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No Prisoner Left Behind: Enhancing Public Transparency of Penal Institutions

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NO PRISONER LEFT BEHIND? ENHANCING PUBLIC TRANSPARENCY OF PENAL INSTITUTIONS

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Prisoners suffer life-long debilitating effects from their incarceration, making them a subordinated class of people for life. This Article examines how prison conditions facilitate the creation and maintenance of a permanent underclass and concludes that enhancing transparency is the first step towards equality. Anti-subordination efforts led to enhanced transparency in schools, a similar but not identical institution. This Article argues that federal school transparency measures provide a rudimentary and balanced framework for enhancing prison transparency through the collection of specific institutional data.

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INTRODUCTION

> When a sheriff or a marshall [sic] takes a man from the courthouse in a prison van and transports him to confinement for two or three or ten years, this is our act. We have tolled the bell for him. And whether we like it or not, we have made him our collective responsibility. We are free to do something about him; he is not.[1]

The public has little idea what happens behind prison walls. Prisons and jails are essentially "closed institutions holding an ever-growing disempowered population."[2] In a democratic country such as the United States, however, prisons are administered in our name and on our behalf. Prison is a critical, but neglected, element of our criminal justice system. There is at least a professed, if perhaps unrealized, commitment to transparency in our prosecution of crime.[3] Statutes criminalizing conduct and detailing potential terms of punishment are (ideally) debated and decided in public by the legislature. Police often call for public assistance and tips when crimes occur. Police departments can be held publicly accountable for increased crime, officer misconduct, and failures to investigate. The courtroom doors are open to any interested individual.[4] Criminal trials are structurally hardwired to involve the community through the selection and empowerment of residents as jurors.[5] After the trial, however, even

1. Warren Burger, *Address by the Chief Justice*, 25 REC. ASS'N BAR CITY N.Y. 14, 17 (Supp. Mar. 1970).

2. Margo Schlanger & Giovanna Shay, *Preserving the Rule of Law in America's Jails and Prisons: The Case for Amending the Prison Litigation Reform Act*, 11 U. PA. J. CONST. L. 139, 139-40 (2008).

3. While our criminal trial process is structured against secrecy and government overreach, many aspects of the investigative process, such as prosecutorial charging decisions, remain hidden from public view.

4. Indeed, this access to the courts is vitally important in a democracy. *See* Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 147 HARV. L. REV. (forthcoming 2014).

5. Although structurally built in, the role of the juror in court is still particularly malleable. For example, the Equal Justice Institute has documented the continuing exclusion of

our professed commitment to transparency stops. While we, as a society, may have participated in the reporting, investigation, or prosecution of the crime, society is practically barred from evaluating the punishment itself.

Yet, it is vitally important that prison operations be transparent. Like the investigative and trial aspects of the criminal justice system, prison operations are administered for the greater democracy. This Article explores the social, economic, and constitutional reasons underlying the need for greater transparency. At its core, this Article argues that if the goal of a prison system is both punishment and rehabilitation, our prisons are failing institutions that result in the creation and maintenance of a racial and socio-economic underclass. Enhanced transparency of prison operations is essential for achieving a more just and safe democracy.

Millions of lives are at stake. As of January 2014, approximately 2.2 million people are incarcerated in prisons and jails nationwide.[6] Nationally, local jails admit approximately ten million people annually and state and federal prisons admit approximately seven hundred thousand people a year.[7] Bruce Western and Becky Petitt have documented how incarceration exacerbates existing inequality, leading to invisible, cumulative, and intergenerational disadvantages[8]—in effect, life-long subordination and the creation of a permanent underclass. Our national obsession with incarceration also affects the families and communities of inmates. One in every twenty-eight children has a parent incarcerated in a prison or jail.[9] Concentrated incarceration rates in communities disrupt social and economic networks, in effect reinforcing a community's marginalization from the American dream.[10]

Public education in the United States was once similarly in crisis and non-transparent. *Brown v. Board of Education*[11] announced a new principle governing public schools, namely countering the political, economic, and societal subordination of African-Americans through integrated public school educa-

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African-Americans from serious crimes and capital murder juries in the South. *See* EQUAL JUSTICE INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION 5, 9-13 (2010), *available at* http://www.eji.org/eji/raceandpoverty/juryselection. In addition, criminal trials are increasingly rare, leading one scholar to argue for a public (relatives of defendants in particular) right of access to non-trial criminal proceedings. *See generally* Simonson, *supra* note 4 (discussing the constitutional right of public access to the courtroom).

6. THE SENTENCING PROJECT, FACTS ABOUT PRISONS AND PEOPLE IN PRISONS (2014), *available at* http://www.sentencingproject.org/doc/publications/inc_Facts%20About%20Prisons.pdf.

7. Bruce Western & Becky Pettit, *Incarceration and Social Inequality*, DÆDALUS, Summer 2010, at 8, 11.

8. *Id*. at 12.

9. PEW CHARITABLE TRUSTS, COLLATERAL COSTS: INCARCERATION'S EFFECT ON ECONOMIC MOBILITY 18 (2010), *available at* http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Economic_Mobility/Collateral%20Costs%20FINAL.pdf?n=5996.

10. Todd Clear, *The Effects of High Imprisonment Rates on Communities*, 37 CRIME & JUST. 97, 122-23 (2008).

11. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

tion. The federal government, faced with halting and uneven progress in reducing the black-white educational achievement gap following *Brown*, enacted a series of measures designed to increase transparency in public education through federal collection of state educational data, culminating in the No Child Left Behind Act of 2001 (NCLB).[12] NCLB's actual impact on education is disputed. However, whether or not NCLB succeeded in improving educational outcomes is beside the point for the purposes of this Article. Rather, the clear innovation, following *Brown* and entrenched in federal education laws, is the federal collection of data on the performance of students and local schools. NCLB (and, to a lesser extent, its forerunners) has been successful in exposing and documenting subordination, even if the educational policies have not necessarily been successful in ending it.

We face a similar moment today in the operation of our prisons and jails. The rapid rise in incarcerated populations and the disparate impact on the poor and racial minorities in particular, as discussed in more detail below, mimic many of the concerns that motivated federal involvement in enhancing transparency of school operations.

This Article is situated within a larger discussion urging greater external and internal oversight of penal facilities. In 2005, the Commission on Safety and Abuse in America's Prisons, composed of corrections officials, former prisoners, civic officials, religious leaders, and academics, conducted a year-long investigation on the state of America's prisons.[13] The Commission issued a final report detailing recommendations for improving prisons, including enhanced accountability measures. Since then, Michelle Deitch has provided incomparable leadership in publishing a fifty-state survey of prison oversight mechanisms[14] and inspiring other authors to examine prison accountability in international and domestic contexts.[15] This Article contributes to this ongoing conversation in three distinct ways. First, I take a different approach by arguing solely for enhanced transparency, leaving greater accountability as a separate project. Second, I present a normative argument for enhanced transparency based on anti-subordination principles. Many of the arguments for greater transparency are strategically based on policy concerns, but lack a strong normative framework for arguing why transparency is necessary. Last, I use a comparative lens to argue for a limited solution of enhanced data collection and publication by the Department of Justice. The goal of this Article, therefore, is

12. No Child Left Behind Act of 2001 (NCLB), Pub. L. No. 107-110, 115 Stat. 1425 (codified as amended in scattered sections of 20 U.S.C. (2002)).

13. John J. Gibbons & Nicholas De B. Katzenbach, *Confronting Confinement*, 22 WASH. U. J.L. & POL'Y 385 (2006) (detailing final report of the Commission on Safety and Abuse in America's Prisons).

14. Michele Deitch, *Independent Correctional Oversight Mechanisms Across the United States: A 50-State Inventory*, 30 PACE L. REV. 1754, 1762 (2010).

15. *See, e.g.*, Symposium, *Opening Up a Closed World: A Sourcebook on Prison Oversight*, 30 PACE L. REV. 1383, 1383-1686 (2010) (presenting twenty-one articles detailing different aspects of prison oversight).

not to supplant the existing conversation, but rather to add a unique perspective towards broader arguments for public engagement in prison operations.

In this Article, I argue that federal school transparency measures provide a rudimentary and balanced framework for enhancing prison transparency. Drawing upon literature demonstrating that prison conditions themselves create a subordinated class, this Article argues for a "No Prisoner Left Behind Act" that builds on the data collection success of NCLB. The proposal is based on the experience of schools, a comparable but not identical institution, in the wake of *Brown v. Board of Education*.[16] Schools and penal facilities are similar facially in terms of federal-state relations and public versus private operation of the institution. Courts have also treated both institutions similarly under the law by applying nearly identical deference standards and imposing comparable duties and obligations on administrators of both schools and penal facilities. In Part I, this Article describes the current state of incarceration in the United States and identifies the ways in which our current practices create and/or exacerbate inequality. Part II argues that in certain respects schools and prisons are comparable institutions, facing similar obligations and challenges, particularly with respect to creating and maintaining a permanent underclass. Part III examines how educational policy has addressed concerns about inequality and concludes that enhanced transparency measures were a critical element in the government's response to educationally fostered inequality. In light of the similarities of schools and prisons, Part IV discusses the value of transparency in undermining institutionally produced inequality and finds that transparency is particularly lacking in the penal context. Part V proposes passage of a federal statute authorizing incentive funding for local and state provision of prison operations data, based on a truncated version of NCLB.

I. CURRENT EFFECTS OF INCARCERATION

The effects of incarceration, both for the inmate and for society more generally, are not limited to the judicial sentence imposed. Rather, how a person is incarcerated (i.e., the conditions in which an inmate serves his or her sentence) can radically shape that person's life, health, and economic prospects. These effects have implications for the communities to which the incarcerated person returns and to society more generally. This Part examines the current effects of incarceration and concludes that incarceration can have debilitating and disproportionate effects.

Incarceration practices are creating a permanent underclass in our society. Giovanna Shay describes prisons as "part of a symbiotic structure that reproduces disadvantage for certain groups within society."[17] Prison and jail condi-

16. 347 U.S. 483, 483 (1954).

17. Giovanna Shay, *Illich (via Cayley) on Prisons*, 34 W. NEW ENG. L. REV. 351, 358 (2012).

tions are a significant part of these disadvantages, as time incarcerated can lead to future unemployment, long-lasting medical and psychological issues, and social isolation.[18] This is fundamentally at odds with the underlying premise of our criminal justice system, namely that the legal punishment imposed is for a specific amount of time, following which the convicted rejoin society. Thus incarceration is intended to serve the goals of punishment for the illegal act, incapacitation from committing additional acts for a period of time, deterrence from committing future acts, and rehabilitation to regain and retain the rights and freedoms lost. Only the most egregious acts result in the permanent incapacitation of the offender and even in those circumstances, the offenders retain their essential human dignity, as guaranteed by our Constitution.[19]

This Article focuses on the distinct aspect of prison conditions in fostering a permanent underclass. I do not intend to minimize the disastrous impact of post-incarceration policies, such as restricting access to public services and benefits, scholarships, voting rights, and employment,[20] but rather to highlight how prison conditions themselves can contribute to subordination. Sharon Dolovich identifies several key features of our current incarceration policies, many of which have distinct implications for subordination, including

> strict limits on visits and communication with family and friends on the outside; . . . limited access to meaningful work, education, or other programming; little if any concern for the self-respect of the incarcerated; and 'us' versus 'them' dynamic between incarcerated and custodial staff; and increased reliance on solitary confinement for the purpose of punishment and control.[21]

Our prisons and jails are rife with violence (by both inmates and correctional staff),[22] inhumane and unconstitutional conditions,[23] and failures to provide adequate medical and mental health services.[24] These conditions matter. Experiencing these conditions can have lasting effects long after the period of incarceration is over.

The case law is replete with examples of prison sentences that impose extreme punishment through unconstitutional prison conditions. The punishment exacted in these cases entails far more than simply the loss of liberty. One of

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18. *See infra* Part II.B for further discussion.

19. *See* Andrea Armstrong, *Slavery Revisited in Penal Plantation Labor*, 35 SEATTLE U. L. REV. 869, 870 (2012) (discussing human dignity as core element of the Eighth and Thirteenth Amendments).

20. *See generally* James Forman Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 28-29 (2012) (listing restrictions); Loïc Wacquant, *Class, Race, & Hyperincarceration in Revanchist America*, DÆDALUS, Summer 2010, at 76 (same).

21. Sharon Dolovich, *Foreword: Incarceration American Style*, 3 HARV. L. & POL'Y REV. 237, 237-38 (2009).

22. *See, e.g.*, Gibbons & Katzenbach, *supra* note 13, at 385 (discussing interviews, testimony, and reports of violence in prisons and jails).

23. *Id.* (discussing prolonged solitary segregation of inmates, lack of medical care, and overcrowding).

