the rape shield exclusion is arbitrary and unreasonable. One problem with the rape shield exclusion is that it evades appellate review because it works to the sole benefit of the defendant. For example, if the rape shield exclusion is used to harass a complaining witness and prejudice a jury, and as a result the culpable defendant goes free, there is no recourse to appeal for the prosecution, so an appellate court would never be called upon to determine the constitutionality of the rule. This, of course, is the opposite of a rule that would be to the detriment of the defendant: a defendant who was convicted with an unconstitutional rule would have the opportunity to challenge the constitutionality of said rule upon appeal.

As Justice Jackson said in his concurrence in *Railway Express Agency, Inc.* v. *New York*, "The framers of the Constitution knew,

[284] That is not to say that only female staff persons are at risk for or experience sexual assault.

[285] *See* Romer v. Evans, 517 U.S. 620, 635 (1996) (rejecting freedom of association and other justifications for Colorado's Amendment 2, stating that the "breadth of the amendment is so far removed from these particular justifications that we find it impossible to credit them").

and we should not forget today, that there is no more effective guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally."[286] Here, a minority of our population—people sexually assaulted while in a California prison facility— are being discriminated against in a way that is unacceptable to the majority of our population, since every other United States jurisdiction has taken steps to ensure rape shield protection for all sexual assault victims.

2. *Analogous Case Law: Mason v. Granholm*

Mason v. *Granholm* is an Equal Protection case from the Sixth Circuit with some parallels to a potential challenge to the California exclusionary rape shield amendment.[287] In litigation leading up to *Mason*, female prisoners filed suit for sexual harassment and assault under Michigan's version of the Equal Protection clause, the Elliott-Larsen Civil Rights Act (ELCRA). The ELCRA bars gender-based discrimination in places of public service.[288] A Michigan appeals court upheld the suit under the theory that a prison is a place of public accommodation.[289] The Michigan legislature then enacted an amendment to ELCRA providing that "public service does not include a state or county correctional facility with respect to actions and decisions regarding an individual serving a sentence of imprisonment."[290] The government argued that the amendment was rationally related to a legitimate government interest in: "protecting the public fiscal, preventing windfall awards, reducing judicial intervention in the management of prisons, deterring frivolous lawsuits by prisoners and reducing trivial or inconsequential suits."[291]

However, when the amendment was challenged in federal court, a judge found that "[g]iven the state's abhorrent and well-documented history of sexual and other abuse of female prisoners, the court finds the amendment particularly troubling . . . the ELCRA amendment denies prisoners the basic protections against discrimination that all others are afforded. . . . Accordingly, the

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[286] Ry. Express Agency, Inc. v. N.Y., 336 U.S. 106, 112 (1949).

[287] *Mason v. Granholm*, No. 05-73943, 2007 U.S. Dist. LEXIS 4579, at *1 (E.D. Mich. Jan. 23, 2007).

[288] *Id*.

[289] *Id.* at *2 (citing Neal v. Dep't of Corrs., 592 N.W.2d 370, 373-76 (Mich. Ct. App. 1998) (on rehearing)).

[290] SINGER, *supra* note 99, at 95.

[291] Mason, No. 05-73943, 2007 U.S. Dist. LEXIS 4579, at *8.

court concludes that the ELCRA amendment violates prisoners' equal protection rights."[292]

As in *Mason*, here an existing statute was amended to specifically exclude those in carceral facilities, with the caveat that the ELCRA amendment only seems to apply to inmates rather than any person in prison. As in *Mason*, here the state has a long and troubled history of sexual abuse of its inmates. As in *Mason*, here prisoners are denied protection from discrimination because of the exclusionary rape shield. The court in *Mason* utilized the reasoning in *Romer* to strike down the ELCRA amendment, and a California court should do the same thing here with the rape shield exclusion.

b. Equal Protection Summary

There is no rational basis for denying persons sexually assaulted inside a carceral facility access to a rule deemed so important that every other state and the federal government make it available to every person in their jurisdiction.[293] As the *Romer* court explained, "[a] law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense."[294] Our hypothetical class of transgender female prisoners could file suit under the *Mason* theory, and the exclusionary rape shield amendment could potentially be stricken as unconstitutional even under deferential rational basis review.[295]

One potential concern with this approach is that the legislature, in order to mend the constitutionality of the rape shield exclusion, could choose to change the wording of the statue to exclude only prisoners, rather than any person in a carceral facility, on the theory that there could be a rational basis for excluding solely prisoners from rape shield protection. Once persons other than prisoners were removed from the law, the concern about inmate deceit could sway the court despite the known risk of rape to the plaintiff class. In that case, there are still strong arguments about prisoners' need for enhanced rape protection and the incoherence of statutes that proscribe prosecution for sexual assaults, which could support an Equal Protection claim.[296] However, rational basis review is very

[292] *Id.* at *11-13.

[293] *Rape Shield Statutes*, *supra* note 10.

[294] Romer v. Evans, 517 U.S. 620, 633 (1996).

[295] *See* Hadix v. Johnson, 230 F.3d 840, 843 (6th Cir. 2000) ("[R]ational basis review is not a rubber stamp of all legislative action, as discrimination that can only be viewed as arbitrary and irrational will violate the Equal Protection Clause").

