WOMEN'S DIGNITY, WOMEN'S PRISONS: COMBATTING SEXUAL ABUSE IN AMERICA'S PRISONS

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ABSTRACT

Staff sexual abuse is rampant throughout the American prison system. This is true despite a federal law—the aspirationally titled Prison Rape Elimination Act ("PREA")—that has been in place for 20 years and despite the rare conviction of prison officials who are found guilty of rape or sexual abuse of people who are incarcerated. Sexual contact between prison staff and incarcerated people is by definition illegal because the power imbalance between people in custody and those who are under their control makes consent impossible as a matter of law. Staff-on-prisoner sexual abuse takes many forms, including sexual humiliation, sexually degrading language and threats, and various forms of rape. The harm of sexual violence in prison is commonly compounded by violations of privacy and by retaliation against those who speak out. To better understand the pervasiveness and profound harms of staff-on-prisoner sexual abuse, this article—co-written by two survivors who were also jailhouse lawyers—examines the harms and demonstrates the inadequacy of the current legal regime to protect women who are incarcerated. It then proposes that understanding prison sexual abuse as a violation of women's inherent human dignity and applying the law of dignity rights to cases of staff-on-prisoner sexual abuse would better protect women who are vulnerable to abuse inside and help to end the culture of sexual abuse that pervades American prisons and jails.

I. INTRODUCTION

Staff-perpetrated sexual abuse is rampant throughout the American prison system. This is true despite a federal law—the aspirationally titled Prison Rape Elimination Act ("PREA")[1]—that has been in place for 20 years; it's true despite the rare conviction of prison officials who are found guilty of rape or sexual abuse of people who are incarcerated; and it's true despite Congress's feeble attempts to address it. It's true because sexual violence is about power and violence—the two traits that characterize the American prison system.

Sexual abuse takes many forms, including sexual humiliation (such as unjustified strip searches and voyeurism), sexually degrading lan-

[1] The Prison Rape Elimination Act was originally codified in 2003 as 42 U.S.C. §§ 15601-09. It has since been editorially reclassified as 34 U.S.C. §§ 30301-09.

guage and threats, and various forms of rape. The harm of sexual violence in prison is commonly compounded by violations of privacy (including disclosures of private information) and retaliation against those who speak out. In any form, all sexual contact between incarcerated people and prison officials is coerced and therefore illegal; people in custody cannot legally consent to sexual contact with the people on whom they depend for their very survival.[2] Thus, sexual abuse is more about power and violence than about sex. Sex is simply the mechanism by which officials assert power against those most vulnerable.

The reasons for the systemic failure to address sexual violence in prison are varied, ranging from dramatic underreporting to high burdens of proof in court and qualified or absolute immunities of putative defendants. This article seeks to provide a new way of thinking about the problems of sexual violence in prisons and jails in the United States. First, through the personal experiences of two of its authors and nationally reported data, it demonstrates how profoundly hurtful and widespread the problem is. Second, it shows that current legal responses are wholly inadequate. Third, it argues that understanding the problem of sexual violence as an injury to the inherent and equal dignity of every person may suggest a way of providing legal redress for those who are harmed and of reducing, and ultimately eliminating, the culture of sexual violence. Now, more than ever, it is crucial to vocally challenge the intrinsic futility of existing systems to protect and uphold the rights of incarcerated individuals, and the narrow recourse available to people in confinement must be expanded to include new and meaningful levers of justice. Dignity rights law is that lever.[3]

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[2] U.S. DEP'T OF JUST. OFF. OF THE INSPECTOR GEN., THE DEPARTMENT OF JUSTICE'S EFFORTS TO PREVENT STAFF SEXUAL ABUSE OF FEDERAL INMATES i (2009) [hereinafter 2009 OIG REPORT] (citing 18 U.S.C. §§ 2241-45) ("Under the federal criminal code, consent by a prisoner is never a legal defense because of the inherently unequal positions of prisoners and correctional and law enforcement staff who control many aspects of prisoners' lives."); STAFF OF S. PERMANENT SUBCOMM. ON INVESTIGATIONS, 117TH CONG., REP. ON SEXUAL ABUSE OF FEMALE INMATES IN FEDERAL PRISONS 7 (Subcomm. Print 2022) [hereinafter PSI REPORT] ("BOP staff sexual relations with inmates is always illegal as there is no 'consent' defense to a violation of 18 U.S.C. § 2243(b).").

[3] A note about the scope of this article: We consider sexual contact in state and federal women's prisons and jails. We address sexual contact between officials (of any rank or level of authority) and women who are incarcerated, not sexual contact *among* women who are incarcerated. The fact that this article does not address sexual violence against men or individuals incarcerated in men's prisons is a function of the article's scope, not an indication that such sexual violence is not equally important.

II. SEXUAL VIOLENCE IN PRISONS IS A PERVASIVE PROBLEM AND A PROFOUND VIOLATION OF THE DIGNITY OF WOMEN WHO ARE INCARCERATED.

A. *Staff sexual abuse of women incarcerated in U.S. prisons and jails is a nationally pervasive problem.*

By definition, sexual contact between prison officials and women who are incarcerated is sexual abuse; the power imbalance between women who are under official supervision and the people who supervise them compromises the validity of any consent, making consent to sexual activity legally impossible and usually factually indefensible. People do not have the legal capacity to consent to sex with people who otherwise control them.[4] Under these circumstances, any sexual contact between staff and incarcerated people is sexual abuse, and we use these terms interchangeably in this article.

Sexual abuse includes not only the systematic, forcible, or statutory rape of people who are incarcerated, but also other forms of power, violence, and threat of violence that take sexual form. This includes any sexual contact (and attempted sexual contact), physical contact with the intent to abuse or arouse or sexually gratify, and voyeurism. It also includes verbal conduct, such as threats of or "requests" for sexual contact, and sexual harassment.[5] It can also include more organized forms of sexual abuse including forced prostitution.

Among the most common forms of sexual abuse is the rampant misuse of strip searches. While on occasion these "visual searches" may be permissible under policy, where they may be justified, they can always be conducted in ways that minimize humiliation and opportunities for voyeurism. In no event are they permissible for the purpose of intimidating or humiliating incarcerated individuals into "compliance," and in no event should they be conducted without protection of the dignity of those involved.

Sexual abuse on the inside is often accompanied by threats and retaliation, just as it is on the outside. The difference is that retaliation may be far more traumatic and consequential than it is for people who

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[4] 2009 OIG REPORT, *supra* note 2, at i (citing 18 U.S.C. §§ 2241-45).

[5] National Standards to Prevent, Detect, and Respond to Prison Rape Under the Prison Rape Elimination Act (PREA), 28 C.F.R. § 115.6. "Sexual harassment" takes several forms, such as "[r]epeated and unwelcome advances, requests for sexual favors, or verbal comments, gestures, or actions of a derogatory or offensive sexual nature by one inmate, detainee, or resident directed toward another," and "[r]epeated verbal comments or gestures of a sexual nature to an inmate, detainee, or resident by a staff member, contractor, or volunteer, including demeaning references to gender, sexually suggestive or derogatory comments about body or clothing, or obscene language or gestures." *Id.*

are abused outside of prison because staff abusers in the prison context are commonly imbued with powers to exert control over all aspects of their victims' lives. Whereas even some (although certainly not all) victims of child abuse have recourse to teachers or other sources of aid outside of the home, incarcerated individuals frequently lack any reprieve from the site of their victimization or means to appeal for help outside of prison walls. Incarcerated victims who dare to report staff sexual abuse have been less likely to receive legal relief and far more likely to suffer further abuse, unjustified security classification increases with attendant losses of privileges, solitary confinement, inter-facility transfers, and other adverse action.[6]

1. The Unfulfilled Promise of the Prison Rape Elimination Act ("PREA")

There is no way to know exactly how common sexual abuse is in prisons. It is chronically underreported and under-investigated, although some reports indicate its pervasiveness.[7] The problem is significant enough that in 2003, Congress adopted PREA to address it.

PREA is further discussed in Part II. It is introduced here simply to demonstrate that it has not fulfilled its promise and may contribute to worsening levels of staff-on-prisoner sexual abuse. In fact, available evidence suggests that the problem has escalated rather than declined since the enactment of PREA in 2003. In compliance with the requirements of PREA, the Bureau of Justice Statistics in the Department of Justice ("DOJ") conducted a Survey of Sexual Victimization in Adult Correctional Facilities. The survey showed a 152% increase in alleged staff sexual misconduct (not including sexual harassment) reported by federal and state prison authorities from 2012 to 2018.[8] It also reflected a 186% increase in alleged staff sexual misconduct (not including sexual harassment) reported by authorities in large local jail jurisdictions from 2012 to 2018.[9] These alleged incidents of staff sexual misconduct were reported by facilities nationwide but reflect only those alleged PREA vi-

[6] *See, e.g.*, DOROTHY Q. THOMAS ET AL., HUM. RTS. WATCH, ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS (1996). *See also* Lisa Fernandez, *Retaliation Is Real, FCI Dublin Prison Psychologist Testifies at Warden Sex Trial*, KTVU FOX 2 (Nov. 30, 2022), https://perma.cc/4XGQ-HH2L.

[7] *See generally* 2009 OIG REPORT, *supra* note 2; PSI REPORT, *supra* note 2.

[8] LAURA M. MARUSCHAK & EMILY D. BUEHLER, U.S. DEP'T OF JUST. BUREAU OF JUST. STAT., SURVEY OF SEXUAL VICTIMIZATION IN ADULT CORRECTIONAL FACILITIES, 2012-2018 – STATISTICAL TABLES 8, 20 (2021).

[9] *Id.* at 26, 56.

olations that are formally documented and acknowledged by prison and jail officials[10] in a regime that incentivizes underreporting.[11]

Because it is based on self-reporting, the data is unreliable and surely undercounts the problem. Moreover, according to a recent Senate report, DOJ's Bureau of Prisons fails to systematically analyze the PREA complaint data it has, and its reporting of that data "is Confusing, Omits Relevant Information, and Obscures BOP's Internal Affairs Case Backlog."[12] The national prison rape statistics, data, and research produced by DOJ's Bureau of Justice Statistics pursuant to PREA[13] are discredited by their reliance on data reported by prison administrators with a known history of failing to report PREA complaints. The findings of the Bureau of Justice Statistics' direct PREA surveys of presently[14] and formerly[15] incarcerated individuals are also suspect given the widespread distrust of government agencies by directly impacted individuals. The distrust is deepened by the failures of DOJ and carceral agencies to protect confidentiality guaranteed by PREA and to otherwise comply with or enforce the statute.[16]

Furthermore, there are widespread failures of implementation across jurisdictions and authorities. In 2009, the DOJ Office of the Inspector General ("OIG") found that there was "[n]o [o]versight" of sexual abuse programs in federal prisons, determining that the "three levels of oversight" required by PREA (triennial reviews by the Program Review Division, facility operational reviews "at least annually," and wardens' "after-action reviews following allegations or incidents of sexual

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[10] *Id.* at 4 (noting that "[t]he survey is based on official administrative records of correctional systems" of several types: "all federal and state prisons, all facilities operated by the U.S. military and U.S. Immigration and Customs Enforcement . . . , and a representative sample of local jails, jails in Indian country, and privately operated jails and prisons").

[11] *See, e.g.*, U.S. DEP'T OF JUST. C.R. DIV. & U.S. ATT'Y'S OFF. DIST. OF N.J., INVESTIGATION OF THE EDNA MAHAN CORRECTIONAL FACILITY FOR WOMEN (UNION TOWNSHIP, NEW JERSEY) 8-11 (2020) [hereinafter EMCF INVESTIGATION].

[12] PSI REPORT, *supra* note 2, at 21-22.

[13] *See* 34 U.S.C. § 30303(a)(1).

[14] *National Inmate Survey (NIS)*, U.S. DEP'T OF JUST. BUREAU OF JUST. STAT., https://perma.cc/7LBM-HYZH (last visited June 25, 2023); *National Survey of Youth in Custody (NSYC)*, U.S. DEP'T OF JUST. BUREAU OF JUST. STAT., https://perma.cc/6A28-DSUY (last visited June 25, 2023).

[15] *Sexual Victimization in Correctional Facilities (PREA)*, U.S. DEP'T OF JUST. BUREAU OF JUST. STAT., https://perma.cc/7F6G-6HZ2 (last visited June 25, 2023).

[16] Congressional correspondence to the Department of Justice stated that when then-Dublin warden Ray Hinkle improperly disclosed the identities of Dublin officials who reported misconduct "in a mass email to all staff," it had "a very chilling effect upon FCI staff and inmates who want[ed] to speak out but [were] afraid of retaliation." Letter from Jackie Speier et al., Congressional Members, to Michael E. Horowitz, Inspector Gen., Dep't of Just. (Mar. 3, 2022) [hereinafter Speier Letter] (on file with CUNY Law Review).

assault") had "not been applied to the [BOP] sexual abuse program."[17] OIG recommended corrective actions, most of which the BOP agreed to implement by the beginning of 2010.[18] Nonetheless, in March of 2022, members of Congress notified Inspector General Michael Horowitz of their discovery that since 2017, California's Federal Correctional Institution, Dublin ("FCI Dublin") had failed to complete the annual reviews required by PREA.[19] There was evidently no objection by either BOP or DOJ about this approximately five-year failure of FCI Dublin to complete PREA-required annual audits.[20]

The 2009 OIG report also found that "[i]n the [six] years since the passage of the *Prison Rape Elimination Act*," the United States Marshals Service ("USMS") had not implemented "a program for preventing, detecting, investigating, and addressing staff sexual abuse in its cellblock and transportation operations."[21] The USMS concurred with OIG's recommendation that it "develop and implement standard procedures for responding to, reporting, and investigating allegations of staff sexual abuse . . . during transportation" of people incarcerated in federal prisons, and it agreed to implement this corrective action by January 1, 2010.[22] As the USMS is responsible not only for safe transit but also for safe housing of federally incarcerated people in some circumstances, this demonstrates the breadth of PREA non-compliance experienced by federally incarcerated people at all stages of their incarceration.

PREA non-compliance is often hidden from view both because of underreporting of sexual abuse by victims and staff alike, and because of the dysfunctional PREA auditing system.[23] If prison facilities participate in PREA-required audits at all, such audits rely on (1) the accuracy of data reported by prison officials who are incentivized and known to underreport and (2) prison facilities' compliant and forthcoming participation in a review process that BOP has been found to brazenly flout. Perhaps the greatest blind spot in PREA assessments is widespread nonreporting by both incarcerated individuals and officials caused by fear of retaliation and other factors. That incarcerated people and prison officials avoid reporting staff sexual abuse due to their fear of reprisals is well established.[24] Incarcerated people do not report the abuse they ex-

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[17] 2009 OIG REPORT, *supra* note 2, at 46.

[18] *Id*. at 95-100.

[19] Speier Letter, *supra* note 16.

[20] *Id.*

[21] 2009 OIG REPORT, *supra* note 2, at vi.

[22] *Id.* at 112.

[23] These matters will be discussed in further detail throughout this article.

[24] *E.g.*, EMCF INVESTIGATION, *supra* note 11, at 8-11. *See also* Speier Letter, *supra* note 16.

perience because of fear of retaliation, and perhaps for all the reasons that people on the outside underreport sexual crimes. Prison administrators who are charged with reporting their data to the government underreport for internal reasons having to do with professional culture and perhaps fear of exposure to legal liability, increased scrutiny from agency overseers, or adverse professional consequences. What is unknown is the magnitude of these unreported cases, which are invisible in PREA data and almost entirely unacknowledged in the recent report of the Senate Permanent Subcommittee on Investigations ("the Subcommittee").[25]

The situation is no better at the state level. The U.S. Department of Justice found that "40 states had not complied with PREA standards as of 2016," and this non-compliance resulted only in "token financial penalties that [did] little to ensure future compliance."[26] This is corroborated by independent studies. In a 1996 report, Human Rights Watch found that

> [s]tates' failure to uphold their own laws regarding custodial sexual misconduct reflects their reluctance to prosecute such crimes, largely because of an ingrained belief, except in the most egregious cases, that the prisoner was complicit in the sexual abuse committed against her. In this sense, state officials still widely view criminal sexual misconduct as a victimless crime.[27]

Human Rights Watch noted that when states "fail to do so, the [DOJ] has the power to prosecute correctional officials who violate federal civil rights statu[t]es."[28] However, "[t]hese prosecutions are difficult, in part due to stringent intent requirements, and are quite rare."[29] Human Rights Watch also found that "prison administrators fail to deal appropriately with cases that are returned to them because the allegations do not meet prosecution standards," which means that there is often not even administrative accountability for prison officials who perpetrate criminal sexual misconduct.[30] There is no basis for believing that the situation has improved since the Human Rights Watch report.