24. *See* Brown v. Plata, 131 S. Ct. 1910, 1942 (2011).

the more recent Supreme Court cases decided the authority of judges to order release based on the unconstitutional overcrowding of inmates.[25] Another case considered the damages to be awarded to the family of a prisoner who died of penile cancer, which could have been identified and successfully treated earlier but for the State of California's abysmal medical care for detainees.[26] Another relatively recent Supreme Court case considered an Alabama practice of hitching prisoners to a post in painful positions for hours without shade or water as punishment more akin to torture.[27] The Supreme Court invalidated a California prison practice of racially segregating incoming inmates, which according to the Court imposes racial stigma and stereotype on inmates and may have increased the possibility of racial violence.[28] And these are only Supreme Court cases in the twenty-first century.

Ernest Drucker describes the physical and mental effects of incarceration, as currently practiced in America, as the "long tail of mass incarceration."[29] Significant and increased risks of HIV/AIDS, other sexually transmitted diseases, hepatitis, and tuberculosis constitute one of the "enduring effects of punishment" long after a person has served his or her formal sentence.[30] Significantly, "[o]ver 40 percent of those in solitary confinement, a widely used disciplinary measure, develop major psychiatric disorders."[31]

In addition, the way we incarcerate prisoners can lead to "learned passivity." "Learned passivity" is the "psychological process of adapting to life in an institution where one is neither expected nor permitted to make decisions, where trust is a liability and intimacy a danger."[32]

Prison conditions can also generate crime, both reducing an inmate's chance of effective rehabilitation and increasing the risks for public safety. In *Brown v. Plata*, the United States Supreme Court recently upheld a lower court's order to reduce the California prison population due to overcrowding. While Justice Kennedy's opinion focused primarily on how overcrowding in California prisons negatively impacts the delivery of critical medical and men-

25. *Id*. at 1942, 1924-25 (describing a mental health inmate who was held for 24 hours in a telephone booth sized cage in his own urine because authorities lacked a "place to put him." In addition, the Court notes, a "prisoner with severe abdominal pain died after a 5-week delay in referral to a specialist; a prisoner with 'constant and extreme' chest pain died after an 8-hour delay in evaluation by a doctor; and a prisoner died of testicular cancer after a 'failure of MDs to work up for cancer in a young man with 17 months of testicular pain'").

26. Hui v. Castaneda, 559 U.S. 799 (2010) (upholding statutory immunity of treating physician).

27. Hope v. Pelzer, 536 U.S. 730 (2002) (finding that handcuffing inmate to a hitching post for more than seven hours without water or sanitary breaks was cruel and unusual punishment).

28. Johnson v. California, 543 U.S. 499 (2005).

29. ERNEST DRUCKER, A PLAGUE OF PRISONS: THE EPIDEMIOLOGY OF MASS INCARCERATION IN AMERICA 108 (2011).

30. *Id*. at 108, 118.

31. *Id*. at 127.

32. Dolovich, *supra* note 21, at 248 (quoting psychologist Craig Haney).

tal health services, Justice Kennedy also noted that reducing overcrowding could in fact enhance public safety by mitigating prisons' "criminogenic" aspects.[33] Our prisons and jails are plagued with high rates of recidivism.[34] California estimates that approximately 63.7% of felon inmates released return to state custody within three years.[35] Delaware boasts similar rates for released inmates recommitted to state custody within three years.[36] The failure to provide mental health care, drug treatment, medical care, and skills training significantly affects the ability of an ex-prisoner to successfully re-enter general society.[37] A prisoner may emerge from prison not only without job skills, but also incapacitated for future work because of severe and lasting physical and mental health issues.

The conditions of incarceration can have profound effects on the incarcerated, both those eventually released and those remaining in prison for life terms. It is worth summarizing (and emphasizing) what we do know about the operation of prisons, as presented above. The incarcerated develop life-long mental and physical illnesses, instead of job-ready skills. Inmates are subject to enormous discretion and sometimes abuse. The punishment suffered can be well beyond the sentence formally imposed by the criminal judge. The experience of being incarcerated, as it is currently practiced in the United States, seems at odds with a basic commitment to human dignity. In effect, and whether or not intended, prison conditions generate a permanent underclass, one whose "[s]ocial and economic disadvantage, crystallizing in penal confinement, is sustained over the life course."[38]

Moreover, these effects disproportionately impact racial minorities and the poor. It is no secret that minority racial groups—particularly African-American and Latino populations—are overrepresented in our criminal justice system. In 2008, one in eleven African-Americans and one in twenty-seven Latinos were under correctional control versus one in forty-five Caucasians.[39] Indeed, as Michelle Alexander and others have argued, our current mass incarceration binge is distinctly tied to continuing attempts to subordinate and control mi-

33. Brown v. Plata, 131 S. Ct. 1910, 1942 n.10 (2011); *see also* Shay, *supra* note 17, at 354.

34. PEW CENTER ON THE STATES, STATE OF RECIDIVISM: THE REVOLVING DOOR OF AMERICA'S PRISONS (Apr. 2011), *available at* http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing_and_corrections/State_Recidivism_Revolving_Door_America_Prisons%20.pdf.

35. CAL. DEP'T OF CORR. AND REHAB. 2012 OUTCOME EVALUATION REPORT vi (Oct. 2012), *available at* http://www.cdcr.ca.gov/Adult_Research_Branch/Research_Documents/ARB_FY_0708_Recidivism_Report_10.23.12.pdf.

36. DEL. CRIMINAL JUSTICE INST., RECIDIVISM IN DELAWARE v (July 2013), *available at* http://wilmhope.org/wp-content/uploads/2013/07/Recidivism-in-Delaware.pdf.

37. Dolovich, *supra* note 21, at 245-47.

38. Western & Petit, *supra* note 7, at 8.

39. PEW CHARITABLE TRUSTS, ONE IN 100: BEHIND BARS IN AMERICA 2008 6 (2008), *available at* http://www.pertrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing_and_corrections/one_in_100.pdf.

nority racial groups.[40] According to the Bureau of Justice Statistics, in 2011 African-Americans and Hispanics, both males and females in all age groups, were incarcerated at higher rates than Caucasians in state and federal prisons.[41] For males in particular, who are by far the majority in prison facilities, African-Americans are incarcerated at rates of three to nine times those of Caucasians, depending on the age group.[42] Prisoners identifying as Hispanic accounted for approximately 20% of the national prison population[43] and one in three of the federal prison population.[44] More than 60% of all state and federal prisoners are members of a racial minority group.[45]

Similarly, the poor are also disproportionately represented in our nation's detention facilities. Although this data is not consistently collected,[46] what data is available demonstrates that, at a minimum, at least a third of our detention population falls under the poverty threshold at the time of arrest.[47] The number is likely more, since that initial income figure does not include the number of dependents, which would expand the poverty threshold to include marginally higher incomes.[48] At the same time, adults in poverty are approximately 11% of the population, thus they are three times more likely to be arrested than adults above the poverty line.[49] The effects of prison conditions are disproportionately concentrated on marginalized groups and may, in fact, facilitate their further exclusion from society.

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40. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010); DOUGLAS BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (2008); Loïc Wacquant, *Class, Race, & Hyperincarceration in Revanchist America*, DÆDALUS, Summer 2010, at 74 (arguing that mass incarceration is a misnomer since the effects of incarceration policies are experienced primarily by poor African-American men from impoverished urban areas).

41. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2011 8 (Dec. 2012), *available at* http://www.bjs.gov/content/pub/pdf/p11.pdf.

42. *Id*. (noting that African-Americans are nine times more likely to be incarcerated than Caucasians among prisoners age eighteen to nineteen and three to five times more likely to be incarcerated among prisoners sixty-five years and older).

43. Forman, *supra* note 20, at 60; *see also* U.S. DEP'T OF JUSTICE, *supra* note 41, at 1 (noting that as of December 2011, Hispanics were approximately 23% of the total state and federal prison population).

44. MICHAEL KANE ET AL., EXPLORING THE ROLE OF RESPONSIVITY AND ASSESSMENT WITH HISPANIC AND AMERICAN INDIAN OFFENDERS 17 (2011) *available at* https://www.bja.gov/Publications/CRJ_Role_of_Responsivity.pdf.

45. U.S. DEP'T OF JUSTICE, *supra* note 41, at 7.

46. Erica J. Hashimoto, *Class Matters*, 101 J. CRIM. L. & CRIMINOLOGY 31, 55 (2011).

47. *Id*. at 56.

48. *Id*.

49. *Id*.

II. SCHOOLS AND PRISONS AS COMPARABLE INSTITUTIONS

Though obviously not identical, schools and prisons are more similar than you would think. Ask a public school student who enters her school each morning through a metal detector; the student whose bag is searched by security before entering homeroom; or the entire class of students sitting dutifully at their desks, watching security guards or police patrolling the halls through the glass window of the classroom door. Henry A. Giroux, a critical pedagogical scholar, argues that in Chicago "schools came to resemble prisons, illustrated most visibly in the ever-increasing use of police and security guards along with a professionalized security apparatus in school buildings—metal detectors, surveillance cameras, and other technologies of fear and containment."[50] At a minimum, in some public schools, the difference between schools and prisons—from a student's perspective—is decidedly murky.[51]

In this Part, I argue that schools and prisons, while not identical, are sufficiently similar institutions, such that rules governing school transparency may be relevant to enhancing penal transparency. I first discuss facial similarities between the two institutions, such as the government's monopolistic role and the limited provision of rights for populations within these institutions. I then examine the courts' similar treatment of the two institutions with respect to the deference accorded to administrators and the legal duties and obligations owed by these institutions to their populations. I find that in many cases courts use substantially similar language both doctrinally and in the underlying discussion of policy concerns. This comparison helps to crystallize the idea that although these two institutions are in fact different, they face similar challenges and concerns; therefore, lessons learned in one institution may be relevant for the other.

A. *Facial Similarities*

One similarity between schools and prisons is the government's near complete monopoly over both prisons and schools. Private operators of both prisons

50. Henry A. Giroux, *Obama's Dilemma: Postpartisan Politics and the Crisis of American Education*, 79 HARV. EDUC. REV. 250 (2009). This account doesn't even include reports indicating that the combination of an increase in security officers in schools and heavy-handed school discipline, which can criminalize what were previously minor disciplinary infractions, has funneled school children (disproportionately minority) directly into prison. *See, e.g.*, CATHERINE Y. KIM & I. INDIA GERONIMO, ACLU, POLICING IN SCHOOLS: DEVELOPING A GOVERNANCE DOCUMENT FOR SCHOOL RESOURCE OFFICERS IN K-12 SCHOOLS (Aug. 2009), *available at* http://www.aclu.org/files/pdfs/racialjustice/whitepaper_policinginschools.pdf.

51. *See, e.g.*, Annie Gowen, *Training a Lens on School Security*, WASH. POST, Apr. 5, 2013, at A6 (noting students in Baltimore "say their high schools, among an estimated 10,000 nationwide with police on campus, feel like prisons"). *But see* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 664 n.3 (1995) (disputing dissent's claim that the majority opinion upholding suspicionless drug testing of school athletes equates the Fourth Amendment rights of schoolchildren and prisoners).

and schools only provide services to a small fraction of the eligible population. Although the rate is increasing, 2009 data indicates that private prisons only house 8% of our nation's incarcerated.[52] Similarly, approximately 10% of this nation's students receive their education from private schools, leaving the vast majority in state or locally run educational institutions.[53] Thus the provision of corrections and education is almost exclusively performed by local, state, and federal agencies.

Another similarity is the federal role in both schools and prisons. Both schools and prisons are within the traditional province of states, not the federal government. These areas are uniquely within the state's purview under the state's constitutional obligation to provide for the "health, welfare, and safety" of its people. Moreover, that power is reserved to the states under the Tenth Amendment, which states that any power not specially delegated to the federal government in the Constitution is reserved to the state.[54] Nevertheless, the federal government plays a role, albeit to different extents, in both education and penal facilities by collecting data or distributing funding or forging consensus on common goals.

There are also several similarities between the populations of schools and penal institutions. First and foremost, both prisoners and schoolchildren must remain in the custody of the institution. Compulsory attendance laws require that children of a certain age attend school, unless the parents decide to home school their children or attendance at school interferes with other fundamental rights.[55] Prisoners are also legally committed to the custody of the state for the duration of their court-ordered sentence.

Second, schoolchildren and incarcerated people do not retain their full panoply of constitutional rights within institutional walls. Students "do not 'shed their constitutional rights . . . at the schoolhouse gate.'"[56] Similarly, "prisoners do not shed all constitutional rights at the prison gate."[57] Nevertheless, for both populations, these rights are limited. "The constitutional rights of students in public school are not automatically coextensive with the rights of

52. HEATHER C. WEST, BUREAU OF JUSTICE STATISTICS, PRISON INMATES AT MIDYEAR 2009—STATISTICAL TABLES 2 (June 2010), *available at* http://www.bjs.gov/content/pub/pdf/pim09st.pdf.

