LEGISLATING "LEGITIMATE" VICTIMS: HOW THE "JAILHOUSE EXCLUSION" DENIES INMATES THE PROTECTION OF CALIFORNIA'S RAPE SHIELD STATUTE

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The passage of rape shield statutes protecting victims' privacy in the 1970s and 1980s changed how the law treats rape victims. However, this rape reform movement gives us the legacy of a puzzling exclusion from California's rape shield statute for sexual assaults that occur in jail or prison. While sensitive questions about sexual history are off-limits when other victims testify, inmates do not have this protection. Yet since the California Legislature passed what it nicknamed the "jailhouse exclusion" in 1981, society and the law have recognized the existence and impact of prison rape. The jailhouse exclusion is an example of how prison rape survivors face barriers reminiscent of the barriers that all rape victims faced fifty years ago.

Since the jailhouse exclusion is perplexing and is incompatible with the rape shield statute's purpose of protecting victims, this article's first focus is to tell the story of its origins. It then discusses its impact, especially in light of subsequent legal developments to prevent prison rape, and calls for the California Legislature to repeal it. It is important to reconsider the jailhouse exclusion because of its message: while most rape victims are spared questions about their past sexual history—questions that have no bearing on consent—it is OK to put an inmate-victim on trial. There are enough barriers to eliminating prison rape; it is time to remove this one from the California Evidence Code.

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INTRODUCTION

"Am I on trial? . . . I did not commit a crime. I am a human being."
—rape victim's testimony[1]

"Sexual violence, against any victim, is an assault on human dignity and an affront to American values."
—Barack Obama, Presidential Memorandum Implementing the Prison Rape Elimination Act[2]

At age seventeen, T.J. Parsell found a toy gun by the side of the road on his way home from a party and used it in what he now calls "a stupid impulsive prank."[3] He pointed the gun at a girl behind the counter at a one-hour photo store and said, "Your money or your life."[4] Parsell says that at the time he thought he was being flirtatious, but unsurprisingly, the state of Michigan did not think it was cute or funny.[5] His lawyer told him he would likely face a short sentence at a minimum-security camp, but the classifications psychologist recommended that he be sent to an adult prison.[6] During that pivotal evaluation, the psychologist asked Parsell if he'd "[e]ver been fucked."[7] The psychologist advised him that a "pretty boy" like Parsell would "need to get a man," or else he'd "be open game."[8] On his first night in prison—while his classmates were at senior prom—Parsell was gang raped by three older inmates who gave him prison wine spiked with a tranquilizer.[9] Then they flipped a coin, and he became a fourth inmate's property.[10]

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[1] Susan Griffin, *Rape: The All-American Crime*, RAMPARTS 26, 32 (1971) (quotation marks omitted).

[2] Barack Obama, PRESIDENTIAL MEMORANDUM: IMPLEMENTING THE PRISON RAPE ELIMINATION ACT, 77 F.R. 30873, 42 U.S.C.A. § 15601 (May 17, 2012).

[3] Carolyn Marshall, *Panel on Prison Rape Hears Victims' Chilling Accounts*, N.Y. TIMES (Aug. 20, 2005), http://nyti.ms/1SbNcyj; *see also* T.J. Parsell, *Unsafe Behind Bars*, N.Y. TIMES (Sept. 18, 2005), http://query.nytimes.com/gst/fullpage.html?res=9C06E2D81131F93BA2575AC0A9639C8B63.

[4] Parsell, *supra* note 3.

[5] *See id.*

[6] T.J. PARSELL, FISH: A MEMOIR OF A BOY IN A MAN'S PRISON x–xi, 14 (2006); *see also* Parsell, *supra* note 3.

[7] PARSELL, *supra* note 6, at ix, 60.

[8] *Id.* at xi.

[9] *Id.* at 88–93.

[10] *Id.* at 94; *see* Parsell, *supra* note 3. Another inmate later told him that the fourth inmate set the gang rape up— "'the oldest game in the penitentiary'"—so that Parsell would "'come willingly into his fold, grateful to him for rescuing you.'" PARSELL, *supra* note 6, at 265. Parsell never inquired about this, later writing, "If he had set up my initial

Our society's sexual assault[11] laws have seen a seismic shift. Unlike in the past, the law now recognizes that all women have the right to be free from rape. In the early 1970s, women's advocates began protesting law enforcement responses to rape, which were driven by cultural attitudes that victims often provoke their assault or may not be worthy of protection.[12] Feminist Susan Griffin's famous exposé of rape publicized the "legal double standard" in the criminal justice system that existed prior to rape shield legislation. She brought attention to how a rape victim's "sexual reputation" was typically a "*crucial* element" of the case, while the law generally protects a defendant from having a prior rape allegation used against him.[13] A rape victim was expected to endure an inquiry into her chastity, putting her character on trial "in a way that was wholly unparalleled in other criminal prosecutions."[14] One woman reacted to her

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rape—I didn't want to know." *Id.* at 307.

[11] A word about language: In this Article, I use the terms "sexual assault," "sexual abuse," and "rape" relatively interchangeably, as well the terms "victim" and "survivor." Additionally, I use both "prison rape" and "sexual assault in detention" as a shorthand for forcible sodomy and oral copulation that occurs in jail or prison. This is done for variation in language, and because debates over what constitutes rape are not germane to this Article's focus. Finally, I use female pronouns most often when speaking of sexual assault victims in general and male pronouns when speaking of prison rape survivors, with the caveat that sexual assault is perpetrated by and against all individuals, regardless of gender and location.

[12] ROBERT O. SELF, ALL IN THE FAMILY: THE REALIGNMENT OF AMERICAN DEMOCRACY SINCE THE 1960S 210–11 (2012); *see* Camille E. LeGrand, *Rape and Rape Laws: Sexism in Society and Law*, 61 CAL. L. REV. 919, 920–22, 939 (1973); *see also* Griffin, *supra* note 1, at 32 ("[T]he courts and the police . . . continue to suspect the rape victim, *sui generis*, of provoking or asking for her own assault . . . [and] the police tend to believe that a woman without a good reputation cannot be raped."). The "assumption [was] that a woman who does not respect the double standard deserve[d] whatever she [got] (or at the very least 'ask[ed] for it')." Griffin, *supra* note 1, at 30; *see also* Julia R. Schwendinger & Herman Schwendinger, *Rape Myths: In Legal, Theoretical, and Everyday Practice*, CRIME & SOC. JUST. 18, 21 (1974) ("Defense attorneys therefore still attempt to uphold the myth about the impossibility of rape, even though changes in rape laws have qualified any absolute standard of physical resistance.").

[13] Griffin, *supra* note 1, at 30–31 (emphasis added); s*ee* Schwendinger, *supra* note 12, at 24; SELF, *supra* note 12, at 213.

[14] DAVID A. SKLANSKY, EVIDENCE: CASES, COMMENTARY, AND PROBLEMS 314 (2012)*; see also* John Henry Wigmore, *A Treatise on The Anglo-American System of Evidence in Trials at Common Law*, *in* EVIDENCE: CASES, COMMENTARY, AND PROBLEMS 315 (David A. Sklansky ed., 2012) (stating "the character of the woman as to chastity is of considerable probative value in judging the likelihood of . . . consent"); LeGrand, *supra* note 12, at 939 ("The most unrealistic aspect of rape law is the treatment of the victim's 'chastity' in court. The concept of 'chastity' is apparently based on the nineteenth century view that there are two kinds of women: 'good' and 'bad.' Those who are either faithful wives or virgins deserve the law's protection; women outside these groups are deemed unworthy of protection. . . . The chastity requirement today places significant numbers of

experience while testifying with an apt retort to the defense attorney: "[a]m I on trial? . . . It is embarrassing and personal to admit these things to all these people. . . . I did not commit a crime. *I am a human being*."[15] The rape reform movement responded to this double standard by passing rape shield statutes that make a rape victim's past sexual history off-limits for cross-examination.

Rape reform, including rape shield statutes, changed the law's treatment of rape and rape victims. In the past two decades, the law has also begun to pay attention to prison rape. However, the rape reform movement gives us the legacy of a puzzling exclusion from California's rape shield statute for any sexual assault that occurs in a local jail or state prison. The "jailhouse exclusion" was part of a 1981 amendment to California's rape shield statute. The legislature excluded jail and prison inmates from its protection, *while expanding it* to cover other types of sexual assault such as sodomy or rape by foreign object. As a result, when most victims testify, sensitive questions about one's past sexual history are off-limits—but not for inmates.

The jailhouse exclusion raises several puzzling questions: what is it about the place (prison) or the people (inmates) that makes them less worthy of the law's protection? What motivated the California Legislature to carve out such a bizarre exception, undercutting the policy goals of the legislation it was enacting? This Article attempts to answer those questions and to expose this incongruity in the California Evidence Code. The jailhouse exclusion was born out of the ACLU's desire to protect inmates from their fellow inmates' false reports of rape, due to the prohibition against consensual sex in prison.

Since the California Legislature passed the jailhouse exclusion, the Supreme Court, Congress, and the California Legislature have all recognized the existence and impact of prison rape. In its pivotal *Farmer v. Brennan* decision in 1994, the Court declared that rape is "not 'part of the penalty'" for committing a crime,[16] and recognized that prison rape can

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women, rather than a few outcasts, beyond the protection of the law.").

[15] Griffin, *supra* note 1, at 32 (emphasis added) (quotation marks omitted). She was asked about her employment as a cocktail waitress and her drinking habits, her sexual reputation was explored "[t]hrough skillful questioning fraught with innuendo," and the defense charged her with being an unfit mother. *Id.* The San Francisco Chronicle described her cross-examination by the defense with the headline "'Grueling Day for Rape Case Victim,'" while women passed out leaflets outside the courtroom bluntly stating, "'[R]ape was committed by four men in a private apartment in October; on Thursday, it was done by a judge and a lawyer in a public courtroom.'" *Id.* The judge acquitted the defendant of charges of kidnapping at gunpoint and gang rape after the jury deadlocked and the court reporter read him the victim's testimony. *Id.*

[16] Farmer v. Brennan, 511 U.S. 825, 834 (1994) (quoting Rhodes v. Chapman, 452

constitute cruel and unusual punishment.[17] Nearly a decade later, Congress followed suit and passed the Prison Rape Elimination Act (PREA), which declared a "zero-tolerance" policy and called on states to help implement its mission to end prison rape.[18] California took the cue in 2005 and passed its own Sexual Abuse in Detention Elimination Act (SADEA), allocating money to the study of its prevalence, and to support the adjudication and prevention of prison rape.[19]

The jailhouse exclusion is an example of how prison rape survivors still face barriers reminiscent of the barriers that all rape victims faced fifty years ago. Under the California Evidence Code, inmates hold the same status that all victims did *before* the rape shield statute was enacted. Much like the infamous Hale instruction that cautioned juries that rape is an "accusation easily to be made and hard to be proved, and harder to be defended by the party accused,"[20] the jailhouse exclusion codifies a bias against prisoner testimony. It also reflects a judgment that policing consensual sex in prison is more important than giving prisoners the dignity of the rape shield statute. The word of a prison rape victim is analogous to the word of an unchaste woman who was "deemed to have consented."[21] It also reinforces the public's misperception of rape as solely a woman's issue—that "real men" do not get raped, or that rape is not something that happens to men, period. Homophobia compounds the jailhouse exclusion in several ways due to the invisibility of male rape victims and because gay, lesbian, bisexual, and trans* inmates are more vulnerable to abuse, and yet are less visible because of assumptions that gay men always consent to sex with other men.[22]

It is important to reconsider the jailhouse exclusion because of the message it sends: while other rape victims are spared questions that have no bearing on consent, it is OK to put an inmate-victim on trial. Prison rape is a "systemic moral wrong."[23] It reflects poorly upon the morality of our society, which has a duty to provide humane conditions of confinement. As T.J Parsell's story illustrates, the law should care about holding rapists

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U.S. 337, 347 (1981)).

[17] *Id.* at 833–34 (citing Hudson v. Palmer, 468 U.S. 517, 548 (1984) (Stevens, J., concurring in part and dissenting in part)). *See also* Estelle v. Gamble, 429 U.S. 97, 102 (1976).

[18] 42 U.S.C. § 15602 (2003).

[19] Correctional Institutions—Sexual Abuse in Detention Elimination Act, 2005 Cal. Legis. Serv. Ch. 303 (A.B. 550) (West).

[20] 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 634 (Phila. 1847).

[21] Kim Shayo Buchanan, *Our Prisons, Ourselves: Race, Gender and the Rule of Law*, 29 YALE L. & POL'Y REV. 1, 34 (2010).

[22] See *infra* notes 124, 154, 155, 231 and accompanying text.

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

accountable, no matter whom they are raping. Californians should care that their law treats victims like Parsell differently.

The California Legislature should repeal or modify the jailhouse exclusion. Most importantly, it is incompatible with the rationales of the rape shield statute and prison rape elimination policies. Its rationale is also moot due to a lack of enforcement of the ban on consensual sex in prison. Additionally, it is overinclusive, and it is superfluous due to other exceptions in the rape shield statute. The jailhouse exclusion is troubling in light of *Farmer* and PREA—both because of the symbolic message it sends and because of its possible present and future chilling effect on reporting and prosecution of sexual assault in detention.[24] There are enough barriers to eliminating prison rape; it is time to remove this one from the California Evidence Code.

This Article has four parts. Part I explains the use of a victim's past sexual conduct in criminal trials in California. Part II examines the fight against the use of a victim's past sexual history as a defense for sexual assault in California from the rape shield statute's inception in 1974 to the 1981 amendment that excluded inmates from its protection. It tells the story of how the jailhouse exclusion came to be in the context of the rape reform movement of the 1970s. Part III explores the modern movement against prison rape and the judicial and legislative recognition of the problem. Finally, Part IV reflects on the impact of the jailhouse exclusion, exploring how it is incongruent with the rape shield statute's purpose and the policy agenda of eliminating prison rape, and recommends eliminating it from the California Evidence Code.

I. THE USE OF VICTIMS' PAST SEXUAL CONDUCT IN CRIMINAL TRIALS

This section first provides a brief overview of character evidence and how a victim's past sexual conduct was historically used in rape cases, and goes on to explain how California's rape shield statute and its jailhouse exclusion work. The legal system calls testimony that tries to prove that a person acted a certain way because it was in their nature "character evidence." In order to understand California's rape shield statute and the jailhouse exclusion, it is necessary to understand character evidence.

The character evidence rules govern when and why someone can present testimony regarding a person's character or past conduct to prove something in court. The general rule is that character evidence is inadmissible because it is unfair to assume that someone did something just because he did something similar in the past or because someone thinks he

[24] PREA makes prosecution an explicit part of its strategy to eliminate prison rape. *See* REVIEW PANEL ON PRISON RAPE, U.S. DEP'T OF JUSTICE, REPORT ON RAPE IN JAILS IN THE U.S.: FINDINGS AND BEST PRACTICES 21–22, 26, 28 (2008).

is a bad person.[25] Character evidence includes a person's past behavior, whether positive or negative, as well as a person's reputation and opinions about a person's character.[26] Since the passage of the rape shield statute in the 1970s, the character evidence rules cover a victim's past sexual history, reputation, and even the clothing the victim was wearing.[27]

Character evidence rules have a perplexing maze of exclusions and exceptions. In the case of sexual assault, these exclusions spiral back in on themselves. To begin, the general principle is a rule *against* propensity inferences: that is, using evidence of a person's character or past actions to prove that he or she acted in a particular way at given time.[28] The rationale is that even though such evidence can be probative of guilt, it will exert an undue influence on the jury.[29] Wigmore attributed the problem to human beings' "natural and inevitable tendency . . . to give [character evidence] excessive weight."[30] For example, a prosecutor cannot use evidence that a person is a thief to prove he or she committed a specific robbery, evidence that someone had forged a different document to prove a forgery,[31] or evidence that a person has driven under the influence in the past to prove a DUI. Such evidence carries so much weight that using it against a criminal defendant is considered unfair.

Despite this general rule, there are several ways in which character evidence may be admitted. It is permissible if it is offered for a purpose *other* than a propensity inference, such as to prove motive or intent,[32] or if it falls within one of three exceptions.[33] A party may always impeach a witness's credibility, that is, his or her character for truthfulness, regardless of whether that party called the witness.[34] In criminal cases, there are two

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[25] *See* JUSTICE MARK B. SIMONS, SIMONS CALIFORNIA EVIDENCE MANUAL § 6:9 (2016) ("Exclusion of this evidence is based on the concern that it is highly prejudicial. Exclusion occurs not because the evidence has too little probative value, but because it has too much.").

[26] CAL. EVID. CODE § 1101(a) (West 2016).

[27] *Id.* § 1103(c)(1)–(3).

[28] *Id.* § 1101(a) (stating that "evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion").

[29] *See* SKLANSKY *supra* note 14, at 270.

[30] Wigmore, *supra* note 14, at 272.

[31] SIMONS, *supra* note 25, § 6.9 (providing an example of admissibility in forgery prosecution).

[32] CAL. EVID. CODE § 1101(b) (West 2016).

[33] In addition, a party to a case may introduce character evidence if character itself is an element of the legal claim. LAW REVISION COMMISSION COMMENTS TO EVIDENCE CODE § 1101 (1965).

[34] EVID. §§ 780, 785.

additional exceptions: the *defendant* may introduce character evidence regarding both him or herself (typically positive) and the victim (typically negative), in order to prove conduct in conformity with that character.[35]

At common law, this resulted in a near-universal inquiry into a rape victim's "character for chastity." Wigmore cited an 1895 California case that explains the reasoning: "[I]t is certainly more probable that a woman who has done these things voluntarily in the past would be much more likely to consent than one whose past reputation was without blemish."[36] In 1965, the California Evidence Code adopted the common law rule that the defendant's character was off-limits to the prosecution but a victim's unchaste reputation was a defense.[37] In rape cases juries were instructed "that a woman who has previously consented to sexual intercourse would be more likely to consent again,"[38] which is nonsensical unless the defense presents evidence that the victim is "of unchaste character." The rape reform movement of the 1970s successfully challenged this practice, questioning how consent to a previous sexual encounter had "any tendency in reason"[39] to prove consent "to an act of sexual intercourse with a *particular* defendant on a *particular* occasion."[40] In other words, the difference between sexual consent and a person's propensity to commit robbery or drunk driving is that prior consent does not increase the chances that a woman wanted to have sex at a later date, particularly with a completely different person.

A. California's Rape Shield Statute

Thus, rape shield statutes constitute an exception within an

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[35] *Id.* § 1103(a)–(b).

[36] Wigmore, *supra* note 14.

[37] LAW REVISION COMMISSION COMMENTS TO EVIDENCE CODE § 1102 (1965) ("[I]t [was] well settled that in a rape case the defendant [could] show the unchaste character of the [alleged victim] by evidence of prior voluntary intercourse in order to indicate the unlikelihood of resistance on the occasion in question."). *See also* People v. Shea, 57 P. 885 (Cal. 1899); People v. Benson, 6 Cal. 221 (1856); People v. Battilana, 126 P.2d 923 (Cal. Ct. App. 1942).

[38] William Gray Beyer & Roger Stewart, *Criminal Procedure Review of 1974 Selected California Legislation*, 6 PAC. L.J. 261, 266 (1975) (discussing the legislation banning the term "unchaste character" from California jury instructions and quoting CALJIC 10.06). The California Supreme Court disapproved this instruction in 1975. People v. Rincon-Pineda, 528 P.2d 247 (Cal. 1975).