According to a 2021 report by the Associated Press, "[t]wo-thirds of the criminal cases against Justice Department personnel in recent years have involved federal prison workers" even though they "account

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[25] *See generally* PSI REPORT, *supra* note 2.

[26] Derek Gilna, *Five Years After Implementation, PREA Standards Remain Inadequate*, PRISON LEGAL NEWS (Nov. 8, 2017), https://perma.cc/9DZG-B8PY.

[27] THOMAS ET AL., *supra* note 6 at 4.

[28] *Id.* at 8.

[29] *Id.*

[30] *Id.* at 6.

for less than one-third of the department's workforce."[31] Indeed, the Associated Press characterized the BOP within DOJ as a "hotbed of abuse, graft and corruption" that "turn[s] a blind eye to employees accused of misconduct" and has, in some cases, "failed to suspend officers who themselves had been arrested for crimes."[32]

Still, since 2019, "[m]ore than 100 federal prison workers have been arrested, convicted or sentenced for crimes," including the sexual abuse of incarcerated women.[33] While "[o]ne-fifth of the BOP cases tracked by the [Associated Press] involved crimes of a sexual nature,"[34] BOP officials have also recently been charged with smuggling weapons, including a loaded gun, into BOP facilities.[35]

Even the small fraction of BOP staff sexual misconduct cases that DOJ pursues frequently do not hold staff sexual abusers accountable. DOJ OIG declined to investigate self-admitted acts of staff sexual abuse by six officers at one federal prison, several of whom were permitted to retire with benefits.[36]

Examples of convictions for sexual abuse are rare and newsworthy. In 2022, Ray J. Garcia, the former warden of BOP's FCI Dublin in California, was convicted of three counts of having sexual contact with an incarcerated person, four counts of abusive sexual contact, and one count of lying to the FBI.[37] In March 2023, Garcia was sentenced to serve 70 months in prison.[38] The DOJ has referred to the Garcia conviction as an indication that PREA is effectively enforced,[39] but only days after the verdict, the Senate Subcommittee issued a scathing report that

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[31] Michael Balsamo & Michael R. Sisak, *Workers at Federal Prisons Are Committing Some of the Crimes*, ASSOCIATED PRESS (Nov. 14, 2021), https://perma.cc/4J9A-5BT3.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] Casey Bastian, *Four BOP Employees, Eight Prisoners Indicted in Widening NYC Federal Jail Smuggling Scandal*, PRISON LEGAL NEWS (May 16, 2022), https://perma.cc/Z735-SPXW.

[36] *See* PSI REPORT, *supra* note 2, at 3, 15.

[37] Ramon Antonio Vargas, *Former California Prison Warden Convicted on Sexual Abuse Charges*, GUARDIAN (Dec. 8, 2022, 7:29 PM), https://perma.cc/U5CC-99TA.

[38] *Former Warden of Dublin Women's Prison Sentenced in Sex Abuse Scandal*, CBS BAY AREA, https://perma.cc/D7EF-G5YR (Mar. 22, 2022, 6:57 PM).

[39] *See* Press Release, U.S. Dep't of Just. Off. of Pub. Affs., Jury Convicts Former Federal Prison Warden for Sexual Abuse of Three Female Inmates (Dec. 8, 2022), https://perma.cc/R9M6-7JK6 [hereinafter Dec. 2022 Press Release] ("As this verdict illustrates, the Department of Justice is committed to prosecuting cases of criminal misconduct by Bureau employees and to holding accountable all who violate their duty to protect those in their custody."). *See also* Press Release, U.S. Dep't of Just. Off. of Pub. Affs., Former Federal Prison Warden Sentenced for Sexual Abuse of Three Female Inmates (Mar. 22, 2023), https://perma.cc/VH2B-3ACQ ("The sentence he received today is another step forward in our ongoing efforts to root out sexual misconduct within the BOP.").

articulated serious and widespread BOP and DOJ OIG failures to implement or enforce PREA.[40]

Still, the Senate report failed to accept any congressional responsibility to strengthen PREA national standards or fortify oversight of the statute's implementation. It also declined to issue specific recommendations for substantive BOP or OIG reforms, signal new legislation to expand OIG's insufficient enforcement capacity, or specify mechanisms to bolster congressional oversight of unanimously passed PREA legislation that is clearly being widely disregarded.[41]

Although high-profile cases like Garcia's focus attention on staff sexual abuse in BOP, such abuse of incarcerated people, and especially incarcerated women,[42] remains a national problem.

2. The Closure of Edna Mahan Correctional Facility for Women "(EMCF")

In 2021, New Jersey Governor Phil Murphy announced his intention to close the New Jersey Department of Corrections' Edna Mahan Correctional Facility for Women ("EMCF") following DOJ and independent reports of widespread staff sexual abuse of women incarcerated there,[43] which is but another indication of a nationwide problem. This followed a 2020 DOJ notice stating that it had "reasonable cause to believe that New Jersey fails to keep women prisoners at Edna Mahan reasonably safe from staff sexual abuse,"[44] and it released a report that set forth findings of widespread staff sexual abuse at EMCF.[45] The report notes:

> Long-standing problems with staff sexual abuse at Edna Mahan have been documented for decades. Despite being on notice of this sexual abuse, [the New Jersey Department of Corrections

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[40] *See* PSI REPORT, *supra* note 2, at 19-30.

[41] *See id.*

[42] *See* U.S. COMM'N ON HUM. RTS., WOMEN IN PRISON: SEEKING JUSTICE BEHIND BARS 3-5 (2020); Nancy Wolff et al., *Patterns of Victimization Among Male and Female Inmates: Evidence of an Enduring Legacy*, 24 VIOLENCE & VICTIMS 469 (2009).

[43] *Governor Murphy Announces Intention to Close the Edna Mahan Correctional Facility for Women*, STATE OF N.J. (June 7, 2021), https://perma.cc/DVT9-7GRQ [hereinafter *Murphy Announcement*].

[44] Letter from Eric S. Dreiband, Assistant Att'y Gen., U.S. Dep't of Just. C.R. Div., & Craig Carpenito, U.S. Att'y, Dist. of N.J., to Phil Murphy, N.J. Governor (Apr. 13, 2020), https://perma.cc/AXQ7-BVGS; *see also* Press Release, U.S. Dep't of Just. Off. of Pub. Affs., Justice Department Alleges Conditions at Edna Mahan Correctional Facility for Women Violate the Constitution (Apr. 13, 2020), https://perma.cc/J557-WWL9.

[45] EMCF INVESTIGATION, *supra* note 11, at 5-8. These findings were the result of a joint investigation that was initiated by the Civil Rights Division of the Department of Justice and the U.S. Attorney's Office for the District of New Jersey in April 2018. *Id.* at 2.

> ("NJDOC")] and Edna Mahan failed to take timely action to remedy the systemic problems that enabled correction officers and other staff to continue to sexually abuse Edna Mahan prisoners.[46]

Additionally, the report states that "a 'culture of acceptance' of sexual abuse has persisted for many years and continues to the present."[47] It found that "systems in place at Edna Mahan discourage prisoners from reporting sexual abuse and allow sexual abuse to occur undetected and undeterred,"[48] and that women incarcerated at EMCF are "Reluctant to Report Sexual Abuse Due to Valid Fear of Retaliation."[49] The report continued, "[D]espite being aware of both ongoing instances of sexual abuse and sexual harassment and the means to report, correction officers did not report sexual abuse or sexual harassment being committed by other custody staff."[50] The report recounted investigative interviews with "dozens of current and former prisoners, staff, investigators, administrators, and third[]parties who credibly described many other incidents of staff-on-prisoner sexual abuse," in which individuals conveyed, among other things:

> [D]espite rules to the contrary, some male correction officers make efforts to watch prisoners as they shower, undress, or use restrooms. Many report that some correction officers inappropriately grope, and sometimes expose, prisoners' breasts and genitals during searches. Similarly, numerous prisoners report that, during unnecessarily close contact with male correction officers, some correction officers "rub" or "press themselves"—that is, their clothed genitals—against prisoners. Others report being strip searched with several other women at the same time or while male correction officers watched. In one instance, a prisoner reported that a male officer watched as she inserted a tampon.[51]

The DOJ report also stated that facility officers "routinely" referred to incarcerated women in derogatory terms and "graphically comment[ed] on [their] physical appearance or remark[ed] about their perceived sexual inclinations and histories."[52]

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[46] *Id.* at 1.
[47] *Id.* at. 5.
[48] *Id.* at 1.
[49] *Id*. at 8.
[50] *Id.* at 26.
[51] *Id.* at 7.
[52] *Id.*

As of April 2020, there had been "over 70 investigations of staff-on-prisoner allegations."[53] In fact, "[f]rom October 2016 to November 2019, five Edna Mahan correction officers and one civilian employee were convicted or pled guilty to charges related to sexual abuse of more than [ten] women under their watch."[54] It was determined that Special Investigations Division ("SID") investigations were "inadequate."[55] The report concluded that "Investigators Lack[ed] the Independence Necessary to Conduct Unbiased Investigations" and that "[i]f Edna Mahan investigators continue[d] to investigate staff with whom they ha[d] personal relationships, Edna Mahan investigations [would] likely . . . continue to be tainted."[56] DOJ found that "NJDOC and Edna Mahan Failed to Remedy Systemic Deficiencies that Enable Sexual Abuse of Prisoners to Persist" and concluded that "[i]f NJDOC and Edna Mahan [did] not effectively address the systemic deficiencies that led to the criminal sexual abuse revealed by the staff indictments, practices [would] continue at Edna Mahan that [would] likely result in continued sexual abuse of the women incarcerated there."[57]

To the credit of the DOJ Civil Rights Division and the U.S. Attorney's Office for the District of New Jersey, which investigated NJDOC and EMCF pursuant to the Civil Rights of Institutionalized Persons Act ("CRIPA"),[58] rather than limiting their actions to the publication of a report and the prosecution of individual officers who perpetrated staff sexual abuse, they also entered into a consent decree with New Jersey to "Resolve Claims that Edna Mahan Correctional Facility for Women Violated [the] Constitution by Failing to Protect Prisoners from Sexual Abuse by Staff."[59] This is an enforcement mechanism that could be advantageously used in PREA enforcements by DOJ OIG, the office charged with enforcing PREA, and by state attorneys who prosecute other cases of staff sexual abuse.

However, less than a year after DOJ's spotlight on EMCF, another incident involving forcible removal and sexual abuse of women incarcerated at EMCF occurred, with the result that "approximately 30 [EMCF] correctional officers and supervisors . . . [were] put on adminis-

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[53] *Id.* at 5-6.

[54] *Id.* at 1.

[55] *Id.* at 12.

[56] *Id.* at 15-16.

[57] *Id.* at 24, 27.

[58] 42 U.S.C. §§ 1997-1997j.

[59] Press Release, U.S. Att'y's Off., Dist. of N.J., Justice Department Reaches Proposed Consent Decree with New Jersey to Resolve Claims That Edna Mahan Correctional Facility for Women Violated Constitution by Failing to Protect Prisoners from Sexual Abuse by Staff (Aug. 10, 2021), https://perma.cc/CQV6-JLAC.

trative leave, and a criminal investigation" began.[60] Shortly afterward, Governor Murphy announced his intention to close EMCF,[61] but as of this writing, more than two years after this announcement, he has still provided no definitive timeline for the completion of this action.[62]

3. Systemic Factors Exacerbating Systemic Sexual Abuse in Prisons

There are several factors at play that make the reduction or elimination of prison sexual abuse less likely. One is the culture of sexual abuse that reinforces its acceptability among those who practice it—the people who have the legal and moral responsibility to protect the very women on whom they prey. The more staff sexual abuse occurs and the more openly it occurs, the more people are involved in perpetrating it and protecting the perpetrators, and the circle of those invested in covering it up expands. Those who breach even minor provisions of policy are at risk of disciplinary action for their infractions, such that any reporting of their colleagues' malfeasance could result in revelations about their own. This mutually assured destruction engenders a code of silence that enables staff sexual abuse to persist and escalate.

Tied to this is the practice of retaliation against the victims who dare to speak out. In her Senate testimony on December 13, 2022 about her experiences as a victim of BOP staff sexual abuse, Linda De La Rosa stated that when she reported the staff sexual abuse she experienced at BOP's Federal Medical Center in Lexington, Kentucky ("FMC Lexington"), she suffered retaliation in the form of property loss and an unjustified facility transfer.[63] When De La Rosa returned to FMC Lexington, she discovered that "all of [her] belongings were missing . . . . There were photos and letters from [her] son and daugh-

[60] LOWENSTEIN SANDLER, REPORT OF INVESTIGATION: JANUARY 11, 2021 CELL EXTRACTIONS AT THE EDNA MAHAN CORRECTIONAL FACILITY FOR WOMEN 1 (2021).

[61] *Murphy Announcement*, *supra* note 43.

[62] *See, e.g.*, Joey Fox, *Murphy Recommits to Closing Edna Mahan, But Doesn't Provide Timeline*, N.J. GLOBE (Sept. 28, 2022), https://perma.cc/4HMU-KZD2; Sophie Nieto-Munoz, *Governor Murphy Wants $90M to Replace Scandal-Plagued Women's Prison*, N.J. MONITOR (Mar. 3, 2023), https://perma.cc/SRD2-M356. On July 17, 2023, Murphy "said he expects to shut [EMCF] down before he leaves office in January 2026," but "25 months have passed since [the] [g]overnor announced plans to shut down" the facility. David Wildstein, *Murphy Says Troubled Women's Prison Will Close Before He Leaves Office*, N.J. GLOBE (July 17, 2023, 11:54 PM), https://perma.cc/3NSX-5KDD.

[63] Cheyanne M. Daniels, *Sexual Abuse Rampant in Federal Prisons, Bipartisan Investigation Finds*, THE HILL (Dec. 13, 2022, 1:07 PM), https://thehill.com/homenews/house/3773579-sexual-abuse-rampant-in-federal-prisons-bipartisan-investigation-finds/ (on file with CUNY Law Review).

ter's father, both of whom had passed. They can never be replaced."[64] Her "attacker continued to access her personal history files, recordings of her telephone calls and personal emails, all of which he then used as additional leverage to extract sexual favors and threaten her safety."[65] This story is not uncommon; as described below, the efforts of Kelly Harnett and Jane Doe to find justice were also met with extreme retaliatory responses.

B. Two Personal Stories

Two of the authors of this article have experienced sexual abuse while incarcerated in state (Harnett) and federal (Doe) facilities. Like an estimated 86% of women who are incarcerated in the United States, they had both experienced sexual abuse prior to their incarceration.[66]

1. Kelly Harnett[67]

Kelly Harnett endured sexual abuse by a staff member during her incarceration at the New York Department of Corrections and Community Supervision's Bedford Hills Correctional Facility ("Bedford Hills"). For Harnett, as for many women, sexual violence was a precursor to her incarceration, and incarceration in turn subjected her to more sexual violence. In Harnett's case, her involvement in the criminal legal system was directly related to her status as a victim of intimate partner violence. She was convicted of second-degree murder under the "acting in concert" theory for a homicide that her batterer committed in her presence as she looked on in horror and fear for own safety. Her sentence was longer than that of her abuser, who had actually committed the murder.

Harnett survived this injustice, and so many others that she encountered inside, by familiarizing herself with the law in the prison law library and serving as a jailhouse lawyer for other incarcerated women. The law library became Harnett's sanctuary, and she was eventually employed as the law library clerk. While serving in that role, she immersed herself in the legal literature and compiled a template for women to use when exercising their rights under the Domestic Violence Survivors Justice Act "(DVSJA"). Harnett later contributed substantively to

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[64] *Id.*

[65] *Id.*

[66] A 2016 report by the Vera Institute of Justice found that 86% of incarcerated women reported experiencing sexual violence prior to their imprisonment. ELIZABETH SWAVOLA ET AL., VERA INST. OF JUST., OVERLOOKED: WOMEN AND JAILS IN AN ERA OF REFORM 11 (2016), https://perma.cc/2W6L-3E8V.