53. THOMAS D. SNYDER & SALLY A. DILLOW, U.S. DEP'T OF EDUC., NAT'L CENTER FOR EDUC. STATISTICS, DIGEST OF EDUCATION STATISTICS 2010, at 16-17 (Apr. 2011), *available at* http://nces.ed.gov/pubs2011/2011015.pdf (finding that there are approximately 55.3 million students nationwide, of which 5.9 million are enrolled in private institutions).

54. U.S. CONST. amend. X.

55. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972) (acknowledging importance of a state's compulsory education law, but holding that Amish high school aged children need not attend if it interferes with their religion).

56. New Jersey v. T.L.O., 469 U.S. 325, 348 (1985) (Powell, J., concurring) (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)).

57. Sandin v. Conner, 515 U.S. 472, 485 (1995) (holding that placement in administrative segregation must be an "atypical and significant hardship" to implicate a liberty interest protected by the Due Process Clause of the Fourteenth Amendment).

adults in other settings."[58] Similarly, the penal environment dictates the "necessary withdrawal or limitation of many privileges and rights."[59] Both populations are subject to different legal standards for violations of certain rights, as compared to a non-incarcerated adult, but both populations retain those rights not inconsistent with educational or penal objectives.

Beyond these facial similarities, prisons and schools are treated similarly by courts in two distinct ways. First, courts use near identical standards when deciding whether or not to defer to the institutional administrator's decisions. Second, courts have identified similar core duties and obligations for both prisons and schools.

B. *Deference to Administrators*

The United States Supreme Court accords substantial deference to the decisions of both school and prison administrators. Regarding prison administrators, the Court has said: "[w]e must accord substantial deference to the professional judgment of prison administrators, who bear a significant responsibility for defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them."[60] Similarly, schools are responsible for determining what may or may not constitute appropriate conduct in the classroom.[61] "[T]he Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."[62]

Deference to prison administrators is prudent, according to the Court, because running prisons requires special knowledge and professional judgment of prison administrators.[63] In addition, courts extend deference because prisons combine legislative and executive functions.

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58. Morse v. Frederick, 551 U.S. 393, 396-97 (2007).

59. Johnson v. California, 543 U.S. 499, 510 (2005) (quoting Price v. Johnston, 334 U.S. 266, 285 (1948)) (holding that the right to be free from racial discrimination was subject to strict scrutiny and is a right retained within the prison walls).

60. Overton v. Bassetta, 539 U.S. 126, 132 (2003); *see also* Lewis v. Casey, 518 U.S. 343, 361, 391 (1996); Turner v. Safley, 482 U.S. 78, 89 (1987) (upholding restriction on inmate correspondence but denying restriction on inmate marriage); Block v. Rutherford, 468 U.S. 576, 588 (1984); Bell v. Wolfish, 441 U.S. 520, 562 (1979); Pell v. Procunier, 417 U.S. 817, 826-27 (1974); Procunier v. Martinez, 416 U.S. 396, 404 (1974).

61. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986)(holding First Amendment does not bar school from disciplining student for his "lewd" speech).

62. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507 (1969); *see Bethel*, 478 U.S. at 511-13 (holding that absent evidence that wearing of black armbands to protest the war in Vietnam substantially or materially disrupted school activities, regulation prohibiting wearing of armbands was an unconstitutional exercise of school authority and violated of First Amendment).

63. Beard v. Banks, 548 U.S. 521, 525 (2006).

> Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of the government. Prison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint.[64]

This broad language appears to exempt the judiciary from close oversight of prison administrations, which perhaps conveniently ignores the role of the judiciary in the criminal justice system as a whole. Nevertheless, the Court also acknowledges a judicial duty to review cases where fundamental questions of constitutionally guaranteed rights are at stake.[65]

The legal standard governing review of prison decision-making is notably low in light of this broad deference extended to prison administrators. Prison practices and regulations must only be "reasonably related to legitimate penological interests."[66] In a series of cases, the Court has recognized rehabilitation, maintaining internal order and discipline, discouraging inmate misbehavior, safety of prisoners, security from unauthorized access and escape, and deterrence of crime as legitimate penological interests.[67] These legitimate penological interests are intended to further the societal goal of incarceration, and become essentially the duties that prisons owe to the prisoners, the state, and thereby the general public.

Schools, too, receive substantial deference. "Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values."[68] Indeed, courts should defer and "refrain from attempting to distinguish between rules that are important to the preservation of order in the schools and rules that are not."[69] The legal standard governing review of school decision-making is almost an exact replica of the prison standard. A school's actions must be "reasonably related to legitimate pedagogical concerns."[70]

The deference extended to school administrators is parallel to the concerns motivating deference to prisons. Courts "lack[] the experience to appreciate

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64. *Turner*, 482 U.S. at 84-85; *see also Martinez*, 416 U.S. at 405.

65. *Lewis*, 518 U.S. at 362, 365; *Bell*, 441 U.S. at 562; *Martinez*, 416 U.S. at 405.

66. *Beard*, 548 U.S. at 528 (quoting *Turner*, 482 U.S. at 87). One exception to this standard is the right to not be discriminated against on account of one's race, which is reviewed under strict scrutiny. *See generally* Johnson v. California, 543 U.S. 499 (2005).

67. *Beard*, 548 U.S. at 539, 546; *Lewis*, 518 U.S. at 391; Pell v. Procunier, 417 U.S. 817, 822-23 (1974); *Martinez*, 416 U.S. at 404.

68. Epperson v. Arkansas, 393 U.S. 97, 104 (1968).

69. New Jersey v. T.L.O., 469 U.S. 325, 342 n.9 (1985) (holding the search of a student's purse is governed by the Fourth Amendment, but that the search need only be reasonable and does not require probable cause).

70. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).

what may be needed."[71] "School officials have a specialized understanding of the school environment, the habits of students, and the concerns of the community, which enables them to formulate certain common-sense conclusions about human behavior."[72]

The standard for extended deference to schools is premised in part on the transparency of the school environment. Potential abuses of authority are curbed by the possibility of criminal or civil sanctions, and students are protected by the "openness of the school environment."[73] Although the court hasn't listed the exact ways in which a school is considered "open," several common-sense macro and micro methods are obvious. At the macro level, many school districts are governed by publicly elected school boards that set policies for the district as a whole. At the micro level, schools may regularly hold informational sessions for parents and the public or distribute weekly or monthly newsletters. Parents are regularly invited to meet with teachers to assess the child's educational progress. Concerns about "openness" are not explicitly present in the prison context, although the Court appears to assume that some degree of openness is present. The Court in *Pell v. Procunier* said that the Court and the general public have the opportunity to monitor the condition of prisons and that the Department of Corrections does routine monitoring for the general public.[74] Justice Stevens, in his dissent in *Pell*, reiterated the importance of the public's interest in being informed about prisons.[75] Yet none of the educational mechanisms for "openness" are present in prisons.

C. *Duties and Obligations of Administrators*

Prisons and schools also have similar duties and obligations to the populations they serve and more broadly to society. Both prisons and schools, for example, have a duty to provide for the security of their respective populations. In the context of schools, the United States Supreme Court has recognized a danger to schoolchildren from speech that may reasonably be viewed as encouraging illegal drug use.[76] Noting the "special characteristics of the school environment and the government interest in stopping student drug abuse," the Court held that schools may reasonably restrict such speech.[77] Indeed, a concurrence by Justices Alito and Kennedy goes even further by recognizing a school's

71. Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 371 n.1 (2009) (holding that strip search of student for prescription-strength ibuprofen violated Fourth Amendment standard of reasonableness).

72. *Id*. at 385 (Thomas, J., concurring in part and dissenting in part) (quoting United States v. Sokolow, 490 U.S. 1, 8 (1989)) (internal quotation marks omitted).

73. Ingraham v. Wright, 430 U.S. 651, 677-78 (1977).

74. Pell v. Procunier, 417 U.S. 817, 830 (1974). *But see infra* Part IV.B. (discussing lack of monitoring and voluntary accreditation).

75. *Pell*, 417 U.S. at 840.

76. Morse v. Frederick, 551 U.S. 393 (2007).

77. *Id*. at 395.

"greater authority to intervene before speech leads to violence."[78] Schools, they argue, can be places of special danger and therefore the duty of school administrators to protect students is heightened in the context of illegal drug use.[79] For example, the Court has recognized a duty to restrain students from assaulting one another, abusing drugs and alcohol, and committing other crimes.[80] Although not formally recognized as a "duty to protect," public school administrators are uniquely positioned to provide "a degree of supervision and control that could not be exercised over free adults."[81] This "comprehensive authority"[82] to protect is rooted, in part, in the vulnerability of school children. For example, in a case upholding a principal's authority to discipline a student for holding a banner ostensibly promoting the use of marijuana, the Court noted how schoolchildren are particularly susceptible to peer pressure.[83]

For penal facilities, the Eighth Amendment's ban on "cruel and unusual punishments" gives rise to a duty to protect prisoners.[84] Prison administrators must provide "reasonable safety" for prisoners.[85] A prison must reasonably protect the incarcerated from violence, including sexual assault, committed by other inmates, guards, or other penal institution staff. In *Farmer v. Brennan*, the petitioner alleged the government had failed to take reasonable measures to protect petitioner from physical and sexual assault. The Court held that prison officials violate the Eighth Amendment when they are "deliberately indifferent" to a "substantial risk of serious harm."[86] The duty to protect is in part based on the vulnerability of the inmate population in general. Prisoners are "stripped" of any means to lawfully protect themselves.[87] The government is "not free to let the state of nature take its course" but instead must provide reasonable security to each inmate.[88]

An associated but separate duty requires the maintenance of order. Distinct from security, which involves a protective element, order is a condition that facilitates the institutional goals. For schools, the Court has noted that schools have an obligation to maintain an orderly environment in which learning can

78. *Id*. at 425 (Alito, J., concurring).

79. *Id*.

80. New Jersey v. T.L.O., 469 U.S. 325, 339-40 (1985).

81. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655 (1995). More broadly, the Court has rejected an affirmative duty to protect children from child abuse by their families, but the leading case did not address a school's obligation to protect students. *See* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189 (1989) (declining to impose a duty to act on the part of Child Protective Services despite repeated warning signs).

82. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507 (1969).

83. *Morse*, 551 U.S. at 408.

84. U.S. CONST. amend. VIII. The same duty governs the treatment of pre-trial detainees through the Due Process Clause.

85. Farmer v. Brennan, 511 U.S. 825, 844 (1994).

86. *Id*. at 834.

87. *Id*.

88. *Id*. at 833.

take place.[89] Similarly, in prisons, maintaining an orderly environment is a legitimate penological goal.[90] Maintaining order, in prisons as in schools, is important to advance other institutional goals, such as security and rehabilitation.[91]

While courts have routinely rejected arguments equating a school's *in loco parentis* status with that of a prison-inmate custodial relationship,[92] there are nevertheless similarities in the relationships between the institutions and their respective populations. Both schools and prisons have custodial relationships with their respective populations. That custodial relationship creates duties on the administrators of both institutions. In the context of schools, the Court has recognized that schools have a duty beyond that of providing a basic textbook education. "Inescapably, like parents, they are role models. The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct . . . ."[93] Schools, for example, have a duty to protect children entrusted into their care from lewd or obscene speech and "stand *in loco parentis* over the children."[94] Children have been "committed to the temporary custody of the State as schoolmaster."[95] For penal facilities, the state has affirmatively taken on additional duties and obligations by virtue of taking custody of the offender. For example, the state must provide nutritionally adequate food and sufficient potable water.[96] The state, under both constitutional and statutory law, must also provide minimally adequate clothing and a hygienic and sanitary environment. The Court has held that 18 U.S.C. § 4042 imposes a duty on prisons to provide "safekeeping, care, and subsistence for all persons charged with offenses against the state."[97] Prisons have a constitutional duty to

89. *See* New Jersey v. T.L.O., 469 U.S. 325, 362 (1985); *see also* Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 384 (2009) (Thomas, J., concurring in part and dissenting in part) (discussing duty to preserve "order and a proper educational environment").

90. Overton v. Bassetta, 539 U.S. 126, 129 (2003) (holding that restrictive visitation policies did not violate an inmate's Eighth Amendment rights and were rationally related to legitimate government concerns).

91. *See id*. (noting that order is disrupted by possibility of visitors smuggling drugs into the facility, which in turn can threaten an inmate's rehabilitation or lead to violence).

92. *See* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189 (1989).

93. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986).

94. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995); *see also Bethel*, 478 U.S. at 684 ("[S]chool authorities act in loco parentis when protecting children from lewd speech."). *But see* Ingraham v. Wright, 430 U.S. 651, 662 (1977) (refusing to apply Eighth Amendment analysis to corporal punishment in public schools and noting that "the concept of parental delegation has been replaced" by the idea that the State derives its authority over school children by virtue of compulsory education laws).