[39] CAL. EVID. CODE § 210 (West 2016) (defining relevancy).

[40] Beyer and Stewart, *supra* note 38, at 265; Harriet R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 767 (1985) ("[A] growing body of feminist literature questioned the traditional rationale that a woman's unchastity has probative value on the question of whether or not she was raped.").

exception, reversing the victim exception to the character evidence rule for past sexual conduct. California's statute creates a distinction between evidence of a victim's sexual conduct that is offered to prove consent and that which is offered to attack his or her credibility; it is improper to offer it to prove consent unless the sexual conduct was with the defendant, or is offered to rebut evidence of the victim's sexual conduct introduced by the prosecutor.[41] But it is permissible to use it to attack the victim's credibility (such as a past report proven to be false), so long as several procedural protections are followed.[42] The credibility exception does not change the substantive law governing impeachment of a witness's credibility.[43] Rather, it safeguards the victim's privacy by requiring the defense to first show how the evidence is relevant and for the judge to decide what evidence the defendant may present to the jury, describing "the nature of the questions to

[41] The text of the statute is as follows; any substantive changes made subsequent to the addition of the jailhouse exclusion in 1981 are indicated in italics:

> Notwithstanding any other provision of this code to the contrary, and except as provided in this subdivision, in any prosecution under Section 261 [rape], 262 [spousal rape], or 264.1 [gang rape] of the Penal Code, or under Section 286 [sodomy], 288a [oral copulation], or 289 [rape by foreign object] of the Penal Code, or for assault with intent to commit, attempt to commit, or conspiracy to commit a crime defined in any of those sections, except where the crime is alleged to have occurred in a local detention facility, as defined in Section 6031.4, or in a state prison, as defined in Section 4504, opinion evidence, reputation evidence, and evidence of specific instances of the complaining witness' sexual conduct, or any of that evidence, is not admissible by the defendant in order to prove consent by the complaining witness.
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> (2) . . . [*paragraph (2) pertains to the inadmissibility of a victim's manner of dress*]
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> (3) Paragraph (1) shall not be applicable to evidence of the complaining witness' sexual conduct with the defendant.
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> (4) If the prosecutor introduces evidence, including testimony of a witness, or the complaining witness as a witness gives testimony, and that evidence or testimony relates to the complaining witness' sexual conduct, the defendant may cross-examine the witness who gives the testimony and offer relevant evidence limited specifically to the rebuttal of the evidence introduced by the prosecutor or given by the complaining witness.
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> (5) Nothing in this subdivision shall be construed to make inadmissible any evidence offered to attack the credibility of the complaining witness as provided in Section 782.
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> (6) As used in this section, "complaining witness" means the alleged victim of the crime charged, the prosecution of which is subject to this subdivision.

EVID. § 1103(c)(1), (3)–(6).

[42] *See id.* § 1103(c)(5) ("Nothing in this subdivision shall be construed to make inadmissible any evidence offered to attack the credibility of the complaining witness as provided in Section 782.").

[43] The judge shall apply the substantive law of section 780 to any decision made regarding evidence presented through section 782's process. *Id.* § 782(a).

be permitted," after weighing it against the effect on the victim.[44]

[44] The text of the statute is as follows; any substantive changes made subsequent to Watson's 1981 amendment are indicated in italics:

(a) In any of the circumstances described in subdivision (c), if evidence of sexual conduct of the complaining witness is offered to attack the credibility of the complaining witness under Section 780, the following procedure shall be followed:

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

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

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

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

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

(b) As used in this section, "complaining witness" means:

(1) The alleged victim of the crime charged, the prosecution of which is subject to this section, pursuant to paragraph (1) of subdivision (c).

(2) An alleged victim offering testimony pursuant to paragraph (2) or (3) of subdivision (c).

(c) The procedure provided by subdivision (a) shall apply in any of the following circumstances:

(1) In a prosecution under Section 261, 262, 264.1, 286, 288, 288a, 288.5, or 289 of the Penal Code, or for assault with intent to commit, attempt to commit, or conspiracy to commit any crime defined in any of those sections, except if the crime is alleged to have occurred in a local detention facility, as defined in Section 6031.4 of the Penal Code, or in the state prison, as defined in Section 4504.

(2) . . . [paragraph (2) concerns testimony of a victim under section 1101(b), and retains the jailhouse exclusion]

(3) . . . [paragraph (3) concerns testimony of a victim under section 1108, and retains the jailhouse exclusion]

Id. § 782 (West). One defect in section 782 is that it provides for a hearing outside the presence of the jury rather than an *in camera* hearing. While a judge has the discretion to

The consent-credibility distinction in California's rape shield statute came under criticism by commentators who saw it as ambiguous and feared that the exception would swallow the rule, rendering the rape shield statute ineffective.[45] One commentator noted that "sexual conduct evidence does not neatly break down into 'consent' or 'credibility' uses"—in fact, since "the testimony of the complainant establishes the crucial element of nonconsent[,] the two terms . . . are functional equivalents."[46] Therefore, the judge's "careful[] scrutin[y]" of the evidence is the statute's "*sole* limitation on abuse."[47] Yet California judges have surpassed these commentators' expectations; despite the "overlap" between the issues of consent and credibility, courts have preserved the policy goals of the rape shield statute by policing defendants' attempts to use it as a "back door for admitting otherwise inadmissible evidence."[48] Additionally, courts have upheld the constitutionality of the rape shield statute,[49] contrary to the beliefs of its opponents.[50]

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conduct the hearing *in camera*, section 782's privacy protections would have been much stronger with such a requirement. A public hearing could still have the same humiliating effect, even with the jury's absence. The Robbins' Rape Evidence law had the dual purpose of sparing the victim such embarrassment and preventing prejudice to the jury. A section 782 hearing outside of the presence of the jury only upholds the latter. Leon Letwin, *"Unchaste Character," Ideology, and the California Rape Evidence Laws*, 54 S. CAL. L. REV. 35, 84 (1980).

[45] T. E. McDermott III, *California Rape Evidence Reform: An Analysis of Senate Bill 1678*, 26 HASTINGS L. J. 1551, 1568 (1974) ("This credibility loophole renders the amendment to section 1103 virtually meaningless except as it supports section 782."); *id.* at 1557–58, 1561, 1567; Galvin, *supra* note 40, at 894–902 (stating "the loophole created by the ambiguous credibility provision threatens to undermine the very purpose behind the reform legislation").

[46] Galvin, *supra* note 40, at 775.

[47] *Id.* at 899 (emphasis added).

[48] People v. Rioz, 207 Cal. Rptr. 903, 909, 911–12 (Ct. App. 1984). *See also* People v. Chandler, 65 Cal. Rptr. 2d 687, 690 (Ct. App. 1997) ("By narrowly exercising the discretion conferred upon the trial court in this screening process, California courts have not allowed the credibility exception in the rape shield statutes to result in an undermining of the legislative intent to limit public exposure of the victim's prior sexual history.").

[49] People v. Blackburn, 128 Cal. Rptr. 864, 867 (Ct. App. 1976) ("Since the due process right to a fair trial does not require that all relevant evidence that may tend to exonerate a defendant be received and since the evidence barred by subsection [(c)(1)] of Evidence Code section 1103 is of limited probative value at best, subsection [(c)(1)] does not deprive the defendant charged with the crime of rape of a fair trial. Since subsection [(c)(1)] of Evidence Code section 1103 does not bar evidence of sexual conduct of the victim or her cross-examination concerning that conduct to attack her credibility, the right of confrontation encompassed in due process is not impinged.").

[50] *See infra* notes 77, 80 and accompanying text.

B. The Jailhouse Exclusion

The maze of character evidence rules gets more complicated: California's rape shield statute contains a unique exception for inmates who are sexually assaulted, sending their cases spiraling back to a pre-rape-shield statute world. The sentence that gives protection to victims who are *not in custody* when assaulted carves out an exception for when the crime occurs in jail or prison.[51] Thus, a defendant can introduce evidence of an inmate-victim's prior sexual history while a defendant in other cases may not.

The only reported appeal of a decision involving what was called the "jailhouse exclusion," *People v. DeSantis*, came up as a side issue in a death penalty case. During the penalty phase, the prosecution presented an aggravating factor: DeSantis had committed forcible sodomy in jail while awaiting trial.[52] The appeal challenged the trial court's position that questions concerning the victim's sexual orientation were irrelevant.[53] The case distinguished evidence of sexual conduct inside and outside of jail. First, the victim endured multiple questions regarding "whether he had ever engaged in consensual sexual activity at the jail,"[54] including inquiry into an alleged "'exchange of sexual favors'" after the assault.[55] Unable to get the victim to admit to having sex with other inmates, the defense asked him if he had "participate[d] in homosexual acts" outside of jail, at which point the victim objected (while the prosecutor sat by) and the court agreed on relevance grounds.[56] The California Supreme Court held that the jailhouse exclusion did not make the evidence "per se admissible," as "[i]ts admissibility would still be subject to the court's power to exclude irrelevant evidence."[57] *DeSantis* clarified the obvious: excluding inmates from the protection of the rape shield statute does not override the rest of the Evidence Code.

The fact that there is only one reported decision involving the jailhouse exclusion does not mean that it has no impact. An appeal concerning the jailhouse exclusion would only result from a conviction after a trial in which the judge made a decision *excluding* evidence of an inmate-victim's sexual history, as in *DeSantis*. If a defendant pleads guilty, is

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[51] CAL. EVID. CODE § 1103(c)(1) (West 2016) (" . . . [E]xcept where the crime is alleged to have occurred in a local detention facility . . . or in a state prison.").

[52] People v. DeSantis, 831 P.2d 1210, 1240 (Cal. 1992).

[53] *Id.*

[54] *Id.*

[55] *Id.* n.23 ("Earlier a guard gave double hearsay testimony—to which there was no objection—that he had heard that the inmate 'wrote a letter or something that said he exchanged sexual favors, but it was after this thing happened.'")

[56] *Id.* at 1240.

[57] *Id.* at 1240–41.

acquitted, or the judge let the defense ask questions about an inmate-victim's prior sexual conduct, there will either be no appeal, or the issue would not come up. The low rate of prosecution would also contribute to the lack of case law.[58] In turn, concerns about putting the victim on trial could be one factor contributing to the low rate of prosecution. Or it may reflect the little concern the criminal justice system has for incarcerated victims of rape. If so, modern public policy attempts to change our lack of attention to the issue of prison rape and the jailhouse exclusion should be a concern as the criminal justice system tries to implement policies such as PREA.

II. THE LEGISLATIVE HISTORY OF CALIFORNIA'S RAPE SHIELD STATUTE AND THE JAILHOUSE EXCLUSION

An assault's location affects how the rape shield statute works. If the assault happens outside of prison, the law protects the victim. If it happens inside, the law fails the victim. This section tells the story of how the jailhouse exclusion came to be. It begins with the history of the original rape shield statute; it is important to know about the experience of victims before the rape shield statute passed because the jailhouse exclusion returns inmate-victims to that world. In addition, the legislative history of the jailhouse exclusion is closely tied to the legislative history of the rape shield statute itself.

In the early 1970s, second-wave feminists took on the law of rape, which in California had seen "virtually no revision for more than 100 years."[59] As gender roles and the sexual mores of the nation shifted rapidly

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[58] *See* HUMAN RIGHTS WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISONS (2001), http://www.hrw.org/reports/2001/prison/report.html [hereinafter NO ESCAPE] ("Only a small minority of victims of rape or other sexual abuse in prison ever report it to the authorities.").

> Human Rights Watch surveyed both correctional departments and prisoners themselves regarding whether rapists faced criminal prosecution. The response—or more accurately, lack of response—was instructive. Although corrections authorities generally stated that they referred all or some cases for prosecution by outside authorities, they had little information regarding the results of such referrals. Prisoners were much more blunt: they uniformly agreed that criminal prosecution of rapists never occurs. Judging solely by the direct accounts of rape we have received, criminal prosecution of prisoner-on-prisoner rape is extremely rare. Of the well over 100 rapes reported to Human Rights Watch, not a single one led to the criminal prosecution of the perpetrators.

Id.

[59] *Revising California Laws Relating to Rape: Hearing Before the Assem. Criminal Justice Comm. and the Cal. Comm'n on the Status of Women*, 1972-73 Reg. Sess. (Cal. 1973) (statement of Alan Sieroty, Chairman, Assem. Criminal Justice Comm.) [hereinafter

in the 1960s and 1970s, feminists fought outdated assumptions behind existing legal standards, the relative dearth of prosecutions, the insensitive treatment of women victims, and to establish that their newfound sexual liberation did not extort an unacceptably high cost by eliminating a woman's right to say "no."[60] The movement began with outrage over a spike in reported rapes and indignation over the response victims typically encountered from the criminal justice system.[61] Activists in California alleged that the state's "laws relating to rape . . . ha[d] the effect of affording more protection to the accused than to the victim."[62] They saw the criminal justice system's treatment of victims as a large part of the problem—such a large part that it was extremely rare for a woman to report a rape.[63]

These activists challenged several barriers to justice for sexual violence, including the defendant's ability to transform his trial into his victim's through unfettered questioning about her sexual history.[64] After Susan Griffin's exposé on the "legal double standard" of rape trials,[65]

Revising California Laws Relating to Rape].

[60] *See* SELF, *supra* note 12, at 209 ("If female self-determination and the consent it implied meant anything, they surely meant freedom from sexual assault.").

[61] SELF, *supra* note 12, at 210–11; LeGrand, *supra* note 12, at 920–22, 939; Griffin, *supra* note 1, at 32 ("[T]he courts and the police . . . continue to suspect the rape victim, sui generis, of provoking or asking for her own assault. . . . [and] the police tend to believe that a woman without a good reputation cannot be raped."). The "assumption [was] that a woman who does not respect the double standard deserve[d] whatever she [got] (or at the very least 'ask[ed] for it')." Griffin, *supra* note 1, at 30. *See also* Schwendinger, *supra* note 12, at 21 ("Defense attorneys therefore still attempt to uphold the myth about the impossibility of rape, even though changes in rape laws have qualified any absolute standard of physical resistance.")

[62] *Revising California Laws Relating to Rape*, *supra* note 59, at 1.

[63] *See* SELF, *supra* note 12, at 210 (stating that "most experts estimated that between 70 and 90 percent of all rapes were never reported to the police").

[64] Activists also challenged both the insensitive treatment victims received from police and medical personnel, and jury instructions that cautioned against convicting on the testimony of the victim alone and that directed the jury to presume consent from an unchaste character. *See Revising California Laws Relating to Rape*, *supra* note 59; Assembly Criminal Justice Committee, FINDINGS AND RECOMMENDATIONS FOR REVISING CALIFORNIA LAWS RELATING TO RAPE (1974). The cautionary instruction was adapted from the seventeenth century writings of Sir Matthew Hale, Lord Chief Justice of the King's Bench, who wrote that rape "is an accusation easily to be made and hard to be proved, and harder to be defended against by the party accused, tho never so innocent." MATTHEW HALE, PLEAS OF THE CROWN 635 (1680). Ironically, Hale's thesis "is patently false: as a rule, the charge of rape is not easily made by women and it is not difficult to defend against by the defense attorneys [thanks in part to the cautionary instruction]. There can be no doubt of this because prosecutors do not usually win in forcible rape cases!" Schwendinger, *supra* note 12, at 24.

[65] Griffin, *supra* note 1, at 30–31. *See also* Schwendinger, *supra* note 12, at 24; SELF,

advocates throughout the country worked to pass legislation to ban the use of a victim's past sexual history in a criminal trial. These laws were named rape shield statutes because they shield a victim from invasive questioning along personal and irrelevant lines. Yet the movement was not without flaws, including a lack of awareness of issues of race,[66] male rape, and prison rape, which manifested itself in the jailhouse exclusion.

The wave of rape shield legislation that swept the nation in the early 1970s took "four distinct conceptual approaches," modeled after provisions in the Michigan, Texas, federal, and California codes.[67] The California approach is unique among these four because it created two "highly ambiguous categories" based on whether the defense offers the evidence to prove consent or to attack the victim's credibility, admitting one but not the other.[68] Of the few states that follow the California model, two take the opposite approach by admitting the evidence to prove consent but excluding it on the issue of credibility, illustrating the perplexity of trying to distinguish consent and credibility in a sexual assault case.[69]

A. The Robbins Rape Evidence Law

The intent behind the Robbins Rape Evidence Law, officially introduced as Senate Bill (S.B.) 1678, was to correct the "inequity" of the legal double standard, halting the public harassment of rape victims on very

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supra note 12, at 213. *See also* SKLANSKY, *supra* note 14, at 314; Wigmore, supra note 14, at 315 (indicating that the chaste character of a woman is probative with regard to the likelihood of her consent); LeGrand, *supra* note 12, at 939 ("The most unrealistic aspect of rape law is the treatment of the victim's 'chastity' in court. The concept of 'chastity' is apparently based on the nineteenth century view that there are two kinds of women: 'good' and 'bad.' Those who are either faithful wives or virgins deserve the law's protection; women outside those groups are deemed unworthy of protection. . . . The chastity requirement today places significant numbers of women, rather than a few outcasts, beyond the protection of the law.").

[66] SELF, *supra* note 12, at 212–13, 215 (describing the predominately white-woman movement's ignorance of black women's experience of rape, the inaccurate "racialized rape narrative," and the tension between the law-and-order support for rape reform and the racial imbalance in the criminal justice system's conviction rates).

[67] Galvin, *supra* note 40, at 773. Michigan enacted a restrictive approach that consists of a prohibition against the use of sexual conduct evidence with two "highly specific exceptions." *Id.* at 812. "The two exceptions are: (1) evidence of sexual conduct between the complainant and the accused; and (2) evidence of specific instances of sexual activity showing the source of origin of semen, pregnancy, or disease." *Id.* at 871 n.518 (citing MICH. COMP. LAWS ANN. § 750.520j (West)). Texas took the opposite approach, granting the court "nearly unfettered discretion to admit sexual conduct evidence," while Congress landed somewhere in the middle, adopting a prohibition with several exceptions, including one for evidence that is "'constitutionally required to [be] admitted.'" *Id.* at 774–75.

[68] *Id.* at 775–76.

[69] *Id.* at 899–901 (discussing the approach in Washington and Nevada).

personal and irrelevant grounds.[70] The bill signaled the official rejection of the rationale behind the common law rule that evidence of a woman's chastity is inherently probative, by turning it on its head and declaring it irrelevant. Robbins described the purpose of S.B. 1678 as safeguarding the "dignity and pride" of victims, calling it "a 'people's rights' piece of legislation" rather than simply a women's issue.[71] Senator Robbins credits the support of law enforcement and the hard work of grassroots women's organizations that spearheaded the rape reform movement in California with the bill's passage.[72] The bill aimed to curtail the impunity surrounding rape by making the process of reporting and prosecuting easier on the victim.[73]

The Robbins Rape Evidence Law underwent a significant evolution during the legislative process. The initial proposed law was a complete ban on the use of any "specific instances of sexual acts of the victim" with individuals other than the defendant.[74] In the legislative process, the law was simultaneously strengthened and diluted. Over the course of eight

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[70] Senate Committee on Judiciary Background Information Form, S.B. 1678 (on file with the California State Archives) ("Under present law, a rape victim's entire sexual history with any person amy [sic] be admitted as evidence in a court of law whereas the accused rapists [sic] prior sexual record is inadmissible. SB 1678 is designed to correct this inequity by making the victim's sexual conduct with persons other than the defendant inadmissible.").

