

# THE YALE LAW JOURNAL

## EDITORS' NOTE

### Prison Law Writing Contest

People who are incarcerated offer a unique perspective on the law. Having broken it, they now live in an environment pervaded by it. But only rarely, if ever, do scholars, lawyers, and policymakers hear directly from them about it.

This year, the *Journal* sponsored a Prison Law Writing Contest to recognize authentic and unheard voices on legal issues. We invited currently and recently imprisoned people to submit short essays in response to one of several questions. We offered a modest cash prize to the top three winners, with the hope of publishing a few essays if they made valuable contributions.

We received about 1,500 responses from people all across the United States—men and women, adults and juveniles, former petty offenders and current death-row inmates. Their work addressed a wide range of subjects, but some themes emerged. Prison is boring, but also dangerous and unpredictable. Prison is rich with regulation, governed by unique codes and procedures whose complexity and pervasiveness may enable official discretion as much as they constrain it. Prison is distant from the outside world, often hidden from the view of the courts and the public; it operates according to its own logic that may be difficult to understand. And, perhaps most of all, people in prison badly want to be heard.

The three Essays that follow were the top prizewinners in our contest, chosen after careful consideration by a committee of *Yale Law Journal* editors. We also recognized two other pieces with an honorable mention, as well as eighteen finalists. We endorse these Essays as we endorse everything we choose to publish: not because we necessarily agree with their conclusions, or because we have any particular feelings about their authors, but because they powerfully express important claims about relevant topics.

We found that the men and women who wrote to us had valuable insights to share. For over a century, the *Journal* has had the privilege of publishing argument and analysis that have shaped the course of the law. We aim to honor that tradition by giving these authors, too, the chance to make lasting contributions to the law's written record.



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ELIZABETH A. REID

## The Prison Rape Elimination Act (PREA) and the Importance of Litigation in Its Enforcement: Holding Guards who Rape Accountable

Elizabeth A. Reid is currently a student at Green River Community College due to graduate this June. She plans on an English major at the University of Washington, where she was the recipient of the 2012 Martin Achievement Scholarship. Her goal is to become an attorney specializing in social justice/public policy practice. Elizabeth speaks at outreach events in prisons to recruit future college students on release. She speaks at these events and other community forums in support of higher education in an attempt to reduce the cycle of recidivism. She also works with community groups reaching out to at-risk youth to help break the intergenerational cycle of imprisonment. She is one of the founding members of the Post-Prison Community Collaboration Project, in conjunction with the Honors Program at the University of Washington, which works in the community to educate citizens about the problems of mass incarceration, racial injustice, homelessness, mental illness, and the stereotypes held about those formerly incarcerated.

I don't even know how to begin this story. I do my best to shove it deep down inside and keep it there, out of sight. But something needs to be said about what happened. It just has to be told as it was—bluntly and without hesitation. So take a warning: this story is graphic and despicable. Rape always is. Strangely, it's the little things that haunt me most. A whiff of cologne. The jingling of keys. The turn of a lock. In a click, I am back in that room. Locked in the room that is the subject of sweats and nightmares that shake me from my sleep. Even now, five years later.

**NO. 07-2-01513-0**  
**THIRD AMENDED COMPLAINT FOR INJUNCTIVE RELIEF**  
**AND DAMAGES**

....

**I. INTRODUCTION**

1. The Plaintiffs in this case are women who have been, are, or will be confined by the Washington Department of Corrections (DOC). They bring this lawsuit to challenge specific acts of sexual assault by prison guards, as well as the systematic failure of DOC to take the steps necessary to prevent sexual assaults by staff in their institutions and to hold offending staff members accountable.

2. Article I, Section 14 of the Washington State Constitution guarantees to every person incarcerated in the DOC that they will not be subject to cruel punishment. . . .

3. Subjecting women to an environment in which they are sexually assaulted, and in which sexual assaults are likely to occur, is cruel punishment.

4. The Class Defendants have a special relationship with inmates in DOC which arises because when a person is arrested and imprisoned for the protection of the public, she is deprived of her liberty as well as her ability to care for herself.

5. As a result of this special relationship, the Class Defendants have a duty to keep prisoners incarcerated in DOC facilities in health and safety. This includes the duty to take reasonable precautions to protect prisoners from sexual assaults by DOC employees and other prisoners.

6. The Class Defendants have a duty to properly supervise correctional officers and dismiss those who have sexual contact with prisoners.

7. As detailed in this complaint, the Class Defendants have breached their duties and, in turn, subjected Plaintiffs to cruel punishment in violation of Washington's Constitution, by incarcerating women in an environment in which sexual assaults have occurred and are likely to occur in the future.