[67] This section recounts the experiences of Harnett and Doe respectively. The accounts are written in the third person for ease of comprehension.

the pleadings that resulted in her own resentencing to time served on a lesser charge under the statute.

Harnett's job in the law library protected her dignity by giving her meaningful work and affording her opportunities to develop her legal skills. Moreover, the meager wages she earned from this work supplied her with the only financial resources she had. Harnett's intrinsic vulnerability as an incarcerated person was compounded by her psychological and economic need to maintain her employment in the law library. These vulnerabilities were exploited when she was sexually abused by an official and again when she suffered retaliation for reporting the abuse. Bedford Hills officials stopped delivering Harnett's legal mail to her, or delivered it to her unsealed, having opened it outside of her presence in violation of applicable policy.[68] She was removed from her job, and then not allowed to return to it.[69] When Harnett alleged retaliation for reporting PREA violations, her allegations were ignored.[70]

Harnett believes the retaliation she experienced for reporting staff sexual abuse sent a message to all women in the facility not to report if they wanted to keep their job or their housing assignment. Harnett subsequently advised incarcerated women not to report and told them that they risked having everything they valued taken from them if they tried to exercise their rights under PREA.

2. Jane Doe

Jane Doe was incarcerated in federal facilities from 2010 until 2015. She served time at FCI Dublin from 2010 until 2012. After she reported her sexual abuse by a Dublin official, she served time in other facilities, either operated privately or by BOP, and in the custody of the USMS.

When Doe arrived at FCI Dublin in 2010 as a low-security prisoner serving time on her first conviction for a non-violent charge, she was designated to Dublin's satellite camp, where she served as the clerk to the Camp's Unit Team Staff—namely, the counselors, case managers, and a unit manager who oversaw the release preparations and daily life activities of the approximately 300 women serving time there.

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[68] N.Y. COMP. CODES R. & REGS. tit. 7, § 721.3(b)(1) (2011).

[69] She had been told that library clerks must be removed from their positions for one year after 36 months of employment, but she was not allowed to return after the year hiatus.

[70] For New York State Corrections and Community Supervision PREA policy, which prohibits adverse action in retaliation for PREA reporting, see N.Y. STATE DEP'T OF CORRS. & CMTY. SUPERVISION, DIRECTIVE NO. 4027, SEXUAL VICTIMIZATION PREVENTION & RESPONSE I (2022).

During Doe's time at Dublin, she reported that she was repeatedly sexually abused by a Dublin official and subsequently experienced retaliation for reporting by her alleged abuser and other staff who seemed to be acting at that official's behest. Doe would be summoned to the alleged abuser's office when that official was alone on duty. This Dublin official would then order Doe to undress for her in her office. Sometimes she was alone when such demands were made, and on other occasions she was flanked by other Dublin officials or other incarcerated individuals. Doe had scarring on her body from physical and sexual assaults that had occurred prior to her incarceration, and descriptions of her injuries were included in the medical evaluation that was excerpted in her presentencing report. Her alleged staff abuser would read excerpts of Doe's medical evaluation aloud, sometimes in front of others, and stated that she wanted to see Doe's naked body for herself. Under PREA and applicable BOP policy, this BOP official could not lawfully compel Doe out of her clothes simply because she wanted to see her naked body.[71] She could not "visual[ly] inspect[] . . . all [Doe's] body surfaces and body cavities"[72] or her "breasts, buttocks, [and] genitalia,"[73] either to satisfy her expressed titillation about the contents of Doe's medical report or to intimidate, coerce, control, or humiliate Doe. Nonetheless, this official repeatedly demanded that Doe undress for her without a policy-permitted justification for doing so. Doe repeatedly refused. The demands for Doe to undress intensified, and on at least one occasion, the guard also touched parts of Doe's body under her clothes. On another occasion, Doe was robbed of her ability to refuse her abuser's demands that she undress, and compelled out of her clothes, when her abuser moved her to a location that required a strip search pursuant to policy. The stated reason for moving Doe to segregated housing was her refusal of a direct order—namely, her refusal to strip naked for her abuser in her office late at night for no legitimate penological purpose.

The pressure on Doe to comply with this official's demands escalated as the official took a variety of adverse actions against Doe, such as removing her from her job and changing her housing assignment. Doe's alleged abuser threatened more extreme adverse actions if Doe continued to resist her sexual demands.

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[71] 28 C.F.R. § 552.11(c)(1); *see also* U.S. DEP'T OF JUST. FED. BUREAU OF PRISONS, PROGRAM STATEMENT NO. 5521.06, SEARCHES OF HOUSING UNITS, INMATES, AND INMATE WORK AREAS 4 (2015) [hereinafter PROGRAM STATEMENT 5521.06].

[72] 28 C.F.R. § 552.11(c); *see also* PROGRAM STATEMENT 5521.06, *supra* note 71, at 4.

[73] 28 C.F.R. § 115.5; *see also* U.S. DEP'T OF JUST. FED. BUREAU OF PRISONS, PROGRAM STATEMENT NO. 5324.12, SEXUALLY ABUSIVE BEHAVIOR PREVENTION AND INTERVENTION PROGRAM 9 (2015) [hereinafter PROGRAM STATEMENT 5324.12].

Doe compiled a lengthy written statement specifying the conduct as acts of voyeurism, prohibited as Category 8 sexual abuse under the PREA regulations.[74] Dublin administrators acknowledged that the incidents Doe alleged had occurred and that the conduct violated applicable policies, but they refused to document or investigate them as staff sexual abuse. The sexual abuse, threats, and retaliation Doe experienced continued to escalate, causing Doe to place herself into administrative detention in the Special Housing Unit ("SHU")[75] to protect herself from abuse that prison administrators refused to stop. At no time during Doe's months-long presence in the Dublin SHU did any Dublin official afford Doe the opportunity to give a formal statement as to her placement in protective custody or grant her a protection case hearing that she was permitted to attend under BOP policy. Instead, Doe was told repeatedly that the prison would not pursue her complaint notwithstanding PREA requirements that all such reports must be addressed. The prison gave her a variety of spurious reasons, among them that the guard's actions did not constitute criminal conduct and that because the guard was a woman and not lesbian, the actions were not sexual. These excuses are legally inaccurate[76] and illustrate the hurdles that victims of staff sexual abuse must overcome in order to have their claims taken seriously. The argument that sexual abuse against an incarcerated person is only actionable if it constitutes a crime ignores the vulnerability of incarcerated people and the special duties of care that prison officials owe to them. Moreover, the sexual motivation of the perpetrator should not be relevant to prove conduct that is fundamentally about violence and power, even if sexual gratification is sometimes the means. The sexual intent element and the exclusion of broadly construed "official duties" exceptions erect insurmountable obstacles for victims and pretext for administrators to ignore abuse reports.

Doe experienced acts of fierce retaliation when she began to call attention to the abuse she had suffered, which included but were not limited to loss of her job as unit staff clerk, forced facility transfer, unlawful monitoring and disruption of her confidential legal communications with counsel, deprivation of a medically necessary device and accommoda-

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[74] *See* 28 C.F.R. § 115.6; *see also* PROGRAM STATEMENT 5324.12, *supra* note 73, at 11 (2015).

[75] *See* 28 C.F.R. §§ 541.21, 541.23(c)(3); *see also* U.S. DEP'T OF JUST. FED. BUREAU OF PRISONS, PROGRAM STATEMENT NO. 5270.11, SPECIAL HOUSING UNITS 2-3, 4-5 (2016).

[76] 2009 OIG REPORT, *supra* note 2, at 5. (explaining that "[c]onduct of a sexual nature that does not rise to the criminal level of sexual abuse . . . may nevertheless constitute sexual misconduct, sometimes serious in nature, that can result in administrative sanctions up to termination" and that "[n]on-criminal sexual misconduct can include" activities such as "using indecent language, obscene gestures, and voyeurism").

tions required under the Americans with Disabilities Act ("ADA"),[77] infliction of physical injuries and withholding of medical care for their treatment, and further acts of sexual abuse as defined by PREA and BOP policy. She also experienced disciplinary action and security classification increases, despite a previously clear disciplinary record. Doe began her prison term as a "camper" serving less than five years on non-violent charges, and her only policy infractions were refusing to leave protective custody to endure further threatened sexual abuse, yet she was deemed a high-security prisoner.

On several occasions, Doe chose living conditions that lowered her quality of life to try to protect herself from further abuse. In addition to placing herself in solitary confinement at FCI Dublin, she asked to remain in the physical custody of the USMS at a federal transit center—where there were no cells, doors, or privacy in Doe's housing unit—to avoid a return to BOP custody. Women in Doe's unit lived on bunks in a large open room akin to a high school gym. They sometimes slept on mats on the floor due to insufficient bedspace. Toilets were open and without doors. There were no programs or work opportunities for the women in Doe's unit at that time. There were only "no-contact" social visits. Had Doe's family traveled to visit her there, she could only have seen them on a video screen. Despite the poor quality of life, Doe sought to remain in the physical custody of USMS at this facility for the remainder of her sentence.

Neither BOP nor the USMS responded to Doe's staff sexual abuse allegations as required by PREA. DOJ OIG states:

> The OIG Investigations Division reviews all allegations it receives concerning alleged sexual abuse and sexual misconduct by Department staff or contractors against prisoners. The OIG generally investigates [only] allegations of sexual abuse that appear likely to result in criminal prosecutions of BOP or USMS staff members. The OIG refers the remaining cases to the BOP's [Office of Internal Affairs ("OIA")] or the USMS's Office of Internal Investigation.[78]

What this means in practice is that investigation and sanctions for non-criminal staff sexual misconduct, such as voyeurism, are delegated to the very carceral agencies that often enable such misconduct to occur in the first place by failing to implement PREA national standards and

[77] 42 U.S.C. §§ 12101-213.

[78] 2009 OIG REPORT, *supra* note 2, at 12. Non-criminal sexual misconduct is alleged sexual misconduct that, if proven, would not constitute a violation of 18 U.S.C. §§ 2241-45. *Id.* at 5.

policy. We examine the legislation and the implementing regulations in the following section.

C. Conclusion to Part II

The sexual abuse and exploitation of women incarcerated in federal and state facilities are rampant and pervasive. Violations of women's rights, their bodies, and their dignity take place on a routine basis, both outside of view and in view of others. It may happen for reasons of sexual gratification and prurience, but more often it is simply a form of violence to establish power and dominance over people who are already under their abusers' control.[79] By definition, victims of staff sexual abuse are in the custody of and entirely dependent on those who commit violence against them and those who turn a blind eye to their abuse. Women in prison are often emotionally depleted, with no physical or legal ability to protect themselves and no support from others. The current legal regime and the conceptual frameworks that it embodies are inadequate to confront and alleviate the tragic conditions in which incarcerated women live.

III. THE INADEQUACY OF THE CURRENT LEGAL REGIME

A. Legislative Response: PREA

PREA was passed unanimously by Congress in 2003.[80] Its stated intent was (among other things) to develop standards and procedures to end prison rape (which was defined in the standards as including non-criminal sexual misconduct such as voyeurism),[81] collect data, administer independent audits, and protect incarcerated victims' Eighth Amendment rights.[82] It applies to all carceral facilities in the United States, including "prisons, jails, juvenile facilities, military and Indian country facilities, and U.S. Immigration and Customs Enforcement facilities."[83] This article, however, focuses on federal prisons as illustrative of the gaps between stated agency policy and actual implementation.

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[79] *See generally* Alice Ristroph, *Sexual Punishments*, 15 COLUM. J. GENDER & L. 139 (2006).

[80] *About: Prison Rape Elimination Act*, NAT'L PREA RESOURCE CTR., https://perma.cc/7YQY-LCJX (last visited June 27, 2023).

[81] 28 C.F.R. § 115.6.

[82] 34 U.S.C. § 30302; 28 C.F.R. § 115.93. *See also* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

[83] *National Inmate Survey*, *supra* note 14.

The Act defines "rape" as "the carnal knowledge, oral sodomy, sexual assault with an object, or sexual fondling of a person," whether such acts occur "forcibly or against that person's will[,] . . . not forcibly . . . where the victim is incapable of giving consent," or are "achieved through the exploitation of the fear or threat of physical violence or bodily injury."[84] Under PREA, "rape" is not limited to sexual intercourse, heterosexual contact, or sexual acts perpetrated by men but applies regardless of the gender of the perpetrator or the incarcerated person.[85] The Act reinforces preexisting law under which it is a crime for a prison employee to engage in any sexual contact or sexual relations with a person incarcerated in a federal prison.[86] DOJ OIG notes that "[u]nder the federal criminal code, consent by a prisoner is never a legal defense because of the inherently unequal positions of prisoners and correctional and law enforcement staff who control many aspects of prisoners' lives."[87]

As Alice Ristroph has discussed, however, PREA "prohibits the establishment of any national prevention standards that 'would impose substantial additional costs compared to the costs presently expended by [f]ederal, [s]tate, and local prison authorities.'"[88] Thus, the rule-making process that developed the PREA National Standards was predicated on a dictum that preventing and responding to prison rape shall not be overly burdensome or costly for carceral agencies. Nor are the costs of rape elimination shifted to the judicial branch, as PREA does not create a private right of action. Its primary method of implementation is to require the collection of data about prison rape—self-reported by prison officials—and to authorize victims of prison sexual abuse to make complaints within their prison or jail facility and to other governmental agencies.[89] It further requires all carceral facilities in the United States to implement and enforce national standards and authorizes further regulatory implementation.[90]

Further illustrating a lack of commitment to protecting people in prison, it took nearly ten years for Congress to adopt the PREA National Standards.[91]

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[84] 34 U.S.C. § 30309(9).

[85] *See id.*

[86] *See, e.g.*, 18 U.S.C. §§2241-45.

[87] 2009 OIG REPORT, *supra* note 2, at i.

[88] Ristroph, *supra* note 79, at 176 (quoting 42 U.S.C. § 15607(3)).

[89] *See* 34 U.S.C § 30303; *5. Reporting*, NAT'L PREA RESOURCE CTR., https://perma.cc/DF88-6YC2 (last visited June 27, 2023).

[90] *See* 34 U.S.C. §§ 30302, 30306.

[91] Although PREA passed in 2003, the National Standards were not codified until 2012. *See* 28 C.F.R. § 115.

B. The National Standards

The PREA National Standards codified in the Federal Register define eight categories of "[s]exual abuse of an inmate, detainee, or resident by a staff member, contractor, or volunteer."[92] All eight categories of sexually abusive behavior by staff are prohibited "with or without consent of the inmate, detainee, or resident."[93] Pursuant to the PREA National Standards and related BOP policy, "[s]exual harassment includes . . . [r]epeated verbal comments or gestures of a sexual nature to an inmate . . . by a staff member . . . including demeaning references to gender, sexually suggestive or derogatory comments about body or clothing, or obscene language or gestures."[94] The following subsections examine the loopholes in and failures of PREA and the National Standards.

1. Allowable Sexual Abuse Under PREA

Perhaps the single largest loophole in the Standards is the ability of prison officials to assert "official duties" exceptions. The consequences of this loophole are exacerbated by poorly articulated policies that permit overly broad "official duties" exceptions and the exploitation of strip searches as pretextual cover for sexual abuse.[95] For example, while voyeurism[96] is a prohibited category of sexual abuse, strip searches are routinely used as pretext to perpetrate sexual abuse and without any consideration for the dignity of incarcerated individuals. In the case of federally incarcerated people, the Code of Federal Regulations and responsive BOP policy define a "strip search" as "a search that requires a person to remove or arrange some or all clothing so as to permit a visual inspection of the person's breasts, buttocks, or genitalia."[97] Rather than defining a strip search as an act authorized for the purpose of looking for contraband or evidence of physical harm that incidentally requires the removal of clothes, this definition sets forth "visual[ly] inspect[ing]" incarcerated individuals' breasts, buttocks, or genitalia as an authorized purpose of such searches. Thus, strip searches may, consistent with

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[92] *Id.* § 115.6.