[71] *Sieroty Votes No: Rape Legislation Approved*, THE DAILY RECORDER, June 11, 1974, at 4.

[72] *See Hearing on Rape Reform Legislation and the Impact of the 1974 Robbins Rape Evidence Law Before the S. Judiciary Subcomm. on Violent Crime*, 1976-77 Reg. Sess. 19, 56, 125 (Cal. 1976) (statement of Sen. Alan Robbins, Chairman, S. Judiciary Subcomm. on Violent Crime) [hereinafter *Impact of the 1974 Robbins Rape Evidence Law*] (praising the vital work of the National Organization of Women's Rape Task Force, the California Attorney General, and the Bay Area Women Against Rape); *Change Voted in Evidence Code on Rape*, L.A. DAILY JOURNAL, Apr. 4, 1974 ("Passage of the legislation was viewed by some as an exercise in political muscle-flexing by the National Organization of Women, which sponsored the measure."). Victims spoke up at hearings to describe the ordeal of attempting to hold their rapist accountable through the criminal justice system as "grueling" and "tremendously degrading." *Revising California Laws Relating to Rape*, *supra* note 59, at 8, 16 (statements of Teri Fredrichs and Barbara Allen, respectively, Los Angeles Commission on Assaults Against Women).

[73] *See Impact of the 1974 Robbins Rape Evidence Law*, *supra* note 72, at 56–66 (discussing statistics of reporting and convictions before and after the Robbins Rape Evidence Law). Others wrote letters to lobby legislators for reforms; one activist asserted that putting the victim on trial takes away a woman's "right to protect herself from violation," stating that many more women would report if they did not have to fear such "humiliation" in court. Letter from Inga Mountain, Facilitator, Sacramento Women Against Rape, to Alfred Song, Chairman, Senate Judiciary Comm. (Mar. 11, 1974) (on file with the California State Archives and the author).

[74] That is, outside a 48-hour window before the rape, due to concerns about physical evidence coming from another individual. Senate Final History, S.B. 1678, 1000 (Cal. 1973-74) (as introduced Feb. 5, 1974).

amendments, Robbins' initial approach of a complete ban on evidence of specific conduct was expanded to include reputation or opinion evidence regarding a victim's sexual history. It was altered significantly by the "credibility exception," which allows the defense to use past sexual conduct to attack a victim's credibility.[75] It is not without limits, as the legislature protected victims from being blindsided in open court by crafting a procedure by which the judge must approve any such evidence the defense wants to present to the jury.[76]

The credibility exception came from the ACLU's influence on the California Assembly Committee on Criminal Justice. In a split with its Northern counterpart, which opposed the idea of rape shield legislation, the Southern California chapter of the ACLU rejected the unchaste character inference as "an irrational . . . premise for admitting highly prejudicial evidence into [rape] trials."[77] Among other reforms, it proposed holding a non-public hearing to determine the relevancy of a victim's prior sexual history.[78] The California Assembly Committee took the Southern ACLU's private hearing proposal and altered it to create the credibility exception.[79] Some commentators have also hypothesized that the credibility exception was a reaction to the Supreme Court's decision on the Confrontation Clause earlier that year in *Davis v. Alaska*.[80]

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[75] S.B. 1678, ch. 569 (Cal. 1974).

[76] *Id.*

[77] *Revising California Laws Relating to Rape*, *supra* note 59, at 82–86. The two California chapters of the ACLU were split in their support of the idea of rape shield statutes. The Northern chapter stood with the California Public Defenders Association, the State Bar of California, and California Attorneys for Criminal Justice to oppose S.B. 1678 as an unconstitutional deprivation of a defendant's right to present relevant evidence. *See also* Letter from Herbert W. Nobriga, Assistant Legislative Representative, State Bar of Cal. to Alan Robbins, Cal. State Senate, and Alister McAlister, Cal. State Assembly (Apr. 24, 1974) (on file with the California State Archives) (stating that "[e]nactment of the proposals would unconstitutionally deprive the accused of his right of fair trial by barring admission of evidence relevant to the defense of assent"); Digest, Assembly Third Reading (Aug. 13, 1974); Beyer and Stewart, *supra* note 38, at 261. Some of the rhetoric from the opposition was vitriolic, describing rape victims as "vindictive, spiteful and fantasy-ridden." *Assembly Unit Kills Rape Bill, Then Offers Reconsideration*, SACRAMENTO BEE, May 22, 1974, at B16 (statement of Paul J. Fitzgerald, representing California Attorneys for Criminal Justice). Another opponent put the word feminist in quotation marks as he described the bill's proponents, and went on to say that while the rape of a virgin "merits . . . punishment," the "effect of rape on women of more easy virtue is not so psychologically disastrous." Letter from William R. McVay, Attorney, to Ronald Reagan, Governor of the State of California (May 7, 1974) (on file with the California State Archives).

[78] COLEMAN A. BLEASE, ACLU OF S. CAL., SOME COMMENTS ON CIVIL LIBERTIES, RAPE, AND THE CALIFORNIA CRIMINAL LAW 10 (1974).

[79] *See* S.B. 1678, ch. 569 (Cal. 1974).

[80] McDermott, *supra* note 45, at 1570–71 (suggesting that "*Davis* caused the legislature to rewrite S.B. 1678"). *Davis* clarified that a defendant's Sixth Amendment

Once Senator Robbins adopted the Assembly's credibility exception, the Robbins Rape Evidence Law quickly passed in the summer of 1974.[81] Law enforcement and activists soon credited it with improving

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Confrontation Clause right outweighs a witness' right to privacy in sealed juvenile records. *Id.* Other commentators have pointed out that a witness's prior criminal record is distinguishable from his or her prior sexual history, and that the former is "a more valid reason for rejecting the credibility of a witness." Beyer and Stewart, *supra* note 38, at 264. *See also* Galvin, *supra* note 40, at 806 (contrasting the relationship between the goals of rape shield legislation and the provision in *Davis*, with the former "promot[ing] accurate fact-finding," while excluding a juvenile conviction protects the witness "despite the possibility of excluding highly relevant evidence"); Richard Edward Cates & Joy L. Wilensky, *A Search for Relevant Evidence: The Robbins Rape Evidence Law*, 52 L.A.B.J. 386, 395 (1977) ("Evidence of prior criminal conduct is more probative on the issue of credibility of a witness than evidence of prior sexual conduct."). The fact that *Davis* is distinguishable from the issues addressed by rape shield legislation did not ease the concerns of its opponents, which most likely caused the substantial changes to S.B. 1678, which the Assembly Committee had previously rejected. S.B. 1678 "failed passage" after its first Assembly Committee on Criminal Justice hearing, with "reconsideration granted." Senate Final History, S.B. 1678, 1000 (Cal. 1973-74). The committee chairman, Alan Sieroty, who presided over the 1973 hearing on Revising California Laws Relating to Rape and introduced the Assembly relevancy approach in A.B. 3661 voted against S.B. 1678 as unconstitutional. James Dufur, *Rape Bill to Protect Victim*, SACRAMENTO BEE, June 13, 1974. He described his bill as one which "would stop questions 'which try only to sway the jury or badger the victim' but would permit legitimate questioning." *Id.*

[81] A history of S.B. 1678's progress through the legislature is as follows:

Mar. 5:	Amended in Senate	Deleted 48 hour provision
Mar. 25:	Passed Jud. Comm. 7-3	
Mar. 26:	Amended in Senate	Added attempt and conspiracy to "or for assault with intent to commit" clause
Apr. 2:	Passed Senate 31-3	
Apr. 17:	Amended in Assembly	Deleted unlawful sex with a minor (Penal Code § 261.5)
May 14:	Amended in Assembly	Adds coverage for opinion and reputation evidence, and exception to rebut evidence introduced by the prosecutor or the victim
May 16:	Amended in Assembly	Adds exclusion for evidence offered under Evid. Code §§ 1100, 1101
May 20:	Amended in Assembly	Edits prior exclusion added on May 16 to evidence offered to prove motive or identity under Evid. Code § 1101(b)
May 21:	1st Crim. Justice Hrg.	Failed, set to reconsider
June 10:	Amended in Assembly	Reconstruction of bill, added consent and credibility distinction
June 12:	Passed Crim. Justice 5-2	
Aug. 13:	Amended in Assembly	Non-substantive change, replaced "victim" with "complaining witness"
Aug. 15:	Passed Assembly 69-4	

victims' experiences with the criminal justice system and with a significant shift in their willingness to report.[82]

B. Unsuccessful Attempts to "Close the Loophole"

The jailhouse exclusion was added to the Robbins Rape Evidence Law in 1981, as part of an expansion of the rape shield statute that was authored by Senator Diane Watson. However, it made its first appearance as a broader "custodial facility" exclusion during several unsuccessful attempts to amend the Robbins Rape Evidence Law.

Although the Robbins Rape Evidence Law was a triumph for victims' rights, advocates and practitioners soon realized it was too narrow because it only applied to the crime of rape. Rape, defined as sexual intercourse perpetrated by male genitalia on female genitalia, and other sexual acts performed without a person's consent are separate crimes.[83] Thus, the protection of a rape shield provision was for naught if the defendant committed rape and other sexual offenses such as sodomy, oral copulation, or rape with a foreign object. Unless the defendant was only charged with the rape—an unlikely event—he was able to introduce evidence of a victim's past sexual behavior to combat the other offense(s), even though it was now inadmissible in defense against the rape.[84] Since the

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Aug. 23: Senate Accepts Assembly Amendments 25-1

S.B. 1678, 1973-74 Reg. Sess. (Cal. 1974); Senate Final History, S.B. 1678, 995 (Cal. 1973-74). After Senator Robbins adopted the Assembly *in camera* credibility hearing, a competing Assembly version of the bill died a quiet death. Assembly Final History, A.B. 3661, 1842 (Cal. 1973-74).

[82] *Impact of the 1974 Robbins Rape Evidence Law*, *supra* note 72, at 65, 71–72, 103, 107 (statements of representatives from the Attorney General's Office, the Los Angeles Police Department, and the San Francisco and Los Angeles County District Attorney's Offices, all indicating that the Robbins Rape Evidence Law had a very positive impact on the enforcement of rape laws, particularly in victims' willingness to come forward and to testify).

[83] CAL. PENAL CODE §§ 261, 286 (sodomy), 288a (oral copulation), 289 (foreign object penetration) (West 2016); People v. Holt, 937 P.2d 213, 250 (Cal. 1997) (defining sexual intercourse for the purposes of the rape statute as "any penetration of the male sex organ into the female sex organ, however slight").

[84] "Senate Bill 23 will close a loophole in the present law which exists in situations where a defendant is charged with multiple sex offenses. In such cases, testimony of prior sexual history cannot be admitted in a prosecution for rape but could come in concerning a sodomy or oral copulation charge." Letter from Vance W. Raye, Deputy Att'y Gen. and Acting Chief, Legislative Unit, on behalf of George Deukmejian, Att'y Gen., Cal. Dep't of Justice, to the Honorable Diane Watson, Cal. State Senate (Feb. 17, 1981) (on file with the California State Archives). *See also* Senate Committee on Judiciary Bill Analysis, S.B. 23 (Cal. 1981–82) ("[P]roponents feel that this bill would close a 'loophole' involving defendants charged with rape as well as other sex offenses against the same victim."); Letter from Deborah De Bow, Legislation Chair, Women Lawyers of Sacramento, to the Honorable Diane Watson, Cal. State Senate (Feb. 26, 1981) (on file with the California

harm comes from asking such harassing and irrelevant questions in the first place, instructing the jury to only consider the evidence of past sexual history for the non-rape offense was no remedy at all.[85]

Less than two years after Governor Reagan signed the Robbins Rape Evidence Law, Senator Robbins made the first attempt to close the loophole.[86] Over the next five years, four different bills to amend the rape shield statute died in the Assembly Committee on Criminal Justice.[87] Each of Robbins' bills limited the expansion to the crimes of sodomy and oral copulation "where the act was committed by force or violence."[88] Senator Robbins did not include either sodomy and oral copulation with minors or the sections that criminalize the consensual performance of these acts in jail or prison.

In contrast, the initial version of Senator Diane Watson's first attempt to amend the Robbins Rape Evidence Law was a blanket expansion covering all sex crimes involving sodomy, oral copulation, and rape by foreign object.[89] Watson expressed the motive behind her "simple and direct" bill in a press release emphasizing that "all the female members of the California Legislature" were onboard as co-authors: "*[w]e* feel the current law is too narrow in scope and must be expanded to more

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State Archives) ("Evidence which must be excluded when dealing with the rape charge can still be admitted on the charges of oral copulation, object rape or sodomy."); *Impact of the 1974 Robbins Rape Evidence Law*, *supra* note 72, at 72 (statement of San Francisco Assistant District Attorney Robert Dondero, calling the loophole the "one glaring weakness" in the Robbins Rape Evidence Law).

[85] McDermott, *supra* note 45, at 1565.

[86] Senate Final History, S.B. 2044, 964 (Cal. 1975–76) (introduced Mar. 25, 1976).

[87] Assembly Committee on Criminal Justice Bill Analysis, S.B. 23 (Aug. 17, 1981) (list of previous legislation). It is not clear why it took so long to expand a bill that garnered such strong support in the California Legislature despite vehement opposition and concerns regarding its constitutionality. *See, e.g.*, S.B. 1678, *supra* note 81 (vote tallies). One plausible explanation is that S.B. 1678's main challenge was getting the votes to pass in the Assembly Criminal Justice Committee, and that these expansion attempts faced the same problem—all of Robbins' bills and Watson's first attempt were held up in this committee. Another explanation is that the expansions did not receive as much attention as S.B. 1678 and thus did not have the political capital to proceed through the legislative process. Regarding S.B. 2044, the first attempt to expand section 1103(c)(1), Robbins commented that he "[thought] it got shunted aside at the last session," but that he would "very definitely carry again the bill [sic] . . . so that the victims of those crimes receive the same protection that the victims of forcible rape do." *Impact of the 1974 Robbins Rape Evidence Law*, *supra* note 72, at 104. Robbins made three bids before Senator Diane Watson first attached her name to a bill in 1980, and each time the Committee either held the bill or deleted the relevant provision. *Id.*

[88] Senate Final History, S.B. 2044, 964 (Cal. 1975–76); Senate Final History, S.B. 1712, 929 (Cal. 1977–78); Senate Final History, S.B. 500, 315 (Cal. 1978–79).

[89] S.B. 1929, as first introduced, simply added Penal Code sections 286, 288a, 289. Senate Final History, S.B. 1929, 1008 (Cal. 1979–80).

realistically reflect the nature of crimes of violence against women."[90] While Watson's bill was broader than any previous version, its breadth may have instigated the "jailhouse exclusion."

The jailhouse exclusion was born out of lawmakers' concerns about a victim's motive to fabricate an assault when a consensual "sex act in itself may be criminal for both parties," such as sodomy and oral copulation between inmates.[91] The Senate passed Watson's first bill, S.B. 1929, after she amended it to add "except where the offense occurred in a custodial facility."[92]

In adopting the custodial facility exception, Watson rejected a Senate Judiciary Committee proposal to limit the expansion of the rape shield statute in sodomy or oral copulation cases to offenses "committed by force or violence," like Robbins' prior unsuccessful bills.[93] Consent can never be a defense to prosecution under the consensual sex in prison bans, nor is it a defense under the provisions pertaining to acts with minors, who cannot legally consent. A likely explanation of this proposal is that it does not seem logical to include crimes for which consent is irrelevant in California's rape shield statute, which explicitly pertains to consent defenses.[94] However, this proposal is internally illogical when considering the jailhouse exclusion rationale as it would exclude past sexual conduct in

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[90] Press Release, Senator Diane E. Watson, Senator Watson Introduces Rape Bills (Mar. 11, 1980) (on file with the California State Archives) (emphasis added).

[91] Assembly Committee on Criminal Justice Bill Analysis, S.B. 23 (Cal. 1981) (discussing various motives to fabricate). Penal Code sections 286 and 288a prohibit consensual sodomy and oral copulation between inmates, respectively. CAL. PENAL CODE §§ 286, 288a (West 2016).

[92] Senate Final History, S.B. 1929, 1008 (Cal. 1979–80) (as amended in Senate, May 6, 1980). Senator Robbins also became a co-author of S.B. 1929 with this amendment. *Id.* The overbroad term "custodial facility" ultimately led to the bill's demise in the Assembly Committee on Criminal Justice, as it was determined this would include mental health, developmental disability, and other custodial facilities in addition to penal institutions. Sen. Diane Watson, Cal. State Senate, Statement on S.B. 23 for Senate Judiciary Committee Hearing (Feb. 10, 1981) (prepared remarks on file with the California State Archives).

[93] Senate Committee on Judiciary Bill Analysis, S.B. 1929 (Cal. 1979–80) (suggesting amendment that read "or under Section 286 or 288a of the Penal Code if such offense was committed by force or violence . . ."). This recommended remedy is reminiscent of Robbins' three prior bills, suggesting that perhaps he was cognizant of the consensual sex in prison bans argument.

[94] The initial version of S.B. 1678 covered CAL. PENAL CODE § 261.5 (West 2016), but was removed by its third amendment on April 17, 1974, suggesting that Robbins was aware of the consent issue even though the consent-credibility clause was not formally part of the bill at this point. S.B. 1678, 1973-74 Reg. Sess. (Cal. 1974) (as introduced Feb. 5, 1974). Past sexual history could never be relevant to show consent in a prosecution for unlawful sex with a minor, as it is a strict liability crime. *See infra* notes 109–110 and accompanying text for further discussion of Robbins and PEN. § 261.5.

a *fabricated* situation leading to a forcible assault charge, but it would be allowed in when neither party disputes consent. Thus in prison rape cases, it would be more logical to allow the evidence in, where there was an allegation of force, but exclude it under the consensual sex bans.[95]

C. The Watson Amendment

The jailhouse exclusion made its way into the California Evidence Code in 1981 when the Robbins Rape Evidence Law was finally amended. Despite Senator Watson's first bill's failure to make it out of the Assembly Committee on Criminal Justice, she wasted no time in introducing another bill.[96] The intent of her amendment mirrors the rationale behind the original Robbins Rape Evidence Law, with the added goal of "bring[ing] logical consistency to the law" by closing the loophole that existed when a defendant was charged with committing multiple sex offenses against the same victim.[97]

The initial version of Watson's second bill, S.B. 23, took the same blanket-expansion approach of her initial bill by dropping the "custodial facility" exclusion that was introduced to her first bill in the legislative process.[98] Watson removed the amendment because the custodial facility language "went beyond merely exempting rapes that occur in penal institutions [such as state hospitals]"; yet she indicated she was willing to accept a jailhouse exclusion provided it was sufficiently narrow in scope.[99] The fact that Senator Watson did not introduce S.B. 23 with the jailhouse exclusion suggests that it was not a priority for her; perhaps it was merely a political concession.[100]

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[95] *See infra* note 268 and accompanying text.

[96] S.B. 23, 1980–81 Reg. Sess. (Cal. 1981) (enacted) (introduced Dec. 1, 1980, less than six months after her first bill failed in committee).