95. *Vernonia*, 515 U.S. at 665 (also noting that the public school system undertook the drug-testing policy as "guardian and tutor of children entrusted to its care").

96. *See* Farmer v. Brennan, 511 U.S. 825, 832 (1994).

97. United States v. Muniz, 374 U.S. 150, 165 (1963). Note that this does not give the federal government the "authority to physically supervise the conduct of a jail's employees; it reserves to the U.S. only the right to enter the institution at reasonable hours for the pur-

provide medical care to prisoners under the Eighth Amendment's ban on cruel and unusual punishment.[98] In addition, prisons have a constitutional duty to provide "access to the courts" by "assist[ing] inmates in the preparation and filing of meaningful legal papers" through the provision of "adequate law libraries or adequate assistance from persons trained in the law."[99]

Schools and prisons are also similar in that in both contexts, the arduous protections accorded by the Due Process Clause of the Fourteenth Amendment are lessened. A prison's or school's duty is substantially less in providing notice and an opportunity to be heard than in other government contexts. For students facing suspension, due process requires only that a student be given written or oral notice of charges, an explanation of the evidence, and an opportunity to present the student's side of events.[100] The notice is required in part because school officials "frequently act on the reports and advice of others; and the controlling facts and the nature of the conduct under challenge are often disputed."[101] In prisons, the majority of due process claims have arisen around prison disciplinary measures, such as placement in administrative segregation. In these cases, the traditional *Mathews* balancing test[102] is preceded by determining whether or not the discipline presents an "atypical and significant hardship" within the context of ordinary prison life.[103] If the punishment does present an atypical hardship, then the discipline implicates a liberty interest and a court can then balance the three *Mathews* factors: private interest, state interest, and the risk of erroneous deprivation.[104] In *Wilkinson v. Austin*, an inmate challenged his placement in administrative segregation and the United States Supreme Court held that though the inmate had a liberty interest at stake, the existing procedures provided sufficient due process.[105] Similar to schools, the Ohio prison provided notice of discipline and associated facts and an opportunity to rebut the facts. Neither schools nor prisons require the hearing to mim-

pose of inspecting and determining the condition under which federal offenders are housed." *Id*.

98. Estelle v. Gamble, 429 U.S. 97, 103 (1976).

99. Bounds v. Smith, 430 U.S. 817, 828 (1977). Notably, this obligation is not as broad as it first appears. The Court has subsequently held that this constitutional duty does not necessarily include photocopying or the training of library staff. Moreover, the alleged inadequacy must specifically result in harm to the prisoners. Lewis v. Casey, 518 U.S. 343, 346 (1996).

100. Goss v. Lopez, 419 U.S. 565, 579-600 (1975).

101. *Id*. at 580.

102. Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (concluding that determining the appropriate level of due process requires balancing the private interest, the state interest, and the risk of erroneous deprivation).

103. Wilkinson v. Austin, 545 U.S. 209, 221-24 (2005).

104. *Mathews*, 424 U.S. at 335.

105. *Wilkinson*, 545 U.S. at 224, 228.

ic a formal adversarial hearing before a judge, with counsel, or use judicial evidentiary standards.[106]

D. *Similar but Not Identical*

There are important differences between the two institutions as well. First and foremost, prisons and schools are not subject to the same constitutional requirements. Public school disciplinary policies are not subject to the Eighth Amendment prohibiting cruel and unusual punishment.[107] The United States Supreme Court has explicitly held that the Eighth Amendment applies only to those convicted of a crime and thus is unavailable to challenge corporal punishment in public schools.[108] The Court has also held that the Fourth Amendment governs searches in public schools (albeit with a lesser standard), but not to searches in prisons because prisoners lack a realistic expectation of privacy while incarcerated.[109]

There are numerous other practical differences as well. Excepting juvenile detention facilities, prisons incarcerate adults and schools have custody of minors. Students attend school by virtue of compulsory attendance laws, but prisoners are incarcerated due to specific prior acts. Most inmates remain within the institutional walls for twenty-four hours a day, seven days a week, while nearly all public school students spend part of each and every day outside of school grounds. I agree with the Court's opinion that "the prisoner and the schoolchild stand in wholly different circumstances, separated by the harsh facts of criminal conviction and incarceration."[110] The point is not to argue that schools and prisons are identical or that school children and prisoners are identical. Rather, the point is to establish the similarities between the two types of institutions, particularly with respect to the Court's treatment of corrections and educational systems. Given these similarities and the creation of a permanent underclass of the currently and formerly incarcerated, what lessons can be learned from government efforts to end the maintenance of a permanent racial minority underclass in the educational context?

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106. *See id*. at 229 (noting prior prison cases where lesser due protections upheld); Goss v. Lopez, 419 U.S. 565, 583 (1975) (noting that formal adversarial hearings could overwhelm a school's administrative system and make suspensions an ineffective and resource-draining disciplinary tool).

107. Ingraham v. Wright, 430 U.S. 651, 662 (1977).

108. *Id*.

109. New Jersey v. T.L.O., 469 U.S. 325 (1985).

110. *Id*. at 338 (quoting *Ingraham*, 430 U.S. at 669).

III. ENDING PERMANENT INEQUALITY IN SCHOOLS

A. *Initial Steps*

Brown v. Board of Education is often heralded as the first Supreme Court case to raise the question of a permanent underclass.[111] Beyond the immediate impact of "separate but equal" schools on a child's education, the Warren Court opinion points to a broader harm in the ability of segregated children to eventually become equal members in our democratic society.[112] Segregating children by 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."[113]

Brown was only the beginning of a decades-long effort by the federal government to desegregate schools nationwide. Initial attempts to desegregate schools were quickly stymied. In the early 1960s, Congress passed a pair of laws to counter integration obstacles in education: the Civil Rights Act of 1964 and the Elementary and Secondary Education Act of 1965 (ESEA).[114] The two acts were passed as part of President Johnson's "War on Poverty."[115] "The 1960s reform treated integration and monetary distribution as individual pieces of the puzzle to achieve quality education and economic parity" as part of a broader strategy of fostering equality.[116]

The ESEA "had as its sole objective, the funding of educational programs that would benefit poor children,"[117] but was strongly associated with outcomes for minority children as well. Douglass Cater, special assistant to President Lyndon Johnson, noted that the "segregation issue" had held up federal education reform laws prior to the ESEA, but that passage of the 1964 Civil Rights Act had eliminated the need to have a separate "civil rights provision" in the proposed ESEA legislation.[118] Title I funds were only available to schools that were not *de jure* segregated due to the Civil Rights Act provision barring

111. Sergio Campos, *Subordination and the Fortuity of Our Circumstances*, 41 U. MICH. J.L. REFORM 585, 585-86 (2008). *But see* Derrick Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524 (1980) (arguing that interest-convergence theory best explains the *Brown* decision).

112. Brown v. Bd. of Educ., 347 U.S. 483 (1954) (discussing, for instance, how use of race to divide who attends what school is irrational).

113. *Id*. at 493.

114. Act of Apr. 11, 1965, Pub. L. No. 89-10, 79 Stat. 27, 29 (codified at 20 U.S.C. §§ 6301-7941 (2002)).

115. Cassandra Jones Havard, *Funny Money: How Federal Education Funding Hurts Poor and Minority Students*, 19 TEMP. POL. & CIV. RTS. L. REV. 123, 128 (2009).

116. Tiffani N. Darden, *Defining Quality Education as a Government Interest: The U.S. Supreme Court's Refusal to "Play Nice" with the Executive Branch, Congress, State Supreme Courts, and the Community Voice*, 14 U. PA. J. CONST. L. 661, 698 (2012).

117. Havard, *supra* note 115, at 125 n.14.

118. Interview by David G. McComb with Douglass Cater, Special Assistant to President Lyndon B. Johnson, in Wash. D.C. (Apr. 29, 1969), *available at* http://www.lbjlib.utexas.edu/johnson/archives.hom/oralhistory.hom/cater/cater01.pdf.

federal funding for segregated spaces.[119] The funds provided by ESEA under Title I were allegedly used to finance school busing programs,[120] while also providing incentives for Southern states, in particular, to desegregate.[121] While President Johnson's legislation sought to improve conditions for the poor, as Patrick McGuinn and Frederick Hess note, "it was also recognized at the time, [poor children] were concentrated in the inner cities and were often from racial minority groups."[122] The ESEA was the carrot and the Civil Rights Act was the stick in the administration's strategy.[123] The core of the ESEA was to improve educational outcomes for the disadvantaged.

Educational opportunities were increasingly linked with economic mobility during this time.[124] *Brown* and the Civil Rights Movement exposed the deep educational inequalities for minorities. In addition, new research in "the early 1960s documented the terrible educational conditions facing poor children and the dire consequences that these conditions had on their later life prospects."[125] To deny racial minorities and the poor strong opportunities to learn was in effect to deny them the chance to economically improve their lives. Thus the ESEA was more than just an educational bill. Its true aim was eventual equality.

The ESEA marked the federal government's largest foray into education at the time and earmarked funds under Title I for supplemental education spending on programs to benefit poor school children.[126] Under pressure from Senator Robert Kennedy, the draft ESEA legislation was amended to include a reporting requirement for programs receiving Title I funding.[127] Senator Kennedy's primary concern was that parents of low-income and minority families, who traditionally lacked political influence, should have information on the success (or failure) of a Title I funded program.[128] Moreover, once armed with that information, parents would be able to hold their elected officials ac-

119. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified in scattered sections of 42 U.S.C. (1964)).

120. Cater Interview, *supra* note 118, at 12-13.

121. Jonathan C. Augustine, *America's New Civil Rights Movement: Education Reform, Public Charter Schools and No Child Left Behind*, 59 LA. B.J. 340, 341 (2012) (quoting John H. Jackson, *From Miracle to Movement: Mandating a National Opportunity to Learn*, in NAT'L URBAN LEAGUE. THE STATE OF BLACK AMERICA, 62 (Jan. 1, 2009)).

122. Patrick McGuinn & Frederick Hess, *Freedom From Ignorance? The Great Society and the Evolution of the Elementary and Secondary Education Act of 1965*, *in* THE GREAT SOCIETY AND THE HIGH TIDE OF LIBERALISM 289, 292 (Sidney M. Milkis & Jerome M. Mileur eds., 2005).

123. *Id*.

124. *Id*.

125. *Id*.

126. MILBREY WALLIN MCLAUGHLIN, EVALUATION AND REFORM: THE ELEMENTARY AND SECONDARY EDUCATION ACT OF 1965, TITLE I, at vii (1974).

127. *Id*. at 3.

128. *Id*. at 1-4.

countable for the success of the program.[129] This initial reporting requirement has evolved into annual reports from local educational agencies to their state educational agency, which is responsible for forwarding the data to the federal government in return for funding.

Federal data collection is a critical aspect of the ESEA, although the depth and breadth of the data has changed over time. In an exhaustive study of reporting under the ESEA for the first ten years, Milbrey McLaughlin concludes that although the data generated was initially anecdotal and at times even undermined the goal of achieving actual accountability of Title I funds, the initial reporting requirement has led to an expectation of data collection and transparency as time passes.[130] One study of the first five years of ESEA implementation found that it was impossible to create a national picture of education, since each state had different reporting formats and student outcome measurements.[131] A model reporting system was subsequently put in place to standardize the information received and the ability of the federal government to get an accurate sense of Title I programming.[132] This is extraordinary for an area once thought to be solely within the state's province.

B. *The No Child Left Behind Act*

Since the passage of the ESEA, Congress has periodically reauthorized the law, maintaining its core purpose, but also modifying the program. The latest iteration of Title I is the No Child Left Behind Act of 2001.[133] Goodwin Liu has described NCLB as a "civil rights statute" for its focus on disparate educational outcomes and the associated lack of a requirement for discriminatory intent to create a legal obligation to remedy the disparate effect.[134] The core of NCLB is the requirement that a school show "adequate yearly progress" in education, as part of their annual comprehensive reform plan, or risk losing Title I funding.[135] To achieve this aim, the law specifies a number of guidelines and

129. *Id*.

130. *Id*. at 117-20.

131. William L. Rutherford & James V. Hoffman, *Toward Implementation of the ESEA Title I Evaluation and Reporting System: A Concerns Analysis*, EDUC. EVAL. & POL'Y ANALYSIS 17 (July/Aug. 1981).

132. *Id*. at 18.

133. No Child Left Behind Act of 2001 (NCLB), Pub. L. No. 107-110, 115 Stat. 1425 (codified as amended in scattered sections of 20 U.S.C. (2002)).

134. Goodwin Liu, *The Bush Administration and Civil Rights: Lessons Learned*, 4 DUKE J. CONST. L. & PUB. POL'Y 77, 100 (2009).