8. As further detailed in this Complaint, the individual correctional officers named herein have committed the intentional torts of assault, battery, and intentional infliction of

emotional distress by committing sexual assaults and engaging in sexual misconduct.<sup>1</sup>

Sexual assault is a popular subject for the prisons. The prison administration vigorously publicizes the Prison Rape Elimination Act (PREA). They tell us we have rights. They tell us that we don't have to be subjected to any unwanted attention from the guards or other employees. They tell us they are there to help us. It even sounds noble. It sounds as if they believe what they are saying. Unfortunately, we later realized that they were simply going through the required motions. On the surface, PREA looks terrific; it appears to be a sincere effort to prevent sexual abuse. But it's always what's under the surface that matters, isn't it? And under the cloak of PREA, things have not changed. There are still guards forcing themselves on prisoners. There are still guards making sexual remarks to prisoners. And there are still those in Administration who allow sham investigations to take place, ultimately finding in favor of their staff. The charges are always "unfounded." The victim is humiliated and then discredited. We cannot win if we come forward.

In 2006, if an inmate made an allegation of sexual abuse against a staff member, the first thing that happened is that the inmate was moved to segregation. She would stay there as long as it took to conduct an "investigation." Oftentimes, this took many months. The victim remained in segregation as if she had done something wrong. If an inmate happened to be at work release and alleged that a staff member was inappropriate with you, the first thing that happened was that you were put in restraints, placed in a car, and returned to prison. Straight to segregation you went. There was a penalty for reporting sexual abuse under PREA; a stiff penalty. Everyone knew this. So there was a decision to make. Speak up and go to the hole for months only to be found incredible. Speak up and be returned to prison and stay in the hole until your release date. Speak up and paint a great big target right on your forehead. There was no winning when you spoke up. The only option left was to be abused and not say a word. To anyone. Even telling another inmate could backfire because they could tell and off to the hole you'd go. The only bright side to having to keep quiet? We are used to that. That's what we do. Those things that are too painful, too degrading, too awful to deal with? We kept quiet. Over and over and over again. We kept quiet. I had felt helpless in my life before prison. But I had to go to prison to understand what true powerlessness was . . .

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1. Third Amended Complaint for Injunctive Relief and Damages at 1-3, *Doe v. Clarke*, No. 07-2-01513-0 (Wash. Super. Ct. Thurston Cnty. filed May 22, 2008) (on file with author).

**IV. CLASS ACTION ALLEGATIONS**

....

34. There are questions of law and fact common to the class.

35. The questions of law and fact common to all members of the Class include but are not limited to: (a) whether Class Defendants breached their duty to prevent the infliction of cruel punishment as prohibited by Article 1, Section 14 of the Washington Constitution; (b) whether Class Defendants breached their duty to keep prisoners in health and safety; (c) whether Class Defendants are liable for their employees' failure to properly investigate claims of sexual assault pursuant to the theory of *respondeat superior*; (d) whether Class Defendants have negligently retained correctional staff, including those who have sexually assaulted prisoners; and (e) whether the Class Defendants have negligently supervised correctional staff, including those who have sexually assaulted prisoners.

....

39. . . . There is a continuing and substantial public interest in these matters.

**V. FACTUAL ALLEGATIONS**

....

*A. Multiple Sexual Assaults Have Occurred at DOC Facilities  
Where Women Are Incarcerated*

....

*Defendant [1]*

....

60. In or about February 2006, Jane Doe 1 was directed to move to a new cell.

61. When Jane Doe 1 was packing up her belongings to move cells, Defendant [1] came into her room and blocked the only entry to and exit from the room.

62. On this occasion, Defendant [1] sexually assaulted Jane Doe 1 by fondling her breasts, kissing her, and forcing her to perform oral sex upon him.

....

*Defendant [2]*

66. On this occasion, Defendant [2] summoned Jane Doe 1 to the P Building on the WCCW grounds, stating that he needed to speak with her.

67. Once at P Building, Defendant [2] approached Jane Doe 1, lifted her shirt, and fondled her breasts.

....

*Defendant [3]*

74. In or about March 2006, Defendant [3] appeared at the door of Jane Doe 1's cell in the middle of the night.

75. Defendant [3] instructed Jane Doe 1 to accompany him to an office.

76. Once in the office, Defendant [3] sexually assaulted Jane Doe 1 by forcing her to engage in vaginal intercourse.

....

*Defendant [4]*

81. Defendant [4] approached Jane Doe 1 when she was alone in a supply closet searching for painting materials.

82. While in the closet, Defendant [4] forcibly performed oral sex upon Jane Doe 1.

83. A couple of weeks after the first sexual assault, Defendant [4] again followed Jane Doe 1 to a secluded property room.

84. While in the property room, Defendant [4] forced Jane Doe 1 to perform oral sex upon him.

85. Defendant [4] has repeatedly sexually assaulted Jane Doe 1 by fondling her genitals and telling her to expose her genitals for him.

....

88. A short while later, Defendant [4] directed Jane Doe 2 to masturbate for him while he watched.<sup>2</sup>

I went to work release in June of 2006, two-and-a-half months before my release date. I was relieved as I was driven away from the prison. I looked out the window and through those fences with the razor wire—the cage I'd been kept in. I almost felt free already. I swore to myself that I would never allow

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2. *Id.* at 9-16.

myself to be treated as a piece of flesh without a name again. The work release I became a resident of was in a residential house. It made us anticipate going home even more. It was quite different from prison. Every day I was one step closer to going home, and it felt fantastic. The staff there was predominantly male. They were different from the prison guards, though. They wore street clothes. They became friendly and personal with the inmates. Some flirted with the women. Some made sexual remarks about the women. They would touch you sometimes when they were talking to you – a hand on your shoulder here, a touch on your back there.