[97] Letter from Maureen P. Higgins, Deputy Att'y Gen., Cal. Dep't of Justice, to Diane Watson, Senator, Cal. State Senate (Apr. 4, 1980) (regarding S.B. 1929); Assembly Committee on Criminal Justice Bill Analysis, S.B. 1929 (June 2, 1980) (stating "the same reasons that dictate that past sexual history should not be admissible in rape cases also dictate that this information should be kept out if there are other charges of sexual assault"); Assembly Committee on Criminal Justice Bill Analysis, S.B. 23 (Cal. 1981) (explaining that "[t]he purpose of this measure is to ensure that irrelevant evidence of prior sexual history is excluded in cases involving the other sexual assaults besides rape").

[98] The only differences between S.B. 1929 and S.B. 23 are stylistic. Senate Final History, S.B. 1929, 1008 (Cal. 1979–80); S.B. 23, 1981–82 Reg. Sess. (Cal. 1981) (enacted) (as introduced Dec. 1, 1980).

[99] Watson, *supra* note 92.

[100] Watson even amended S.B. 23 to expand the statute that contains the procedural protections for the credibility exception after S.B. 23 passed the Senate Judiciary Committee, without including the jailhouse provision. S.B. 23, 1981–82 Reg. Sess. (Cal. 1981) (enacted) (as amended Feb. 19, 1981); Senate Final History, S.B. 23, 28 (Cal. 1981–82). It appears that this amendment was the result of the California Attorney General

The impetus behind the jailhouse exclusion stemmed from the opposition of the ACLU to *any* expansion of the Robbins Rape Evidence Law. The ACLU wrote multiple letters to make its pitch against both of Senator Watson's bills.[101] The various letters were of virtually identical substance, the first dated between the introduction of Watson's initial bill and its "custodial facility" amendment.[102]

The ACLU opposed Watson's bills on two grounds; their first and main argument was that evidence of prior sexual history can be relevant to consent, but is never relevant with regard to credibility.[103] They contended that the Robbins Rape Evidence Law "stands everything on its head" and expanding it would not make it better.[104] More pertinently, they also argued that

> expanding the Robbins Act to cover forcible sodomy and forcible oral copulation creates unusual problems in the jailhouse situation, because in jails and prisons the very act of oral copulation or sodomy is a felony. Thus, where one sex partner claims "rape" in order to avoid punishment, evidence that the "victim" engaged in similar sex acts with other inmates would be highly relevant and probative.[105]

Both the Senate and Assembly Committees as well as Senators Watson and Robbins seem to have taken this argument at face value, as the written documentation saved in the archives contains no critical analysis of its merits.[106]

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bringing this credibility loophole to Senator Watson's attention two days before she introduced the amendment. Letter from Vance W. Raye, Deputy Att'y Gen., Cal. Dep't of Justice, to Diane Watson, Senator, Cal. State Senate (Feb. 17, 1981) (on file with the California State Archives). Amending section 782 as well as section 1103 was a task that her first bill, S.B. 1929, had overlooked. S.B. 1929, 1979-80 Reg. Sess. (Cal. 1980).

[101] Letter from Brent A. Barnhart & James R. Tucker, Legislative Advocates, ACLU, to Diane E. Watson, Senator, Cal. State Senate (Apr. 21, 1980) (on file with the California State Archives) [hereinafter ACLU Letter]. This letter was dated after a press conference in which Senator Watson announced S.B. 1929 on behalf of the Los Angeles County Legislative Coalition, which included representatives of the ACLU Women's Rights Task Force. Press Release, *supra* note 90. *See also* Letter from Brent A. Barnhart, Legislative Advocates, ACLU, to Diane E. Watson, Senator, Cal. State Senate (Jan. 16, 1981) (on file with the California State Archives); Letter from Brent A. Barnhart & Beth J. Meador, Legislative Advocates, to Diane E. Watson, Senator, Cal. State Senate (Aug. 12, 1981) (on file with the California State Archives).

[102] ACLU Letter, *supra* note 101.

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] A bias that creates a motive to lie would be admissible as credibility impeachment regardless of the jailhouse exclusion. *See infra* note 264 and accompanying text. In addition, the Assembly Committee identified several other situations where prior sexual history would also be "relevant," such as evidence pertaining to sexual orientation in the

The jailhouse exclusion made a dramatic entrance in the debate over S.B. 23. Senator Robbins introduced the amendment after an incident where he was forcibly removed from the Senate floor when Watson presented her bill for debate.[107] He later explained that his outburst was due to his protective concern over amendments to the law that bears his name.[108] However, the larger scandal and ensuing drama surrounding the bill was Robbins' indictment on nine counts of sexual misconduct, including oral copulation and statutory rape.[109] Robbins made accusations that his

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case of a same-sex assault or where the act occurred in a public place such as a public restroom—another scenario in which both parties could be subject to criminal liability. Assembly Committee on Criminal Justice Bill Analysis, S.B. 23 (Aug. 17, 1981); Assembly Committee on Criminal Justice Bill Analysis, S.B. 1929 (June 2, 1980) ("Although the relevance of this evidence is tenuous in cases of heterosexual rape, this evidence may be quite relevant in cases of alleged homosexual attacks."). However, they did not create exclusions regarding these other situations. The Legislation Chair of Women Lawyers of Sacramento responded to the suggestion that "this evidence is needed especially when the case at hand involves homosexual assault" as "spurious" and simply "indicat[ing] a clear anti-gay bias." Letter from Deborah De Bow, Legislation Chair, Women Lawyers of Sacramento, to Diane Watson, Senator, Cal. State Senate (Feb. 26, 1981).

[107] *See* Steve Lawrence, *Delay on Rape Bill Forced by Robbins: Measure Might Have Affected His Sex Trial*, L.A. TIMES, Mar. 6, 1981, at 3; *Robbins Loses His Temper in Debate on Sex Crime Bill*, SACRAMENTO BEE, Mar. 6, 1981, at A10 [hereinafter *Robbins Loses His Temper*]; *Robbins Gets Delay on Sex Bill*, APPEAL-DEMOCRAT, Mar. 6, 1981; Dan Walters, *Robbins Supports Sex-Privacy Bill*, SACRAMENTO UNION; Jeff Raimundo, *Robbins' Effort to Amend Sex Crimes Bill Ires Author*, SACRAMENTO BEE; John Stanton, *Watson Gets Senate OK--Robbins Wins Delay*, PENINSULA TIMES TRIBUNE, Mar. 20, 1981. The Senate then delayed its vote by one week. *Robbins Gets Delay on Sex Bill*, *supra*; Stanton, *supra*. On the Senate floor, Robbins accused Watson of amending S.B. 23 after it was approved by the Senate Judiciary Committee. *Robbins Gets Delay on Sex Bill*, *supra*.

[108] *Robbins Loses His Temper*, *supra* note 107.

[109] *See Robbins Gets Delay on Sex Bill*, *supra* note 107; Walters, *supra* note 107. According to a lobbyist, Robbins had attempted to negotiate an amendment to S.B. 23 prior to his outburst on the Senate floor, criticizing it as "overly broad," and asking that it be "changed to remove its coverage of people under 18." Robert Fairbanks, *Robbins Bid to Alter Bill on Sex Alleged: Measure Would Cover Cases Such as His; Senator Asked His Aid, Deputy D.A. Says*, L.A. TIMES, at 3. The jailhouse exclusion made its appearance in a surprise move by Robbins—he used the delay he won in his outburst on the Senate floor to draft and introduce three amendments to S.B. 23. *See* Stanton, *supra* note 107; *Sex-Background Measure, Affecting Robbins, Passed*, SACRAMENTO UNION, Mar. 20, 1981 [hereinafter *Sex-Background Measure*]; Walters, *supra* note 107; Raimundo, *supra* note 107. The first of the three amendments extended S.B. 23's coverage to statutory rape, and an internal memorandum from Watson's staff indicates that Robbins admitted to another lobbyist that this move was to make himself look better in the press by acting against his personal interests. Memorandum from Georgette Imura to Diane Watson, Senator, Cal. State Senate (Mar. 17, 1981) (on file with the California State Archives). The Senate voted to send S.B. 23 back to the Judiciary Committee for consideration of Robbins' amendments, against the wishes of Senator Watson, who feared that this was an attempt to

indictment had a political motivation, and was ultimately acquitted on all charges.[110] The drama of Robbins' case and the Watson amendment[111] illustrates some of the advantages heterosexual men have in our culture: Robbins is an example of how the very lawmakers who champion rape reform and women's rights can simultaneously exercise sexual privileges that these laws seek to challenge.[112]

The momentum behind the feminist rape reform movement helps to explain how the jailhouse exclusion came to be without much consideration, especially in light of the five-year-long attempt to close the rape shield statute loophole. The feminist movement's lack of awareness of issues

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kill the bill; she publicly stated that she felt she had been "raped by the men." Walters, *supra* note 107; *see also* Raimundo, *supra* note 107. Robbins inexplicably failed to show up to the Judiciary Committee meeting, meaning it could not consider the amendments and S.B. 23 went back to the Senate floor with no change. Stanton, *supra* note 107; *Robbins Abstains as Sex Bill Passed*, SACRAMENTO BEE, Mar. 20, 1981; *Sex-Background Measure*, *supra*. But documents prepared by the committee in preparation for the hearing indicate that they opposed the statutory rape amendment. Senate Committee on Judiciary Bill Analysis, S.B. 23 (Cal. 1981–82) (rejecting an expansion to cover unlawful sex with a minor as illogical due to the fact that consent is not a defense). Watson raised the issue that the amendment defied logic because consent is not a defense to statutory rape, and that it could allow a defendant to argue that the legislature recognized a consent defense. Memorandum from Georgette Imura to Diane Watson, Senator, Cal. State Senate (Mar. 17, 1981) (on file with the California State Archives) (". . . [I]t could work against us by sending a message to the courts that the Legislature recognizes consent as a defense in unlawful intercourse."). Whether or not Robbins intended this result, or as is more likely, it was simply a media stunt, the Senate leadership was wary of Robbins' attempt; the Senate President Pro Tem responded with the statement "God help Sen. Robbins if he is trying to weaken this bill." Raimundo, *supra* note 107.

Despite his failure to show up to the committee hearing, Robbins pressed on in support of S.B. 23. He wrote a letter to the members of the Senate indicating that even though S.B. 23 would go into effect after his trial, he would set an example by requesting that his attorneys apply the Robbins Rape Evidence Law to his case. Letter from Alan Robbins, Senator, Cal. State Senate, to Members of the Cal. State Senate (Mar. 12, 1981) (on file with the California State Archives). But the press had already reported that his attorneys were investigating the sexual background of at least one of his alleged victims. *Robbins Gets Delay on Sex Bill*, *supra* note 107; Dan Walters, *Robbins Erupts at Bill Affecting His Case*, SACRAMENTO UNION, at A1, A6. The Senate passed consideration of Robbins' amendments on to the Assembly Criminal Justice Committee, who rejected all save the narrow, jailhouse exclusion that Watson had indicated she could accept. S.B. 23, 1981-82 Reg. Sess. (Cal. 1981) (enacted) (as amended Feb. 19, 1981); Watson, *supra* note 92.

[110] Stanton, *supra* note 107; *Sex-Background Measure*, *supra* note 109; John Kendall, Carl Ingram & Douglas Shuit, *California Legislator Innocent of Sex Charges*, L.A. TIMES, July 16, 1981, at 1, 20.

[111] *See supra* note 109 and accompanying text.

[112] *See also* SELF, *supra* note 12, at 213 (describing rape as "the presumed right . . . of ordinary men").

regarding race, male rape, and prison rape similarly sheds light on this development, especially because prison rape did not rise to cultural consciousness until over a decade later. Now that the judiciary, legislature, and public have recognized prison rape as a problem, the rationale behind the jailhouse exclusion can no longer justify it.

III. MODERN DEVELOPMENTS: JUDICIAL AND LEGISLATIVE RECOGNITION OF PRISON RAPE

> "*What they took from me went beyond sex. They had stolen my manhood, my identity and part of my soul. . . . I blame prison officials for my rape as much as I blame the men who assaulted me. They created and shaped the environment, both actively and through their negligence, in which I was gagged, effectively silenced, and unable to resist*."
>
> – T.J. Parsell[113]

The tension between the jailhouse exclusion and the modern prison-rape elimination policies accentuates the exclusion's issues. The prevalence, impact, and legal implications of sexual assault in detention have gone from being invisible—or even endorsed—to a point where the Supreme Court and Congress *unanimously* recognize inmates' rights to serve their time free from sexual abuse. In preparation for Part IV's reflections on the impact of the jailhouse exclusion, this section explores modern developments in the law that make the exclusion incompatible with the current policy agenda. It first discusses our nascent understanding of the prevalence of sexual assault in detention and introduces the anti-prison-rape movement. It goes on to explore the Supreme Court's recognition in *Farmer v. Brennan* that prison rape can be a violation of an inmate's Eighth Amendment right to be free from cruel and unusual punishment. This section also presents the overwhelming barriers to using civil litigation as a remedy for prison rape, in spite of the *Farmer* decision. Part III concludes with a brief overview of the relevant twenty-first century legislative efforts: Congress' Prison Rape Elimination Act and California's ensuing Sexual Assault in Detention Elimination Act.

A. Shining a Light on the Problem of Prison Rape

There are over two million people incarcerated in America at any given time.[114] However, because many people flow in and out of jail every day,

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[113] *At Risk: Sexual Abuse and Vulnerable Groups Behind Bars: Hearing Before the Nat'l Prison Rape Elimination Comm'n* 2, 3 (Aug. 19, 2005) (testimony of Timothy J. Parsell) [hereinafter *At Risk*].

[114] SINGER, *supra* note 23, at 4.

this figure is somewhat misleading. The bigger picture includes the 13.4 million people who cycle in and out of correctional facilities each year.[115] We now have a better sense of how many of these individuals experience sexual assault than ever before. When Congress passed PREA, it acknowledged and set out to remedy the dearth of reliable data on the prevalence of prison rape.[116] Collecting this data is tough for many reasons, including the difficulty of obtaining access from corrections administrators and inmates' distrust of researchers.[117]

The Department of Justice's Bureau of Justice Statistics (BJS) surveys and the Regulatory Impact Assessment for PREA's National Standards provide the "most up-to-date and reliable" data on the prevalence of prison rape nationwide.[118] The BJS annual inmate surveys report that approximately 4 percent are sexually victimized each year, and a BJS survey of former prisoners found that 9.6 percent had been victimized during their last incarceration.[119] Another report, called the PREA

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[115] *Id.* at 5.

[116] PREA Preamble: "An act [t]o provide for the analysis of the incidence and effects of prison rape in Federal, State, and local institutions and to provide information, resources, recommendations, and funding to protect individuals from prison rape." 42 U.S.C. § 15602 (West).

> Insufficient research has been conducted and insufficient data reported on the extent of prison rape. However, experts have conservatively estimated that at least 13 percent of the inmates in the United States have been sexually assaulted in prison. Many inmates have suffered repeated assaults. Under this estimate, nearly 200,000 inmates now incarcerated have been or will be the victims of prison rape. The total number of inmates who have been sexually assaulted in the past 20 years likely exceeds 1,000,000.

Id. § 15602 [findings]. *See also* SINGER, *supra* note 23, at 18.

[117] *See* Valerie Jenness et al., *Violence in California Correctional Facilities: An Empirical Examination of Sexual Assault* 52–53 (2007).

[118] SINGER, *supra* note 23, at 18.

[119] BUREAU OF JUSTICE STATISTICS, NCJ 242114, PREA DATA COLLECTION ACTIVITIES 1–2 (2013). BJS conducts an annual "comprehensive statistical review" under PREA using a random sample of at least ten percent of prisons and a representative sample of municipal facilities. *Id.* at 1. Findings include that in 2011-12, an estimated 4.0 percent of prison and 3.2 percent of jail inmates reported one or more sexual victimizations in past twelve months. *Id.* There was no statistically significant difference in these numbers in the three surveys conducted since 2007. *Id.* The 4.0 figure for federal prison inmates breaks down to 2.0 percent reporting inmate-on-inmate incidents, 2.4 percent with staff, and 0.4 percent for both. *Id.* For local jail inmates, it broke down to 1.6 percent inmate-on-inmate victimizations, 1.8 percent by staff, and 0.2 percent for both. *Id.* Rates were highest for non-heterosexual inmates: 12.2 percent of prisoners and 8.5 of jail inmates reported victimization by another inmate; while 5.4 percent of prisoners and 4.3 percent of jail inmates reported victimization by staff. *Id.* at 2. *See also* ALLEN J. BECK & CANDACE JOHNSON, BUREAU OF JUSTICE STATISTICS, NCJ 237363, SEXUAL VICTIMIZATION REPORTED BY FORMER STATE PRISONERS 5–6 (2012) (finding that 9.6 percent of former

Regulatory Impact Assessment, calculated that at least 149,200—and possibly more than 209,400—inmates are sexually abused in incarceration every year.[120]

All types of inmates experience sexual abuse in incarceration; however, some are more vulnerable than others.[121] This includes female inmates, who experience abuse from other inmates despite the fact that officers abusing

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state prisoners reported one or more incidents of sexual victimization during their most recent incarceration, 5.4 percent of reported incidents involving another inmate, an estimated 3.7 percent reported being forced or pressured to have nonconsensual sex, and 5.3 percent reported an incident involving staff). The Beck & Johnson report notes that these figures are higher than previous BJS surveys and states that they "may reflect longer exposure periods." *Id.* at 5. It found that inmate-on-inmate victimization was "at least three times higher for females (13.7%) than males (4.2%)." *Id.* Additionally, 34 percent of bisexual males reported being victimized by another inmate, which rose to 39 percent among homosexual or gay inmates. *Id.* Eighteen percent of female bisexual inmates reported inmate-on-inmate victimization, and 8 percent reported staff victimization—compared to 13 and 4 percent of female heterosexual inmates. *Id.* Inmate-on-inmate victimization was higher for both non-Hispanic white males (5.9 percent) and males of two or more races (9.5 percent) than non-Hispanic black inmates (2.9 percent). *Id.* Finally, 87 percent of "victims of staff sexual misconduct reported only perpetrators of the opposite sex." *Id.* at 6. The BJS annual surveys, however, only capture a cross-section of the population of people who flow in and out of jail and prison every year, and only look at the prevalence of sexual abuse, not incidence. SINGER, *supra* note 23, at 28, 32. The PREA Regulatory Impact Assessment explains this issue and calculated adjusted numbers to account for inmates missed by a cross-section analysis. "The BJS inmate and youth surveys capture data only from a sampling of inmates who happen to be in the facility on the days the surveys are administered, missing inmates who may have been in the facility during the twelve-month period covered by the surveys but who were released or transferred before the dates of the surveys. Put otherwise, the surveys take a cross-section, or snapshot, view of the prevalence of prison rape, without accounting for the flow of inmates through a facility over the period covered by the study." U.S. Dep't of Justice, *Regulatory Impact Assessment, United States Department of Justice Final Rule, National Standards to Prevent, Detect, and Respond to Prison Rape Under the Prison Rape Elimination Act (PREA), 28 C.F.R. Part 115* 28 (May 17, 2012) [hereinafter *Regulatory Impact Assessment*].