[93] *Id. See also* PROGRAM STATEMENT 5324.12, *supra* note 73, at 11-13.

[94] 28 C.F.R. §115.6; *see also* PROGRAM STATEMENT 5324.12, *supra* note 73, at 11-13.

[95] *See* 28 C.F.R. §115.6.

[96] 28 C.F.R. § 115.6. Voyeurism, at issue in Doe's case, is defined as "an invasion of privacy of an inmate, detainee, or resident by staff for reasons unrelated to official duties." *Id.* Some examples are "peering at an inmate who is using a toilet in [their] cell to perform bodily functions; requiring an inmate to expose [their] buttocks, genitals, or breasts; or taking images of all or part of an inmate's naked body or of an inmate performing bodily functions." *Id.*

[97] 28 C.F.R. § 115.5; *see also* PROGRAM STATEMENT 5324.12, *supra* note 73, at 9.

PREA, be conducted without actual need and for the sole purpose of "visual[ly] inspect[ing]" the breasts, buttocks, or genitalia of people who are incarcerated—that is, voyeurism.[98]

Although there is an express policy requirement that the humiliation and violations of dignity necessarily entailed in a strip search be minimized,[99] in practice, this is often ignored. For instance, a prison official can enlist a fellow member of staff to hold an incarcerated individual down to forcibly remove her clothes for the purpose of "visual[ly] inspect[ing]" her breasts, buttocks, or genitalia if she does not comply with an ordered strip search; that official is not violating any policy as long as they document the incident and assert that, in their sound discretion as a prison official, they deemed such action necessary "to ensure the safe and orderly running of the institution."[100] Consent is not required.[101]

Strip searches of women by BOP officials who are men are permissible when "circumstances are such that delay would mean the likely loss of contraband."[102] In settings like the Dublin Camp, where there was only one official on duty at any given time while Doe was incarcerated there (and that official was frequently a man), circumstances permitted that official to claim that a cross-gender search was unavoidable due to the absence of women officers. BOP policy specifies that "[p]ost assignments may not be restricted on the basis of gender."[103] In other words, the prison is not permitted to ensure that an official who is a woman be on site at all times.

Moreover, BOP PREA policy explicitly states that none of the protections that limit the opposite-gender viewing of women's nude bodies or performance of bodily functions applies to viewing video surveillance.[104] So, for example, segregated housing cells in BOP that are equipped with in-cell cameras, such as those monitoring especially vulnerable people, may require incarcerated women to change clothes and defecate on camera in units that are frequently staffed by officials who

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[98] 28 C.F.R. § 115.5.

[99] Pursuant to 28 C.F.R. § 552.10, "Staff shall employ the least intrusive method of search practicable." BOP implementing instructions for this federal regulation state, "When searches are required, staff shall avoid unnecessary force and strive to preserve the dignity of the individual being searched." *See* PROGRAM STATEMENT 5521.06, *supra* note 71, at 1 (specifying the "purpose and scope" of such searches, of which strip searches, or "visual searches," are one kind).

[100] PROGRAM STATEMENT 5324.12, *supra* note 73, at 12.

[101] 28 C.F.R. § 552.11(d)(1).

[102] *Id.* § 552.11(c)(2).

[103] PROGRAM STATEMENT 5521.06, *supra* note 71, at 3; PROGRAM STATEMENT 5324.12, *supra* note 73, at 17.

[104] PROGRAM STATEMENT 5324.12, *supra* note 73, at 18.

are men. Under this policy, the viewing of such video by officials who are men and are assigned to other posts is also not a violation of PREA, such that these officials could share and watch videos of nude women even if they are not assigned to their unit.

Voyeurism is one of several categories of staff sexual abuse that is complicated by policy provisions that enable BOP officials to evade accountability for their sexually abusive conduct and provide BOP investigators with pretexts to dismiss credible PREA allegations as "unfounded."

2. Intent Requirements

Administrative regulations implementing PREA treat sexual abuse by prison officials against people who live under their authority as if the problem were one of excessive sex rather than abuse of power that violates people's inherent and inalienable dignity. Allowing sexual abuse in prisons violates basic principles of human dignity, which prohibit conduct that is degrading, regardless of whether the perpetrator's intent is to cause harm or whether their purpose is sexual gratification. As will be discussed, the aim of the law should be to protect people against degradation, particularly those who are already in vulnerable situations by virtue of their incarceration and, in the cases of most incarcerated women, by virtue of their histories of sexual abuse.

By contrast, for some categories of sexual abuse, the PREA National Standards prohibit only actions that can be proven to have been motivated by sexual gratification, but not other actions that demean and humiliate a person.[105] Four of the eight categories of staff sexual abuse of incarcerated people set forth in the PREA National Standards require a showing of the alleged abuser's "intent to abuse, arouse, or gratify sexual desire."[106] Only three of the eight staff-on-prisoner[107] categories

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[105] *See* 28 C.F.R. § 115.

[106] *Id.* § 115.6.

[107] What are commonly referred to as "staff-on-prisoner" PREA policy violations pertain to the conduct of all non-prisoners (i.e., not only BOP staff, but also BOP contractors and volunteers). *Id.* PREA policy differs for sexual contact that occurs between incarcerated individuals, which is commonly termed "inmate-on-inmate" PREA policy. *See id.* §§ 115.78, 115.83. The PREA National Standards only consider sexual contact between prisoners to constitute sexual abuse "if the victim does not consent, is coerced into such act by overt or implied threats of violence, or is unable to consent or refuse." *Id.* § 115.6. While consensual sexual contact between BOP prisoners is a violation of policy that may result in disciplinary sanctions, it is not considered sexual abuse pursuant to PREA. *Id.* Compare, for example, BOP Prohibited Act 114 ("[s]exual assault of any person, involving non-consensual touching by force or threat of force") with lower-severity BOP Prohibited Act 205 ("[e]ngaging in sexual acts"). U.S. DEP'T OF JUST. FED. BUREAU OF PRISONS, PROGRAM STATEMENT NO.

of sexual abuse under PREA do not either require a showing of sexual intent on the part of the perpetrator or allow an "official duties" justification: "[c]ontact between the penis and vulva or anus" (Category 1);[108] "[c]ontact between the mouth and penis, vulva, or anus" (Category 2);[109] and display of a staff member's, contractor's, or volunteer's uncovered genitalia, buttocks, or breast to a prisoner (Category 7).[110] All other categories of staff-on-prisoner sexual abuse under the PREA National Standards require incarcerated victims to show that the alleged conduct was perpetrated with the "the intent to abuse, arouse, or gratify sexual desire" or that it was unrelated to the official duties of the alleged perpetrator.[111] The PREA Standards permit degradation where there is no such evidence.

In Category 4 and Category 8 sexual abuse allegations, people who are incarcerated must not only prove that the contact was intentional and that it was intended to arouse or sexually gratify the perpetrator, but they must also show that the alleged staff conduct cannot be justified by some purported official duty, as discussed above.[112]

These intent requirements are onerous to prove, irrelevant to establishing sexual abuse, and inconsistent with the definitions set forth in the PREA statute. They also run counter to the legislative intent of PREA[113] and violate basic principles of human dignity. Moreover, the burden placed on victims by the PREA National Standards to show sexual abusers' "intent to abuse, arouse, or gratify sexual desire"[114] has the effect of insulating staff who are women from accountability for sexually abusive conduct because of difficulties of proof, as was the case with Doe.

5270.09, INMATE DISCIPLINE PROGRAM 45-46 (2011) [hereinafter PROGRAM STATEMENT 5270.09].

[108] 28 C.F.R. § 115.6.

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] *Id*. Under the PREA National Standards and related BOP policy, BOP staff may have admitted contact between their mouth and other body parts of incarcerated individuals (Category 3); acknowledged penetration of the anal or genital openings of prisoners with anything other than their penis (Category 4); or have "intentional contact, either directly or through the clothing, of or with the genitalia, anus, groin, breast, inner thigh, or the buttocks" (Category 5), as long as the perpetrating staff member, contractor, or volunteer did not have "the intent to abuse, arouse, or gratify sexual desire" or can justify the act as an official duty. *Id.*

[113] The purpose of PREA includes "establish[ing] a zero-tolerance standard for the incidence of prison rape." 34 U.S.C. § 30302(1).

[114] 28 C.F.R. § 115.6.

3. Retaliation

The PREA National Standards that govern the implementation and enforcement of the federal statute prohibit not only sexual abuse, but also retaliation for reporting such abuse or participating in investigations of the same.[115] Such retaliation has a deterrent effect, causing incarcerated people and staff alike to avoid reporting PREA violations, which in turn enables staff to continue sexually abusing incarcerated people with impunity.[116]

The DOJ Bureau of Justice Statistics reported as early as 2006 that prison rape often goes unreported because of fear of reprisals and the humiliation commonly experienced by victims of sexual exploitation. The report states:

> Administrative records alone cannot provide reliable estimates of sexual violence. Due to fear of reprisal from perpetrators, a code of silence among inmates, personal embarrassment, and lack of trust in staff, victims are often reluctant to report incidents to correctional authorities.[117]

Despite testimony to the Senate Subcommittee that described a pervasive pattern of retaliation, the Senate report makes virtually no reference to the retaliation suffered by incarcerated individuals and prison staff who report PREA violations.[118]

Even if an incarcerated victim of staff sexual abuse has not engaged in conduct that is specified as an infraction under BOP's Inmate Discipline Program,[119] BOP officials are imbued with vast discretionary powers to "ensure the safe and orderly running of the institution," a vague principle that BOP officials are broadly empowered to self-determine.[120] Among the principal forms of retaliation experienced by incarcerated victims who report staff sexual abuse are loss of job or housing assignment, placement in solitary confinement, increased security classifications, and forced inter-facility transfers.[121] These adverse actions are justified by officials by the need for order, and by the PREA National

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[115] *Id.* § 115.67; *see also* PROGRAM STATEMENT 5324.12, *supra* note 73, at 25-27, 42-43.

[116] *See* discussion *supra* Section II.B.1.

[117] ALLEN J. BECK & PAIGE M. HARRISON, U.S. DEP'T OF JUST. BUREAU OF JUST. STAT., SPECIAL REPORT: SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES, 2005 2 (2006).

[118] *See* PSI REPORT, *supra* note 2. In fact, the word, "retaliation" appears nowhere in the report, and fear of reprisals are referenced in only one citation.

[119] 28 C.F.R. §§ 541.1-541.8; *see also* PROGRAM STATEMENT 5270.09, *supra* note 107.

[120] PROGRAM STATEMENT 5270.09, *supra* note 107.

[121] *See* discussion *supra* Sections II.B.1-2.

Standards that mandate the separation of victims and abusers.[122] Union protections for alleged BOP staff abusers afford them union representation in the investigative process[123] and protect them from reassignment or other adverse action pending final PREA determinations by affording them the opportunity to appeal any such action in a collective bargaining process.[124] Incarcerated victims have no advocate or designated representative acting on their behalf during the investigative process and no meaningful opportunity to appeal their forced transfer to another facility. Therefore, this "separation" of victims from their abusers routinely takes the form of transferring the incarcerated victim to a different facility. The policy requirements for such transfers often result in the assignment of "management variables"[125] that increase the alleged victim's security classification, thereby reducing their privileges and quality of life, often in ways that directly violate their human dignity.[126] Forced transfer to a different location may also separate victims of sexual abuse from their families and support networks, interrupt their ongoing Release Preparation Programming, and further distance them from their release location.[127] The 2009 DOJ OIG assessment of BOP's implementation of PREA found that BOP was overusing inter-facility transfers in cases of alleged sexual abuse.[128]

The burdens borne by incarcerated individuals who allege staff sexual abuse are almost unimaginable, particularly given that they are piled on to the original sexual abuse (which, for most incarcerated women, is piled on to a *history* of sexual abuse). BOP's practices deter women from reporting their prison abuse, which diminishes their agency and leaves them exposed to further abuse.

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[122] 28 C.F.R. §115.64(a)(1); *see also* PROGRAM STATEMENT 5324.12*, supra* note 73, at 40.

[123] "The local [BOP staff] Union representative is provided an opportunity to review the draft [of sexual abuse incident reviews] and submit the Union's recommendations, . . . [which] are included in the review team's final report and recommendations as an addendum." PROGRAM STATEMENT 5324.12, *supra* note 73, at 53.

[124] *Id.* at 42.

[125] *See* U.S. DEP'T OF JUST. FED. BUREAU OF PRISONS, PROGRAM STATEMENT NO. 5100.08, INMATE SECURITY DESIGNATION AND CUSTODY CLASSIFICATION (2019).

[126] *See* discussion *supra* Section II.B.2.

[127] Note that the First Step Act provisions as to designating federal prisoners as close as practicable to their primary residence are subject to "the prisoner's security designation . . . and other security concerns of the Bureau of Prisons." U.S. DEP'T OF JUST. FED. BUREAU OF PRISONS, CHANGE NOTICE-1: PROGRAM STATEMENT NO. 5100.08, INMATE SECURITY DESIGNATION AND CUSTODY CLASSIFICATION (2019), https://perma.cc/2RDD-TV7M.

[128] *See* 2009 OIG REPORT, *supra* note 2, at iv.

4. Data Collection

The legislative intent of PREA includes "increas[ing] the available data and information on the incidence of prison rape, consequently improving the management and administration of correctional facilities."[129] The PREA National Standards require prisons and jails to collect data on alleged incidents of sexual abuse and harassment and conduct an annual agency review of that data.[130] The stated purposes of these annual agency reviews are "(1) [i]dentifying problem areas; (2) [t]aking corrective action on an ongoing basis; and (3) [p]reparing an annual report of [the agency's] findings and corrective actions for each facility, as well as the agency as a whole."[131]

Again, focusing on the federal context as an indicative example, BOP policy specifies that "[t]he National PREA Coordinator reviews data compiled by the Regional PREA Coordinators, the Information, Policy, and Public Affairs Division, and the Office of Internal Affairs, and issues a report to the Director on an annual basis, meeting the requirements of this section."[132] The PREA National Standards also require prisons and jails to submit to independent PREA audits one or more times every three years.[133] The stated purpose of these audits is for independent outside auditors to determine whether a facility exceeds or meets PREA standards,[134] and to develop and implement a corrective action plan with the audited facility if it does not.[135]

The PREA National Standards require BOP to "collect accurate, uniform data for every allegation of sexual abuse at facilities under its direct control using a standardized instrument and set of definitions."[136] They obligate carceral agencies such as BOP (and their contractors)

> to report . . . any knowledge, suspicion, or information regarding an incident of sexual abuse or sexual harassment that occurred in a facility, whether or not it is part of the agency; retaliation against inmates or staff who reported such an incident; and any

[129] 34 U.S.C. § 30302(4).

[130] *See* 28 C.F.R. §§ 115.86-115.89; PROGRAM STATEMENT 5324.12, *supra* note 73, at 52-57.

[131] 28 C.F.R. § 115.88(a)(1)-(3).

[132] PROGRAM STATEMENT 5324.12, *supra* note 73, at 56.

[133] 28 C.F.R. §§ 115.93, 115.401-115.405; *see also* PROGRAM STATEMENT 5324.12, *supra* note 74, at 57-61.

[134] 28 C.F.R. § 115.403(b)-(c); *see also* PROGRAM STATEMENT 5324.12, *supra* note 73, at 59-60.

[135] 28 C.F.R. § 115.404(a)-(c).