On the surface, it appeared harmless. But it wasn't. They were still guards, and they still had that power over us. They could send us back to prison. They could send us back to prison with more time. They were just as powerful as cops. And their word was always believed over ours. So a hand on your shoulder was not something you could pull away from, even if you wanted to. You had to smile and laugh and pretend it was all okay – that you were cool with everything they did and said. I've asked myself a million times if that was the mistake I had made. Did I encourage him to do what he did to me later by allowing him to put that hand on my shoulder? On my back? Did I smile and laugh a little too much at what he had to say? What was it? Why was it me? Why?

In the end, I never did get the answer to those questions.

*B. Class Defendants Have Failed and Continue to Fail to Protect  
Inmates From Sexual Assault*

*Failure to Properly Monitor DOC Facilities Where Women Are  
Incarcerated and Properly Supervise Correctional Officers  
within These Facilities*

102. There are large portions of the WCCW grounds which are unmonitored by video surveillance.

103. The areas referred to in paragraph 102 include numerous secluded locations which are unmonitored by either video or live surveillance.

....

105. On information and belief, the lack of video monitoring and the location of secluded locations are well known to DOC employees working in those facilities.

....



117. Class Defendants permit male correctional officers to be alone with female prisoners, including in locations where the women may be naked or otherwise vulnerable.

118. By failing to properly monitor the facilities where women are incarcerated, allowing secluded locations which have no video or live surveillance to exist, and failing to properly supervise correctional officers, the Class Defendants have created an environment in which sexual assaults have occurred and are likely to occur in the future.<sup>3</sup>

I was out on the front porch of the work release house with some other residents one weekend. We were enjoying being out in the fresh summer air. Jokes and smiles were being tossed about freely. Then I thought I heard my name being called somewhere. I finally realized that the guard was outside at the back of the house, calling my name. I walked back to him. He told me that he needed me to help him get some pillows and blankets out of the storage closet, upstairs in the second house next door. So I followed him.

This closet was upstairs by staff offices. No one was there because it was the weekend. There is nothing and no one else around. The silence was deafening, and I began to feel uneasy. But I kept walking up the stairs. What else was I supposed to do? Disobey a direct order? I had no options to choose from. We reached the top and proceeded to the end of the hall. I can still hear the keys jangling as he turned them in the lock of the door; then the click. That sound still makes me jump. He opened the door, then stood aside, ushering me into the storage closet. He came in behind me, shut the door, then locked it from the inside. That's when a wave of adrenaline began to surge into my stomach. Then dread. I'd been here before. Something awful was about to happen. I knew this as surely as I knew my own name.

My eyes followed his hand as he put it in his pocket and pulled out a condom. He smiled as he stood there, a predator that has finally bagged his prey. He told me to turn around and face the wall. I tried to tell him that he didn't want to do this—not here. He didn't agree. He roughly turned me around, pushed my pants down around my ankles, and shoved my face down onto the shelf. It smelled of old dust. That's when I let my thoughts go elsewhere. I knew what was happening to me, every detail. I just didn't let my body feel it. I was relieved that I had learned long ago how to become numb—to not feel, to be dead. I choked on the nauseating and cloying smell of Nautica cologne in the dusty air. I remember looking down and wondering how he got

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3. *Id.* at 18-19.

these deep, dark bruises on his legs. I remember the burn on my skin when his sweat dripped down on my neck. I remember thinking that this room needed to be cleaned. I remember him letting go of my wrist and seeing his hand take a washcloth off the shelf, then wiping it across his head to mop up the stench of his sweat. And I remember praying to the God that I used to believe in to send someone, anyone, to come looking for us. But no one did.

When he was finished with me, I pulled my pants back up. I asked him if he was finished with me. I asked him if I could go now. He adjusted his clothes, unlocked the door and opened it. He stood there with his hand on the door and a smirk on his face. As I walked by him, he warned me to keep my mouth shut. Once I was out of that room, I almost flew down the stairs and out of that house, crossed the walkway over to the house I was assigned to, and ran to the bathroom. I threw up until I dry heaved. Then I got into the shower. I turned the water as hot as I could take it, then began scrubbing. Once I started, I couldn't stop. As the water from the shower poured down my face, so did the tears. I wanted his touch off of me, and I scrubbed myself until I was raw, but I still felt dirty. Then, for more than an hour, I sat in the tub shivering. The hot water had gone ice cold.

*Failure to Conduct Proper Investigations*

119. When women report sexual misconduct by officers, Class Defendants treat the women inappropriately and fail to properly investigate the conduct.

120. For example, Jane Doe 2 reported to WCCW officials that she had been sexually assaulted by Defendant [1] in August 2005.

121. At the time Jane Doe 2 made this complaint, Defendant [1]'s employment file showed that several complaints of sexual misconduct had been made against him, including by a fellow officer who reported that Defendant [1] had had improper sexual interactions with an inmate.

....