> [T]his flow adjustment increases the baseline prevalence figures, especially in jails and juvenile detention centers. For example, when accounting for annual flow, the prevalence of sexual abuse in jails in 2008 increases from 24,054 to 108,100. The prevalence in juvenile facilities increases from 3,141 to 10,600. In prisons, the prevalence increases from 64,488 victims to 88,800.

Id. at 30.

[120] SINGER, *supra* note 23, at 34; *Regulatory Impact Assessment*, *supra* note 119, at 37–38. The Regulatory Impact Assessment provided baseline as well as these adjusted figures to take into consideration false reporting and the flow of inmates in and out of incarceration.

[121] Jenness et al., *supra* note 117, at 3.

inmates receives almost all of the attention.[122] Factors that make inmates more vulnerable to abuse include being "young, small, and naïve," past sexual victimization, physical and developmental disabilities, and sexual orientation.[123] Gay, bisexual, lesbian, and trans* inmates experience sexual abuse in incarceration at significantly higher rates than heterosexual inmates. One study conducted in California institutions found that non-heterosexual inmates "are considerably more vulnerable" and that transgender inmates were 13 times more likely to experience abuse.[124]

The mainstream American prison culture[125] is a sink-or-swim environment, especially when it comes to sexual victimization; young, first-time offenders who are among the most vulnerable are nicknamed "fish"[126] or "fresh meat." Once an inmate has been sexually assaulted, he is even more vulnerable.[127] In prison slang, he has been "turned out," and is now a "punk" who is fair game for other perpetrators.[128] Victims sometimes enter

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[122] *See* BARBARA OWEN ET AL., GENDERED VIOLENCE AND SAFETY: A CONTEXTUAL APPROACH TO IMPROVING SECURITY IN WOMEN'S FACILITIES, 1 OF 3, at 42–52 (2008) ("We heard very few stories of officers or other staff members physically forcing a woman to have sex. We could not determine whether this was due to the relative rarity of the event or the focus group method we used to collect these accounts").

[123] NAT'L PRISON RAPE ELIMINATION COMM'N, NATIONAL PRISON RAPE ELIMINATION COMMISSION REPORT 68–74 (2009).

[124] Jenness et al., *supra* note 117, at 3. *See also* Buchanan, *Our Prisons, Ourselves*, *supra* note 21, at 13 ("The victims of prison rape are usually targeted for being unmasculine . . ."); *id.* at 11, 16.

[125] *Cf.* Sharon Dolovich, *Two Models of the Prison: Accidental Humanity and Hypermasculinity in the L.A. County Jail*, 102 J. CRIM. L. & CRIMINOLOGY 965, 970 (2012) (discussing the segregated unit in the L.A. County jail for gay and transgender female inmates, and arguing that a hyper-masculine male prison environment with high rates of violence and sexual assault is not inevitable).

[126] PARSELL, *supra* note 6, at x.

[127] Tess M. S. Neal & Carl B. Clements, *Prison Rape and Psychological Sequelae: A Call for Research*, 16 PSYCH., PUB. POL'Y & L. 284, 292 (2010) ("Once an inmate is raped, he becomes an immediate target for other potential aggressors because he is perceived as weak and vulnerable.") (citation omitted).

[128] *See id*. ("Even the rape itself is described as 'turning [the victim] out' rather than 'rape.'").

> Upon being turned out, the boy prisoner will acquire an overriding master status—that of a punk. . . . [A]s two long-time inmates of Louisiana's notorious Angola Prison explained, turning-out "strip[s] the male victim of his status as a 'man,'" leaving him feminized in an inmate social world that embraces hypermasculinity, which in turn equates manhood with the capacity to dominate others. No longer is he a boy among men; he has become a non-man residing at the bottom of the prison gender order. Correspondingly, his fellow inmates will not see him as a legitimate victim.

James E. Robertson, *The "Turning-Out" of Boys in a Man's Prison: Why and How We Need to Amend the Prison Rape Elimination Act*, 44 INDIANA L. REV., 819, 832–33 (2011).

into a "protective pairing" or "partnership" where one inmate becomes the "property" of another and submits to regular sexual contact with this person in exchange for protection from others.[129] Going one step further, sexual slavery, in which "punks" are bought and sold, occurs in some jails and prisons.[130] It is important to note that sexual encounters in incarceration exist along a "[c]ontinuum of sexual coercion" from mutually consensual to violent rape.[131] A protective pairing is a good example of sexual encounters

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See also Buchanan, *Our Prisons, Ourselves*, *supra* note 21, at 32 ("'Once an inmate has been turned out, he's considered a target wherever he goes.'").

[129] See SINGER, *supra* note 23, at 7 (protective pairings are neither assaultive nor fully consensual); Buchanan, *Our Prisons, Ourselves*, *supra* note 21, at 32 (stating that "a GBT prisoner or one who has been 'punked' will often form a 'protective partnership' with one man, in which sex and domestic services are exchanged for protection against violence by other prisoners"); Neal & Clements, *supra* note 127, at 292–93 ("Often, the victim may be required to provide for the perpetrator's needs in return for some protection (e.g., to avoid being gang raped). Punks are the victims of the most violent sexual assaults in prisons, and are forced to perform emasculating tasks for their 'owners,' including satisfying their owner's sexual appetite, being forced to use a female name, and completing various chores for the aggressor.") (citation omitted).

[130] Neal & Clements, *supra* note 127, at 293 ("The owner sometimes sells oral or anal sex from his punk to other inmates in exchange for money, cigarettes, or other perks.").

> Prisoners unable to escape a situation of sexual abuse may find themselves becoming another inmate's "property." The word is commonly used in prison to refer to sexually subordinate inmates, and it is no exaggeration. Victims of prison rape, in the most extreme cases, are literally the slaves of the perpetrators. Forced to satisfy another man's sexual appetites whenever he demands, they may also be responsible for washing his clothes, cooking his food, massaging his back, cleaning his cell, and myriad other chores. They are frequently "rented out" for sex, sold, or even auctioned off to other inmates, replicating the financial aspects of traditional slavery. Their most basic choices, like how to dress and whom to talk to, may be controlled by the person who "owns" them.

NO ESCAPE, *supra* note 58, at 93.

[131] Owen et al., *supra* note 122, at 42 (describing a "continuum of sexual coercion"). *See also* SINGER, *supra* note 23, at 7 (protective pairings are neither assaultive nor fully consensual).

> In a letter to Human Rights Watch, a Florida prisoner set out a rough typology of the various forms of prisoner-on-prisoner sexual abuse. He explained:
>
> > Let me say I believe there are different levels or kinds of rape in prison. First, there is what I will refer to as "Bodily Force Rape" for lack of a better term. This is the kind of assault where one or more individuals attack another individual and by beating and subduing him force sex either anal or oral on him.
> >
> > Second there is what I'll call Rape By Threat. An example of this would be, when an individual tells a weaker individual that in order to avoid being assulted [sic] by the individual who's

that fall somewhere between the two extremes. This section gives an overview of the physical and psychological impact of prison rape, and then of the anti-prison rape movement.

1. The Physical and Psychological Effects of Prison Rape

Prison rape has a profound impact on inmates' physical and mental wellbeing. The myriad effects of sexual victimization, from psychological distress to physical injury and disease, "are magnified" when the assault occurs in detention.[132] The egregious nature of the harms that result from this violation of the right to dignity and physical integrity has led the United Nations Special Rapporteur on Torture and others to declare that prison rape amounts to torture under international law.[133] Although international law is outside of the scope of this Article, this demonstrates the gravitas of the physical and psychological harm caused by sexual abuse in detention.

The physical impact of a sexual assault can vary from no injury at all, to serious, permanent, or even fatal injuries and illnesses. This range is no different for abuse that occurs in detention, but several factors that often show up in prison rapes increase the likelihood of sustaining a physical injury during a sexual assault. These factors include multiple perpetrators, recurring assaults, whether the "incident involved a violent attack, whether

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> speaking he must submit to his demand for sex.
>
> Third and by far the most common is what I'll call using a persons fears of his situation to convince him to submit to sex. . . . Among inmates there is a debate wheather [sic] this is in fact rape at all. In my opinion it is in fact rape. Let me give you an example of what happens and you decide.
>
> Example: A new inmate arrives. He has no funds for the things he needs such as soap, junk food, and drugs (there are a great deal of drugs in prisons). Someone befriends him and tells him if he needs anything come to him. The new arrival is some times [sic] aware, but most times not, that what he is receiving has a 100% interest rate that is compounded weekly. When the N.A. is in deep enough the "friend" will tell him he can cover some of his debt by submitting to sex. This has been the "friend's" objective from the begining [sic]. To manuver [sic] the N.A. into a corner where he's vulnerable. Is this rape? I think it is.

NO ESCAPE, *supra* note 58, at 82.

[132] Kevin R. Corlew, *Congress Attempts to Shine A Light on A Dark Problem: An in-Depth Look at the Prison Rape Elimination Act of 2003*, 33 AM. J. CRIM. L. 157, 160 (2006).

[133] Just Detention International, *Fact Sheet: Prisoner Rape is Torture Under International Law* (2009) (citing *Summary Record of the 21st Meeting*, U.N. ESCOR, Comm'n Hum. Rts., 48th Sess., ¶ 35, U.N. Doc. E/

CN.4/1992/SR.21 (1992)) ("Rape and other forms of sexual assault in detention are a particularly despicable violation of the inherent dignity and right to physical integrity of every human being; and accordingly constitute an act of torture.").

there was anal penetration, and whether a lubricant was used."[134] Human Rights Watch published some of the earliest reports of prisoner's experiences of sexual abuse.[135] Their 2001 report, *No Escape: Male Rape in U.S. Prisons*, concluded that "a forcible rape that occurs as part of a larger physical assault may be extremely violent."[136] The source support for the report's conclusions included letters, interviews, and other documents submitted by over 200 inmates who had survived, witnessed, or in a few cases, participated in sexual assaults while imprisoned in the United States.[137] Forced anal penetration can produce "intense pain, abrasions, soreness, bleeding, [and] even, in some cases, tearing of the anus."[138]

Victims of prison rape are also at a higher risk for contracting HIV/AIDS and other sexually transmitted infections such as viral hepatitis than the general population. This increased risk is due to higher rates of infection in the prison population and a higher rate of transmission during unprotected anal penetration.[139] The potential transmission of HIV is obviously the most serious health threat that survivors of prison rape face. Without HIV testing and treatment following an assault, prison rape can "impose an unadjudicated death sentence."[140] The BJS found that "significantly higher percentages" of former inmates who experienced prison rape are HIV-positive.[141] The risk of contracting HIV goes beyond being an unacceptable physical effect of prison rape; the fear of potential infection alone is a significant influence on the mental health of victims and

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[134] NO ESCAPE, *supra* note 58, at 110.

[135] HUMAN RIGHTS WATCH, ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS (1996), http://www.hrw.org/legacy/reports/1996/Us1.htm [hereinafter ALL TOO FAMILIAR]; NO ESCAPE, *supra* note 58.

[136] NO ESCAPE, *supra* note 58, at 110.

[137] These inmates recounted rape-related physical injuries that ranged from "broken bones to lost teeth to concussions to bloody gashes requiring dozens of stitches," and to death. *Id.*

[138] *Id.* at 111.

[139] James E. Robertson, *Rape Among Incarcerated Men: Sex, Coercion and STDs*, 17 AIDS PATIENT CARE AND STDS 423 (2003); *HIV in Correctional Settings*, CENTERS FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/hiv/risk/other/correctional.html (last visited May 15, 2016); *HIV/AIDS and Incarceration*, AIDS.GOV, http://aids.gov/federal-resources/policies/incarceration (last visited May 15, 2016); Laura M. Maruschak & Randy Beavers, *HIV in Prisons, 2007–08*, BUREAU OF JUSTICE STATISTICS BULLETIN 1–12 (2009); BUREAU OF JUSTICE STATISTICS, *HIV in Prisons, 2001-2010*, http://www.bjs.gov/content/pub/press/hivp10pr.cfm (last visited May 15, 2016).

[140] Robertson, *supra* note 139, at 423 (quotation marks omitted).

[141] Beck & Johnson, *supra* note 119, at 6 ["Among former inmates who had been tested for HIV (90%), those who had been sexually victimized by other inmates or by staff had significantly higher percentages for HIV positive (6.5% and 4.6%, respectively) than those who had not been victimized (2.6%)."].

vulnerable individuals.[142]

The psychological effects of prison rape are no less severe. Prisoners have scant access to mental health counseling or external rape crisis advocates.[143] Many survivors suffer from rape trauma syndrome or post-traumatic stress disorder.[144] On top of a lack of access to post-assault psychological services, repeat victimization or the fear of it compounds the psychological effects of prison rape.[145] The BJS found that approximately two-thirds of former inmates who experienced prison rape felt shame or humiliation, and over half felt guilt and had difficulty feeling close to friends or family as a result.[146]

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[142] NO ESCAPE, *supra* note 58, at 115 ("The fear of becoming infected with the AIDS virus also preoccupies victims. 'Catching Aids and Hiv [sic] is a major concern for everyone,' an Arkansas inmate emphasized. 'There is no cure.'" *See also id.* at 111 (quoting one Illinois state representative who described the threat of HIV transmission resulting from prison rape as an "unadjudicated death sentence").

[143] *Id.* at 122 ("[M]any prisoners receive inadequate health care, particularly mental health care. . . . [O]nly a minority [of prisoners in contact with Human Rights Watch] said that they received the necessary psychological counseling. . . . [O]ne appellate court has affirmed that a prison's failure to make adequate psychological counseling available to rape victims violates the U.S. constitution's prohibition on cruel and unusual punishment.") The latter reference includes a citation to *LaMarca v. Turner*, 995 F.2d 1526, 1534, 1543 (11th Cir. 1993).

[144] *See id.* at 115 (stating that the majority of research on non-incarcerated women has found that rape trauma syndrome or PTSD is "a common result of rape"). "Victims of prison rape commonly report nightmares, deep depression, shame, loss of self-esteem, self-hatred, and considering or attempting suicide. Some of them also describe a marked increase in anger and a tendency toward violence." *Id.* at 112. "In their correspondence and conversations with Human Rights Watch, victims of prison rape frequently alluded to these symptoms [of rape trauma syndrome/PTSD], stating they felt depressed, paranoid, unhappy, fatigued, and worried. Feelings of worthlessness and self-hatred were often expressed." *Id.* at 115.

> Rape's effects on the victim's psyche are serious and enduring. Inmates . . . leave the prison system in a state of extreme psychological stress, a condition identified as rape trauma syndrome. Given that many people in such condition leave prison every year, it is important to consider the larger consequences of prison rape. Serious questions arise as to how the trauma of sexual abuse resolves itself when inmates are released into society.

Id. at 112.

[145] *Id.* at 115 ("Exacerbating the psychological stress of their situation, many victims of prison rape feel that they remain vulnerable to continuing abuse, even believing themselves trapped in a struggle to survive.").

[146] Beck & Johnson, *supra* note 119, at 6 ("The majority of victims of staff sexual misconduct involving unwilling activity said they felt shame or humiliation (79%) and guilt (72%) following their release from prison. More than half (54%) reported having difficulty feeling close to friends or family members as a result of the sexual victimization.").

2. The Anti-Prison Rape Movement

Decades passed after his release before T.J. Parsell began telling his story of being "a boy [raped] in a man's prison."[147] First, he got out of prison and went on to become a successful software engineer.[148] Yet, the multiple assaults he experienced continued to impact his physical and mental health. Parsell eventually became an advocate against prison rape. He wrote a memoir, became president of Stop Prisoner Rape, and testified as a survivor for the National Prison Rape Elimination Commission.[149] But he never testified in court against his assailants because, like many other victims of prison rape, he did not report his assault.[150] The idea of reporting made him fear for his life. What his brother told him before he entered prison stuck with him: "'You don't want to be a punk,' Rick said. 'And you never want to be a snitch. Punks get fucked, but snitches get killed.'"[151]

Incarceration magnifies the harm of sexual assault, yet these inmates have been invisible victims in our society until very recently. Prison rape's popularity in comedy demonstrates that our culture is comfortable with rape as a part of criminal punishment. For comedians and public officials alike, criminals are fair game for jokes that feature images of dropping bars of soap in the shower or tattooed tough guys nicknamed "Spike."[152] The jailhouse exclusion is a relic of this invisibility. In 1981, the California Legislature passed the bill out of a fear that some inmates would falsely accuse their consensual partners of rape to avoid criminal sanctions for such consensual activity.[153] The legislature acted without producing a record that they considered the effects of prison rape, or even the prospect that inmates might be victimized at all.[154]

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[147] PARSELL, *supra* note 6 (subtitle).

[148] *Id.* at 318.

[149] *Id.* at 318–19; *SPR President Publishes Memoir, Launches Book Tour*, JUST DETENTION INTERNATIONAL (Oct. 26, 2006), http://justdetention.org/spr-president-publishes-memoir-launches-book-tour; *At Risk*, *supra* note 113 (testimony before the National Prison Rape Elimination Commission).

[150] *See* Parsell, *supra* note 3 ("I was too afraid to tell anyone what happened to me because I was convinced my attackers would kill me.").

[151] PARSELL, *supra* note 6, at 81.

[152] Buchanan, *Our Prisons, Ourselves*, *supra* note 21, at 2, 12; David K. Ries, *Duty-to-Protect Claims by Inmates After the Prison Rape Elimination Act*, 13 J.L. & POL'Y 915, 916 (2005); Sabrina Qutb & Lara Stemple, *Selling a Soft Drink, Surviving Hard Time, Just what part of prison rape do you find amusing?*, JUST DETENTION INTERNATIONAL, http://justdetention.org/selling-a-soft-drink-surviving-hard-time-just-what-part-of-prison-rape-do-you-find-amusing/#search (Jun. 9, 2002) (discussing 7-Up's "Captive Audience" advertisement) (archived by Just Detention International, "JDI in the News - 2002").

[153] *See* Part II.C, *supra*.

[154] The archival files of records from S.B. 1678, S.B. 1929, and S.B. 23 that were submitted to the California State Archives are on file with the author, and are available at the California State Archives.

Cultural attitudes about prison rape have shifted since the early 1980s, largely as a result of "a social movement that regards prison rape *as* rape."[155] The anti-prison rape movement lacks the large grassroots support seen with 1970s rape reform. While the narrative that endorses rape as a legitimate form of punishment has given way to recognition that no one deserves to be raped, regardless of what crime he or she has committed, this activism is limited to a small but "diverse coalition of social action groups."[156] The movement still battles the vestiges of our former collective consciousness; for example, when reviled figures like Kenneth Lay or Bernie Madoff go to prison, the idea that they may be violated is celebrated.[157] However, the concerted efforts of a few social justice organizations have made vast inroads into shifting the American attitude toward prison rape.

The anti-prison rape movement is a story of a curious partnership between traditionally liberal and conservative activist groups. In 1980, prison rape survivor Russell Dan Smith founded one of the first and most influential organizations, Just Detention International (JDI), formerly Stop Prisoner Rape.[158] In its early years, JDI's headquarters included a beat up pickup with a camper-top parked on the streets of San Francisco and a barn on a ranch north of the city.[159] Volunteers were the lifeblood of the organization run by a series of survivor activists, including Stephen Donaldson and Tom Cahill. JDI submitted an amicus brief for *Farmer v. Brennan* and later spearheaded the PREA lobby.[160] Other early participants were Human Rights Watch, and researchers such as psychologists Cindy and David Struckman-Johnson.[161] The human rights organizations then

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[155] James E. Robertson, *Compassionate Conservatism and Prison Rape: The Prison Rape Elimination Act of 2003*, 30 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 1, 3 (2004) [hereinafter *Compassionate Conservatism*].