135. No Child Left Behind Act of 2001, 20 U.S.C. §§ 6311(a)(1), (b)(2)(B) (2000); *see also* MARIA PABÓN LÓPEZ & GERARDO R. LÓPEZ, PERSISTENT INEQUALITY: CONTEMPORARY REALITIES IN THE EDUCATION OF UNDOCUMENTED LATINA/O STUDENTS 101-03 (2010) (summarizing the requirements of NCLB).

transparency measures.[136] For example, the law requires that states report on "steps to ensure that poor and minority children are not taught at higher rates than other children by inexperienced, unqualified, or out-of-field" teachers.[137] Accordingly, states must collect student demographic information, teacher qualification information, and test achievement scores.[138]

One of the more prominent features of NCLB is its requirement to generate and disseminate data at the school and district level regarding students' performance on standardized tests and graduation rates. In addition, schools must also break down the performance data for the "following categories: ethnic and racial groups, low-income students, students with disabilities, and students with limited English proficiency."[139] States receiving Title I funding are required to produce "report cards" that include each school's testing scores and the report cards are made public.[140]

In the fall of 2011, the Obama administration acknowledged some of the difficulties in NCLB and instead has allowed for states to submit "ESEA Flexibility" waivers.[141] Schools must still follow certain mandates, including continued data collection and dissemination, even if they receive a waiver, to continue receiving funding. The waivers remove two of the most controversial accountability provisions for states, namely that states achieve 100% student proficiency by 2014 and that states implement specific policies for those schools that fail to make adequate yearly progress for two years in a row.[142] In return, schools must develop standards and evaluation for teachers and administrators that factor in student achievement and focus on college and career standards and assessment.[143]

Without a doubt, the No Child Left Behind Act is controversial.[144] Teachers and scholars alike have criticized the Act for an excessive focus on testing

136. *See* U.S. DEPT. OF EDUC., IMPROVING DATA QUALITY FOR TITLE I STANDARDS, ASSESSMENTS, AND ACCOUNTABILITY REPORTING GUIDELINES FOR STATES, LEAS, AND SCHOOLS 5 (Apr. 2006), *available at* https://www2.ed.gov/policy/elsec/guid/standardsassessment/nclbdataguidance.doc (providing summary table on required data collection).

137. No Child Left Behind Act of 2001 § 1111(b)(8)(C) (codified at 20 U.S.C. § 6311(b)(8)(C) (2000)).

138. U.S. DEPT. OF EDUC., *supra* note 136, at 5.

139. Darden, *supra* note 116, at 707.

140. No Child Left Behind Act of 2001 § 1111(a)(1), (b)(2)(B) (codified at 20 U.S.C. §§ 6311(a)(1), (b)(2)(B) (2000)); *see also* Andrea Bell & Katie Meinelt, *A Past, Present, and Future Look at No Child Left Behind*, 38 AM. BAR ASSOC., HUMAN RIGHTS, Fall 2011, at 12.

141. Bell & Meinelt, *supra* note 140, at 12.

142. *What Impact Will NCLB Waivers Have on the Consistency, Complexity and Transparency of State Accountability Systems?*, CENTER ON EDUC. POLICY, 1 (Oct. 2012), http://www.cep-dc.org/displayDocument.cfm?DocumentID=411.

143. *Id*.

144. *See* LÓPEZ & LÓPEZ, *supra* note 135, at 103-06 (summarizing arguments for and against NCLB).

outcomes,[145] which in many cases has led to "teach[ing] to the test" in classrooms across the nation.[146] Others have questioned whether NCLB actually achieves its aims of minimizing achievement gaps in education.[147] And numerous authors have documented how NCLB's compromise of enhanced federal data collection and dissemination with state-controlled standards has immunized states from real accountability for improving education.[148]

Most of the criticisms, however, center on the accountability provisions and not the data collection provisions.[149] In fact, the critics rely on the data provided through the NCLB to support their arguments[150] and the enhanced data collection has "won praise" from education scholars and advocates.[151] NCLB "increases transparency by disseminating data on progress" by requiring schools to "generate[] and aggregate[]" annual test scores and then "disaggregate[]" the data "for a number of student subgroups that are traditionally underserved by public schools" such as race and economically disadvantaged backgrounds.[152]

The provision of this data has not interfered with a school's obligation to keep secret other types of information. Besides a student's educational records, which schools must keep private under the Federal Educational Rights and Privacy Act, schools also safeguard student health and family information from public release.[153] In addition, where mass attacks in schools are an unfortunate but continuing concern, schools also must protect certain security information about their facilities and emergency procedures. Yet schools manage to provide

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145. *See* Havard, *supra* note 115, at 137.

146. LÓPEZ & LÓPEZ, *supra* note 135, at 106.

147. *See* Havard, *supra* note 115, at 123; Bell & Meinelt, *supra* note 140, at 123.

148. *See* Michael Heise, *The 2006 Winthrop and Frances Lane Lecture: The Unintended Legal and Policy Consequences of the No Child Left Behind Act*, 86 NEB. L. REV. 119, 127-28, 131 (2007) (noting that states have lowered their educational standards in order to demonstrate adequate progress in achieving outcomes); James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932 (2004). Note that the original ESEA legislation is also criticized for failing to provide real accountability. *See* Havard, *supra* note 115 at 142-43.

149. To the extent that the data collection policies have been criticized, the criticism centers on what type of data is collected, such that by focusing on test scores, we increase and emphasize standardized testing in the classroom. *See* Damon Todd Hewitt, *Reauthorize, Revise, and Remember: Refocusing the No Child Left Behind Act to Fulfill Brown's Promise*, 30 YALE L. & POL'Y REV. 169, 174 (2011).

150. Heise, *supra* note 148, at 121.

151. *Id*. at 139 (noting that NCLB at least has made the costs and benefits of educational policy "more transparent"); Liu, *supra* note 134, at 101-03 (although Liu supports the data generation aspect of NCLB, he does question whether the data transparency—in an age of highly segregated schools in areas of concentrated poverty—accurately reflects the structural forces that lead to unequal schooling opportunities).

152. Michael Heise, *Courting Trouble: Litigation, High Stakes Testing, and Education Policy*, 42 IND. L. REV. 327, 330 (2009).

153. 20 U.S.C. § 1232g (2013).

important data on their students through the provisions of NCLB while also keeping sensitive information from the general public.

Schools have managed to balance greater transparency with their primary goal of education.[154] Both education and incarceration require not only expertise but also hands-on experience. When we open up the operation of these institutions, we run the risk of management without the requisite expertise. In schools, this dilemma is partially addressed by not mandating participation, but rather allowing states to participate in exchange for funds. And, to the extent that federal education guidelines have interfered with local educational decisions, that interference has not been a product of transparency, but rather the accountability portion of the latest iteration of federal education law.

IV. TRANSPARENCY (AND THE LACK THEREOF)

Transparency itself is complicated and never more so than in prisons, where there are genuine concerns of safety and privacy. Rather than proffer an idealistic view of transparency solving all evils, I adopt a limited definition of transparency and address general arguments against enhanced transparency. Based on this limited definition, I demonstrate the current lack of transparency mechanisms in the penal context and why greater transparency is necessary.

A. *Transparency Defined*

Transparency, at its core, is simply the process of making the invisible or hidden visible or seen. This definition of transparency is narrow, akin to what Jack Balkin has described as "informational transparency."[155] Informational transparency is "knowledge about government actors and decisions and access to government information."[156]

Transparency, in its most limited definition of producing visibility, is integral to the democratic project. Democracy relies on popular participation, which in turn presupposes an informed electorate. When the electorate is forbidden information relevant to the voters' participation in the democratic project, the lack of information can undermine the legitimacy of the democracy itself. Information about how our government operates can influence voter political choices at the ballot box, and even more broadly, it can shape voter policy, preferences, and priorities. As James Madison wrote in the context of education, "[a] popular Government, without popular information, or the means of

154. To the extent that many public schools still provide a sub-standard education, I would argue that data dissemination is not the cause. Instead, our antiquated funding system and structural segregation are more to blame.

155. Jack Balkin, *How Mass Media Simulate Political Transparency*, 3 CULTURAL VALUES 393, 393 (1999).

156. *Id.*

acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both."[157] Madison was writing about public education, but this quote assumes a degree of transparency in democratic government. In effect, Madison argues that once a person is educated, he will have access to the information required to participate accordingly, thus making the democracy more representative. Instead of concentrating information in the hands of the few, a Madisonian approach would argue for broader availability of information to enable public participation in the democratic project.

Beyond education, both government and non-governmental actors have increasingly embraced Justice Brandeis's mantra that "sunshine is the best disinfectant."[158] Recent changes in regulations have fostered greater transparency in financial transactions, particularly mortgages, consumer financing, and banking.[159] In the area of intellectual property, "open source" advocates argue for transparent laws and contracts over traditional concepts of property.[160] Corporations have urged greater transparency as an alternative to greater regulation, while shareholders of corporations seek transparency in corporate governance and decision-making.[161]

Transparency, however, is not the same as accountability.[162] The two concepts—transparency and accountability—while closely linked and often intertwined, have significantly different objectives. The objective of transparency is to make the hidden visible. The objective of accountability, in contrast, is to enforce adherence to identified standards. Accountability is fundamentally concerned with potential gap between actual and desired performance, while transparency only addresses actual performance.

Part of the confusion stems from the relationship between transparency and accountability. Transparency, or the visibility of information, is often incorporated into greater accountability measures.[163] This reflects a common-sense notion that we need verifiable information for the subsequent accountability measures to be both effective and just. And often, the call for accountability is in reaction to a hidden non-transparent practice. Once exposed or made transparent, accountability often requires continued transparency to prevent reoccurrence of non-transparent practices.

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157. Letter from James Madison to W.T. Barry (Aug. 4, 1822), *in* THE COMPLETE MADISON: HIS BASIC WRITINGS 337 (Saul K. Padover ed., 1953).

158. LOUIS BRANDEIS, OTHER PEOPLE'S MONEY AND HOW BANKERS USE IT 92 (1914) ("Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.").

159. Frederick Schauer, *Transparency in Three Dimensions*, 2011 U. ILL. L. REV. 1339, 1341 (2011).

160. *Id*.

161. *Id*.

162. Eric Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885 (2006) (critiquing "transparency theory" by highlighting the complexity of the sender, the message, and the receiver).

163. *Cf*. No Child Left Behind Act of 2001, 20 U.S.C. § 6301 *et. seq*. (2013).

Nor does transparency automatically produce accountability. Underlying a broad idea of transparency (as opposed to the narrow idea advanced in this Article) is an assumption that information, once set free, will produce an informed and engaged public that will hold officials accountable.[164] As Eric Fenster notes, this broad version of transparency assumes public interest and ready availability of the desired information.[165] Still, transparency, in its most limited form, can foster attention. Simply requiring the collection and transmittal of information, may bring certain trends to light—particularly in cases where the information may not have previously existed in a particular form or even have been internally assembled.[166] As discussed more fully in Part IV, this has certainly been the case in the educational context where requiring data collection on the performance of minority, disabled, and poor students has provided clear evidence of achievement gaps.

Even acknowledging that transparency is an important democratic goal, some critics have argued that enhanced transparency statutes are simply unnecessary in a democratic system. For example, Justice Scalia has argued institutional checks and balances between the executive, judiciary, and legislative branches are sufficient to produce the required disclosure and if required, accompanying accountability.[167] Under this view, institutions will not only balance one another, but members of the legislative and executive branches (and indeed in some states, members of the judiciary as well) are also subject to electoral accountability.

Yet, for prisons in particular, this argument is less potent. Electoral accountability is overrated as a transparency-producing strategy when a specific or particular policy issue is at stake.[168] Candidates adopt positions on a range of policy issues and voters may overvalue a single issue (perhaps one that directly touches their livelihood, beliefs, or freedoms) over other issues central to our democracy.[169] Voters may also use a candidate's party affiliation as a proxy for an actual policy position, particularly where—as in the operation of detention facilities—candidates often fail to identify with a particular position.[170] In addition, voters may simply have less sympathy for prisoners. Inmates are incarcerated specifically because they have committed a wrong against society. Similar to other minority groups in a given population, prison-

164. Fenster, *supra* note 162, at 885-86.

165. *Id*.

166. *Id*.

167. *See* Antonin Scalia, *The Freedom of Information Act Has No Clothes*, REGULATION 14-15 (Mar./Apr. 1982).

168. *See* Glen Zaszewiski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1266-77 (2009) (drawing from literature in political science, law, and the humanities to argue that specific political accountability is unrealistic, and instead proposing accountability based on required or expected "reason-giving" as the primary determinant of democratic accountability).

169. *Id*.

170. *Id*.

ers are particularly vulnerable to the whims of the law-abiding majority. In this light, prisoners may be considered less deserving by voters and therefore particularly susceptible to election rhetoric.