123. During the course of this investigation, Class Defendants allowed Defendant [1] to have at least periodic contact with Jane Doe 2 when he substituted in for other officers in her unit.

124. During the course of this investigation, Investigator [5] and other WCCW employees treated Jane Doe 2 as a suspect, rather than as a potential victim. For example, Jane Doe 2 was interrogated by Investigator [5] and subjected to a polygraph examination.

125. In contrast, on information and belief, Defendant [1] was not required to take a polygraph examination. Instead, Investigator [5] merely interviewed Defendant [1].

126. In addition to the previous complaints against Defendant [1], the evidence generated by this limited investigation was that Jane Doe 2's polygraph results were positive (supporting her complaint) as to one question and inconclusive as to two others. Investigator [5] deemed that this was insufficient evidence of a sexual assault.

127. At the conclusion of this investigation, Class Defendants allowed Defendant [1] to return to work. As a result, he had the ability to sexually assault Jane Doe 1 and engage in sexual misconduct directed toward other class members.

128. On information and belief, when Jane Doe 2 reported improper behavior by Defendant [4] to another correctional officer, no investigation occurred. As a result, he had the ability to engage in sexual misconduct directed toward other class members.

129. On information and belief, Defendant [3] has been under investigation for alleged sexual contact with several women prisoners during the course of his employment at WCCW.

130. On information and belief, in approximately February 2007, Defendant [3] was investigated for alleged sexual contact with an inmate.

131. On information and belief, Investigator [5] was responsible for investigating Defendant [3]'s conduct.

132. On information and belief, during the course of this investigation, the inmate was required to take a polygraph examination.

133. In contrast, on information and belief, Defendant [3] was not required to take a polygraph examination.

134. On information and belief, at the conclusion of the investigation, Investigator [5] informed the inmate that her polygraph test was positive, substantiating the allegation that she had been sexually assaulted by Defendant [3].

135. At the conclusion of the investigation, Defendant [3] was allowed to return to work at WCCW. As a result, he was able to sexually assault Jane Doe 1 and Jane Doe 44 and engage in sexual misconduct directed toward other class members.

136. Beginning in approximately May 2007, Defendant [2] was under investigation for sexually assaulting Jane Doe 1 and improper behavior toward another inmate.

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138. During the course of this investigation, Investigator [5] and other WCCW employees treated Jane Doe 1 and the other inmate as suspects, rather than as potential victims. . . .

139. In contrast, on information and belief, Defendant [2] was not required to take a polygraph examination.

140. At the conclusion of the investigation, DOC investigator [6] informed Jane Doe 1 and the other inmate that there was insufficient evidence that Defendant [2] had acted improperly.

141. Defendant [2] was allowed to return to work at WCCW.

....

147. The investigations above were conducted without appropriate regard to confidentiality of the complaints. In each case, other corrections staff and inmates were made aware of the allegations of sexual assaults.

148. On information and belief, the Class Defendants never reported the alleged sexual assaults described above to law enforcement, despite the fact that custodial sexual assault is a crime pursuant to RCW 9A.44.160-170.

....

#### *Retaliation Against Women Who Report Sexual Assaults*

151. By treating women who report sexual assaults as suspects rather than potential victims, the Class Defendants have created an environment in which sexual assaults will go unreported, making such assaults more likely to occur.

152. For example, Jane Doe 1 was afraid to report the sexual assault by Defendants . . . [1, 3, and 4] because she had been retaliated against and placed in solitary confinement after reporting a previous sexual assault which occurred in January 2005 and was afraid of further retaliation.

153. On July 24, 2007, Investigator [6] informed Jane Doe 1 that Defendant [2] was going to be allowed to return to work on the same post to which he had previously been assigned, even though it meant that he would have access to Jane Doe 1.

154. During that conversation, Jane Doe 1 expressed fear about having to be near Defendant [2]. She was told that Defendant [2] would not be reassigned because he “owned his post.”

155. Investigator [6] also told Jane Doe 1 that instead, she would likely be transferred to Mission Creek.

156. At the time, a transfer to Mission Creek would have been tantamount to retaliation against Jane Doe 1, because it would have made it significantly more difficult for her to receive visits from her child, caused her to lose her employment at WCCW, and resulted in a loss of property she has acquired at WCCW.<sup>4</sup>

I didn't say a word about being raped for the next two weeks. I waited. I did not want to go back to prison and into segregation. I couldn't do it. I felt at that time that if I had to go back behind the razor wired fences, then I would rather die. Maybe I wasn't thinking clearly. Maybe the shock of just being raped was enough to deal with at that moment. Maybe, I thought, if I could just get to my release, then I could report it to the police. The real police. So that's what I did. The day after I got out of there, I called and made the report. I went through the humiliation of having to describe what happened to a male police officer. I went through it again when I was summoned to the police station and interviewed by a male and a female detective. It was awful. It was embarrassing. But that wasn't the worst of it.