[156] *See id.* at 2 (discussing the non-governmental organizations who supported PREA).

[157] *See* David Feldman, *Bernie Madoff Gets Prison Dated in the Shower*, YOUTUBE (Mar. 13, 2009), http://www.youtube.com/watch?v=kjEUQoRnIHM&list=UUjoYII97bLFOsQyvcrCKesA&index=63.

[158] *Just Detention International: A Brief History*, JUST DETENTION INTERNATIONAL, http://www.justdetention.org/en/spr_history.aspx (last visited May 15, 2016). Initially, the organization was named People Organized to Stop the Rape of Imprisoned Persons. *Id.*

[159] *Id.*

[160] *SPR Files Brief in Farmer v. Brennan*, JUST DETENTION INTERNATIONAL, http://justdetention.org/spr-files-brief-in-farmer-v-brennan (Jan. 11, 1994); *The Prison Rape Elimination Act*, JUST DETENTION INTERNATIONAL, http://justdetention.org/what-we-do/federal-policy/the-prison-rape-elimination-act/ (last visited May 15, 2016) ("JDI was instrumental in securing passage of this landmark legislation").

[161] ALL TOO FAMILIAR, *supra* note 135; Cindy Struckman-Johnson et al., *Sexual Coercion Reported by Men and Women in Prison*, 33 J. SEX RES. 67 (1996).

joined forces with the evangelical and compassionate conservative movement to garner unanimous bipartisan support in Congress.[162] These forces were led by conservative politicos Michael Horowitz and Eli Lehrer, along with the "prominent evangelical" Charles Colson, who founded Prison Fellowship Ministries.[163] Lehrer rejected Human Rights Watch's recommendation to "expand[] prisoners' rights to sue corrections officials," and he urged conservatives to support PREA as a "sensible middle-ground solution" to "America's most ignored crime problem."[164] But long before Congress considered PREA, the Supreme Court recognized that prison rape could constitute a violation of the Eighth Amendment.

B. "Deliberate Indifference:" The Eighth Amendment Implications of Prison Rape

Twelve years after the California Legislature decided to treat victims of sexual assault differently based on whether or not the assault occurred in custody, the United States Supreme Court recognized that prison rape can constitute a violation of an inmate's Eighth Amendment right to be free from cruel and unusual punishment. Dee Farmer, a trans* person serving a sentence for credit card fraud, sued federal officials after another inmate beat and raped her in her cell in a federal penitentiary.[165] Before setting out a stringent Eighth Amendment test, the Court held that correctional institutions have a duty to "provide humane conditions of confinement," which includes assuring inmates' safety by protecting them from sexual assaults perpetrated by other inmates.[166] The Court reasoned that prison rape "serves no 'legitimate penological objectiv[e],'"[167] and that "evolving standards of decency"[168] dictate that it "is simply not 'part of the penalty that criminal offenders pay for their offenses against society.'"[169] Justice Blackmun declared that sexual assault in detention, where one is unable to escape, "'is the equivalent of torture, and is offensive to any modern standard of human dignity.'"[170]

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[162] *See, e.g.*, Jenness et al., *supra* note 117, at 11 (discussing how PREA was "[b]acked by diverse groups" including Prison Fellowship Ministries and the NAACP).

[163] Robertson, *Compassionate Conservatism*, *supra* note 155, at 4–5.

[164] Eli Lehrer, *No Joke*, NATIONAL REVIEW ONLINE, http://old.nationalreview.com/comment/comment-lehrer062002.asp (June 20, 2002, 9:35 AM).

[165] Farmer v. Brennan, 511 U.S. 825, 829–30 (1994).

[166] *Id.* at 832–33.

[167] *Id.* at 833 (quoting Hudson v. Palmer, 468 U.S. 517, 548 (1984) (Stevens, J., concurring in part and dissenting in part)).

[168] *Id.* (quoting Rhodes v. Chapman, 452 U.S. 337, 346 (1981)).

[169] *Id.* at 834 (quoting *Rhodes*, 452 U.S. at 347).

[170] *Id.* at 852 (Blackmun, J., concurring in judgment) (quoting United States v. Bailey, 444 U.S. 394, 423 (Blackmun, J., dissenting)).

1. The Farmer Standard to Establish an Eighth Amendment Claim for Prison Rape

Farmer does two significant things: first, it sets the standard that inmates must meet to establish an Eighth Amendment claim, and second, it requires prison officials to take action against "substantial risk[s]" to inmates under their care.[171] The Court started by declaring that "[a] prison official's 'deliberate indifference' to a substantial risk of serious harm to an inmate violates the Eighth Amendment."[172] The Court then set out to clarify the test for deliberate indifference.[173] Farmer argued that the Court ought to adopt the objective recklessness standard used in the civil law context, meaning that prison officials are liable if they know of the risk *or* if the risk is so obvious that they should realize it, whether they actually did or not.[174] Instead, the Court embraced the subjective criminal law standard for recklessness: prison officials "must 'consciously disregar[d]' a substantial risk of serious harm."[175] That is, they are not liable for a sexual assault that occurs on their watch unless they were aware of the risk. The Court adopted the subjective standard for prison officials' state of mind because the Eighth Amendment prohibits cruel and unusual *punishments*, rather than conditions.[176] However, this risk is not specific to a threat posed to or by a particular inmate—it applies to *all* prisoners—and the burden is on prison

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[171] *Id.* at 828, 832, 844.

[172] *Id.* at 828. Although *Farmer* was the first Supreme Court case to consider an Eighth Amendment claim for sexual assault, this rule came directly from earlier prison conditions cases. *See id.* at 834 (citing Helling v. McKinney, 509 U.S. 25, 34–35 (1993); Wilson v. Seiter, 501 U.S. 294, 302–03 (1991); Estelle v. Gamble, 429 U.S. 97, 106 (1976); *Rhodes*, 452 U.S. at 347.

[173] Farmer v. Brennan, 511 U.S. 825, 828, 834 (1994). Prior cases held that deliberate indifference entailed something more than mere negligence, but less than a purposeful intent to cause harm or knowledge that harm would occur. *Id.* at 835.

[174] *Id.* at 836–37. In a footnote, the Court references Farmer's brief, which "suggest[s] that a prison official is deliberately indifferent if he 'knew facts which rendered an unreasonable risk obvious; under such circumstances, the defendant should have known of the risk and will be charged with such knowledge as a matter of law'." *Id.* at 837 n.5.

[175] *Id.* at 837–40 (quoting Model Penal Code § 2.02(2)(c)).

> We reject petitioner's invitation to adopt an objective test for deliberate indifference. We hold instead that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.

Id. at 837.

[176] *Id.* at 838–39.

officials to show that they were not aware of an obvious risk.[177]

2. Subjective Knowledge and Other Barriers to Civil Litigation

The subjective recklessness test for deliberate indifference has proven difficult to meet, since a prisoner faces the task of proving the officials' state of mind. As with all such questions, unless the prisoner has evidence of statements that indicate knowledge, he or she must rely on circumstantial evidence.[178] Despite *Farmer*'*s* sweeping language that rape is "not part of the punishment," it created a high burden that few victims can surpass.[179]

Farmer's subjective knowledge requirement also has the potential to foster a perverse incentive for corrections officials to turn a blind eye to prison rape so that they cannot be held liable.[180] Likewise, for prisoners, it creates a tension between alerting officials of the risk in order to establish evidence, and risking retaliation for reporting.[181] Katherine Robb argues that if officials "believe inmates are not entitled to protection or protection is impossible," then the subjective knowledge standard is impossible to meet.[182] Regardless, it is clear that in assessing subjective knowledge of risk, courts usually look to the "attributes of the alleged aggressor" rather than the victim, when the victim's attributes are a more salient factor.[183] As

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[177] *Id.* at 842–44.

[178] *See, e.g.*, Katherine Robb, *What We Don't Know Might Hurt Us: Subjective Knowledge and the Eighth Amendment's Deliberate Indifference Standard for Sexual Abuse in Prisons*, 65 N.Y.U. ANN. SURV. AM. L. 705, 708 (2010).

[179] Corlew, *supra* note 132, at 175 ("So while the Supreme Court stepped forward and condemned the allowance of prison rape as unconstitutional, litigants have found it difficult to meet Farmer's 'deliberate indifference' standard."). *See generally* Jerita L. DeBraux, *Prison Rape: Have We Done Enough? A Deep Look into the Adequacy of the Prison Rape Elimination Act*, 50 HOW. L.J. 203 (2006) (stating that "the extremely high burden of culpability required to prove such a claim made the judicial remedy insufficient to stop the problem").

[180] Bennett Capers, *Real Rape Too*, 99 CAL. L. REV. 1259, 1270–71 (2011) ("This legal standard creates an incentive for correctional staff to remain officially unaware of inmate sexual victimization.").

[181] *See* James E. Robertson, *A Clean Heart and an Empty Head: The Supreme Court and Sexual Terrorism in Prison*, 81 N.C. L. REV. 433, 450 (2003) ("As a precondition for constitutional protection from rape, the [Seventh Circuit] court required what many potential victims of rape would find too dangerous—a willingness to rat.") (citing McGill v. Duckworth, 944 F.2d 344, 349 (7th Cir. 1991)).

[182] Robb, *supra* note 178, at 708. For further explanation of this assertion, *see id.* at 715–17 (using a hypothetical to illustrate what the author describes as the conflation of two separate questions: was the prisoner "entitled to protection," and did he or she consent?).

[183] *Id.* at 708–09 (citing, *e.g.*, Riccardo v. Rausch, 375 F.3d 521 (7th Cir. 2004); Durrell v. Cook, 71 Fed. Appx. 718 (9th Cir. 2003); Billman v. Ind. Dep't of Corrs., 56 F.3d 785 (7th Cir. 1995); Brown v. Scott, 329 F. Supp. 2d 905 (E.D. Mich. 2004)). *See also* Christopher Hensley et al., *Examining the Characteristics of Male Sexual Assault Targets*

Robb notes, "without attention to traits proven through research to be good risk indicators, courts' decisions on reasonableness are virtually impossible to predict, which only makes guards' ability to make reasonable decisions more difficult."[184] Some guards even conflate homosexuality with perpetual consent,[185] a mentality similar to the historical, antiquated notions that marriage is a contract of continuous consent[186] and that an unchaste woman is more likely to have consented.

Coupled with other barriers, the subjective knowledge test under *Farmer* makes civil claims an ineffective remedy for many victims of prison rape. These other barriers include the Prison Litigation Reform Act (PLRA), qualified immunity for government officials, and the higher pleading standard set by *Ashcroft v. Iqbal*.[187] Prisoners may bring section

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in a Southern Maximum-Security Prison, 20 J. INTERPERSONAL VIOLENCE 667, 672 (2005); NAT'L INST. OF CORR., ANN. REP. TO CONG.: PRISON RAPE ELIMINATION ACT (PREA) PUBLIC LAW 108-79, Appendix A: Rape and Coercive Sex in American Prisons: Interim Findings and Interpretation on Preliminary Research 27, 31 (2004); NAT'L PRISON RAPE ELIMINATION COMM'N, NATIONAL PRISON RAPE ELIMINATION COMMISSION REPORT 70-74 (2009) (regarding vulnerability).

[184] Robb, *supra* note 178, at 725. *See also id.* at 731–33 (describing how the Ninth Circuit misapplied *Farmer* in Harvey v. California, 82 Fed. Appx. 544 (9th Cir. 2003) in requiring that the plaintiff show that he was at risk of being raped by his particular assailant, when the Supreme Court clearly held that the question was about general safety rather than safety with regard to a specific inmate).

[185] Robb, *supra* note 178, at 730–31.

> Prison rape may be improperly viewed as consensual sex because some guards believe that a homosexual man would never refuse to have sex with another man; thus, a homosexual inmate can never actually be raped. Peter Nacci and Thomas Kane, whose research focuses on sexual conduct in prisons, found that officers equated homosexuality and bisexuality with voluntariness. In a three-month study of the Philadelphia prison system, Alan Davis found that "homosexual liaisons" were often deemed to occur after threats of or actual gang rape and that prison officials simply considered such activities consensual.

Id. at 730 (citing Peter L. Nacci & Thomas R. Kane, *Sex and Sexual Aggression in Federal Prisons: Inmate Involvement and Employee Impact*, 8 FED. PROBATION 46, 48 (1984); Alan J. Davis, *Sexual Assaults in the Philadelphia Prison System*, *in* THE SEXUAL SCENE (John H. Gagnon & William Simon eds., 1970)).

[186] "At common law, husbands were exempt from prosecution for raping their wives. Over the past quarter century, this law has been modified somewhat, but not entirely. A majority of states still retain some form of the common law regime: They criminalize a narrower range of offenses if committed within marriage, subject the marital rape they do recognize to less serious sanctions, and/or create special procedural hurdles for marital rape prosecutions." Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373, 1375 (2000). In California, the marital rape exemption was repealed in 1979. CAL. PENAL CODE § 262 (West) (1979 ch. 994).

[187] 556 U.S. 662 (2009).

1983[188] constitutional claims before a federal court, and may bring *Bivens* claims against individual federal officials.[189] However, the Eleventh Amendment provides states with immunity from financial liability, and individual officials often enjoy immunity as well.[190] While injunctive relief may still be available, Congress severely curtailed this remedy with the passage of the PLRA in 1995.[191] Designed to curtail frivolous suits by prisoners that were clogging the federal courts, the PLRA imposed many limits on litigation. The change that is most relevant to prison rape allegations is the requirement that prisoners first exhaust administrative remedies, with an administration that is "often unresponsive."[192] In fact, the limited protections provided and efficacy of administrative procedures can discourage reporting.[193] Thus, with the barriers to civil claims so high, the criminal justice system is a victim's best or only recourse.[194]

3. The Affirmative Duty to Prevent Prison Rape

Farmer'*s* second significant effect is its "clear message" that prison officials have an "affirmative duty under the Constitution to prevent inmate assault."[195] In order to avoid liability, officials must take "reasonable measures to abate" sexual violence that poses a "substantial risk of serious harm."[196] The Court does not require that the officials avert an assault, so

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[188] *See* 42 U.S.C. § 1983 (2016).

[189] *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1999).

[190] For a discussion of the nuances of *Bivens* liability in the prison rape context, *see* David K. Ries, *Duty-to-Protect Claims by Inmates After the Prison Rape Elimination Act*, 13 J.L. & POL'Y 915, 922–27 (2005).

[191] *See, e.g.*, *id.* at 922, 934-38; Kim Shayo Buchanan, *Impunity: Sexual Abuse in Women's Prisons*, 42 HARV. C.R.-C.L. L. REV. 45, 48 (2007) (asserting that "a network of prison law rules—the Prison Litigation Reform Act of 1995 ('PLRA'), governmental immunities, and constitutional deference—work together to confer near-complete immunity against prisoners' claims"); David M. Adlerstein, *In Need of Correction: The "Iron Triangle" of the Prison Litigation Reform Act*, 101 COLUM. L. REV. 1681, 1683, 1689–91; James E. Robertson, *The Prison Litigation Reform Act as Sex Legislation: (Imagining) a Punk's Perspective of the Act*, 24 FED. SENT'G REP. 276, 276 (2012); Anthony C. Thompson, *What Happens Behind Locked Doors: The Difficulty of Addressing and Eliminating Rape in Prison*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 119, 132 (2009); Buchanan, *Our Prisons, Ourselves*, *supra* note 21, at 6.

[192] Robertson, *Compassionate Conservatism*, *supra* note 155, at 16; 42 U.S.C. § 1997e (2013).

[193] *See, e.g.*, Thompson, *supra* note 191, at 131.

[194] *Id.* at 132.

[195] Farmer v. Brennan, 511 U.S. 825, 858 (1994) (Blackmun, J., concurring in judgment).

[196] *Id.* at 847.

long as they made a reasonable effort in light of the risk.[197] While some may be disappointed that officials can avoid liability, and wish for a strict liability standard, the upside to the reasonable measures clause is that it imposes an affirmative duty to act. This affirmative duty has important implications for the jailhouse exclusion, whose message and effects contradict the object and purpose of any action California takes to fulfill its duty to prevent prison rape. Nine years later, Congress responded to the Court's call for preventative action with PREA, which raised the bar to an objective standard.[198] California subsequently passed its own legislation—the Sexual Abuse in Detention Elimination Act (SADEA)—to implement its obligations under *Farmer* and PREA.

C. Zero-Tolerance: Prison Rape Elimination Legislation

The unanimous passage of PREA in 2003 was a watershed moment in the legislative recognition of the existence, severity, and implications of prison rape. Regardless of whether PREA achieves its goal, it shifted the policy agenda from indifference to prison rape prevention. One of its top purposes is to change corrections attitudes and public perspectives on prison rape. By heeding *Farmer*'s warning about the moral and financial[199] consequences of continued inaction, PREA and ensuing state legislation did what the Supreme Court could not: it specified what "reasonable measures" institutions must take to prevent prison rape.[200] California followed Congress' direction in 2005 with SADEA.[201] The message the jailhouse exclusion sends, as well as any chilling effect it has on reporting and prosecution, is inconsistent with the purpose of prison-rape-elimination legislation. This section will provide a brief overview of the context and content of this legislation needed for Part IV's discussion of the effects of the jailhouse exclusion.[202]

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[197] *Id.* at 844.

[198] The objective standard that PREA sets, *see infra* note 220 and accompanying text, imposes a statutory standard rather than changing the constitutional standard. What this means for litigants trying to establish subjective knowledge remains unclear. However, it is likely instructive regarding the reasonable measures necessary to avoid liability.

[199] "[W]hen prisons or prison officials are sued and found liable for failing to protect the Eighth Amendment rights of prisoners, the judgment can be in excess of one million dollars and taxpayers end up paying that bill." Heather L. McCray, *Protecting Human Rights in California's Detention Facilities: The Sexual Abuse in Detention Elimination Act of 2005*, 37 MCGEORGE L. REV. 303, 311–12 (2006) (citing Letter from Barry Broad, Shane Gusman & Liberty Sanchez, Cal. Pub. Defender's Assoc., to Senate Pub. Safety Comm., Cal. State Senate (June 14, 2005) (on file with the McGeorge Law Review)).

[200] *See Farmer*, 511 U.S. at 847.

[201] Correctional Institutions—Sexual Abuse in Detention Elimination Act, 2005 Cal. Legis. Serv. Ch. 303 (A.B. 550) (West).