The ability of the judiciary to also perform its traditional oversight role in our democracy is also frustrated by standing doctrines and the Prison Litigation Reform Act.[171] The general public lacks standing to sue for improved prison conditions, because the public lacks an actual injury.[172] In addition, Margo Schlanger and Giovanna Shay argue the only existing transparency mechanism for detention facilities, a civil lawsuit on behalf of inmates, is simply insufficient because the requirements of the Prison Litigation Reform Act (PLRA) actively obstruct meritorious lawsuits.[173] The PLRA requires any inmate complaint to be administratively exhausted (i.e., the prisoner must complete the ininternal complaint process, including any appeals, before they may file a civil lawsuit). Courts routinely dismiss prisoner civil complaints for failure to exhaust a prison's internal grievance system, which often entails filing specific forms and multiple levels of written appeals before an administrative decision is considered final.[174] "The exhaustion rule establishes an extremely difficult hurdle for many of the inmates who bring damage actions, usually without counsel, because they are frequently unable to navigate cumbersome and confusing grievance procedures."[175] The PLRA effectively internalized the inmate complaint process such that they occur almost exclusively behind prison walls and thus out of public sight.[176] In addition, the PLRA requires that "no federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury."[177] John Boston, author of the leading treatise on prison litigation, interprets the provision to allow for suit but to prohibit more than nominal damages where physical injury is lacking.[178] Courts, however, have interpreted "physical injury" narrowly as to preclude suits where inmates were humiliated, forced to parade naked or on leashes, or

171. 42 U.S.C. §1997 (1996).

172. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 575 (1992).

173. Schlanger & Shay, *supra* note 2, at 139-40; *see also* David Fathi, *The Challenge of Prison Oversight*, 47 AM. CRIM. L. REV. 1453, 1454-60 (2010) (discussing how courts and civil suits only provide at best an "ad hoc" and "haphazard" oversight function).

174. *See e.g.*, Smith v. Chau, 2013 WL 5674849 at *2 (S.D. Cal. Oct. 17, 2013) (dismissing complaint for failure to exhaust grievances by filing a Patient/Inmate Health Care Appeal Form and pursuing three additional levels of review including ultimately to the Director of the California Department of Corrections and Rehabilitation).

175. Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 592-93 (2006).

176. *See* Giovanna Shay, *Ad Law Incarcerated*, 14 BERKELEY J. CRIM. L. 329, 333-36 (2009).

177. 42 U.S.C. § 1997(e) (1996).

178. JOHN BOSTON & DANIEL E. MANVILLE, PRISONERS' SELF-HELP LITIGATION MANUAL (4th ed. 2010).

even forced to inhabit unsanitary and soiled cells.[179] Such restrictions limit the ability of relying on civil lawsuits to provide any measure of transparency on prison operations. The usual democratic methods for oversight are simply not present in the penal institution context.[180]

B. *Lack of Transparency in Penal Facilities*

Currently, prisons and jails are shrouded in secrecy. Media access to prisoners and prisons is extremely limited and completely discretionary.[181] Moreover, investigative reporting is generally in decline given the changing nature of media, news, and reporting. In combination with the high barriers to obtaining prison related information, media coverage is less able to fill the prison transparency gap.[182] States rarely, on their own initiative, voluntarily produce information about how a penal facility actually operates. Some individual state institutions produce annual reports, but those reports are cursory at best, listing the number incarcerated and their sentences, with little information on the actual participation in programming or access to medical and mental health treatment.[183] Moreover, in a survey of prison oversight mechanisms in the United States, Michele Deitch demonstrates that very few states involve members of the general public in oversight or in fact have any external oversight mechanism beyond general authority granted to the state department of corrections agency.[184]

The lack of publicly provided information is even more pronounced for local jails. Jails house both pre-trial detainees, whose detention can last several months to years, and convicted offenders serving relatively short sentences, usually five years or less. And states, under budgetary pressures, are increasingly outsourcing their state inmates to be housed in local jails.[185] Approximately ten million people are admitted to local jails each year,[186] making the need for accurate information about operations even more critical. Increasingly large

179. Sarah Geraghty & Melanie Velez, *Bringing Transparency and Accountability to Criminal Justice Institutions in the South*, 22 STAN. L. & POL'Y REV. 455, 479-81 (2011).

180. Schlanger & Shay, *supra* note 2, at 139-40.

181. *See* Pell v. Procunier, 417 U.S. 817 (1974).

182. Rem Rieder, *Cute Kittens! Easter Tips! Oh, and Serious News, at 'BuzzFeed,'* USA TODAY, Mar. 29, 2013, *available at* 2013 WLNR 7718583. *But see* Cindy Chang, *Louisiana Is the World's Prison Capital*, TIMES-PICAYUNE (May 29, 2013), http://www.nola.com/crime/index.ssf/2012/05/louisiana_is_the_worlds_prison.html (presenting part one of an eight-part series on incarceration in Louisiana).

183. *See e.g.*, LOUISIANA STATE PENITENTIARY, ANNUAL REPORT FY 2009-2010 (on file with author).

184. *See* Deitch, *supra* note 14 (presenting a fifty-state survey).

185. *See* W. David Ball, *Tough on Crime (on the State's Dime): How Violent Crime Does Not Drive California's Incarceration Rates and Why It Should*, 28 GA. ST. U. L. REV. 987 (2012).

186. Western & Pettit, *supra* note 7, at 11.

swaths of our population are coming and going from our correctional facilities; thus the problems associated with jails and prisons increasingly impact our broader society. Although jail incarceration is often shorter than a sentence served in prison, the effects of detention on the incarcerated apply in jails as well as prisons.[187]

At the federal level, there is admittedly some data collected, but problems remain.[188] For example, the Bureau of Justice Statistics (BJS) conducts census counts of jails and prisons, providing one-day snapshots of staffing levels, programs, admissions, and average populations.[189] These counts, however, are conducted only every five to seven years.[190] There is also an annual survey of jails, but the survey covers only a nationally representative sample and only the most basic information on admissions, staffing, inmate demographics, and violence/deaths in custody.[191] The BJS does not collect annual facility level information. In addition, the BJS is statutorily required to collect and analyze data on the "incidence and effects of prison rape" at representative facilities each calendar year.[192] The BJS has recently released a new data program, the Correctional Statistical Analysis Tool, which allows for collation of existing data in some cases from 1978 to present.[193] Although this tool shows promise, the types of information available are limited to population counts and a few demographic characteristics.

Data on many groups of prisoners, especially vulnerable and traditionally excluded groups, is simply not collected at all. For example, the BJS only publishes their prison census data in terms of race and gender, but not in terms of sexuality, physical or mental disability, or level of education—all groups that may require specific strategies or care. In addition, some groups of prisoners are particularly vulnerable, such as prisoners in segregation, prisoners with mental and physical disabilities, and prisoners with serious medical needs within "an institution [that] has total control over the lives and well-being of individuals."[194]

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187. *See e.g.*, Jones v. Gusman, 296 F.R.D. 416, 469-70 (E.D. La. 2013) (discussing the acute and unconstitutional conditions in the Orleans Parish jail and approving the consent judgment to "overcome the years of stagnation that have permitted OPP to remain an indelible stain on the community").

188. For an excellent summary of the strengths and weaknesses of federal, state, and non-governmental data collection efforts, see Gibbons & Katzenbach, *supra* note 13, at 529-32.

189. *Corrections*, U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, http://www.bjs.gov/index.cfm?ty=tp&tid=1 (last visited May 17, 2014).

190. *Id*.

191. *Annual Survey of Jails*, U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, http://www.bjs.gov/index.cfm?ty=dcdetail&iid=261(last visited May 17, 2014).

192. Prison Rape Elimination Act of 2003 (PREA), 42 U.S.C. §§ 15601-15609 (2003).

193. *Corrections Statistical Analysis Tool*, U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, http://www.bjs.gov/index.cfm?ty=nps (last visited May 17, 2014).

194. Michele Deitch, *Special Populations and the Importance of Prison Oversight*, 37 AM. J. CRIM. L. 291, 292, 296-302 (2010).

Data on educational and work assignments is also unavailable. Although BJS does collect data on whether or not inmates are assigned work, they do not publish data on types of work assignments. This data had been collected by the Criminal Justice Institute and published annually in the Corrections Yearbook.[195] However, the last version published is from 2002 and more recent information is unavailable.[196]

Why is this data unavailable? First, the BJS collects much of its data through voluntary questionnaires sent to facilities. Other than when statutorily mandated, BJS simply lacks the authority to require or incentivize compliance.

Another reason the data may not be available is simply because facilities lack the necessary resources to either collect the data or synthesize the data they do possess. Many prisons and jails are still transitioning from antique information management systems.[197] Thus while a facility may have data on individual inmates, aggregating and sorting the data may be too resource intensive. For example, a prison may have a record of each inmate's job assignment, but may not have readily accessible data on the percentages of the inmate population assigned to particular jobs sorted by race, security status, and education.

Even when the information is less data intensive, such as internal prison policies and procedures, public access is nevertheless restrictive. The current process for obtaining prison operation information, even in this digital age, is byzantine, complex, and usually involves submission of public record requests.[198] The Southern Center for Human Rights has zealously litigated for increased access to public documents, particularly in cases where excessive force is alleged and/or a prisoner has suffered severe bodily injury or death.[199] The response to the requests is almost always the same: public access to the requested documents would threaten the security of the institution. Corrections officials have argued that release of the information could lead to prison riots, public disturbances, and increases in violent crime within prison walls.[200]

Yet, corrections officials fail to see that release of policies and data accompanied by transparent state efforts to curb abuses and punish wrongdoers could actually have the opposite effect. The orderly operation of a prison relies in part on the "acquiescence and cooperation" of the prisoners themselves.[201] When

195. *See e.g.*, CRIM. JUSTICE INST., CORRECTIONS YEARBOOK (2002).

196. Armstrong, *supra* note 19, at 871 n.10.

197. *See e.g.*, Christopher Osher, *$19.8M needed for PC system*, DENV. POST (Jan. 7, 2014), http://www.denverpost.com/news/ci_24857549/colorado-corrections-seeks-19-8-million-computer-tracking (describing Colorado Department of Corrections budget request to replace existing 20-year-old computer system).

198. In this author's experience, even when a public records request is lodged, prisons often fail to respond (requiring civil suit to obtain the information) or cite security concerns. *See also* Geraghty & Velez, *supra* note 179, at 461-62.

199. *See id.* at 458-64.

200. *Id.* at 460.

201. Jonathan Jackson et al., *Legitimacy and Procedural Justice in Prisons*, 191 PRISON SERVICE J. 4 (2010).

prisoners perceive the prison administration as legitimate (i.e., that the policies are neutral and fairly applied), prisoners are more likely to contribute to an orderly and safe prison environment.[202] Empirical studies in related fields, like policing and criminal justice, clearly demonstrate the relationship between enhanced institutional legitimacy and fair and neutral treatment by the institution.[203] Although a prisoner may disagree with a particular decision or rule, the overall legitimacy of the prison administration—"established and reproduced" through transparent and fair procedures—serves to preserve internal order.[204]

The lack of public transparency about prisons is further compounded by the general lack of oversight on prison operations in general.[205] The American Correctional Association (ACA) does provide institutional accreditation, but accreditation is voluntary, not mandatory, for most institutions.[206] There are no mandatory federal or state standards for prison conditions, other than those constitutionally mandated[207] and for those specific populations (religious groups,[208] the disabled[209]) or topics (prison rape[210]). As of 2010, there are "130 accredited jails (out of more than 3,300) and 590 accredited prisons throughout the country."[211] The accreditation process provides at best a snapshot review of an institution's policies and procedures, but does not necessarily entail review of how those policies are actually applied and how the institution fares over time.[212] In addition, critics question the impartiality of the accreditation process given the fee structure for membership in the association.[213]

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202. *Id*. at 5.

203. *Id*. at 10.

204. *Id*.

205. *See generally* David C. Fathi, *The Challenge of Prison Oversight*, 47 AM. CRIM. L. REV. 1453 (2010).

206. David Bogard, *Effective Corrections Oversight: What Can We Learn From ACA Standards and Accreditation*, 30 PACE L. REV. 1646, 1649 (2010).

207. Several constitutional amendments provide minimum standards for the treatment of the incarcerated in detention facilities. Even within the prison walls, prisoners still retain certain basic rights, such as the right to be free from "cruel and unusual punishment," U.S. CONST. amend. VIII, the right to "due process of law," U.S. CONST. amends. V & XIV, and the right not to be enslaved, U.S. CONST. amend. XIII. In addition, detainees retain certain and limited speech and associational rights including marriage, freedom from censorship, freedom of religion, and freedom of speech. U.S. CONST. amend. I.

208. Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc *et seq*. (2013).

209. Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 *et seq*. (2013).

210. 42 U.S.C. §§ 15601-09 (2013).