The worst part was the look on their faces. As soon as they realized that I'd been an inmate on work release, the skepticism of what I'd told them became evident on their faces. It made me feel angry. I volunteered to take a polygraph examination if that would help. They said, “We'll see.” I told them about the deep, dark bruises on his legs that could be verified as identifying marks on his body. The only way that I could know about those marks was if I had seen him without his pants on. I shouldn't have known about them! I believed that once they verified those marks for themselves, they would have no choice but to realize that I was telling the truth. They ended the interview by telling me that they would interview my rapist, and then get back to me.

Months went by, and I heard nothing. They wouldn't even return my calls. I learned later that there was no real investigation. They pretended to go through all of the necessary motions but knew all along that they weren't going to do anything about it. The detectives didn't ask him about, or check his body for, those identifying marks. In fact, they never laid eyes on him at all. What

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4. *Id.* at 20-24.

they did do was pick up the phone, call him, tell him everything I said, and then ask him if it was true. He said no—and that was the end of my rape investigation.

*C. Women Suffer Severe Psychological and Physical Injury as a Result of Being Sexually Assaulted, Due to Improper Investigative Procedures, and Due to Being Confined in a Facility Where Sexual Assaults Are Likely To Occur.*

162. On information and belief, “[v]ictims of prison rape suffer severe physical and psychological effects.” 42 U.S.C. § 15601(11).

163. On information and belief, the effects suffered by women prisoners who are sexually assaulted can include problems with concentration, low self confidence and self esteem, irritability, anxiety, nervousness, anger, fear, depression, nausea, insomnia, fatigue, feelings of stress, increased isolation, suicidal ideation, and other negative physical and psychological effects.

164. On information and belief, the effects of sexual assault in prison can be particularly damaging to women who have histories of sexual abuse.

....

166. Jane Doe 1 informed the DOC that she had a history of sexual abuse before coming to WCCW, yet Class Defendants still failed to take adequate steps to protect her from predatory staff.

167. Jane Doe 2 also has a long history of molestation, sexual abuse and sexual assault. These experiences began at the age of two, and continued throughout her childhood in various foster homes. . . .

168. Jane Doe 1 and Jane Doe 2’s experiences as survivors of sexual assault [are] not unique amongst Class Plaintiffs. On information and belief, eighty-five (85) percent of the women incarcerated at WCCW “report a history of serious abuse to WCCW counselors, including rapes, molestations, beatings, and slavery.” *Jordan v. Gardner*, 986 F.2d 1521, 1525 (9th Cir. 1993).

169. Continued sexual assaults, the failure to properly investigate alleged sexual assaults, and the threat of being sexually assaulted by prison guards cause[] harm to Class Plaintiffs.

....

172. On information and belief, women prisoners are afraid of retaliation so often decide not to complain about sexual assaults.

173. On information and belief, Class Defendants' failure to keep information about alleged sexual assaults confidential causes additional trauma to women prisoners, because it is degrading for such information to be generally known in the community in which they live.

174. On information and belief, the lack of confidentiality in the process coerces women prisoners into silence, thereby reducing the reporting of sexual assault in prison.

175. On information and belief, allowing correctional officers who sexually assault inmates to return to their work in prisons communicates to prisoners and correctional staff that sexual misconduct is not a serious matter.

176. The continued presence of correctional officers who have committed sexual assault exacerbates the trauma experienced by women who have been assaulted.

....

*D. Class Plaintiffs Face a Continuing Risk that their Constitutional Rights Will Be Violated and Torts Inflicted Upon Them*

....

181. There is a substantial risk that the Class Defendants' violations will continue and will deprive the Class Members of their rights. Among other things:

a. The Class Defendants have persisted in their wrongful course of conduct for many years;

b. The Class Defendants have failed to take remedial action when presented with allegations of sexual misconduct by correctional officers, even where similar allegations have been lodged against a correctional officer on multiple occasions; and

c. Upon information and belief, the Class Defendants have failed to implement their own policies drafted to prevent and address circumstances of prison rape and sexual assault.<sup>5</sup>

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5. *Id.* at 25-28.

I never realized that once I was labeled as a criminal, I had forfeited my right to be considered a victim. But that's the cold, hard truth of it. I guess it is open season on me—I am, up for grabs. The law won't serve and protect me. I am a felon.

After my release and failed rape investigation, my life fell down around me. I had a difficult time caring about it. I felt worthless. I had been deemed worthless by those in charge—and I felt it in every fiber of my being. Not surprisingly, I ended up back in prison. I found it filled with anxiety and fears that it previously hadn't held.

But it was during that time that I learned about *Jane Doe v. Clarke*. I learned that the State of Washington Department of Corrections had settled the case against it for a million dollars, and gotten rid of the guards named. It also agreed to install video surveillance in the secluded areas that had been used for such evil by those guards.<sup>6</sup> It put a new policy into effect that prohibited male guards from working only with other male guards; they had to have a female officer on their team at all times. They are no longer allowed to place an inmate in segregation for reporting a sexual assault.<sup>7</sup> Investigations are to be taken seriously.

Well, it's a start. I am hopeful that others may not have to experience what I did. I am thankful for attorneys that are willing to pursue civil rights litigation for prisoners. They are all that stand between the inmates and predators. Without them, PREA has no teeth. Without them, there is no accountability.