[202] Other commentators have provided detailed analysis of PREA and California's

PREA announces a "zero-tolerance" policy for sexual assault in detention in the United States.[203] It aims to make the "prevention of prison rape a top priority"[204] in every correctional institution through a cooperative federalism model in which the federal government and states are both responsible for implementing it. Unfortunately, PREA has not yet made an impact on the nationwide prevalence of prison rape.[205] However, there are some individual institutions that have made considerable improvements.[206]

Many correction officers and prisoners do not consider sex in exchange for protection or goods as assault,[207] but as one commentator notes, "[i]n prison, consensual, bartered, and coerced sex are not sharply differentiated."[208] Accordingly, PREA defines prison rape very broadly, including "the carnal knowledge, oral sodomy, sexual assault with an object, or sexual fondling of a person" that is

(a) accomplished by force or "against that person's will," or

(b) "where the victim is incapable of giving consent" because of age or incapacity, or

(c) that is "achieved through the *exploitation of the fear or threat* of physical violence or bodily injury."[209]

PREA's definition of rape is not gender-specific,[210] and applies to inmate-on-inmate and staff-on-inmate abuse alike.[211] The BJS surveys also inquire about consensual encounters, "[r]ecognizing the complexity of sexual behavior in correctional settings."[212] But the BJS does not consider

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SADEA, which is outside the scope of this Article. *See, e.g.*, Corlew, *supra* note 132, at 157 (PREA); Valerie Jenness & Michael Smyth, *The Passage and Implementation of the Prison Rape Elimination Act: Legal Endogeneity and the Uncertain Road from Symbolic Law to Instrumental Effects*, 22 STAN. L. & POL'Y REV. 489 (2011) (PREA); McCray, *supra* note 199 (SADEA); Brenda V. Smith, *Rethinking Prison Sex: Self-Expression and Safety*, 15 COLUM. J. GENDER & L. 185 (2006) (PREA); Sarah K. Wake, *Not Part of the Penalty: The Prison Rape Elimination Act of 2003*, 32 J. LEGIS. 220 (2006) (PREA).

[203] 42 U.S.C. § 15602 (2003).

[204] *Id.*

[205] SINGER, *supra* note 23, at 39.

[206] *Id.* at 36.

[207] Smith, *supra* note 202, at 192.

[208] Kim Shayo Buchanan, *Engendering Rape*, 59 UCLA L. REV. 1630, 1648 (2012).

[209] 42 U.S.C. § 15609(9) (2015) (rape) (emphasis added). *See also id.* § 15609, subds. (1) (carnal knowledge), (5) (oral sodomy), (10) (sexual assault with an object), (11) (sexual fondling).

[210] *Id.* § 15609; Corlew, *supra* note 132, at 158, 165.

[211] H.R. REP. 108–219, 13 ("All sections of the bill are intended to address the problem of inmates who are raped by fellow inmates as well as the equally serious problem of inmates who are raped by correctional staff and contractors."); Corlew, *supra* note 132, at 165.

[212] Smith, *supra* note 202, at 192.

"[c]onsensual sex among inmates . . . [to be] sexual abuse." [213] However, the BJS does consider "staff-inmate sexual activity as 'victimization' even if the inmate describes the sex as 'willing'"[214] because sexual contact between staff and inmates is "'legally nonconsensual.'"[215] Since the passage of the jailhouse exclusion in 1981, Congress and all fifty states have criminalized staff-on-inmate sexual contact.[216]

PREA did not establish any new criminal liability or civil causes of action for inmates who are sexually abused in prison,[217] but PREA may have made it easier for civil litigants to meet the *Farmer* standard. First, Congress acknowledged the lack of reliable statistics on prison rape, and then set out to remedy the dearth of adequate data.[218] The statistics collected

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[213] Buchanan, *Engendering Rape*, *supra* note 208, at 1648.

[214] *Id.* at 1649 (citing Allen J. Beck & Paige M. Harrison, BUREAU OF JUSTICE STATISTICS, NCJ 231169, *Sexual Victimization in Prisons and Jails Reported by Inmates, 2008-09*, at 7 (2010)).

[215] *Id.* at 1632 n.2.

[216] *See, e.g.*, NIC/WCL Project on Addressing Prison Rape, *Fifty-State Survey of Criminal Laws Prohibiting Sexual Abuse of Individuals in Custody* (2009), http://www.prearesourcecenter.org/sites/default/files/library/50statesurveyofssmlawsfinal2009update.pdf; Jenness & Smyth, *supra* note 202, at 510 ("Although staff-on-inmate sexual misconduct was neither illegal nor criminal in most jurisdictions until the latter decades of the twentieth century, by 1996 when the NIC special report was released, the U.S. Congress and more than half of U.S. state legislatures had passed laws defining sexual misconduct by correctional staff as a criminal offense."); NAT'L INST. CORR., *Sexual Misconduct in Prisons: Law, Agency Response, and Prevention* 1 (1996), http://www.prearesourcecenter.org/sites/default/files/library/127-sexualmisconductinprisons1996.pdf (indicating that much of the legislative activity criminalizing staff sexual misconduct occurred since 1991).

[217] *See, e.g.*, Jenness & Smyth, *supra* note 202, at 491.

[218] 42 U.S.C. § 15601 (2015) ("Insufficient research has been conducted and insufficient data reported on the extent of prison rape."). *See also* Buchanan, *Engendering Rape*, *supra* note 208, at 1645 ("Until about 2007, empirical evidence of the prevalence and dynamics of prison rape was relatively scanty, and methodologically unreliable."); Gerald G. Gaes & Andrew L. Goldberg, NAT'L INST. OF JUSTICE, *Prison Rape: A Critical Review of the Literature* (2004); Gerald G. Gaes, *Report to the Review Panel on Prison Rape on the Bureau of Justice Statistics Study: Sexual Victimization in State and Federal Prisons Reported by Inmates, 2007*, at 2 (2008).

> In a 2004 meta-analysis of the extant prison sex literature, Gerald Gaes, a senior research scientist with the Bureau of Justice Statistics (BJS), characterized its limitations as follows:
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> > [They] included vague or unclear question wording; lack of detail in the various types of potential sexual victimization; extremely small samples; very low response rates that raised significant questions about bias in the responses; survey methods that are not ideal to elicit responses on sensitive subjects; and long time horizons that produce errors in recall.

by BJS and other studies funded by PREA make the prevalence of prison rape more obvious.[219] This makes it harder for an official to claim ignorance, and easier for a court to presume awareness. Second, its national standards enumerate the reasonable measures officials must take to respond to the substantial risk of prison rape—a substantial risk that is now reliably documented. Third, PREA went farther than the Supreme Court: it set an objective standard for Eighth Amendment violations. Congress noted that

> [t]he high incidence of sexual assault within prisons involves actual and potential violations of the United States Constitution. In Farmer v. Brennan, 511 U.S. 825 (1994), the Supreme Court ruled that deliberate indifference to the substantial risk of sexual assault violates prisoners' rights under the Cruel and Unusual Punishments Clause of the Eighth Amendment. . . . *States that do not take basic steps to abate prison rape by adopting standards that do not generate significant additional expenditures demonstrate such indifference*.[220]

California's SADEA implements PREA in California.[221] It mandates inmate education on the issue, access to resources from community organizations, prevention policies, data collection, and provides guidelines for after-assault responses, including treatment and investigation.[222]

T.J. Parsell testified before the National Prison Rape Elimination Commission established by PREA about his experiences as a survivor of prison rape.[223] He told his story, spoke of the tremendous physical and emotional impact it has had on his life, and asked the commission to "make incarceration safe for all prisoners and create an environment where if an inmate is raped, he or she can seek justice without repercussions."[224] He

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> Moreover, while many earlier studies had attempted to estimate the incidence or prevalence of prison sexual abuse, only one had used a randomly selected probability sample that could represent an entire jurisdiction.

Buchanan, *Engendering Rape*, *supra* note 208, at 1645.

[219] *See* 42 U.S.C. § 15603 (2015) (directing the BJS to conduct an annual "comprehensive statistical review and analysis of the incidence and effects of prison rape" using a random sample representative of all federal, state, and municipal institutions).

[220] *Id.* § 15601, subd. (13) (emphasis added). *See also* Corlew, *supra* note 132, at 176 ("Whereas the Supreme Court used a subjective test for determining whether prison officials have demonstrated deliberate indifference, PREA announces an objective test: state institutions demonstrate deliberate indifference by not complying with PREA.").

[221] McCray, *supra* note 199, at 308 (describing SADEA as "California's attempt to comply with the requirements of PREA and address the problem of sexual abuse within the California corrections facilities").

[222] *Id.* at 308–10.

[223] *At Risk*, *supra* note 113 (testimony of Timothy J. Parsell, providing his personal account as a survivor of prison sexual assaults); PARSELL, *supra* note 6, at 318; Marshall, *supra* note 3.

[224] *At Risk*, *supra* note 113.

also called attention to why it is so callous that perpetrators of prison rape enjoy considerable impunity:

> Sexual violence in prison exists not only in direct victimization, but in the daily knowledge that it's happening. It approaches legitimacy in the sense that it's tolerated. Those who perpetrate these acts of violence often receive little or no punishment. To that extent alone, corrections officials and prosecutorial authorities render these acts acceptable. At the same time, we can't expect a rape victim to report it if he anticipates a lack of responsiveness, a lack of sensitivity or basic protection by those who are charged with his care.[225]

PREA tasked the Commission with an in-depth study of prison rape. The Commission's Report made numerous findings, including that prison rape is not inevitable, that some inmates are more vulnerable than others, and that the system needs better reporting procedures.[226]

IV. REFLECTIONS ON THE IMPACT OF THE JAILHOUSE EXCLUSION

Preventing prison rape is a vast and complicated issue. One goal of this Article is to raise awareness about the issues surrounding prison rape, using the jailhouse exclusion as an example of how survivors face barriers to accountability that are reminiscent of the barriers that all rape victims faced fifty years ago. It is time to reconsider the jailhouse exclusion because

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[225] *Id.*

[226] This report also made a recommendation for national standards. Professors Jenness and Smyth summarized the report's nine core findings as follows:

> (1) protecting prisoners from sexual violence remains a challenging task; (2) *carceral sexual violence is not inevitable* and correctional leadership can create a culture that promotes safety rather than abuse; (3) *some prisoners are more vulnerable to victimization than others* and, relatedly, corrections could—and must—do more to identify and protect vulnerable populations; (4) understanding why sexual abuse in carceral settings occurs requires a considerable degree of internal monitoring and external oversight that is largely nonexistent in corrections today; (5) *reporting procedures must be improved*; (6) currently, correctional facilities fail to ensure access to medical and mental health care for victims that would minimize the trauma of sexual abuse; (7) juveniles in confinement are much more likely than incarcerated adults to be sexually abused, particularly when confined with adults; (8) individuals under correctional supervision in the community, who outnumber prisoners by more than two to one, are at risk of sexual abuse; and (9) a large and growing number of detained immigrants are at risk of sexual abuse, thus their heightened vulnerability and unusual circumstances require special interventions.

Jenness & Smyth, *supra* note 202, at 520 (emphasis added). *See also* NAT'L PRISON RAPE ELIMINATION COMM'N, NATIONAL PRISON RAPE ELIMINATION COMMISSION REPORT 3–24 (2009) (providing a full summary of the Commission's findings).

of its message: While other rape victims are not questioned about their past sexual history because it has no bearing on consent, it is OK to put a victim who is also an inmate on trial.

Rape shield statutes do not directly prevent rape, wherever it occurs. Some commentators take issue with rape shield statutes as a whole.[227] However, as long as we are employing rape shield statutes to protect all other victims we should not leave out victims who are incarcerated.

The California Legislature should repeal or modify the jailhouse exclusion for two main reasons: first, it is incompatible with the general rationales behind the rape shield statute and prison rape elimination policies, and second, it is unnecessary and poorly constructed.

A. The Jailhouse Exclusion Is Incompatible with Modern Policy Developments

The jailhouse exclusion is incompatible with the current federal and state policy agenda of eliminating prison rape. While the jailhouse exclusion itself is not an Eighth Amendment violation,[228] its disparate

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[227] *See, e.g.*, Thomas A. Mitchell, *We're Only Fooling Ourselves: A Critical Analysis of the Biases Inherent in the Legal System's Treatment of Rape Victims (or Learning from Our Mistakes: Abandoning A Fundamentally Prejudiced System & Moving Toward A Rational Jurisprudence of Rape)*, 18 BUFF. J. GENDER, L. & SOC. POL'Y 73, 77 (2010) (arguing that rape shield statutes do more harm than good because they reinforce the historical concept that rape is an "affront to chastity" rather than an "affront to autonomy"); Capers, *supra* note 180, at 1307 n.310 (arguing that banning discussion of past sexual history at a rape trial "virginizes" the victim, again reinforcing a rape script that is dependent on a chaste victim). However, the whole point is that past sexual history simply is not relevant, and only relevant evidence is admissible in court. We still have a long way to go in preventing, prosecuting, and changing attitudes about sexual assault. The history of rape prosecution shows us that it was necessary to formally declare that a person's chastity is not relevant to consent, as this fact was not recognized. It would be backtracking to take rape shield statutes away, and some judges still might not understand that past sexual history has nothing to do with consent. Whether or not rape shield statutes continue to legitimize beliefs about chaste rape victims is beyond the scope of this Article, along with the fact that California law defines rape as vaginal intercourse between a male perpetrator and female victim, criminalizing anal rape under an antiquated and otherwise-unconstitutional sodomy provision. *See* CAL. PENAL CODE § 261 (West) (defining rape first as "an act of sexual intercourse"); California Jury Instruction-CRIM 10.00 (defining the first element of rape as "[a] male and female engaged in an act of sexual intercourse"); Judicial Council of California Criminal Jury Instruction 1000 (defining the first element of rape as "[t]he defendant had sexual intercourse with a woman," and sexual intercourse as "any penetration, no matter how slight, of the vagina or genitalia by the penis"); CAL. PENAL CODE § 286 (West) (sodomy).

[228] The jailhouse exclusion does not rise to an Eighth Amendment violation because of *Farmer*'s subjective standard. The California Legislature did not "'consciously disregar[d]' a substantial risk of serious harm" to inmates when it passed the jailhouse exclusion—to

treatment of victims of prison rape and the added barrier to holding perpetrators accountable conflicts with California's affirmative duty to prevent prison rape.[229] Once one recognizes that inmates can be rape victims, the jailhouse exclusion contradicts the purpose of the rape shield statute itself. Specifically, the jailhouse exclusion causes harm in the symbolic message it sends and because of its possible present or future chilling effect on reporting and prosecution. Prosecution is a vital strategy to combat impunity for prison rape. There are enough barriers to accountability for sexual assault, *especially* when the assault occurs in prison, without an unnecessary and poorly constructed exemption from California's rape shield statute that sends the message that inmates are not legitimate victims.

1. The Jailhouse Exclusion's Implicit Message

One of the most troubling impacts of the jailhouse exclusion is its unintentional message that while society cares about eliminating rape, it does not care about an inmate's right to serve his or her sentence free from rape. The message that prison rape victims are not as worthy of the law's protection implies that these victims should be treated differently, reinforces gendered attitudes about rape, and perpetuates a fear of false reporting. Excluding prison rape survivors from the protection of California's rape shield statute is one example of how they face barriers that are reminiscent of the barriers that all survivors faced fifty years ago.

The jailhouse exclusion locks inmates into a pre-rape-shield statute world, symbolically suggesting that society sanctions sexual assaults occurring in jails and prisons. Carving prison rape victims out as less worthy of protection is an implicit acceptance of prison rape, and feeds into what Bennett Capers describes as the "invisible" and "lawless zones" of prison.[230] Even if one looks at the jailhouse exclusion narrowly as the denial of a procedural protection, at a minimum, this deems prison rape less

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the contrary, it did not seem to be conscious of a risk of harm at all. *See Farmer*, 511 U.S. 825, 837–40 (1994) (quoting Model Penal Code § 2.02(2)(c)).

> We reject petitioner's invitation to adopt an objective test for deliberate indifference. We hold instead that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.

Farmer, 511 U.S. at 837.

[229] *See id.* at 858 (Blackmun, J., concurring in judgment).

[230] Capers, *supra* note 180, at 1263. *See also* Buchanan, *Our Prisons, Ourselves*, *supra* note 21, at 6, 23–24 (discussing how the *Farmer* standard and the Prison Litigation Reform Act have administratively exempted correctional institutions from the rule of law).

worthy of redress than the sexual assault of other victims. It singles inmates out not only as less worthy of bodily autonomy, but also as less trustworthy. The only recorded explanation for the jailhouse exclusion is the ACLU's argument that inmates may falsely report rape to get out of being punished for having consensual sex, which is (still technically) a crime. The statute codified this distrust, stripping them of the same status as other victims.

a. The Disparate Impact on Gay, Lesbian, and Trans* Inmates

The jailhouse exclusion disproportionately impacts gay, lesbian, and trans* inmates, both literally and symbolically. Literally, because they are more vulnerable to sexual abuse and are not protected by the rape shield statute if they do report this abuse. Symbolically, because of its message about who is worthy of protection and thus who can be a "legitimate" victim. Until now, the rationale behind the jailhouse exclusion has been hidden in files in the California State Archives. One of the goals of this Article is to bring this story to light. Once one understands the rationale—that inmates caught having consensual sex would be motivated to fabricate a rape allegation because it is a crime—its message is even more troubling. The rationale promotes two troublesome ideas. First, it suggests that society cares more about enforcing the ban on consensual sex in prison than protecting these individuals from sexual abuse. Second, the rationale promotes the myth that non-heterosexual individuals cannot be raped by members of the same sex; this is the tired and offensive "[y]ou're gay[, y]ou must have liked it"[231] argument. It's analogous to the Hale instruction's reasoning about unchaste women: if you are not chaste or you are gay, it is okay, because you must have consented every time.

The jail and prison environment is complicated, and sexual encounters occur on a continuum from mutually consensual to violent assaults. Gay, lesbian, transgender, and non-gender conforming individuals are far more vulnerable to sexual abuse in detention than heterosexual inmates.[232] Since vulnerable individuals experience more sexual abuse, especially if other inmates know they have been victimized, their prior and subsequent sexual activity or reputation is *even less relevant* to consent than for non-incarcerated victims. Additionally, victims often enter into

[231] Buchanan, *Our Prisons, Ourselves*, *supra* note 21, at 32–36 ("Prison officials tend to assume that gay, bisexual, or transgender prisoners consent to sex with any and all men."); NO ESCAPE, *supra* note 134, at 152 ("Prison officials are particularly likely to assume consent in sexual acts involving a gay inmate.").

[232] Buchanan, *Our Prisons, Ourselves*, *supra* note 21, at 13 ("The victims of prison rape are usually targeted for being unmasculine: They tend to be gay, bisexual, transgendered, young, small, weak, or effeminate.) *See also id.* at 16 ("[C]riminologist Valerie Jenness . . . and her colleagues found that 67% of GBT inmates reported sexual victimization in prison, compared to 2% of straight men.").

protective partnerships to avoid violent assaults by multiple perpetrators. These relationships may be more or less coercive, and thus what may look like consensual sexual activity from the outside may in reality fall between consensual encounters and violent assaults.[233] Thus, through the jailhouse exclusion, the law treats an inmate's sexual history as *more relevant*, when in reality, while a victim's sexual history is *never* relevant, an inmate's may be even *less relevant* than that of other victims who are protected from being forced to reveal it.