211. Bogard, *supra* note 206, at 1649 (internal citations omitted).

212. *See e.g*., Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 488-90 (2005) (discussing how the ACA process fails to be meaningful in the private prison context).

213. Bogard, *supra* note 206, at 1650; Lynn S. Branham, *Accrediting the Accreditors: A New Paradigm for Correctional Oversight*, 30 PACE L. REV. 1656, 1664 (2010) (noting that large institutions can affect the accreditation process by withdrawing their membership fees from the association).

Moreover, neither the standards nor the accreditation reports are made public.[214] The voluntary ACA accreditation process is simply inadequate to provide transparency to the public.

Informal oversight mechanisms are also unavailing. Members of the general public do not participate in prison operations in an oversight capacity.[215] While individuals may serve on clemency boards, non-employee individuals generally do not serve on administrative, disciplinary, or internal appeals boards in penal facilities.

The lack of transparency has economic costs as well. Prisons and jails are administered by virtue of our payment of taxes. The cost of incarceration continues to rise, even now in times of state budget deficits. Incarceration in the state of Georgia, for example, costs approximately one billion dollars per year.[216] Nationally, the Pew Center on States estimates that states spend approximately fifty-one billion dollars a year, a figure that does not include federal incarceration expenditures.[217] The total federal and state expenditures on corrections in 2010 may be as high as eighty billion dollars per year.[218] In an era of performance-based standards and outcomes, particularly for public institutions justifying expenditures during record deficits, prisons appear to have flown under society's radar until recently.[219]

C. *More Transparency?*

Academics, lawyers, and even some corrections officials agree that increased transparency in correctional administration is needed. The American Bar Association passed a resolution supporting enhanced public transparency in prison governance.[220] The Commission on Safety and Abuse in America's

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214. Bogard, *supra* note 206, at 1650.

215. *But see* Anne Owers, *Prison Inspection and the Protection of Prisoners' Rights*, 30 PACE L. REV. 1535, 1537-38 (2010) (describing Independent Monitoring Boards in the United Kingdom that are empowered to monitor prisons, have a statutory right of entry, and must exercise additional supervision of inmates in administrative segregation).

216. *See* PEW CHARITABLE TRUSTS, *supra* note 39, at 7.

217. PEW CENTER ON THE STATES, TIME SERVED: THE HIGH COST, LOW RETURN OF LONGER PRISON TERMS 1 (2012), *available at* http://www.pewstates.org/uploadedFiles/PCS_Assets/2012/Pew_Time_Served_report.pdf.

218. U.S. Department of Justice, *Justice Expenditure and Employment Extracts 2010 – Preliminary*, BUREAU OF JUSTICE STATISTICS, http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4679 (last visited May 17, 2014) (data summarized in sheet one of csv file); *see also* Western & Pettit, *supra* note 7, at 18 (noting national expenditures on prisons and jails at seventy billion dollars).

219. *See generally* RIGHT ON CRIME, http://www.rightoncrime.com (last visited May 17, 2014) (demonstrating an example of growing conservative activism on prison reform).

220. STEPHEN J. SALTZBURG, AMER. BAR ASSOC., CRIMINAL JUSTICE SECTION, REPORT TO THE HOUSE OF DELEGATES 1 (2008), *available at* http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_policy_am08104b.authcheckdam.pdf ("RESOLVED, That the American Bar Association urges federal, state, local and

Prisons has urged greater transparency, noting "[m]ost correctional facilities are surrounded by more than physical walls; they are walled off from external monitoring and public scrutiny to a degree inconsistent with the responsibility of public institutions."[221] The Prison Rape Elimination Act specifically calls for greater data collection in part to combat the hidden nature of sexual violence against prisoners.[222]

Critics would argue that enhanced transparency in prisons could actually be harmful. Michael Campbell and Heather Schoenfeld argue that the current mass incarceration boom was due in part to the politicization of crime within a federal-state incentive loop.[223] Voters across the nation passed variations of "three-strikes" laws and state legislatures supported mandatory sentences.[224] That politicization fostered special interest groups and enhanced the groups' influence on crime legislation.[225] In a national poll of voters for their revenue and reduction preferences, 48% supported reducing funding for state prisons over raising property or business taxes.[226] Defendants and prisoners are not necessarily the most sympathetic population and perhaps greater transparency in prison operations would actually lead to worse prison conditions.

This stands in stark contrast to the expectations of the general public of our nation's prisons and jails. In 2012, 87% of respondents agreed that "we must increase access to treatment and job training programs so [people in prison] can become productive citizens once they are back in the community." Of that 87%, 66% strongly agreed with the statement. Over three-quarters of the respondents supported that statement, regardless of whether they identified as Democrat, Independent, or Republican.[227] A 2006 poll by the National Council on Crime and Delinquency provides even stronger evidence of societal support for greater, not less, rehabilitation services.[228] Voters, by an eight to one mar-

territorial governments to develop comprehensive plans to ensure that the public is informed about the operations of all correctional and detention facilities . . . within their jurisdiction and that those facilities are accountable to the public.").

221. Gibbons & Katzenbach, *supra* note 13, at 15, 95 (2006).

222. *See* 28 C.F.R. § 115.87 (2013) (mandating facility, state, and federal data collection); *see also* Jamie Fellner, *Ensuring Progress: Accountability Standards Recommended by the National Prison Rape Elimination Act*, 30 PACE L. REV. 1625, 1634 (2010).

223. Michael C. Campbell & Heather Schoenfeld, *The Transformation of America's Penal Order: A Historicized Political Sociology of Punishment*, 118 AM. J. SOC. 1375, 1375 (2013).

224. *See id*.

225. *Id*. at 1398 (noting the growing influence of police associations, prosecutors' associations, corrections officers' unions, and victims' groups).

226. PEW CTR. ON THE STATES, PUBLIC OPINION ON SENTENCING AND CORRECTIONS POLICY IN AMERICA 3 (2012), *available at* http://www.pewstates.org/uploadedFiles/PCS_Assets/2012/PEW_NationalSurveyResearchPaper_FINAL.pdf (noting that raising property taxes only garnered 23% support and raising business taxes 43%).

227. *Id*. at 7.

228. BARRY KRISBERG & SUSAN MARCHIONNA, NAT'L COUNCIL ON CRIME & DELINQUENCY, ATTITUDES OF US VOTERS TOWARD PRISONER REHABILITATION AND REENTRY

gin, supported rehabilitative services for prisoners as compared to a punishment only system.[229] More than 80% of respondents supported providing rehabilitative services during incarceration and 76% were in favor of providing rehabilitative services after incarceration.[230] In fact 66% of respondents attribute a high recidivism rate to the failure to improve life skills during incarceration.[231] Eighty-two percent of respondents link access to job training to successful reintegration post-incarceration.[232] A poll conducted for the Open Society Institute in 2001 indicates that 66% of respondents support *requiring* education and job training for prisoners.[233] Clearly the public expects prison conditions to foster rehabilitation, and I would argue that given these expectations, greater transparency showing these expectations remain unmet would not lead to greater or additional harm.

Another argument against enhanced transparency is the fear that increased openness about actual prison operations could threaten order and security in the penal institution. There are good reasons to be cautious about distributing information on prison operations. Information about guard protocols and assignments, non-visible escape alert tools, staff rotations, and cell search protocols are critical to maintaining a safe and secure custodial environment. An inmate committed to violence or escape could use that information to plan an attack on another inmate or guard, smuggle contraband into the facility, or even escape custody. At the other end of the spectrum, however, is information that relates to prison operations but not security. So for example, the actual use of particular programming, the expected co-pay for access to health services, and the level of training required for medical and correctional staff all impact the type of environment a prisoner experiences and would not necessarily threaten the orderly operation of the prison.

Enhanced transparency about prison conditions can actually improve, not worsen, an institution's ability to safely care for the incarcerated. The corrections community itself acknowledges that increased transparency can improve safety for both inmates and staff.[234] For example, the warden of a London prison has argued that public attention to the challenges in providing humane conditions to prisoners led to greater public support for increased resources, ena-

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POLICIES (2006), *available at* http://www.sdgrantmakers.org/members/downloads/2006april_focus_zogby.pdf.

229. *Id*. at 3.

230. *Id*.

231. *Id*. at 6.

232. *Id*. at 5 (but note that 47% support planning an inmate's re-entry only six months to a year prior to release; 44% support initiating re-entry planning at sentencing).

233. PETER D. HART RESEARCH ASSOCS., INC., THE OPEN SOC'Y INST., CHANGING PUBLIC ATTITUDES TOWARD THE CRIMINAL JUSTICE SYSTEM 4 (2002), *available at* http://www.prisonpolicy.org/scans/CJI-Poll.pdf.

234. *See* Gibbons & Katzenbach, *supra* note 13, at 494-99 (noting testimony by former wardens on how greater openness could have improved conditions).

bling him to fulfill the prison's mission of deterrence and rehabilitation.[235] Second, increasing transparency can enhance institutional legitimacy[236] and enhance the professionalization of corrections.[237] Third, increased transparency can enhance prison efficiency by increasing the costs of non-compliance, creating personal incentives for individual employees, and increasing the probability of detecting diversion of resources.

The current "see no evil" approach entails significant but hidden costs. Inmates suffer most directly, but conditions of incarceration affect their families, our communities, and society more generally. While enhanced transparency may or may not mitigate those costs, at a minimum we will be able to understand the various ways in which mass incarceration policies operate to maintain disadvantage and permanent subordination of certain groups.[238]

V. ENHANCING PENAL INSTITUTION TRANSPARENCY

Penal institutions face challenges and constraints similar to—but not identical to—schools. Both institutions have custodial relationships with a captive population; require particular expertise and hands-on experience; are tasked with additional duties and obligations beyond their primary institutional goal; and are traditionally state concerns. Both must balance a certain degree of transparency to the general public with the obligation to keep secret information that could harm their respective populations. Most importantly, success in both institutions consists of providing environments where the populations learn and practice the skills to succeed later in life, while also keeping them safe. Both schools and prisons run the risk of creating and maintaining a permanent underclass when they fail to attend to these challenges.

Although our public schools are far from perfect, the federal approach to increasing transparency of school operations has, at a minimum, enhanced our understanding of how schools succeed and fail in educating our children. NCLB establishes common terms and definitions to guide data collection, which also facilitates comparisons between individual schools, among school districts, and among the states. In so doing, we can at least compare the educational progress of the most vulnerable school populations across jurisdictions. Where disproportionate impacts are identified, the public at least has a basis on

235. Andrew Coyle, *Professionalism in Corrections and the Need for External Scrutiny: An International Overview*, 30 PACE L. REV. 1503, 1506-08 (2010).

236. *See supra* notes 201-204 and accompanying text; *see also* David Gartner, *Beyond the Monopoly of States*, 32 U. PA. J. INT'L L. 595, 596-98 (2010) (discussing study of the public legitimacy of international institutions as a product of involvement by non-governmental organizations).

237. Deitch, *supra* note 194, at 292.

238. *See* Todd R. Clear & James Austin, *Reducing Mass Incarceration: Implications of the Iron Law of Prison Populations*, 3 HARV. L. & POL'Y REV. 307 (2009) (arguing that the link between crime reduction and incarceration are relatively weak and overshadowed by the societal costs).

which to ask further questions and, possibly, identify solutions. Given the current impact of incarceration on society, it is imperative that we begin to understand how prisons succeed and fail in punishment, deterrence, and rehabilitation.

A. *Critical Data to Address Incarceration Inequality*

Collecting information and thereby enhancing transparency of penal facilities is a delicate endeavor. Simply put, the act of collecting can imply policy choices and frame political arguments.[239] Moreover, the initial data collection—the reporting, aggregation, and disaggregation of prison operations data—entails real financial costs for corrections facilities. In the current economic climate, any future data collection program has to be mindful that some corrections facilities face significant budget shortfalls to provide basic services to the incarcerated. At the same time, I have argued in this Article that the current operations in prison entail significant costs. Creating a permanent underclass of people not only entails economic costs—such as loss of income to the communities most impacted by incarceration or increased health care costs—but also costs to our democracy as a whole by undermining our commitment to equality.

Information about actual practices and outcomes is critical to effectively stymie this creation and maintenance of a permanent underclass of the currently and formerly incarcerated. Transparency, as a method to expose these practices and outcomes, is then an integral part of advancing justice through exposing the ways in which the underclass is permanently entrenched. In this light, the costs associated with enhanced transparency measures can be considered an investment in understanding exactly why our penal facilities fail. With these constraints and benefits in mind, any enhanced transparency measures must be limited to the most relevant data affecting how prison conditions create and maintain a permanent underclass.