My rapist, however, will never have to be held accountable. He will never get a sentence for his actions; he got away with it. And me? Well, I may be free, but I got a life sentence . . .

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6. Press Release, *Female Prisoners Settle Lawsuit Against Washington State Department of Corrections Challenging Staff Sexual Abuse*, COLUMBIA LEGAL SERVS. (Aug. 6, 2010), <http://www.columbialegal.org/files/JaneDoeSettlementPressRelease.pdf> (“Since the case was filed, five of the six Department employees alleged in the suit to have committed acts of sexual misconduct against inmates . . . have resigned or been terminated . . . . In June 2009, the Department agreed to pay \$1 million to settle the damages claims of the five women individually named in the suit.”). The installation of additional surveillance cameras is also part of the settlement. *Id.*
  7. Class Action Notice to Female Offenders Under the Supervision of the Washington State Department of Corrections, *in* Settlement Agreement and Order app. 1, *Doe v. Clarke*, No. 07-2-01513-0 (Wash. Super. Ct. Thurston Cnty. Oct. 1, 2010) (on file with author) (“Under the settlement, the Department will: . . . [h]ave at least one female staff person on each shift in the housing units and on each transport team at the women’s prisons; . . . [and n]ot place female offenders into protective custody for reporting Staff Sexual Misconduct and/or Staff Misconduct of a Sexual Nature within a year or two of the alleged misconduct . . .”).



ERNIE DRAIN

## The Meaning of Imprisonment

I'd like to thank my son for his encouragement as well as my mother for laying the foundation for my intellectual curiosity and training.  
E-mail: The14thamendment@yahoo.com.

Being incarcerated in prison means tucking your life into your back pocket for a while. It means taking your slumber on a bunk bed for the first time since childhood. If your incarceration is the end result of a mistake you made rather than a criminal lifestyle you were leading, then it means becoming acquainted with an unfamiliar and wicked subculture. It means showing your pride the door as the staff begins to emasculate you. It's the choice between answering to a pejorative or going to the hole for disobeying a direct order. It's being appalled at the number of grown men who enjoy watching Jerry Springer and Maury Povich. It's anger management classes, group psychotherapy, undercooked rice, indirect pepper-spray shots and petty politicking. It's sleeping the day away in an effort to push time forward. It's accepting responsibility for the acts that brought you here and learning to purge yourself of anger and resentment. It's questioning the morals of inmates who befriend child predators. It means standing in line for the privilege of performing a bowel movement. It's being made to stand in ninety-seven-degree weather in order to receive your medication. It means locking everything you own in a small steel box and hoping that no one smashes the lock when you go to dinner. It's understanding too late, the difference between the priorities of a man serving three years and a man serving a life sentence.

It means physically fighting for your reputation—which means that you care what other inmates think of you while professing that you don't. It's listening to the details of another inmate's deteriorating family life when you couldn't care less. It's suddenly realizing that you have a deep affinity for Mark Twain's political commentary, Norman Mailer, and the *New Yorker* magazine. It's forgetting what real ground beef tastes like. It's spending your whole life running away from an African-American stereotype only to smack face first into it. It's letting down your ancestors. It's the process of mental self-devaluation. It's earning sixty cents a day and enduring a lecture on work ethic from a twenty-dollar-an-hour C.O. whose most strenuous task of the day is reheating his coffee. It's watching the C.O.'s own low self-esteem ooze from every demeaning word he speaks to you. It means watching the staff eat food that was meant for inmates while the state deals with budgetary problems by

shrinking the portion sizes of the food delivered to those inmates. It's holding out hope that your life can mean something, that a talent can somehow be discovered, nurtured, and appreciated, even as your gut is telling you that your life is unredeemable. It's looking forward to an early release while walking into a fierce headwind of potential obstacles that threaten to detail that goal. It's knowing that at any moment, a philosophical debate can turn into a fist fight. It's wearing the anxiety that comes with that realization like a winter coat.

It's trying to make peace with the world while going to war with yourself. It's thanking God for the small things like seventy-five-degree days, pizza bagels, quiet and mail, hash browns on Sundays, a soft pillow, Dove soap, the few staff members who treat you like a human being, and the ability to write a cohesive sentence. It means trying to walk up the down escalator. It's the extreme rationing of hygiene and food products. It means constantly reminding yourself that this is not a place to make friends. It's picking and choosing very carefully which of your rights to fight for to avoid becoming a target of C.O.'s, staff, or administrative personnel. It means adopting the new first name of "inmate" or "offender." It means hiding your own emotional desperation and only exuding power and confidence. For some, it's grouping up and planning the next caper or sharing imagined war stories from the streets. For others, it's making sure their names ring bells on the yard, going too far in an effort to gain favor with dim-witted thugs, getting their security level raised and getting shipped out to a more restrictive joint. It's the total absence of pure joy. It's having your exuberance replaced by momentary relief from anguish and paranoia. It's the intoxication of denial. It's searching for familiarity and finding none. It's mandated nudity before an anonymous person. It's imagined authority and real tyranny, unnerving ethos and unavoidable conflict. It's a lesson learned, never to be forgotten.