[136] *Id.* § 115.87(a).

staff neglect or violation of responsibilities that may have contributed to an incident or retaliation.[137]

These standards also obligate and entrust carceral agencies such as BOP to, among other things, (1) fulfill "first responder duties";[138] (2) execute a coordinated response that includes crisis intervention and preservation and collection of physical evidence;[139] (3) provide "protection against retaliation" to staff and incarcerated individuals who report sexual abuse or harassment or cooperate with a related investigation;[140] (4) "conduct[] [their] own investigations into allegations of sexual abuse and sexual harassment . . . promptly, thoroughly, and objectively for all allegations, including third-party and anonymous reports";[141] (5) report investigative outcomes and actions taken, if any, against the accused;[142] (6) decide and implement disciplinary sanctions, if warranted, against staff, contractors, volunteers, and incarcerated individuals who violate PREA policy or make false allegations in bad faith;[143] (7) provide medical and mental health screenings, emergency services (which may include "conduct[ing] forensic examination[s] at the institution"[144] where the alleged sexual abuse occurred, by staff who may know and work with the accused), and ongoing medical and mental health care for sexual abuse victims and abusers;[145] (8) collect and review data as to sexual abuse and sexual harassment and conduct internal incident reviews;[146] and (9) store, publish, and destroy PREA data.[147]

In effect, the final rule that specifies national standards for the implementation of the PREA statute by prisons and jails imbues carceral agencies with the authority to manage virtually all aspects of documentation, investigation, evidence collection and preservation, and data collection for alleged incidents of sexual abuse and sexual harassment, despite the fact that such agencies and their officials would very likely be defendants in any civil lawsuit that might arise from such incidents. Moreover, these internal actions are routinely administered by officers

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[137] *Id.* § 115.61(a); *see also* PROGRAM STATEMENT 5324.12, *supra* note 73, at 37-38.

[138] 28 C.F.R. § 115.64; *see also* PROGRAM STATEMENT 5324.12, *supra* note 73, at 40.

[139] *See* 28 C.F.R. §§ 115.64-.65, 115.71(c); *see also* PROGRAM STATEMENT 5324.12, *supra* note 73, at 40-42, 44.

[140] 28 C.F.R. § 115.67; *see also* PROGRAM STATEMENT 5324.12, *supra* note 73, at 42-43.

[141] 28 C.F.R. § 115.71(a); *see also* PROGRAM STATEMENT 5324.12, *supra* note 73, at 43-44.

[142] 28 C.F.R. § 115.73; *see also* PROGRAM STATEMENT 5324.12, *supra* note 73, at 45-46.

[143] 28 C.F.R. § 115.76-77; *see also* PROGRAM STATEMENT 5324.12, *supra* note 73, at 47.

[144] PROGRAM STATEMENT 5324.12, *supra* note 73, at 50.

[145] *Id.* at 49-52; 28 C.F.R. §§ 115.81-.83.

[146] 28 C.F.R. § 115.86-88; *see also* PROGRAM STATEMENT 5324.12, *supra* note 73, at 52-56.

[147] 28 C.F.R. § 115.89; *see also* PROGRAM STATEMENT 5324.12, *supra* note 73, at 56-57.

who are colleagues and friends of accused staff and who may be subject to disciplinary or other adverse action for "neglect or violation[s] of responsibilities that may have contributed to [an] incident[]."[148] Even if facility administrators and investigators are not exposed to civil or criminal liability, those officials entrusted with implementing virtually all aspects of PREA know or should know that documented allegations and incidents of sexual abuse or sexual harassment could subject a facility to increased scrutiny and have adverse professional consequences for a facility's administrators and supervisory staff. The PREA National Standards charge agency officials with protecting and upholding the rights of incarcerated victims, and they trust that those officials will create documentation, preserve evidence, and administer investigations that could expose them to liability and adverse professional consequences. This incentivizes prison officials to exploit their control over PREA procedures to conceal reports of staff sexual abuse or issue determinations that dub meritorious claims "unsubstantiated" or "unfounded."

5. Conflicts of Interest

The entire PREA regime relies on prison officials' self-reporting of PREA data and facilities' participation in audits that may or may not be occurring as required by law. Those audits that do occur, should they uncover areas of PREA noncompliance, depend on facilities for the implementation and subsequent reporting of corrective action.

The conflicts of interest created by the PREA National Standards' assignment of dual roles to carceral agencies in sexual abuse cases, and the underlying culture of corruption that defines some BOP facilities, are but two factors that both reflect and exacerbate the deep dysfunction of the prison system and the PREA regime.

Assigning the facility standard-bearer for discipline a dual role as the institution's PREA coordinator is a mainstay of BOP PREA implementation. For reasons discussed previously, this has a chilling effect on reports by incarcerated people who are reluctant to bring themselves to the attention of the prison disciplinarian.

This approach has also caused PREA reporting to be managed as a disciplinary issue at the expense of victim services and support. PREA holds BOP psychological services out as a resource for the screening, treatment, and support of incarcerated victims of sexual abuse and assigns BOP mental health practitioners and departments integral roles in the PREA-coordinated response to sexual abuse allegations.[149] Too of-

[148] 28 C.F.R. § 115.51(a); *see also* PROGRAM STATEMENT 5324.12, *supra* note 73, at 35.

[149] 28 C.F.R. §§ 115.35, 115.41, 115.65, 115.81-115.83; *see also* PROGRAM STATEMENT 5324.12, *supra* note 73, at 28-32, 40-42, 49-52.

ten, rather than fulfilling these roles with integrity, BOP mental health providers' multiple roles conflict with their obligations to victims. BOP mental health practitioners' dual roles as therapists for incarcerated people and security and "correctional management" consultants for administrators frequently means that what should be therapeutic contact is exploited and debased in service to BOP's institutional, custodial, and legal priorities. Despite PREA National Standards and BOP policy that guarantee "access to outside confidential support services,"[150] people incarcerated in federal prisons are routinely denied such access, as Doe was.

When a carceral agency's failures to implement PREA are discovered, there are no meaningful accountability mechanisms that ensure that such shortfalls are corrected. Accountability for such violations, when discovered, has proven to involve little more than hollow gestures of harsh pronouncements or the assessment of nominal financial penalties.[151] Some carceral agencies apparently prefer to risk the assessment of a nominal fine for PREA noncompliance rather than take meaningful steps to observe the National Standards, which all but assures that individuals in their custody will never be afforded the administrative process set forth in the PREA National Standards.

The intrinsic futility of PREA procedures is emblematic of systems and structures that not only disfavor incarcerated people who try to challenge humiliating and inhumane conditions of confinement, but also impose punitive measures for those who try to make use of them.

C. *Cutting off Administrative and Judicial Avenues for Redress and Protection*

PREA's failure to protect women inside prison, and to provide vindication when they are abused, extends far beyond prison walls into the courtrooms of the United States.

For the reasons set forth above, as well as other legal and factual barriers to grievance procedures—including vulnerability and illiteracy, among others—most people who are the victims of sexual abuse while in prison are unable to access or exhaust administrative remedies. This, in turn, forecloses their ability to vindicate their rights in federal and state courts. In *Woodford v. Ngo*, the United States Supreme Court determined that the Prison Litigation Reform Act ("PLRA")[152] requires incarcerated people to properly exhaust all available administrative reme-

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[150] 28 C.F.R. § 115.53; *see also* PROGRAM STATEMENT 5324.12, *supra* note 73, at 36.
[151] Gilna, *supra* note 26.
[152] 42 U.S.C. §1997e.

dies before they may access federal courts.[153] In effect, this ruling "requir[es] cases to be dismissed if [incarcerated] plaintiffs have failed to 'exhaust' all of the prison or jail's internal administrative grievance processes before taking their case to [federal] court."[154] The Michigan Law Prison Information Project noted in its 50-state survey of prison and jail grievance policies that "[g]iven the court gatekeeper function that the PLRA, as interpreted by the *Woodford* court, assigns to internal grievance processes," unfair grievance procedures can "needlessly cut off prisoners' constitutional right of access to federal courts."[155]

On the 25th anniversary of the PLRA, Melissa Benerofe found that the PLRA's impact extends beyond federal courts:

> While the PLRA governs prisoners' lawsuits challenging prison conditions in federal court, state prisoners theoretically have the option of bringing state claims in state court. However, after the PLRA's passage, many state legislatures enacted analogous statutes restricting inmate access to state court if they had not done so already. Thus, at both the federal and state levels, courthouse doors remain largely closed to people in prison.[156]

Incarcerated people may be foreclosed from seeking judicial relief because they filed a grievance that was written in the wrong color ink[157] or affixed pages together with tape instead of a staple,[158] and "[s]everal jurisdictions are unforgiving of such errors, dismissing without appeal any complaints that fail to meet procedural requirements."[159] In one particularly instructive case, the United States Court of Appeals for the Third Circuit affirmed a district court's dismissal of incarcerated plaintiff Derrick Mack's case in part because he had failed to properly exhaust his administrative remedies.[160] Mack's grievance was rejected be-

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[153] Woodford v. Ngo, 548 U.S. 81, 83 (2006); *see also* ANDREA FENSTER & MARGO SCHLANGER, PRISON POL'Y INITIATIVE, SLAMMING THE COURTHOUSE DOOR: 25 YEARS OF EVIDENCE FOR REPEALING THE PRISON LITIGATION REFORM ACT (2021).

[154] FENSTER & SCHLANGER, *supra* note 153.

[155] *See* PRIYAH KAUL ET AL., PRISON AND JAIL GRIEVANCE POLICIES: LESSONS FROM A FIFTY-STATE SURVEY 3 (2015).

[156] Melissa Benerofe, Note, *Collaterally Attacking the Prison Litigation Reform Act's Application to Meritorious Prisoner Civil Litigation*, 90 FORDHAM L. REV. 141, 171 (2021) (footnotes omitted) (citing, inter alia, Allison Brill, Note, *Rights Without Remedy: The Myth of State Court Accessibility After the Prison Litigation Reform Act*, 30 CARDOZO L. REV. 645, 676 (2008); Lynn S. Branham, *Of Mice and Prisoners: The Constitutionality of Extending Prisoners' Confinement for Filing Frivolous Lawsuits*, 75 S. CAL. L. REV. 1021, 1029 (2002); Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1635 n.272 (2003)).

[157] FENSTER & SCHLANGER, *supra* note 153.

[158] KAUL ET AL., *supra* note 155, at 13.

[159] *Id.* at 14.

[160] Mack v. Klopotoski, No. 11-3019, 540 F. App'x 108, 109 (3d Cir. 2013).

cause he filed handwritten copies of his appeal rather than the photocopies specified in the policy without notifying prison officials that the photocopier was broken.[161] Additionally, "some facilities' procedures require that grievances be submitted directly to a specific officer—without regard to whether that officer is implicated in the complaint," an issue that could be especially traumatic for sexual abuse victims who are required to submit forms to their abuser.[162] To bar a victim of sexual abuse from accessing any administrative or judicial forum in the nation compounds the violation of their dignity and violates their dignity-based rights to procedural justice.

In its summary of best practices for grievance procedures in prisons and jails, the Michigan Law Prison Information Project states that "[p]risoners should be able to readily access forms in common areas of the prison"[163] as opposed to being restricted to obtaining forms through prison officials. The Project also highlights the importance of access to procedures that specifically address sexual abuse "[g]iven the sensitivity and urgency of [such] complaints."[164] Sadly, the Project found that the policies of many carceral systems fail to align with these best practices.

The failure of PREA extends even to constitutional claims under the Eighth Amendment. Far from bolstering incarcerated people's efforts to challenge prison sexual abuse as Eighth Amendment violations, which are notoriously difficult to prove,[165] courts have tended to allow prison *defendants* to invoke PREA standards to defend against these claims, all while deeming PREA standards irrelevant when put forth by plaintiffs. Although "courts have been inconsistent in their determination of PREA standards' relevancy" in Section 1983[166] actions alleging Eighth Amendment violations, they "appear to make PREA's relevancy dependent upon whether PREA is being used as either a sword or a shield."[167] Sage Martin states that:

> Defendants in Eighth Amendment sexual abuse cases, typically prison staff, have been allowed to use PREA as a shield, while inmates have been barred from using it as a sword . . . . By al-

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[161] *Id.* at 113.

[162] *The Prison Litigation Reform Act Obstructs Justice for Survivors of Sexual Abuse in Dentention* [sic], JUST DETENTION INT'L (Feb. 2009), https://perma.cc/FX6P-X2VQ.

[163] KAUL ET AL., *supra* note 155, at 1.

[164] *Id.* at 6.

[165] Sage Martin, Comment, *The Prison Rape Elimination Act: Sword or Shield?*, 56 TULSA L. REV. 283, 301-302 (2021).

[166] 42 U.S.C. § 1983 ("Every person who, under color of [state law] . . . causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any [constitutional] rights . . . shall be liable to the party injured.").

[167] Martin, *supra* note 165, at 301-02.

> lowing defendants to use PREA to their advantage, the courts have equipped prison staff with yet another means of protection from accountability. . . .
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> . . . .
>
> As illustrated by cases in which the courts have allowed them to be used as a defense, PREA standards are of at least minimal relevance and should be made equally available to both parties.[168]

This exemplifies the obstacles placed in the way of women who seek to protect themselves from sexual abuse by those in whose custody they live. The *Garcia* guilty verdict in December 2022 is a rare counter-example.

D. The Garcia *Case*

In December 2022, the former warden at FCI Dublin, Ray J. Garcia, was convicted of seven counts of sexually abusing women incarcerated at the facility.[169] He had "directed training" on PREA at Dublin and "trained new supervisors on [PREA] procedures and policies as part of his official job duties."[170] At Garcia's trial, prosecutors alleged that on at least one occasion, "Garcia digitally penetrated [a woman incarcerated at the facility] in a prison changing stall on the same day that PREA investigators were visiting the prison."[171]

Sexual abuse was not new at FCI Dublin. In 1997, plaintiffs Robin Lucas, Valerie Mercadel, and Raquel Douthit filed a civil rights action charging that they were raped, attacked, and sold for sex by officials to incarcerated men.[172] The plaintiffs further alleged that Dublin administrators knew about the ongoing rape and abuse but did nothing.[173] The lawsuit resulted in a $500,000 settlement paid to the plaintiffs.[174] The officers accused of misconduct were not criminally prosecuted or subjected to disciplinary action.[175]

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[168] *Id.*

[169] Dec. 2022 Press Release, *supra* note 39.

[170] Lisa Fernandez, *Woman Testifies Dublin Prison Doesn't Follow Rape Elimination Law*, KTVU FOX 2 (Nov. 30, 2022), https://perma.cc/D6TL-KJV6.

[171] *Id.*

[172] Amended Complaint for Damages and Injunctive Relief at 32-36, Lucas v. White, 63 F. Supp. 2d 1046 (N.D. Cal. 1999) (No. C 96-2905 TEH).

[173] *Id.*

[174] *Bureau of Prisons Sexual Abuse Suit Settled for $500,000*, PRISON LEGAL NEWS (June 15, 1998), https://www.prisonlegalnews.org/news/1998/jun/15/bureau-of-prisons-sexual-abuse-suit-settled-for-500000/ (on file with CUNY Law Review).

[175] *Id.*

The situation did not markedly improve during Garcia's tenure as the facility's warden. One woman who testified against Garcia stated that "PREA . . . does not exist in Dublin."[176] This witness stated, "I've never heard of a PREA class or a program in the 11 years that I've been there."[177] The lack of information provided to incarcerated people at FCI Dublin about PREA policy and their rights pursuant to it was apparently by design. Tess Korth, a former FCI Dublin unit manager who was reportedly "forced out of her job for reporting abuse" after 25 years of BOP employment, stated that "incarcerated women were handed brochures mentioning 'a little blurb'" about PREA and claimed that this minimal effort was only undertaken so that "BOP could cover their ass."[178]

FCI Dublin administrators' concealment of the facility's longstanding culture of staff sexual abuse from PREA auditors, and Dublin officials' pattern of flouting audits, are indicative of the ineffectiveness of such assessments. BOP's abject failure to overcome the longstanding culture of staff sexual abuse, which has spanned decades and survived repeated admonitions by oversight agencies, belies the notion that government authorities—whether state or federal—are effectively protecting incarcerated women who suffer staff sexual abuse or curtailing staff sexual abuse at the macro level. The closure of courtroom doors, explained in Section III.C *supra*, further reduces the likelihood that vulnerable women might be protected from the depredations of those who control their lives.

E. The 2022 Senate Report

On December 13, 2022, the U.S. Senate Committee on Homeland Security and Governmental Affairs' Permanent Subcommittee on Investigations issued a staff report entitled "Sexual Abuse of Female Inmates in Federal Prisons."[179] The release of this report in the days after Garcia's conviction provided welcome acknowledgement of the pervasive staff sexual abuse of women incarcerated in federal prisons. The report's findings reflect the Subcommittee's rigorous investigation of these abuses in federal women's facilities. It draws appropriately scathing conclusions about the culture of staff sexual abuse that pervades many federal facilities and the overarching failures of BOP and DOJ OIG to enforce PREA and provide remedies or succor to abused women.[180]

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[176] Fernandez, *supra* note 170.