Many of the concerns about prisoner re-entry and humane treatment could be better addressed if the public had even a rudimentary knowledge of basic prison operations. What programming does the prison offer, and does it contribute to that prisoner's eventual re-entry into society? What medical care is offered to prisoners, and is preventive care emphasized over the more costly emergency urgent care? How are prisoners housed and to what extent do the housing or programming arrangements impact violence upon inmates? To what extent are prisoners forced to work, and for whom?[240] What training is required for prison employees and what rules govern the use of force in prison? How do prisons insure that inmates are treated not only humanely, but also fairly as they

239. W. David Ball, *E Pluribus Unum: Data and Operations Integration in the California Criminal Justice System*, 21 STAN. L. & POL'Y REV. 277, 302-03 (2010).

240. *See* Andrea Armstrong, *Slavery Revisited in Penal Plantation Labor*, 35 SEATTLE U. L. REV. 869 (2012) (examining the branding of prisoners as slaves in modern forced plantation-style labor under the Eighth and Thirteenth Amendments).

serve their sentences of punishment? All of these questions target how prison conditions manufacture permanent inequality, but translating these broad questions into manageable and limited data points is essential for any enhanced transparency program.

Based on the harms outlined in Part I, the following categories would appear to be most critical: 1) physical safety; 2) medical; 3) institutional employment/education; 4) internal discipline; and 5) recidivism. Below, I propose initial minimal data points for annual collection at the facility level. This is not a comprehensive list of all we might want to know about how penal facilities operate. The policies that guide these decisions are certainly relevant, and I would also encourage facilities to make these policies more available to the general public. But to include policies or best practices within this data set goes well beyond the type of data collected in the educational context and may in fact be less useful in creating a picture of how prisons actually operate.

1. Physical Safety

A) Violence—number of violent acts resulting in additional criminal charges and/or convictions; number of violent acts resulting in a) death, b) serious bodily injury, c) hospital (external) treatment, and d) medical (internal) treatment; number of inmate-on-inmate violent acts; number of correctional officer-on-inmate violent acts (whether or not justified); number of inmate-on-correctional officer violent acts; number of cell searches; number of dangerous weapons confiscated.

B) Use of Force—number of use-of-force incidents; number of cell extractions; number of use of non-lethal force incidents; number of use of pepper spray (per incident as well as overall); number of deployments of canines in inmate housing/areas.

C) Housing—number of inmates held in each category of security classification; number of inmates held in administrative segregation; median length of stay in administrative segregation.

D) Correctional Staff—educational and demographic information for correctional staff exercising custodial control; training availability, topics, frequency, and resulting certifications; availability of mental health counseling for correctional staff; number of administrative reprimands/suspensions/dismissals for custodial control staff.

2. Medical

A) Physical health—number and type of communicable diseases diagnosed and treated; number and type of non-communicable diseases diagnosed and treated; average wait time for non-emergency medical visits; average wait time for emergency medical visits; availability of specified drugs for chronic conditions; amount of inmate co-pays for medical visits and pharmaceuticals; num-

ber of hospital visits; number of deaths in custody; number of preventative, curative, or emergency dental visits; number of inmates receiving chronic condition health care; number of "disabled" inmates; number of inmates requiring interpretive services.

B) Mental health—number and type of mental health conditions diagnosed and treated; number of suicides (successful and attempted); number of mental health interventions in disciplinary treatment; number of inmates receiving psychiatric treatment; number of inmates receiving counseling; types of counseling available (drug/alcohol addiction and anger management); number of mental health inmates on restricted housing status (disciplinary or administrative).

C) Medical staff—educational and demographic information for medical staff treating inmates; training availability, topics, frequency, and resulting certifications; availability of mental health counseling for medical staff; number of administrative reprimands/suspensions/dismissals for medical staff.

3. Institutional Employment/Education

A) Employment—number of inmates with work assignments; types of inmate work assignments; amount of incentive wages paid per type of work assignment (per individual and overall); number of inmates performing labor outside of the facility; number of average weekly work hours; number of inmates performing work for private businesses; annual income from all prison labor programs; average annual income per inmate from work assignments.

B) Education—number of inmates enrolled in educational classes; number of inmates enrolled in degree programs; types of educational classes and degree programs available; costs to inmate to enroll/participate in educational programs and classes; amount of incentive wages paid (for educational work) per inmate and overall; demographic and certification of teaching staff; number of vocational training programs; numbers of inmate participation in each vocational training program; number of English as a second language inmates.

4. Internal Discipline

A) Grievances—number of inmate grievances total and by category; number of review levels before administrative decision is final; average response time for initial complaint and for each level of review; number of grievances initially granted and denied; number of grievances granted following initial denial.

B) Disciplinary—number of disciplinary hearings held; availability of inmate or outside counsel at disciplinary hearings; types of disciplinary measures actually imposed (such as loss of visitation, canteen privileges, work privileges, or assignment, etc.) number of inmates held in disciplinary segregation; median length of stay in disciplinary segregation; number of review or extension hear-

ings for inmates in disciplinary segregation; number of hours in cell in disciplinary segregation.

5. Recidivism

A) Outcomes—number and percentages of inmates with prior incarceration terms; number of inmates with prior incarceration terms in the same jurisdiction or facility; number of inmates returning with a higher charge; number of inmates returning with a lower charge; number of inmates returning for violation of parole; number of inmates incarcerated for violation of probation; number of inmates released with debts incurred while incarcerated; total number of inmates released from custody.

B) Related factors—number of inmates receiving visits from family and friends; number of inmates incarcerated within thirty miles from their home; average number of non-legal visits per inmate; number of inmates who completed transition training prior to release.

* * *

The parameters and content of each of these data points will need to be specifically defined. In addition, data within each of these categories should be accompanied by offender characteristic information including an offender's security classification, race, gender, age, disability status, total time incarcerated, and remaining term of sentence. Through adding these demographics, we can paint a more vibrant picture of the replication (or more optimistically the elimination) of patterns of privilege and subordination.

B. *A Federal Approach to Collecting Data*

Why a federal approach in corrections? Our penal facilities are a national issue. Increased mobility from state to state can lead to negative externalities among states. Once a person is released, he can relocate to another state so long as he complies with the terms of his post-incarceration supervision. Both the federal government and states have started housing prisoners for incarceration out of state and many of these prisoners will return home after release.[241] But

241. Judith Resnik, *Harder Time*, SLATE (July 25, 2013), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/07/women_in_federal_prison_are_being_shipped_from_danbury_to_aliceville.html (describing plans to move inmates currently located in a female-only federal prison in Danbury, Connecticut to a prison in Alabama). Due in part to Professor Resnik and the Liman Fellows at Yale University, the proposed transfer has been indefinitely halted. *See* Daniela Altimari, *Transfer of Female Inmates Out of Danbury Halted*, HARTFORD COURANT (Aug. 14, 2013), http://articles.courant.com/2013-08-14/news/hc-inmate-transfer-danbury-0815-20130814_1_female-inmates-tax-evasion-minimum-security (noting that the transfer has been temporarily halted).

think of the people we are releasing, who have not only served a sentence for their crime, but in effect will continue to be punished far more than their official criminal sentence required. Former inmates may emerge worse off in terms of their medical and mental health and their employment and social skills. Studies have documented how influxes of the recently incarcerated can impact communities, leading possibly to additional economic and social costs. And these costs are not necessarily borne by the region where the inmate was housed. Beyond these economic and social externalities, penal facilities are part of our broader criminal justice system. With hundreds of thousands of inmates released each year, their receiving communities learn secondhand the true nature of justice in the United States.

One of the key problems, even with existing haphazard data collection efforts, is a lack of uniform definitions among states. For example, the Commission on Safety and Abuse in America's Prisons notes that an inmate death during a forcible cell extraction can be classified either as an accidental death, negligent or reckless homicide, or murder.[242] Similar definitional challenges exist in defining recidivism and assault as well as classifying work and educational programs. By housing data collection explicitly within the federal government, states would provide information according to nationally defined terms.

Under a federal approach to penal transparency, provision of annual data would be voluntary under an incentive-based approach similar to Title I. Federal spending on education is only 10% of overall education spending, and yet, has been enormously successful in gaining the participation of all fifty states. Given that prisoners are generally less politically popular than children, the total funds dedicated to incentivizing participation are likely to be smaller. Nevertheless, even small amounts might be compelling, particularly to smaller jails with tighter budgets. The budgets of correctional facilities have been slashed in recent years. A federal law—and set-aside of funds—could incentivize prisons and jails to collect and disseminate annual data specifically identified by statute. A federal agency, such as the Department of Justice (DOJ), which is primarily responsible for corrections issues, could collect the data, much like the Bureau of Justice Statistics (BJS) in the DOJ currently does with more limited and ad hoc information.

Creating a transparency incentive program can also clarify federal responsibilities regarding state and local inmates. One of the byproducts of the passage of the ESEA was the creation of a cabinet level position for Education in 1980 to manage hundreds of programs.[243] The position makes one department responsible for receiving and disseminating information. A similar structure is already present for the prison system, since the Attorney General holds a cabinet level position representing the Department of Justice. The responsibility for

242. Gibbons & Katzenbach, *supra* note 13, at 524.

243. McGuinn & Hess, *supra* note 122, at 11.

addressing prisoners' rights, however, is muddled. The Special Litigation section handles matters related to incarceration, law enforcement, the disabled, reproductive access, and religious worship. With some exceptions, the Special Litigation section focuses on the rights of institutionalized persons, but leaves enormous discretion on which rights receive the most attention, particularly in comparison to other clearly defined areas within the Civil Rights Division, such as education, voting, housing, etc. As with the passage of the ESEA, creating a program for states to share critical information about their penal institutions implicates creating a focal point for the receipt of that information as well.

The proposed transparency approach stops short of enhancing accountability for administrators of penal facilities. Perhaps after initial data collection efforts are in place, the next step may be in rewarding improvements or penalizing failures to improve. But the current criticisms of NCLB caution against imposing accountability measures simultaneously with enhanced transparency measures. The secondary effects of NCLB on actual classroom teaching present serious concerns about whether NCLB is actually achieving its goal of education for every child. In effect, this Article argues for a "No Prisoner Left Behind Act"—a truncated and transparency focused version of the current No Child Left Behind Act.

CONCLUSION

"[G]overnment by secrecy benefits no one. It injures the people it seeks to serve, it injures its own integrity and operation. It breeds mistrust, dampens the fervor of its citizens, and mocks their loyalty."[244] Our current lack of information about the operation of penal facilities is costly as well. Economically, our current focus on mass incarceration is disastrously expensive. Given the extremely high recidivism rates, we create a self-fulfilling prophecy of ongoing high levels of incarceration, due in part to subordinating prison conditions in these facilities. Improving prison conditions is integral to reducing mass incarceration by lowering recidivism rates.[245]

More importantly, the lack of transparency is devastating for the incarcerated. In the absence of information about how certain conditions foster recidivism, our national conversation about inmates further subordinates the incarcerated population by stamping them as morally flawed or forever criminal. Accordingly, increasingly punitive penal policies are justified by the flawed character of people who commit crimes, instead of by assessing why one bad act can become multiple criminal acts over time.

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244. Martin E. Halstuk & Bill F. Chamberlin, *The Freedom of Information Act 1966-2006: A Retrospective on the Rise of Privacy Protection Over the Public Interest in Knowing What the Government's Up To*, 11 COMM. L. & POL'Y 511, 512 (2006) (quoting S. REP. No. 89-813, at 10 (1965)).

245. Forman Jr., *supra* note 20, at 66-67; *see supra* Part II.B (discussing the relationship between recidivism and prison conditions).

Clearly a balance must be struck in determining how much transparency is required. State institutions, such as schools and prisons, must be allowed to function and to continue to serve the important societal goals. And transparency that would in effect hold the prison hostage, "rendering the state a prisoner of the public's gaze,"[246] would undermine the purpose of the institution itself. Transparency is not an all or nothing enterprise; there can be varying degrees of transparency in terms of what information is disclosed and to whom the information is disclosed.[247] The experiences of schools in terms of public transparency show that a balance can be achieved. Schools, by allowing for significant discretion while also creating routines and structural mechanisms to hardwire transparency into the operation of the educational institution, demonstrate that such a balance is possible.

We, as a society, cannot start a conversation about prison conditions without knowing how prisons currently operate. At the time of writing, hundreds of inmates across California are reduced to engaging in a month long hunger strike to protest administrative segregation, placement, and conditions. For many inmates, this is their only option to make public the subordinating conditions of their daily lives. Yet, "[o]ur treatment of prisoners, even the most dangerous and irredeemable, is a fundamental expression of American values."[248] When we create a life-long subordinate class of people, we pervert our national commitment to equality.

246. Mark Fenster, *Seeing the State: Transparency as Metaphor*, 62 ADMIN. L. REV. 617, 624 (2010).

247. Schauer, *supra* note 159, at 1345-46.

248. Editorial, *Prisons and American Values*, L.A. TIMES (Aug. 7, 2013), http://articles.latimes.com/2013/aug/07/opinion/la-ed-hunger-strike-20130807.