AARON LOWERS

## Solano Justice

Aaron Lowers received his B.A. from Adams State University in Colorado while incarcerated. He currently works in the Offender Mentor Certification Program at California State Prison-Solano and is dedicated to helping his fellow inmates recover from addiction.

Prison discipline has come a long way since Attica, at least in California. The California Department of Corrections and Rehabilitation (CDCR) administers California's thirty-three adult correctional facilities, including California State Prison-Solano (CSP-Solano). Inmate discipline at these facilities is governed by Title 15 of the California Code of Regulations (CCR), which provides uniform rules and behavioral expectations for all California prisoners.<sup>8</sup> With uniformity comes a certain rigidity, however, and in many instances this rigidity leads to an unfair application of discipline in California prisons.

The primary purpose of CCR Title 15 is to ensure the safety and security of California prisons. It provides for violent or disruptive inmates to be isolated from the general population in administrative segregation (solitary confinement) for a period of time based on the gravity of the misconduct. If violent or disruptive behavior persists, the inmates can be isolated for progressively longer periods. While the level of violence varies from prison to prison, the disciplinary generally system works well to minimize violence.

Nonviolent misconduct is handled differently. Possession of most contraband, for example, is usually punishable by a loss of privileges and "good time" credit. "Good time" is time off of one's sentence for good behavior. The reality is that these sanctions have little impact on the availability of contraband. Drugs and tobacco are commonplace, as is inmate-manufactured alcohol. In recent years, cell phones have also become prevalent. In 2011, for example, CDCR staff discovered over fifteen thousand cell phones in California prisons and camps.<sup>9</sup> During that same year, staff at CSP-Solano confiscated

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8. CAL. CODE REGS. tit. 15 (2013).

9. *Contraband Cell Phones in CDCR Prisons and Conservation Camps*, CAL. DEP'T OF CORRECTIONS & REHABILITATION 1 (2012), <http://www.cdcr.ca.gov/Contraband-Cell-Phones/docs/Contraband-Cell-Phone-Fact-Sheet-January-2012.pdf>.

672 cell phones—at a prison housing approximately forty-five hundred inmates.<sup>10</sup>

There are several reasons the sanctions provided within CCR Title 15 have so little impact on the amount of contraband in California prisons, but perhaps the single biggest factor is that prison inmates are seldom caught red handed. Contraband items are typically found in and around inmates' living quarters, not on the inmates themselves. This allows a certain level of deniability to individuals who actually possess contraband. Prison overcrowding has exacerbated the situation. California's inmates are housed either in cells or dormitories. In some dormitory situations, as many as eighteen inmates have been crammed into living areas designed to accommodate only eight inmates. California prison cells designed to accommodate one inmate typically house two.

Attributing possession of contraband found in a cell housing two inmates is difficult enough. It is all but impossible in dormitory settings where bunk beds are often separated by as little as one foot.

In an effort to overcome this difficulty, prison officials have taken to relying on constructive possession in disciplinary hearings to determine guilt or innocence. Constructive possession exists when one does not have physical custody of an item, but is in a position to exercise control over it. If, for example, two men wearing ski masks are arrested in a car with a gun on the back seat, it can be construed that both men are in possession of the weapon. In a similar fashion, if two men are housed in the same prison cell where a cell phone is discovered, both men can, and often are, found guilty of possessing the contraband, and both suffer the consequences.

The overriding difference here is that the two men in ski masks choose to get into the car together, whereas the two men in the cell are ordered to live together by CDCR officials. When two men are found guilty of possessing the same contraband in a prison cell, almost invariably one innocent man is falsely accused. Admittedly, finding two or more inmates guilty for possessing the same contraband started out as a tactic CDCR to gain admissions from the guilty parties. Over time, however, this tactic has evolved into a coercive device designed to force inmates to police themselves. Today, California inmates are routinely found guilty of possessing contraband based on constructive possession, even when another inmate admits guilt.<sup>11</sup>

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10. Solano Cnty. Grand Jury 2011-2012, *California State Prison-Solano*, SUPERIOR CT. OF CAL. COUNTY OF SOLANO 3 (Apr. 23, 2012), <http://www.solano.courts.ca.gov/materials/CSP-Solano%20Report%20-%20Final.pdf>.

11. See, e.g., *In re Hibbert*, No. H036217, 2012 WL 210340 (Cal. Ct. App. Jan. 25, 2012); *In re Zepeda*, 47 Cal. Rptr. 3d 172, 177 (Cal. Ct. App. 2006).

In essence, CDCR's policy of finding multiple inmates guilty based on constructive possession puts inmates in the precarious position of being their brother's keeper. On its face this may seem like a reasonable means of enlisting the aid of inmates in discouraging possession of contraband. In practice, the policy increases tension, promotes violence, and disrupts order by pitting inmates who choose to obey the rules against those who do not.

The negative impact of CDCR's ill-advised reliance on constructive possession is not limited to increased disorder. The majority of California's prisoners have determinate sentences with a fixed release date. If one of these inmates receives a write-up for possession of contraband, he rarely serves more than twenty-five to seventy-five days longer on his sentence, depending on the type of contraband. There are, however, roughly thirty thousand inmates serving out indeterminate sentences.<sup>12</sup> These inmates have no fixed release date, but instead must appear before a panel of parole commissioners and demonstrate that they are suitable for parole.