[177] *Id.*

[178] *Id.*

[179] PSI REPORT, *supra* note 2.

[180] *Id.* at 4-5.

However, the report omits key issues that are of defining importance to understanding or eliminating staff sexual abuse of incarcerated individuals. The report also does not demand, or propose to enact or fund, substantive reforms to correct the shortfalls identified by the Senate investigation. It thereby assures the continued sexual exploitation of incarcerated women, both in federal prisons and in state and local facilities that may perceive the Senate report as a bellwether for the concerns and priorities of elected representatives in other legislative bodies.

Although BOP's Office of Internal Affairs "should resolve complaints of employee misconduct within 180 days,"[181] the Senate Subcommittee found that, as of October 28, 2022, OIA—the internal BOP agency to which DOJ OIG refers all cases of non-criminal BOP staff sexual abuse[182]—"had a backlog of approximately 8,000 cases, with some cases pending for more than five years."[183] These are cases brought by incarcerated people who may be suffering *ongoing* sexual abuse. The delay in responsiveness may mean more abuse, more exploitation, more rape, more humiliation, more destruction of the human spirit. The Subcommittee also found that DOJ OIG "is only able to pursue a fraction of the allegations of criminal misconduct, including sexual abuse of female prisoners" and "sends the vast majority of cases back to BOP OIA."[184] The Senate Subcommittee concluded that this referral process "can reduce the deterrent of criminal sanctions, cause delay, and preclude fully independent investigations of allegations of misconduct from outside the agency" and "can also lead to perverse outcomes."[185] While the Senate report acknowledges some marginal steps instituted by DOJ OIG "[i]n the past year" to try to improve these conditions, it determined that "OIG Lacks Resources to Pursue Criminal Investigations of Most BOP Employees Accused of Crimes."[186] Even so, the Senate report failed to recommend the appropriation of sufficient funds to meet the need.

The Senate report focuses exclusively on male perpetrators of staff sexual abuse without acknowledging or investigating the prevalence of female staff abusers or same-sex staff sexual abuse in BOP facilities (as was the case for Doe, recounted earlier). This omission also seems to reflect a deeper misunderstanding of sexual abuse on the part of the Senate Subcommittee. The Senate report demonstrates no awareness of the ex-

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[181] *Id.* at 24.

[182] U.S. DEP'T OF JUST. FED. BUREAU OF PRISONS OFF. OF INTERNAL AFFS., REPORT FOR FISCAL YEAR 2020 3-4, 8 (2020).

[183] PSI REPORT, *supra* note 2, at 25.

[184] *Id.* at 27.

[185] *Id.*

[186] *Id.*

tent to which staff sexual humiliation of incarcerated women is used as a lever of control.[187]

The Senate report also notes BOP's "fail[ure] to detect or prevent sexual abuse of incarcerated women" and its "poor implementation of the audit program and reporting mechanisms required by PREA," which "allowed serious, repeated sexual abuse in at least four facilities to go undetected."[188] The report also found that "BOP's internal affairs practices have failed to hold employees accountable, and [that] multiple admitted sexual abusers were not criminally prosecuted as a result."[189]

The report specified DOJ OIG's lack of staff capacity to investigate cases of criminal sexual misconduct by BOP officials, noting that the Office has only about "80 non-supervisory criminal special agents" to review not only cases of alleged criminal sexual misconduct, but all cases of all forms of alleged misconduct by current BOP employees.[190] By publicizing these "chronic staff shortages"[191] without announcing corresponding solutions, such as legislative intent to propose funding to hire additional investigators, the Senate report effectively announced that most cases of alleged criminal sexual abuse by BOP staff cannot and will not be reviewed for prosecution. Prosecutorial discretion, limited resources, and variations in available evidence and testimony inevitably result in only a select subset of cases of alleged criminal misconduct being advanced.[192]

The report's conclusion may be stated in full and is shocking in its deficiency:

> BOP failed to detect or prevent sexual abuse of incarcerated women by male BOP employees. The agency's poor implementation of the audit program and reporting mechanisms required by PREA allowed serious, repeated sexual abuse in at least four facilities to go undetected. BOP's internal affairs practices have failed to hold employees accountable, and multiple admitted sexual abusers were not criminally prosecuted as a result. Further, for a decade, BOP failed to respond to this abuse or implement agency-wide reforms. Moving forward, BOP should consider the Subcommittee's findings as it works to implement

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[187] *See* discussion *supra* Section II.C; Ristroph, *supra* note 79, at 139 (explaining that "threatened assaults that occur in prison, even the ones that involve genitals, are expressions of dominance and power that have little to do with desire").

[188] PSI REPORT, *supra* note 2, at 30.

[189] *Id.*

[190] *Id.* at 27.

[191] *Id.* at 10.

[192] *See Justice Manual*, U.S. DEP'T OF JUST., § 9-27.110, https://perma.cc/B62H-SFVK (June 2023) (discussing wide breadth of prosecutorial discretion).

> changes to how it handles sexual abuse of female prisoners by male BOP employees.[193]

Women are being raped on a routine basis throughout the federal prison system, and the officials who are responsible for the abuses should consider implementing changes. This barely-a-slap-on-the-wrist approach may embolden perpetrators when they sexually violate and abuse the most vulnerable of women. The effect is likely to be carried over into state, local, and other carceral systems that will note the federal indifference to human suffering.

F. Conclusion to Part III

Accountability for individual BOP officials who sexually abuse incarcerated people, and justice for their victims, as in the *Garcia* case, is welcome and appreciated. However, DOJ's characterization of Garcia's conviction as emblematic of DOJ's purportedly effective enforcement of PREA is misplaced. In DOJ's press release announcing the *Garcia* verdict, one deputy attorney general characterized Garcia's conviction as illustrative of the Department's commitment to "prosecuting cases of criminal misconduct by Bureau employees and to holding accountable all who violate their duty to protect those in their custody."[194] A comment attributed to DOJ Inspector General Horowitz in this departmental announcement states, "The Department of Justice Office of the Inspector General will continue to bring to justice any BOP employee who abuses inmates . . . ."[195] DOJ representations such as these indicate that the Department's decades of PREA failures are not acknowledged or understood. Another approach is urgently needed.

IV. SEXUAL ABUSE VIOLATES THE INHERENT AND EQUAL DIGNITY OF EVERY PERSON.

This part provides a framework for understanding the harms of sexual violence as harms to a person's human dignity.[196] Dignity embodies the intrinsic and equal worth of every member of the human fam-

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[193] PSI REPORT, *supra* note 2, at 30.

[194] Dec. 2022 Press Release, *supra* note 39.

[195] *Id.*

[196] This part is derived from the global jurisprudence of dignity at the national and international levels surveyed in ERIN DALY & JAMES R. MAY, DIGNITY LAW: GLOBAL EMERGENCE, CONSTITUTIONS, CASES, AND PERSPECTIVES (2020) [hereinafter DIGNITY LAW], and ERIN DALY & JAMES R. MAY, DIGNITY UNDER LAW: A GLOBAL HANDBOOK (2021) [hereinafter GLOBAL HANDBOOK].

ily.[197] Dignity is inherent in the human person; it is not given or granted, nor is it dependent on any action or status. Dignity is inalienable; it cannot be withdrawn or diminished. Dignity is equal; no one has more or less dignity than any other person, and no one's life has more value than anyone else's. Dignity embodies both the feeling of self-worth and the internalization of how others see us. It is the reason why one person has no right to demean, degrade, or humiliate another person or to treat them as if their life has less value than any other person's.[198]

Human rights law around the world and increasingly in the United States acknowledges rights that derive from the recognition of human dignity.[199] Dignity rights entitle every person to be treated "as a person"[200]—that is, with equal respect for their equal worth and autonomy.[201]

Casting a dignity lens on the experiences of sexual violence of women who are incarcerated in the United States not only helps us see the harms that they endure, but also suggests a legal theory for protecting women against such harms. Understanding the harms discussed in these pages as violations of women's dignity imposes on the law a non-derogable obligation to protect them. This part describes the harms of sexual abuse of incarcerated people in terms of human dignity and offers suggestions based in U.S. and international law for the protection of human dignity.

A. The Recognition of Dignity Rights

1. Dignity rights are recognized under the United States Constitution.

Human dignity is referenced throughout American law, although the United States is one of only about 30 countries whose constitution does not explicitly protect dignity.[202] In 1958, in a turn of phrase that has been cited innumerable times since then, the Supreme Court wrote,

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[197] *See* G.A. Res. 217 (III) A, Universal Declaration of Human Rights, Preamble (Dec. 10, 1948) [hereinafter UDHR].

[198] *Id.*, Art. 1 ("All human beings are born free and equal in dignity and rights. They . . . should act towards one another in a spirit of brotherhood.").

[199] *See generally* ERIN DALY, DIGNITY RIGHTS: COURTS, CONSTITUTIONS, AND THE WORTH OF THE HUMAN PERSON (2d ed. 2020). For resources on dignity law in the United States and abroad including a database of cases, see *Dignity Resources Project*, AM. BAR ASS'N (Jul. 7, 2023), https://www.americanbar.org/groups/human_rights/dignity-rights-initiative/dignity-documents-project/ (on file with CUNY Law Review).

[200] UDHR, *supra* note 197, Art. 6

[201] *See id.*, Art. 1.

[202] *See DRI Constitutions Database*, https://perma.cc/3SDK-XX6K (last visited July 1, 2023).

"The basic concept underlying the Eighth Amendment is nothing less than the dignity of man,"[203] indicating both that dignity is a foundational constitutional value and that it applies no less to people who are incarcerated than to anyone else. Since then, the Court has frequently referred to dignity in the context of the criminal legal system and specifically the protections owed to people who are incarcerated.[204]

The Supreme Court has described dignity as even more essential than liberty and requiring the utmost level of protection. In *Brown v. Plata*, the Court ordered the California prison system to end massive overcrowding because it violated the Eighth Amendment dignity rights of incarcerated people.[205] It held that dignity rights cannot be stripped away even when the government has a compelling interest in taking away an individual's freedom: "As a consequence of their own actions, prisoners may be deprived of rights that are fundamental to liberty. Yet the law and the Constitution demand recognition of certain other rights. Prisoners retain the essence of human dignity inherent in all persons."[206] When a person is convicted of a crime, they sometimes forfeit rights likened to liberty or freedom, but they still maintain their right to live with and be treated with dignity.

2. Every human being has the inherent right to the protection of their dignity.

The Supreme Court's recognition that dignity underlies the Eighth Amendment's prohibition on cruel and unusual punishment aligns with the way courts around the world have understood the human right to be treated with respect for one's dignity.

Indeed, in most of the world, the very right to life is the right to live with dignity, even for people convicted of crimes. The Human Rights Committee, in interpreting the right to life guaranteed in the International Covenant of Civil and Political Rights (which the United States ratified in 1992)[207] has said explicitly that every person is entitled to live with dignity. It states:

> The right to life is a right that should not be interpreted narrowly. It concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause

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[203] Trop v. Dulles, 356 U.S. 86, 100 (1958).

[204] *See* DALY, *supra* note 199, at 88-90.

[205] Brown v. Plata, 563 U.S. 493, 500-02 (2011).

[206] *Id.* at 501, 510.

[207] G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Dec. 16, 1966); *Status of Treaties: International Covenant on Civil and Political Rights*, U.N. TREATY COLLECTION, https://perma.cc/7ZQY-PBCH (last visited July 1, 2023).

> their unnatural or premature death, as well as to enjoy a life with dignity. Article 6 of the Covenant guarantees this right for all human beings, without distinction of any kind, including for persons suspected or convicted of even the most serious crimes.[208]

In some national constitutions, the right to live with dignity travels intact into the prison setting. In a case involving visitation rights of an incarcerated person, the Indian Supreme Court interpreted the right to life in the Indian Constitution as including

> the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing one-self in diverse forms, freely moving about and mixing and commingling with fellow human beings.[209]

Thus, even people who are imprisoned are entitled to the protection of "the bare minimum expression of the human-self."[210] The court further explained that violations of dignity could never be countenanced:

> Now obviously, any form of torture or cruel, inhuman or degrading treatment would be offensive to human dignity and constitute an inroad into this right to live and it would, on this view, be prohibited by [the right to life] unless it is in accordance with procedure prescribed by law, but no law which authorises and no procedure which leads to such torture or cruel, inhuman or degrading treatment can ever stand the test of reasonableness and non-arbitrariness: it would plainly be unconstitutional and void as being violative of Articles 14 and 21 [which protect the right to life]. It would thus be seen that there is implicit in Article 21 the right to protection against torture or cruel, inhuman or degrading treatment which is enunciated in Article 5 of the Universal Declaration of Human Rights and guaranteed by Article 7 of the International Covenant on Civil and Political Rights.[211]

The Court recognized that the right to liberty is limited when a person is imprisoned. Yet, they retain "the right to live with human dignity."[212]

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[208] U.N., H.R. Comm'n, International Covenant on Civil and Political Rights: General Comment No. 36, ¶ 3, U.N. Doc. CCPR/C/GC/36 (Sept. 3, 2019).

[209] Francis Coralie Mullin v. Administrator, Union Territory of Delhi, (1981) 2 SCR 516 (India).

[210] *Id.*

[211] *Id.*

[212] *Id.*

The European Court of Human Rights has similarly recognized that failures to protect the dignity of those in police custody violate the prohibition against torture and degrading treatment in Article 3 of the European Convention on Human Rights.[213] Even though the Convention (like the U.S. Constitution) makes no explicit mention of human dignity, the Grand Chamber of the Court held:

> Ill-treatment that attains such a minimum level of severity usually involves actual bodily injury or intense physical or mental suffering. However, even in the absence of these aspects, where treatment humiliates or debases an individual, showing a lack of respect for or diminishing [their] human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition set forth in Article 3 . . . . It should also be pointed out that it may well suffice that the victim is humiliated in his own eyes, even if not in the eyes of others . . . .[214]

Referring to a case in which a young man had been slapped in the face by a police officer, the Grand Chamber of the European Court recognized that even though "the applicant did not suffer any severe or long-lasting physical effects, his punishment—whereby he was treated as an object in the power of the authorities—constituted an assault on precisely that which it is one of the main purposes of Article 3 to protect, namely a person's dignity."[215]

It is the debasement, the denigration of another's humanity, and the bending of their will to suit the person in power—and not merely sexual gratification—that is the essence of sexual abuse. This is why sexual abuse by a prison official against someone in their custody is an unjustifiable violation of human dignity. The action is done primarily to humiliate another human being, to demean them, to subjugate them to the perpetrator's will. This violates the essence of human dignity, which insists on the fundamental *equal worth*[216] of "all members of the human family."[217]

But as we will see below, even if the motivation for staff-on-prisoner sexual abuse were sexual gratification, it would violate the principle of dignity that prohibits the objectification of a person or use

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[213] Bouyid v. Belgium, App. No. 23380/09, ¶ 107 (Sept. 28, 2015), https://perma.cc/WMN3-2Z32.

[214] *Id.* ¶ 87 (citations omitted).

[215] *Id.* ¶ 90.

[216] UDHR, *supra* note 197, Art. 1 ("All persons are born equal in dignity and rights.").

[217] *Id.*, Preamble.

of a person as a means to one's own ends. As the German Federal Constitutional Court has explained in permitting life sentences only if there is a realistic possibility of parole:

> [E]ven within the community, each individual must in principle be recognized as a juridically equal member with a value of his own. It contradicts human dignity to make the person a mere object in the state. The sentence "Man must always remain an end in himself" has unlimited validity in all areas of the law; for the dignity of man as a person, which can never be lost, consists particularly in this, that he remains recognized as a personality responsible for himself.[218]

Because dignity rights attach to the value of a person's life and to their self-worth, those rights must be respected and maintained at all times and under all circumstances. As the German court said, dignity rights have "unlimited validity."[219] Dignity rights are therefore absolute, allowing no derogation or justification for their infringement. Protecting dignity absolutism is especially important for individuals who are incarcerated because dignity rights are distinct from other rights, which may be withdrawn, limited, or conditioned.[220]

B. *The Law's Protection of Human Dignity Promotes Decisional Autonomy, Bodily Integrity, and Sexual Privacy.*

International law tells us that every member of the human family is born "equal in dignity and rights."[221] Dignity gives us the right to have and to claim rights, to paraphrase Hannah Arendt.[222] It is the sense that we have worth that is equal to everyone else's that catalyzes our entitlement to be treated "as a person" and our claims to rights. But what rights does dignity protect?