[296] Sometimes courts will look with special disfavor upon rules that apply only to disenfranchised minorities. *See, e.g.*, Romer, 517 U.S. 620. Prisoners

deferential to the state: should plaintiffs lose their case, legislative lobbying may be the only recourse to remove the exclusion entirely.

3. *Policy Arguments: Legislative Options*

The strategy with perhaps the highest chance of success would be utilizing the arguments in this Comment to lobby the California legislature for repeal of the rape shield exclusion utilizing the California SADEA[297] and federal PREA.[298]

PREA enumerates strategies designed to protect inmates from staff sexual abuse as well as abuse by other inmates.[299] The legislation enjoyed strong bipartisan support and passed unanimously.[300] As enacted, PREA establishes a "zero tolerance" policy for rape in custodial settings.[301] While PREA does not create a private cause of action for prisoners,[302] it does create a system of incentives and disincentives for state correctional agencies and correctional accrediting organizations that fail to comply with its provisions.[303] As an incentive to comply, PREA provides grant assistance to states to implement practices that reduce, prevent, or eliminate prison rape.[304] States and accrediting organizations stand to lose 5% of all federal funds for criminal justice activities if they fail to implement or develop standards meeting the federal requirements.[305]

The California rape shield exclusion is incompatible with the spirit of PREA.[306] An argument could be made that the DOJ should withhold funding from California prisons until this exclusion is eliminated. However, since the rape shield law is not explicitly

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are normatively a disenfranchised minority. However, the Supreme Court has never found prisoners to be a minority requiring increased protections for purposes of Equal Protection Analysis.

[297] SADEA, *supra* note 22.

[298] PREA, *supra* note 21.

[299] *Id.*

[300] *Id.* at § 15601.

[301] *Id.* at § 15602(1).

[302] *Id.* at § 15602 (In its purpose section, it notes that one purpose of PREA is "to protect the 8th Amendment rights of prisoners."). *See also* Alexander v. Sandoval, 532 U.S. 275, 291 (2003) (holding that, in the absence of explicit authorization by Congress, no private right of action is created simply by statute).

[303] *Id. at* § 15605.

[304] *Id.*

[305] *Id.* at § 15607(c)(2). *See also*, Irin Carmon, *Rick Perry Refuses to Comply with Anti-Rape Law*, MSNBC, April 3, 2013 (stating that Texas' refusal to comply with PREA could result in a loss of an estimated $962,259, or 5% of Texas' federal grants from the Justice Department.)

[306] *Id.* at § 15602.

named as a requirement for meeting PREA standards, this is unlikely to occur.

SADEA[307] is a California statute enacted in response to the national PREA requirements.[308] SADEA mandates that prison officials attempt to reduce the amount of rape occurring inside state carceral facilities.[309] SADEA also requires that confirmed cases of sexual assault by prison staff be prosecuted.[310] It is inconsistent to have a statutory scheme that requires staff to be prosecuted for sexually assaulting prisoners, while simultaneously making it less likely that charges will be brought or that legitimate convictions will be achieved. This inconsistency could be leveraged to convince legislators to back a repeal of the exclusionary rape shield law.

Since California is the only United States jurisdiction that has such an exclusion, it is an extreme outlier, a fact that may also serve to convince the legislature. In short, while it may prove difficult to have the rape shield exclusion struck down through the courts, legislative reform or repeal is a viable option. Surely enough time has passed since its adoption that we can see that the exclusion does not work, but instead harms some of our most vulnerable populations; it should be repealed.

Conclusion

This Comment concludes that the California rape shield law should be amended to drop the explicit exclusion of victims in state carceral facilities, especially because it disproportionately burdens vulnerable populations. Rape shield laws can lead to an increase in substantiated rape claims and convictions. California is home to 38 million people and sees tens of millions more domestic and international visitors. Everyone who lives in or visits California has the potential to be affected by the exclusionary rape shield. An interstate visitor who is mistakenly arrested and detained for only hours could be the victim of sexual assault in jail, and by bringing a complaint against her attacker, that visitor may run the risk of having her sexual history placed on trial. The rape shield exclusion is not just a California problem, but one that potentially affects anyone who travels here. Moreover, California is often a leader in national

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[307] SADEA, Cal. Penal Code §§ 2635-2643 (2012).

[308] *Id.*

[309] Cal. Penal Code § 2636(a)(1)-(4) (2008). *See also* Alexander Lara, Comment, *Forced Integration of Gay, Bisexual and Transgendered Inmates in California State Prisons: From Protected Minority to Exposed Victims*, 19 S. Cal. Interdis. L.J. 589, 606 (2010).

[310] *See* SADEA, *supra* note 22.

policymaking. Given California's example, other states could adopt exclusionary rape shield laws of their own.

While laws are not always easy to change, there are two potential routes available, including legislative lobbying and a constitutional challenge. Eliminating the rape shield exclusion would lead to more legitimate claims and convictions for sexual abuse and rape, deterring those who would rape in carceral facilities. This would comport with the stated intent of both PREA and SADEA, the elimination of rape in United States prisons.