For these inmates, the stakes surrounding rule infractions are incredibly high. California has some of the strictest standards in the nation regarding the release of inmates serving indeterminate sentences. Proposition 9, a ballot initiative more commonly known as Marsy's Law, was passed by California voters in 2008.<sup>13</sup> This law increased the minimum length of a parole denial for a person serving an indeterminate sentence from one to three years.<sup>14</sup> It also increased the maximum length of a parole denial to fifteen years.<sup>15</sup> Thus, an inmate serving an indeterminate sentence who is found guilty of a rule infraction may expect to serve at least an additional three years.

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12. See Robert Weisberg, Debbie A. Mukamal & Jordan D. Segall, Stanford Criminal Justice Ctr., *Life in Limbo: An Examination of Parole Release for Prisoners Serving Life Sentences with the Possibility of Parole in California*, STAN. L. SCH. 3 (Sept. 2011), [http://blogs.law.stanford.edu/newsfeed/files/2011/09/SCJC\\_report\\_Parole\\_Release\\_for\\_Lifers.pdf](http://blogs.law.stanford.edu/newsfeed/files/2011/09/SCJC_report_Parole_Release_for_Lifers.pdf) (“[F]ar too little attention has been given to the prison population serving life sentences with the possibility of parole under older indeterminate sentencing principles, a population that as of 2010 represents a fifth of California state prisoners. More than 32,000 inmates comprise the ‘lifer’ category, i.e., inmates who are eligible to be considered for release from prison after screening by the parole board . . .”).
  13. Proposition 9: Victims’ Bill of Rights Act of 2008: Marsy’s Law, in CAL. SEC’Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA GENERAL ELECTION: TUESDAY, NOVEMBER 4, 2008, at 128 (2008) <http://vig.cdn.sos.ca.gov/2008/general/pdf-guide/vig-nov-2008-principal.pdf>.
  14. See CAL. PENAL CODE § 3041.5(b)(3), (6) (West 2013); see also *In re Vicks*, 56 Cal. 4th 274 (Cal. 2013) (interpreting this provision).
  15. CAL. PENAL CODE § 3041.5(b)(3)(A).

The stark contrast in consequences between those serving determinate sentences and those serving indeterminate sentences does more than just create tension among inmates. The inequitable treatment also serves to erode the self-esteem of an entire class of inmates. Their faith in the fundamental fairness of government and authority is undermined, and their rehabilitative efforts are often stymied by hopelessness and despair.

The lamentable stratification of the inmate population and the increase in violence is bad enough. Sadly, there is a more tragic consequence. There are countless stories of inmates who have served ten, twenty, or twenty-five years, yet have been repeatedly denied parole because they have been found guilty of possessing contraband not belonging to them. For these inmates, resorting to violence in an effort to control the behavior of a short-term inmate with little to lose is simply not an option. Instead they suffer quietly, routinely falling victim to the unjust application of constructive possession.

The situation in CDCR's chronically overcrowded dormitories is particularly dire. In dorm situations, every inmate has access to all areas in the dorm. Contraband found anywhere in the dormitory could conceivably belong to anyone. Rather than abdicating assignment of responsibility for discovered contraband in dormitory settings, officials at CSP-Solano have take to assigning guilt to the individual whose bunk happens to be closest to where the contraband is discovered.

This practice is particularly unjust when one considers the common practice among inmates of tossing contraband onto an adjacent bunk whenever warned of approaching staff. Again, it is those inmates with indeterminate sentences who suffer the most. Many have returned to their living quarters from their job assignments only to discover that another inmate, frequently one with only days or weeks left to serve, has tossed a cell phone onto their bunk during a surprise inspection, rather than admit guilt and serve an additional month of two. While this is not an everyday occurrence, over time the risk increases, and it only takes once.

Having spent the last twenty years in California's prisons, I can attest to the psychological toll of potentially being held accountable for the actions of others. I have witnessed numerous inmates charged with possession of contraband not belonging to them. I have seen these same inmates found guilty at disciplinary hearings based on a preponderance of evidence.<sup>16</sup> I have seen these same inmates denied parole by the Board of Parole Hearings because of disciplinary findings. While inmates may appeal the findings of a

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16. CAL. CODE. REGS. tit. 15, § 3320(i) (2013).

disciplinary hearing in court, the process takes years and the outcome is far from certain.

The environment of California's prisons has changed dramatically in the last twenty years. Tobacco, once sold in prison commissaries, is now considered contraband. Cell phones, once unheard of, are now commonplace. The prison environment has changed but the disciplinary system has not kept up with the times. Certainly CDCR has an interest in holding rule-breakers accountable. The practice of indiscriminately assigning guilt based on proximity is not the answer. Because the consequences can be so grave, the standard of evidence needs to be raised. Keeping inmates locked up for years, and in some cases decades, because some item of contraband was found near where they happen to sleep is neither fair nor just. The time has come for the California Code of Regulations to be amended to reflect the changing realities within California prisons.