Staff-on-prisoner sexual abuse threatens at least three different aspects of human dignity that are protected by international law and U.S.

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[218] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 1 BvL 14/76, June 21, 1977, ¶ 142, *translated in* ERNEST J. WEINRIB, RECIPROCAL FREEDOM: PRIVATE LAW AND PUBLIC RIGHT 122 (2022).

[219] 1 BvL 14/76 at ¶ 142.

[220] *See, e.g.*, Noori v. Nat'l Accountability Bureau (NAB), CP No. 3637 & 3638/2019, 4 (2021) (Pak.), https://perma.cc/5PQN-6BN9 (last visited July 31, 2023) (considering bail reform, stating that "[r]ight to dignity under Article 14 is an absolute constitutional standard, which is not subject to law . . . because dignity inheres in a human person and is not granted by law or cannot be taken away by law").

[221] UDHR, *supra* note 197, Art. 1.

[222] HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 298 (1st ed. 1951) ("[T]he right to have rights, or the right of every individual to belong to humanity, should be guaranteed by humanity itself.").

constitutional law: the rights to (1) agency over our lives, including the right to make important decisions about our lives; (2) bodily integrity, including the right to control what happens to our bodies; and (3) privacy, including sexual privacy, which allows us to draw a line between ourself and others in intimate matters.

All three of these rights fall under the umbrella of dignity because they help to protect an individual's self-worth from being demeaned, and when a person is forced to endure unwanted sexual contact, all three of these dignity-based rights are violated. No one should be forced into *unwanted* sexual contact or forced to endure conditions that make them question their worth. [223]

These rights are particularly important to people in prison because they are absolute and inalienable. While the law currently permits violations of incarcerated people's rights that would not be permitted against those on the outside, it cannot permit violations of dignity. As the highest court of the United States and those of many other nations have said, those who are in prison lose their liberty but do not lose their dignity.[224] We need to understand sexual abuse as a violation of inherent personal dignity, and courts need to protect women's dignity from the depredations of others, be they private individuals or public officials.

1. Decisional Agency and Autonomy

Decisional autonomy speaks to agency and the dignity-based right to make choices for oneself that affect oneself.[225] In philosophy, "an agent is a being with the capacity to act."[226] This is foundational to dignity rights: Each person has the right to act for themselves, and no one

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[223] As set forth elsewhere in this article, there is no such thing as consensual sex inside carceral facilities as a matter of law. Due to the power differentials between prison officials and incarcerated individuals, consent cannot be granted. Thus, even cases that do not involve forcible sexual contact are not consensual, chosen, or "wanted." *E.g.*, 2009 OIG REPORT, *supra* note 2, at i (citing 18 U.S.C. §§ 2241-45).

[224] *See, e.g.*, Brown v. Plata, 563 U.S. 493, 510 (2011) ("As a consequence of their own actions, prisoners may be deprived of rights that are fundamental to liberty." Even so, "the law and the Constitution demand recognition of certain other rights. Prisoners retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment" because "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man.").

[225] We use the terms "autonomy" and "agency" interchangeably. "Autonomy" is more often used in the judicial and secondary literature, although we prefer "agency" because it connotes self-determination—the defining characteristic of dignity—without implying that any person has the unilateral right to make decisions that affect others. In the context of control over one's body and sexual privacy, however, each person does have the unilateral right to make rules for themselves.

[226] Markus Schlosser, *Agency*, ST. ENCYCLOPEDIA PHIL., https://perma.cc/LBQ5-B486 (Oct. 28, 2019).

can take away or control the agency of another. To do so would be to treat another person as of lesser value, as an object or means to accomplish another person's ends or goals, as a being of lesser dignity.

Agency can be about any decision that is important to one's life: whether and when to have children,[227] choice of occupation[228] or educational goals,[229] choice of intimate partner,[230] or anything else. The Supreme Court of Israel has described dignity in these terms, focusing on the decisional autonomy of each individual:

> [T]he right to human dignity lies in the recognition that man is a free creation that develops his body and spirit according to his desire in the society in which he lives; in the center of human dignity lies the sanctity of his life and of his liberty. At the foundation of human dignity lies the autonomy of individual desire, freedom to choose and freedom of action of man as a free creation.[231]

Autonomy is protected throughout American law. In legal practice, the American Bar Association ("ABA") sets out rules to ensure that clients have the final say in their cases. ABA Rule 1.2 states, "A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation" and shall "abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify."[232] The rule is similarly based in the law's commitment to the decisional agency of, in this case, the client. The client alone has the final say on the essential matters in their cases that may affect the course of their lives, their sense of self-worth, and their relations with others in society—all dignity interests that support the essential right of self-determination.

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[227] *See, e.g.*, Griswold v Connecticut, 381 U.S. 479, 485-86 (1965).

[228] Corte Constitucional [C.C.] [Constitutional Court], abril 23, 2009, Sentencia T-291/09, Gaceta de la Corte Constitucional [G.C.C.] (Colom.).

[229] Miss Mohini Jain v. State of Karnataka, 1992 AIR 1858 (1992) (India).

[230] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 567 (2003); Obergefell v. Hodges, 576 U.S. 644, 665 (2015).

[231] GLOBAL HANDBOOK, *supra* note 196, at 10 (quoting HCJ 6427/02 Movement for Quality Gov't v. The Knesset (2006) (Isr.)).

[232] MODEL RULES OF PRO. CONDUCT r. 1.2 (AM. BAR ASS'N 1983).

2. Bodily Integrity

The state may never violate a person's dignity right to bodily integrity.[233] It may not use a person's body to achieve any goal or policy, no matter what the context or situation. Rape as a tool of war, bondage and enslavement, medical experimentation, and other forms of bodily control or abuse are absolutely prohibited under fundamental principles of human rights and constitutional law, of which there may be no derogation.[234] This is true even when the bodily invasion takes subtler forms. When the City of Flint, Michigan began to use a contaminated water system to supply water to its residents, it violated the residents' bodily integrity in numerous ways. As the state court in *Mays v. Governor of Michigan* explained, violations of bodily integrity involve "an egregious, nonconsensual entry into the body [that is] an exercise of power without any legitimate governmental objective."[235] Violations of a person's bodily integrity violate their dignity because every individual has the right to self-determination against nonconsensual or harmful activity to their body.

In the medical field, matters of decisional agency combine with the dignity right to maintain bodily integrity. The law requires that patients receive informed consent before procedures and treatments.[236] Doctors

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[233] *See, e.g.*, Brown v. Plata, 563 U.S. 493, 510-11 (2011) ("Just as a prisoner may starve if not fed, [they] may suffer or die if not provided adequate medical care. A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society."); Bouyid v. Belgium, App. No. 23380/09, ¶ 90 (Sept. 28, 2015), https://perma.cc/WMN3-2Z32 (referring to the European Convention on Human Rights and finding that even when an "applicant [does] not suffer any severe or long-lasting physical effects," if their punishment treats them "as an object in the power of the authorities," it "constitute[s] an assault on precisely that which it is one of the main purposes of Article 3 to protect, namely a person's dignity and physical integrity").

[234] These interests are protected in constitutions and align with the unofficial list of peremptory norms from which no state derogation is permitted. *See, e.g.*, Int'l Law Comm'n, Rep. on the Work of Its Seventy-First Session, U.N. Doc. A/74/10, at 146-47 (2019) (listing non-derogable peremptory norms of general international law (*jus cogens*): "(a) The prohibition of aggression; (b) The prohibition of genocide; (c) The prohibition of crimes against humanity; (d) The basic rules of international humanitarian law; (e) The prohibition of racial discrimination and apartheid; (f) The prohibition of slavery; (g) The prohibition of torture; (h) The right of self-determination.").
This is also why forced pregnancy, in the form of prohibitions on abortion, may be considered a form of involuntary servitude in violation of the Thirteenth Amendment. *See* U.S. v. Handy, Criminal Action No. 22-096 (CKK) (D.D.C. 2023) (citing Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480 (1990)).

[235] Mays v. Governor of Mich., 954 N.W.2d 139, 158 (Mich. 2020) (quoting Rogers v. City of Little Rock, 152 F.3d 790, 797 (8th Cir. 1998)).

[236] *E.g.*, Cobbs v. Grant, 502 P.2d 1, 9-10 (Cal. 1972).

must inform patients about treatment, potential risks, and therapies in the medical field before initiating a procedure.[237] Fully informing patients is critical because every competent individual has the right to choose what should or should not happen to their body. In order to make the decision that is right for them, patients need to be fully informed about the options. For instance, in *Cobbs v. Grant*, the California Supreme Court laid out a list of elements necessary to ensure that consent is fully informed and voluntarily given. The court stated that "a person of adult years and in sound mind has the right, in the exercise of control over [their] own body, to determine whether or not to submit to lawful medical treatment."[238] Recognizing that consent must be fully informed in order to be effective, the court protected the patient's right to maintain his decision-making agency regarding his body and life, which is precisely the principle with which decisional dignity is concerned. Indeed, agency over matters of bodily integrity is so strongly protected that a "physician's failure to inform [a] plaintiff of all material risks associated with the procedure, and . . . a showing that a reasonably prudent patient, with all the characteristics of the plaintiff and in the position of the plaintiff, would have declined the procedure had the patient been properly informed," constitutes a violation of the right to informed consent.[239] The rule clarifies the protection of the patient's right to determine if the procedure and the effects are risks they are willing to endure.

In *Lozado Tirado v. Testigos Jehová*, the Supreme Court of Puerto Rico upheld a person's right to refuse even lifesaving medical treatment "by virtue of the principle of the inviolability of the dignity of the human being and the right of privacy enshrined in our Constitution,"[240] thus conjoining individual autonomy, privacy, and bodily integrity rights as part of the constitutional commitment to human dignity. It is noteworthy that in American prisons and jails, where incarcerated individuals lose many rights, most still retain the right to refuse medical examination, treatment, and medication except under unusual circumstances (such as, for instance, where a threat to public health is posed).[241] Thus,

[237] *See id.* at 9-11.

[238] *Id*. at 9.

[239] Looney v. Moore, 886 F.3d 1058, 1066 (11th Cir. 2018) (quoting Giles v. Brookwood Health Servs., 5 So. 3d 533, 553-54 (Ala. 2008)).

[240] Lozada Tirado v. Testigos Jehová, 2010 TSPR 9 (translated from the original Spanish).

[241] *See, e.g.*, Washington v. Harper, 494 U.S. 210, 221-22 (1990) (finding that "in addition to the liberty interest created by the State's Policy [requiring nonconsensual administration of antipsychotic drugs], respondent possesse[d] a significant liberty interest in avoiding the unwanted administration of [those] drugs under the Due Process Clause of the Fourteenth Amendment").

even in the highly regimented and tightly controlled carceral setting, the rights of incarcerated individuals to bodily integrity are protected under the law.

3. Sexual Privacy

Personal choices over one's sexual privacy are under the umbrella of dignity protection as well. One's personal sexual privacy is outside the purview of governmental intrusion because of its connection to a person's dignity and individuality. For nearly 60 years, the Supreme Court has protected rights relating to sexual intimacy, first as it applied to married couples,[242] and later for others,[243] ultimately recognizing this as an essential aspect of human dignity.

In *Griswold v. Connecticut*, the Supreme Court first protected sexual privacy by prohibiting a state from regulating (and therefore having to enforce) a ban on contraceptives.[244] As Justice Goldberg's concurrence explains, the drafters of the Constitution "sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."[245] This is language that bespeaks dignity because it concerns not only sexual privacy *per se* but all of a person's attributes that make them who they are: A person's beliefs, thoughts, emotions, and sensations are all aspects of a person's innate dignity. Here, the concern is compounded because of the intimate and private nature of the intrusion, and the potential pregnancy-related effects on the body.

This compound interest was brought out in many of the court's subsequent cases protecting what it would call privacy in the first cases and dignity in the later ones. In *Eisenstadt v. Baird*, the court explained that "[i]f the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person."[246] Thirty years later, in *Lawrence v. Texas*, the court would recognize that prohibitions on sexual activity between people of the same sex violated dignitary interests as well, saying:

> The stigma this criminal statute [prohibiting same-sex sexual activity] imposes, moreover, is not trivial. The offense, to be sure,

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[242] Griswold v. Connecticut, 381 U.S. 479 (1965).

[243] Eisenstadt v. Baird, 405 U.S. 438 (1972); Lawrence v. Texas, 539 U.S. 558 (2003).

[244] *Griswold*, 381 U.S. at 485-86.

[245] *Id.* at 494 (Goldberg, J., concurring) (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

[246] *Eisenstadt*, 405 U.S. at 453.

> is but . . . a minor offense in the Texas legal system. Still, it remains a criminal offense with all that imports for the dignity of the persons charged. The petitioners will bear on their record the history of their criminal convictions.[247]

The Court would reinforce this concern in *Obergefell v. Hodges*, where it again found that the dignity interests of individuals protected them from laws that violated their right to choose whom to marry.[248] Whom we marry or connect ourselves to is how we express what is important to us and how we want to live our lives. As the Court explained, "[T]he right to personal choice regarding marriage is inherent in the concept of individual autonomy" because "decisions concerning marriage are among the most intimate that an individual can make."[249]

These examples demonstrate the overlap between decisional autonomy, bodily integrity, and sexual privacy. These cases all concerned people who were making important decisions about their lives and their bodies, in some cases in the context of sexual privacy. Because these rights are rooted in human dignity, they follow the person wherever they are, even in prison. Indeed, the law should take special measures to protect the dignity of those who are particularly vulnerable to the duress forced upon them by those under whose control they live.

C. Judicial Respect for Women's Dignity in Cases Involving Nonconsensual Sexual Conduct

We see a soft trend in the courts toward recognizing the dignity harms of abusive and unwanted sexual contact, mostly through the judicial removal of barriers to recovery for victims and survivors. For instance, elements including proof of fear of violence or threat to life, or proof of physical injury, or proof that consent was withheld, are giving way to evidence that the sexual contact was unwanted and therefore, by definition, violative of human dignity precisely because it violated the three aspects of dignity discussed above.

1. Courts are increasingly vindicating dignity rights in cases of sexual abuse.

Whether or not they explicitly use the term "dignity," courts are increasingly attending to the dignity harms implicated in cases involving unwanted or nonconsensual sexual contact. For instance, in *United States v. Price*, the defendant, Price, sat next to the victim on a plane,

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[247] *Lawrence*, 539 U.S. at 575.
[248] Obergefell v. Hodges, 576 U.S. 644, 665-66 (2015).
[249] *Id.*

and while the victim was asleep, Price proceeded to touch her breast and slip his hand into her underwear.[250] Price was ultimately found guilty of abusive sexual contact.[251] On appeal, the Ninth Circuit concluded that "touching first, and asserting later that he 'thought' the victim consented . . . [was] precisely what [the law] criminalize[d]."[252] To rule otherwise would be to put the burden on the survivor to adduce evidence that she withheld consent and for the law to presume that sexual contact is wanted. This would violate bodily integrity, sexual privacy, and, in some cases, decisional autonomy as well, where there is no admissible evidence of lack of consent. The court recognized that to protect her dignity, it could not require her to prove that she did not consent or that she was fearful or coerced into the activity for the defendant to be found guilty of sexual assault.[253] The harm to her dignity—evidenced by the lack of consent and the violation of her bodily integrity and sexual privacy—was sufficient.

Additionally, a physical representation of the violation should not be necessary for courts to agree that a person's bodily integrity has been violated. When a woman is touched sexually without consent, bruise marks, scars, ligature tears, or lacerations are not necessary for courts to say that there has been a violation of a person's bodily integrity. For instance, in *Kerry G. v. Stacy C.*, the victim sought a protective order against the defendant, who had repeatedly assaulted her.[254] The evidence showed that the defendant had engaged in sexual activity with the victim while she was unconscious and unable to consent.[255] The Supreme Court of Kansas ruled that a bodily injury occurred because the victim did not consent to the contact.[256] This ruling exemplifies that evidence of physical signs of an assault is not necessary to prove that a violation of bodily integrity occurred. The court ruled that "any unwanted sexual touching causes bodily injury"[257] by definition and implicitly constitutes a violation of dignity. The district court wrote, and the Kansas Supreme Court quoted, that "[i]f someone tells you to quit touching them and you continue to touch them, then this Court is going to find, particularly when it's of a sexual nature, that you are injuring their body . . . . I'm going to

[250] United States v. Price, 980 F.3d 1211, 1215 (9th Cir. 2019). *See generally* Daisy Zavala Magaña, *'Disturbing Uptick' in Sexual Assaults on Aircraft, Officials Say*, SEATTLE TIMES (Aug. 10, 2023, 6:00 AM), https://perma.cc/AK93-AGEE.

[251] *Id.*

[252] *Id.*

[253] *See id.*

[254] Kerry G. v. Stacy C., 386 P.3d 921, 922 (Kan. 2016).

[255] *Id.* at 218-20.

[256] *Id*. at 223-24.

[257] *Id*. at 218.

take any sexual contact . . . [that's] unwanted [as] an injury to someone else."[258] This case does an excellent job of protecting the dignity aspect of bodily integrity because it does not require evidence of harm to the body; rather, it focuses on the dignity harm of depriving victims of the right to control their bodies, particularly in a sexual way. Protecting dignity means protecting not just the physical body, but the individual's sense of control over their life and their body, their sense of self-worth, and their identity.

As shown above, in the context of staff-on-prisoner sexual abuse, the lack of consent is *de jure*, not only *de facto*; if the victim is unable to consent *as a matter of law*, then the sexual contact is necessarily unwanted and a violation of human dignity.[259] Thus, the cases that presume consent by placing the burden of proving lack of consent on the victim not only violate the principle of human dignity, but are also inapposite to the staff-on-prisoner incidents of sexual abuse. For instance, in *State v. Beckner*, the Oregon Court of Appeals remanded the case for a lesser sentence, holding that the victim had not proven that she feared she would be killed, kidnapped, or physically injured; without such evidence, first-degree sexual assault could not be proven.[260] Such a requirement ignores the dignity harms of unwanted sexual contact and is irrelevant where consent cannot be presumed.

Likewise, in *State v. Townsend*, the defendant, Townsend, sexually touched the victim without consent and was charged with sexual assault in the second degree.[261] Townsend was ultimately acquitted of charges since there was no evidence that he had "coerced" the victim to agree to the contact.[262] The applicable state law defined "without consent" as requiring the victim to be "coerced by the use of force . . . or by the express or implied threat of death, [or] imminent physical injury."[263] A better definition of "without consent" would be multifaceted. While it may include evidence of possible coercion, it should also consider how, if at all, the victim exercised their dignity rights. Unwanted sexual contact does not need to be coerced in order for a person's bodily integrity to have been violated or for their autonomy or agency to have been compromised.

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[258] *Id*. at 220.

[259] *E.g.*, 2009 OIG REPORT, *supra* note 2, at i; 18 U.S.C. §§ 2241-45. The term "*de facto*" is "a legal concept used to refer to what happens in reality or practice," whereas the term "*de jure*" "refers to what is actually notated in legal code." Michele Metych, *De Facto*, ENCYC. BRITANNICA (Feb. 8, 2023), https://perma.cc/B2CG-5AJN.

[260] State v. Beckner, 466 P.3d 1000, 1002, 1005 (Or. Ct. App. 2020).

[261] State v. Townsend, No. A-10502, 2011 WL 4107008, at *1 (Alaska Ct. App. 2011).

[262] *Id.*

[263] *Id*.

Regardless of the evidentiary burden, judicial attention to physical injuries, the victim's disposition (such as their level of fear), or the level of coercion that accompanies sexual battery reinforces the implication that the harm of sexually abusive behavior is in the sexual contact rather than in the dignity violation of diminished capacity to control one's life and body. The focus should instead be on the fact that the person did not want the sexual contact—that is, whether or not they exercised autonomy to make a decision for themselves—not the degree of fear that enveloped their decision. An individual should not have to be fearful of harm being done to them when someone is touching them sexually without permission. The individual initiating the contact should seek and receive consent where it is factually and legally possible to do so before engaging in the contact. If there is no evidence of consent or if the consent is without legal content—that is, if the person is not exercising their decisional autonomy—then the court should find that the contact was nonconsensual in violation of the person's dignity rights.

An individual's dignity right to bodily integrity is violated if they are touched sexually without consent because they did not choose to engage in said contact. Conversely, when a person is using another for their own objectives (whether to gratify their own sexual urges or for the purpose of demeaning or humiliating them), they are violating the person's dignity. Either way, a dignity violation occurs when a prison official engages in sexual activity or contact with an incarcerated individual.

2. A dignity-based right to protection from nonconsensual sexual contact ensures that the dignity of both parties is fully protected.

The law should demand that each person respect others' human dignity, especially in matters as important as bodily integrity and sexual privacy. In the context of cases about sexual activity, the law should ensure that each person can exercise their dignity right to make decisions for themselves about their bodies and sexual activity. This means that the law should presume lack of consent unless there is evidence to the contrary. Only then can it be said that both parties have affirmatively chosen to engage in sexual activity and only then can it be said that the equal dignity of both is respected.

This is consistent with the light trend, as shown above, in the United States, as well as in cases from foreign courts. For instance, in *Vishaka v. State of Rajasthan*, the Indian government had created a right to safe workplace spaces to protect the dignity and bodily integrity of

women at work.[264] This class-action lawsuit came as a response to a woman's rape at her job.[265] Activists realized preventative procedures needed to be put in place to protect women against sexual harassment.[266] In response, the court made a list of preventative steps to assist in the protection of women and foster gender equality in the workplace.[267] Through these actions, the Supreme Court of India agreed and affirmed that all people have a dignity-based right to work without being sexually attacked or harassed.[268] For present purposes, the significance of this case is that dignity may demand that the state take affirmative measures to ensure that every person can live with dignity, which includes freedom from sexual abuse. In the case of prisons, the obligation is heightened because prisons have a duty of care toward those in their custody that demands, at a minimum, respect for each person's dignity.[269]

One example of a legislative directive that requires a person to obtain consent before seeking sexual contact with another is California's "yes means yes" standard.[270] The "yes means yes" standard protects the dignity of both parties by fostering healthy communication between consenting partners about their expectations during sexual activity and ensuring that both parties affirmatively assert their consent.[271] This standard protects bodily integrity, as a person can make their wishes known to those with whom they are engaging sexually. This replaces the prior "no means no" standard, which required the victim to prove that they had affirmatively withheld consent in order to protect their bodily integrity; the new standard protects their decisional autonomy.[272] This standard also ensures that people who cannot give consent are not presumed to have consented; such incapacity may be factual, as in the case of people who are asleep or unconscious, or legal, as in the case of women in custody. It shifts the presumption to one that leaves a woman's body and privacy protected *unless* she takes affirmative measures to engage in sexual activity.

A dignity lens thus focuses attention on the experience of those whose dignity is threatened. An analogy may be made to the Supreme

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[264] Vishaka v. State of Rajasthan, AIR 1997 SC 3011, ¶ 3 (1997) (India).

[265] *Id.* ¶¶ 1-2.

[266] *Id.* ¶ 1.

[267] *Id.* ¶ 16.

[268] *Id.* ¶ 3.

[269] *See* Brown v. Plata, 563 U.S. 493, 510-11 (2011).

[270] Kevin de León & Hannah-Beth Jackson, *Why We Made 'Yes Means Yes' California Law*, WASH. POST (Oct. 13, 2015, 10:39 AM), https://www.washingtonpost.com/news/in-theory/wp/2015/10/13/why-we-made-yes-means-yes-california-law/ (on file with CUNY Law Review).

[271] *Id.*

[272] *Id.*

Court's decision in *Brown v. Board of Education*, where the unanimous court considered not the intent of the school districts but the experience of students who attended segregated schools.[273] As the Court famously wrote, "To separate [students] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[274] This evinces a particular concern for the dignity of students—their self-esteem and sense of self-worth, their standing in their community, and their ability to fully develop their personalities and act as agents of their own lives.

That same approach should be used in protecting the dignity-based right to bodily integrity against nonconsensual sexual contact because sexual contact without consent or from a position of subordination can have long-lasting effects on a person's dignity. Ultimately, in order to adequately protect a person's bodily integrity, privacy, and decisional autonomy, judicial sensitivity to power imbalances and the dignity harms of sexual violence are necessary to protect the dignity of people who are vulnerable to sexual violence, especially those who live in conditions of confinement.

3. The right to dignity is inviolable.

Typically, when the Supreme Court has decided cases involving fundamental constitutional rights, it has allowed the government to justify violations of such rights if they are narrowly tailored to a compelling state interest. In dignity cases, however, including *Lawrence v. Texas* and *Obergefell v. Hodges*, no such test applies because human dignity is inviolable; violating a person's dignity can never be justified, not even if the violation is minimal, and not even if the need is great.[275] The same was true in *Brown v. Board of Education*, where the court simply held that "[s]eparate educational facilities are inherently unequal."[276] It did not give the government the opportunity to justify segregation or to create exceptions for the dignity violations it found. Segregation in public education was simply found to be unconstitutional.

Nonconsensual sexual battery illustrates the inviolability of dignity. It cannot be said that a prison official is justified in engaging in sexual assault with a person under their authority even if they could persuade a court that the sexual assault was minimal or that they had some justifica-

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[273] Brown v. Bd. of Educ., 347 U.S. 483, 493-94 (1954).

[274] *Id.* at 494.

[275] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 574 (2003); Obergefell v. Hodges, 576 U.S. 644, 663 (2015).

[276] *Brown*, 347 U.S. at 495.

tion for engaging in it. Nor would qualified immunity be available to an officer who relied on the victim's purported consent, as the law is clear that such consent is never legally acceptable.[277]

The line between a legitimate strip search and voyeurism or sexual abuse exemplifies the distinction: A strip search may be permissible when the need is based on individualized facts and when it is conducted with respect for the incarcerated person's dignity—that is, with privacy and with respect for the person as a person.[278] On the other hand, when the harm to the person who is imprisoned is disproportionate to the actual need or conducted for some purpose other than actual (not merely asserted) penological need, then the conduct humiliates the person and objectifies them in violation of the very essence of their dignity rights. By definition, such abuse is impermissible. There is no compelling interest that would justify the objectification or humiliation of a person, particularly a person in the custody or under the control of the perpetrator.

Dignity's absolutism is recognized as a matter of logic and a matter of law, particularly at the international level. In countries as diverse as Germany and Pakistan, the right to dignity is recognized as inviolable and absolute. Germany's Basic Law states, "Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authori-

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[277] *Cf.* Clark v. Coupe, 55 F.4th 167, 188 (3d Cir. 2022) (finding no qualified immunity where prison officials had "fair warning" that forcing a person with a serious mental illness into solitary confinement for an extended period would violate the Eighth Amendment).

[278] Examples of policies that seek to protect a prisoner's dignity while permitting prison officials to engage in involuntary strip searches exist in Europe. *See Personal Strip-Searches Performance*, EUROPRIS KNOWLEDGE MGMT. SYS., https://perma.cc/C7EW-3J8V (last visited July 2, 2023).

Spain: Strip searches can be conducted "[o]nly under concrete circumstances and evaluation, with officers from the inmate's gender and with the inmate partially dressed." *Id.*

Norway (in part): "A body search should be done by a person of the same sex as you. The body search should take place in a manner that has the least possible embarrassing or demeaning effect on you. It may not be more extensive than necessary." And further: "Undressing and dressing must be done step-by-step, where one should put on clothes for the upper body before removing garments below. Body scanners - safety scanners are recommended to be used when available. A protocol is written in all cases of body-search." *Id.*

Belgium (in part): "Strip-search is possible if there is individualized evidence that the search of the clothes is not sufficient to maintain order and security. In this case, the prison governor takes an individual reasoned decision that [they] set[] down on a form," which the inmate signs and keeps a copy of (and note is taken if the inmate declines to sign). "Strip-search must be carried out by at least two members of the penitentiary surveillance staff of the same gender as the searched inmate in a closed area and without any other inmate being present" and it may not be carried out if such personnel are not available. "In a strip-search, it is permitted to oblige the inmate to take all [their] clothes off in order to conduct an external inspection of [their] body and mouth. Strip-search must not be vexatious and must be carried out with respect for the inmate's dignity." *Id.*

ty."[279] This means that above everything else, human dignity shall never be infringed upon or dishonored, as has been recognized in the German Constitutional Court.[280] The Supreme Court of Pakistan has held the same. In a case invalidating the investigation of the sexual history of a person who claims to have been raped, the court relied on Article 14 of the Constitution, which is titled "Inviolability of dignity of man, etc." and establishes that "[t]he dignity of man and, subject to law, the privacy of home, shall be inviolable."[281] The court there held that "Article 14 of our Constitution mandates that dignity shall be inviolable, therefore, reporting sexual history of a rape survivor amounts to discrediting her independence, identity, autonomy and free choice thereby degrading her human worth and offending her right to [dignity, which] is an absolute right and not subject to law," meaning that it cannot be limited or encroached upon even by a law.[282]

D. Conclusion to Part IV

Women in prison cannot freely consent to engage in sexual activity with prison officials. Women in prison are, in some way, always under the perpetrator's influence or authority, which means that consent would never be free. While the PREA regime has seen a measurable deterioration of incarcerated women's protection from staff sexual abuse, dignity rights law offers the promise of a legal prism that is better aligned with the experience of staff sexual abuse and better equipped to both vindicate incarcerated victims and protect them from further harm.

V. CONCLUSION

Sexual abuse in prison violates incarcerated women's dignity because it tramples on their decisional autonomy, violates their bodily integrity, invades their privacy, and humiliates them. The experiences of Doe and Harnett and of the untold thousands of women who similarly suffer staff sexual abuse inside illustrate the violence that sexual abuse does to the human spirit. The current legal regime fails to recognize the profound harm that staff sexual abuse inflicts on incarcerated women, who are vulnerable to abuse by those who control almost every aspect of their lives. While PREA and other provisions of law absolutely prohibit

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[279] Grundgesetz [GG] [Basic Law], art. 1(1), translation at https://perma.cc/BXP8-VSWY.

[280] *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 1 BvL 14/76, June 21, 1977, ¶ 142.

[281] PAKISTAN CONST. art. 14, § 1.

[282] Zareef v. State, (2021) PLD (SC) 550 (Pak.).

certain forms of staff-on-prisoner contact, they define the impermissible conduct narrowly, thereby permitting violations of dignity, including acts that are nominally unlawful under the PREA National Standards but largely unenforceable or unenforced. In addition, the PREA National Standards impose nearly insuperable hurdles for women bringing sexual abuse claims, including irrelevant intent requirements and procedural obstacles. Moreover, for structural and cultural reasons, and due to legitimate fear of retaliation, incarcerated women who are sexually abused by prison officials rarely assert their right to report under PREA. To report their sexual abusers would be to report the very people who are in charge of their lives. Thus, it is nearly impossible for women who are sexually abused to obtain vindication, either administratively or in court. The recent *Garcia* case is simply the exception that proves the rule.

A different approach to the problem of sexual abuse in the United States' prisons and jails is desperately needed. Many countries around the world, as well as international human rights law, have already recognized the dignity rights of people in prison, and in a few cases, the United States has as well. But so far, the United States' legal system has failed to recognize that staff-on-prisoner sexual abuse is a violation of human dignity, and it has failed to use the law of dignity rights to protect women from pervasive staff-on-prisoner sexual abuse in prison. The United States should protect the dignity of all people by ensuring that their decisional autonomy, their bodily integrity, and their sexual privacy are always protected and that they are free from humiliation and objectification. Lawyers advocating on behalf of incarcerated people should insist on it.