The reasoning behind the jailhouse exclusion only applies to inmates who have consensual sex in prison. It does not apply to prisoners who only have sex with those they force or coerce. And it does not apply to those prisoners who choose to abstain from having sex with a partner while incarcerated. In fact, the rationale only applies to inmates who are (1) *caught* having consensual sex with a partner, (2) caught with a partner *who is willing to falsely accuse him or her of assault*, and (3) who have previously had consensual sex with a different partner while in custody. The reasoning perpetuates the fear of false reporting that the anti-rape movement was battling. Despite our society's history of paranoia about false rape accusations, false reporting of rape outside of the prison context occurs at similar rates to false reporting of any crime.[234] Since the consequences of reporting rape are even higher for inmates—the adage that snitches get stitches, or even killed—it is unlikely that there will ever be a rash of false reporting of prison rape.[235]

b. The Jailhouse Exclusion's Message is Analogous to the Hale Instruction

The jailhouse exclusion sends a message that is analogous to the Hale instruction: do not believe the victim—or heavily scrutinize the victim's story before convicting. Both suggest that a victim is subject to incentives to manufacture a story and that we should be more concerned about those perverse incentives than the assault itself. Under the Hale instruction, these perverse incentives came from society's norms about

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[233] *See supra* notes 129–131 and accompanying text.

[234] *See* David Lisak et al., *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16 VIOLENCE AGAINST WOMEN 1318, 1330 (2010) (reporting rates between 2 to 10 percent and distinguishing between "false reports" and "unfounded" cases, unlike the FBI's 1996 Crime Index Offenses report). *But see* FBI, CRIME INDEX OFFENSES REPORTED II, 24 (1996) ("Eight percent of forcible rape complaints in 1996 were 'unfounded,' while the average for all Index crimes was 2 percent.").

[235] Robb, *supra* note 178, at 753 (stating that, with regard to lawsuits against institutions for Eighth Amendment violations for prison rape, "[a]dmitting that one was raped makes one appear weak and vulnerable, and a prisoner does not want to be perceived as such; therefore, it is unlikely that prisoners will begin to file fabricated or frivolous suits").

chastity, and under the jailhouse exclusion they stem from the ban on consensual sex in prison.

As explained in Part I, the Hale jury instruction was given in all rape cases until 1975 and its logic is as follows: a woman who has consented to sex before is more likely to consent again. It cautioned juries about the difficulty of defending an accusation of rape, which it said is easily made. The inference of consent from a victim's past sexual behavior is the Hale instruction's foundation. The jailhouse exclusion actively perpetuates this logic for prison rape victims by returning them to a pre-rape-shield statute world. In other words, the jailhouse exclusion makes the word of someone with a criminal conviction equivalent to the word of an unchaste, seventeenth-century woman whose honesty must be closely examined. The idea that an inmate's accusation of sexual assault is less credible than a non-inmate's also inserts the bias against prisoner testimony, discussed in Part IV.B.2, into the Evidence Code.

The message to take a prison rape victim's word with skepticism is not limited to the courtroom; it reflects and reinforces the gender myths that surround sexual assault both inside and outside of prison. These come from the archetypical conception of rape as a crime committed by a man against a woman.[236] The traditional concept of rape set up a "rape script" against which we still judge all sexual conduct.[237] While the rape reform movement challenged the law's gendered definition of rape with significant success (though the California jury instructions still define rape as sexual intercourse between a man and a woman[238]), how these gender-neutral laws are applied is "still very much gendered."[239]

We associate rape with men assaulting women; this view is a problem because it leaves out victims of same-sex assaults, and it reinforces the notion that "real men" cannot be raped.[240] If straight, masculine men do not

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[236] In acknowledging that women and men alike can be victims of rape, it is important to note that women experience rape at higher rates than men. CENTERS FOR DISEASE CONTROL AND PREVENTION, *National Intimate Partner and Sexual Violence Survey (NISVS), National Data on Intimate Partner Violence, Sexual Violence, and Stalking* (2014), http://www.cdc.gov/violenceprevention/pdf/nisvs-fact-sheet-2014.pdf (illustrating disproportionate effect on women in noting that "[n]early 1 in 5 women (19.3%) and 1 in 59 men (1.7%) have been raped in their lifetime").

[237] Capers, *supra* note 180, at 1288–89.

[238] California Jury Instruction-CRIM 10.00 (defining the first element of rape as "[a] male and female engaged in an act of sexual intercourse"); Judicial Council Of California Criminal Jury Instruction 1000 (defining the first element of rape as "[t]he defendant had sexual intercourse with a woman," and sexual intercourse as "any penetration, no matter how slight, of the vagina or genitalia by the penis").

[239] Capers, *supra* note 180, at 1265.

[240] *Id.* at 1288–96, 1306 (arguing that because male rape does not fit the traditional "rape script" it is largely silenced and ignored).

need to worry about rape, then society does not need to protect male victims through the rape shield statute unless we also care about non-heterosexual victims. The jailhouse exclusion was passed before the public recognized prison rape (though it has been known and discussed since the advent of prisons), and male rape outside of the prison context is still on the very edges of our social consciousness.[241]

Unlike the jailhouse exclusion itself, which only comes up in the context of a criminal prosecution, its message of skepticism—or more accurately, disbelief—of victims is actively in force inside prisons. Guards often decide whom to protect and whom not to protect on the basis of whether the inmate fought like "a man" or is or is not heterosexual.[242] When they receive reports of sexual assault, officials routinely find them "either 'unsubstantiated' (unproven) or 'unfounded' (false)."[243]

2. The Jailhouse Exclusion's Potential Chilling Effect

The jailhouse exclusion is in direct conflict with the purpose of the rape shield statute: the intention is for the statute to promote the reporting and prosecution of rape, yet the jailhouse exclusion may reduce reporting of prison rape.

As soon as one or two inmates learn about the possibility that their private sex lives could be exposed in court if a case goes forward, this information is likely to "spread like wildfire" throughout the inmate population.[244] This is bound to have a chilling effect on reporting, much like the prospect of being interrogated about your personal sex life did for all victims before rape shield laws were passed. The chilling effect that putting the victim on trial has on reporting as well as its negative influence on conviction rates is precisely what the rape shield statute was designed to curtail.

Reporting rates are low for all sexual assaults, and are even lower in the prison context. This is because the consequences of reporting are so high. Victims fear retaliation, including physical and/or further sexual assaults; harassment; the punishment of protective custody segregation; and they often view reporting their assault as futile.[245] Inmates who experience

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[241] *Id.* at 1265 (calling attention to male rape and critiquing how our ideas about rape are "gendered").

[242] Buchanan, *Our Prisons, Ourselves*, *supra* note 21, at 24–25.

[243] *Id.* at 27 (citing Allen J. Beck & Paige M. Harrison, *Sexual Violence Reported by Correctional Authorities, 2005*, at 3 (2006), http://bjs.ojp.usdoj.gov/content/pub/pdf/svrca05.pdf).

[244] Interview with Jeanne Woodford, Former Director of the California Department of Corrections and Rehabilitation (Dec. 12, 2012) (explaining that this would only have to happen a few times before it would be well known in the inmate population).

[245] *See* NO ESCAPE, *supra* note 134, at 131–39, 143 (describing the fear of retaliation

sexual abuse and who want their perpetrator held accountable face enough barriers as it is, without the burden of living in a pre-rape-shield world.

The jailhouse exclusion's possible chilling effect on the prosecution of prison rape is another important impact to consider. Since the rape shield statute does not apply to these cases, a prosecutor must rely on other provisions of the evidence code if the defense tries to introduce evidence of the victim's past sexual history. A judge should rule the evidence inadmissible because it is irrelevant and more prejudicial than probative,[246] but neither the prosecutor nor the victim can know the outcome of this before litigating the issue. Thus, a prosecutor must consider the effect the presentation of the victim's prior sexual history may have on the jury when deciding whether to bring the case forward.

The jailhouse exclusion's possible inhibitive effect on reporting and prosecution of prison rape conflicts with the policy agenda of eliminating prison rape. PREA established a Review Panel on Prison Rape to examine and compare the correctional facilities with the highest and lowest incidence of rape. The panel identified rarely referring sexual assault cases to a prosecutor or an "outside investigator" as one of the "unique characteristics" of institutions with a high prevalence of rape.[247] It also made strengthening prosecution a focus of its best practices recommendations, including setting up a hotline where inmates can confidentially report "threats and sexual victimization" directly to a

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for reporting, the discrepancy in disciplinary responses for perpetrators and the use of protective custody for victims, chronic underreporting, inadequate responses to reports, and the lack of prosecution). "Only a small minority of victims of rape or other sexual abuse in prison ever report it to the authorities. Indeed, many victims—cowed into silence by shame, embarrassment and fear—do not even tell their family or friends of the experience." *Id.* at 130–32. "Prisoners' natural reticence regarding rape is strongly reinforced by their fear of facing retaliation if they 'snitch.'" *Id.* at 131. Human Rights Watch described "cases in which the victimized inmate was not removed from the housing area in which he was victimized, even with the perpetrator remaining there. In other cases, victimized inmates are transferred to another housing area or prison, but still face retaliation." *Id.* at 132. *See also* ALL TOO FAMILIAR, *supra* note 135, at 97 (discussing retaliation and female inmates being placed in administrative segregation after reporting); SINGER, *supra* note 23, at 11–14 (discussing how reporting makes inmates a target for other violence and retaliation, and how inmates fear reporting violence and then later running into the perpetrator at another facility); Buchanan, *Impunity*, supra note 191, at 64–65 (describing the use of rape as retaliation for reporting prison guards); Corlew, *supra* note 132, at 161 ("Inmates who break the 'code of silence' by reporting an incident may be subjected to increased violence if corrections officials do not adequately protect them. Because victimized inmates fear such a result, many incidents go unreported.").

[246] *See* CAL. EVID. CODE §§ 210 and 352 (West 2016) (addressing relevance and the balancing test between probative and prejudicial value, respectively).

[247] REVIEW PANEL ON PRISON RAPE, DEP'T OF JUSTICE, REPORT ON RAPE IN JAILS IN THE U.S.: FINDINGS AND BEST PRACTICES 12, 14 (2008).

prosecutor or investigator.[248] Several scholars have also emphasized the need to use prosecution as a tool to combat prison rape, calling for "active prosecution" and even suggesting dedicated units in prosecutors' offices similar to domestic violence or gang units.[249]

Beyond possibly influencing an inmate's decision to report, or a prosecutor's decision to file charges, the jailhouse exclusion reinforces a bias against prisoner's testimony. This bias against their credibility is based solely on their status as an inmate. The reinforcement of this bias is harmful not only to cases of prison rape, but to other cases as well. Prosecutors often rely on testimony from inmates, whether for crimes committed in prison, or whether from a co-defendant who has pled guilty in a deal that involves testifying against someone else. The jailhouse exclusion writes into the Evidence Code distrust in a person's word simply because they have been incarcerated. This inflicts a symbolic (and potentially concrete) harm on inmates as well as the prosecution of crime.

One of the main counterarguments to repealing the jailhouse exclusion is that it is hard to tell if it is having a direct impact such that inmates are being made to testify about their past sexual history. It is difficult to measure the jailhouse exclusion's direct impact for several reasons. First, not very many prison rapes are prosecuted, let alone make it to trial.[250] But that could change, especially as PREA is implemented.

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[248] *Id.* The Panel recommended the following best practices regarding prosecution: referring any sexual assault for prosecution; adopting policies and procedures for prosecuting sexual assault; educating inmates on "what constitutes illegal conduct and the fact that it is a prosecutable crime"; creating a hotline for reporting; and developing a relationship between the administration and the local prosecutor. *Id.*

[249] Lauren Teichner, *Unusual Suspects: Recognizing and Responding to Female Staff Perpetrators of Sexual Misconduct in U.S. Prisons*, 14 MICH. J. GENDER & L. 259, 297 (2008) (calling for "active prosecution of all offenders"); Thompson, *supra* note 191, at 131–32 (noting that the "principal avenue for relief available to the victim has been the justice system" due to administrative grievance processes failing to address the issue); *id.* at 171–72 (calling for new, specialized units in prosecutorial offices akin to domestic violence units); Robb, *supra* note 178, at 753 ("The best deterrent to prison rape is to ensure that each incident is fully investigated and if appropriate, prosecuted to its fullest extent. Only then will we likely see an actual decrease in prison rape."). Human Rights Watch made the following recommendation to state and local prosecutors: "Strictly enforce state criminal laws prohibiting rape by investigating and prosecuting instances of prisoner-on-prisoner rape. Do not abdicate responsibility for prison abuses by allowing corrections authorities to handle them via internal disciplinary procedures." NO ESCAPE, supra note 134, at 18. One Ohio prisoner said, "As of this time I have almost 14 years in prison and have never heard of a prison rape case being prosecuted in court. . . . I'm quite sure if a man committed a rape in prison and got 5 or 10 years[']time, prison rape would decline." *Id.* at 154.

[250] NO ESCAPE, *supra* note 134, at 130–39 (detailing chronic underreporting); *id.* at 154–58 (discussing a general failure to prosecute).

Second, if a case does make it to trial, but is not appealed, or the past sexual history evidence is not discussed in the appeal (and a defendant is not likely to challenge the evidence being admitted), there will be no appellate record of litigation of this issue. The issue is only likely to come up on appeal if the judge rules the victim's past sexual history inadmissible on other grounds, as in *People v. Desantis*. However, a judge ruling that the victim's past sexual history is inadmissible does not remove the symbolic harm of the law separating these victims out from the protection of the rape shield statute. Furthermore, even if the jailhouse exclusion is not currently being used, there is the chance it could be, and with the attention of PREA this risk may increase if prosecutions increase.

Another similar counterargument is that a judge should just rule the victim's past sexual history inadmissible on other grounds, such as relevance or prejudice, so there is no need to amend the statute. The problem with this argument is that there are effects to having to fight that battle in the first place, just as if we did not have rape shield statutes at all (though there are those who argue that rape shield statutes do more harm than good).[251] This argument holds no water regarding a chilling effect, because the uncertainty of the outcome would still effect reporting decisions. Also, using other Evidence Code provisions to keep past sexual history out of a trial does not reduce any of the symbolic harm of the message that it sends to inmates and the public. If the jailhouse exclusion is truly not being used, then why have it at all and risk any future effects or symbolic harm? Why not simply recognize what any judge who rules the evidence inadmissible on relevancy grounds is doing and repeal the jailhouse exclusion altogether?

B. The Jailhouse Exclusion Is Unnecessary and Poorly Constructed

This symbolic message and the potential chilling effect of the jailhouse exclusion are particularly unfortunate because it is unnecessary and poorly constructed. The general lack of enforcement of the criminal prohibition against sodomy and oral copulation in prison makes its original justification moot. The exclusion is also overinclusive for two reasons. First, based on the exclusion's original rationale, it is unjustified to apply it to crimes other than forcible sodomy or oral copulation, such as rape, rape by foreign object, or forcible sexual penetration. Second, it is similarly unjustified to apply the exclusion to allegations of assaults by guards. Finally, the credibility exception to California's general rape shield statute already provided a procedure for addressing the specific concern behind the jailhouse exclusion raised by the ACLU, making the jailhouse exclusion

[251] *See supra* note 227 and accompanying text.

pointless and superfluous from its inception.

1. The Original Justification of the Jailhouse Exclusion is Moot

The concern that originally justified the jailhouse exclusion is moot because consensual encounters between inmates are unlikely to receive prosecutorial attention, despite the fact that the Penal Code criminalizes the behavior.[252] Some commentators have argued that inmates' loss of liberty does not deprive them of the right to "sexual expression."[253] The California Department of Corrections and Rehabilitation either agrees with this premise or takes a pragmatic and public-health-oriented approach to the issue, as demonstrated by pilot projects to distribute condoms to inmates.[254] Additionally, SADEA, California's version of PREA, clearly mandates that the "increased scrutiny" that it establishes only applies to "nonconsensual sexual contact among inmates and custodial sexual misconduct."[255]

The appellate record of criminal prosecutions of consensual sex in prisons provides additional evidence that the concerns that drove the jailhouse exclusion are moot. The handful of reported decisions since 1981 indicate that these provisions are rarely enforced for consensual encounters: of the five cases, only one involved consenting inmates, and another involved a female visitor and male inmate in a public visitation space.[256] The others were all forcible encounters, including officer- or employee-on-inmate assaults.[257] As consent is not a defense to the consensual sex in prison ban, acquittals are less likely to skew the representative nature of the case law, unless there was a lack of evidence of the sexual act, or the acquittal was due to jury nullification. The fact that the concern that drove the creation of the jailhouse exclusion is largely nonexistent exacerbates the slight of categorically denying inmates the protection of the rape shield

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[252] *See* Interview with Jeanne Woodford, Former Director of the California Department of Corrections and Rehabilitation (Dec. 12, 2012) (noting that in her thirty-year career in corrections, ascending from corrections officer to warden of San Quentin to director of CDCR, she never heard of disciplinary action taken on inmates involved in consensual sexual activity while incarcerated and even mentioned recent pilot projects that supplied condoms to inmates).

[253] Smith, *supra* note 202, at 233–34.

[254] *See Larry Buhl, Condoms & Corrections, A&U: AMERICA'S AIDS MAGAZINE (Mar. 16, 2015), http://www.aumag.org/2015/03/16/condoms-corrections;* Interview with Jeanne Woodford, Former Director of the California Department of Corrections and Rehabilitation (Dec. 12, 2012) (referencing condom distribution pilot projects).

[255] CAL. PENAL CODE § 2639 (West 2016).

[256] *See* People v. Santibanez, 154 Cal. Rptr. 74 (Ct. App. 1979) (involving consenting inmates); People v. Ruffin, 133 Cal. Rptr. 3d 27 (Ct. App. 2011) (involving a female visitor and male inmate in a public visitation space), *review denied* Feb. 15, 2012.

[257] *See* People v. Campbell, 151 Cal. Rptr. 175 (Ct. App. 1978); People v. Fraize, 43 Cal. Rptr. 2d. 64 (Ct. App. 1995); People v. West, 277 Cal. Rptr. 237 (Ct. App. 1991).

statute.

2. The Jailhouse Exclusion Is Overinclusive

Additionally, the jailhouse exclusion is overinclusive based on its original rationale, both in terms of the perpetrators to which it applies and the crimes it includes. First, while the original rationale theoretically justified the exclusion's application to sexual activity between guards and inmates at the time it was passed, this is no longer valid. The law and society's understanding of sexual relations between guards and inmates has shifted such that we consider such activity unlawful, regardless of whether the inmate consented. Second, the original rationale only supports applying the exclusion to sodomy and oral copulation, and not rape, gang rape, rape by foreign object, or forcible sexual penetration.

The jailhouse exclusion is also overinclusive because it does not differentiate between inmate and officer defendants. The legislature adopted the jailhouse exclusion in order to protect inmates from false allegations from their consensual fellow-inmate partners, yet it applies equally to situations in which the alleged partner is a corrections officer. It is doubtful that the legislators even considered this issue, just as they did not take a serious look at the issue of prison rape when drafting the jailhouse exclusion.[258]

Today the rationale behind the exclusion carries little weight in the context of guard-on-inmate activity. All consensual sexual acts between an officer and inmate occur in the shadow of coercion due to the authority of the guard.[259] The power differential between the two parties makes sexual contact suspect, and for the officer it is now criminal.[260] The fact that the

[258] The records submitted to the California Archives on the Robbins Rape Evidence Law and the Watson Amendments do not contain any references to a correction officers' lobby. Archive files for S.B. 1678, S.B. 1929, and S.B. 23 (on file with the author and available at the California State Archives). When the Watson Amendment passed in 1981, sexual contact between guards and inmates was viewed in a different light. There was no disciplinary or criminal sanction for the corrections officer until 1994; thus, one can appreciate that there was little reason for the legislature to differentiate between applying the exclusion to inmate-on-inmate and guard-on-inmate assaults. *See* Legis. Serv. Ch. 499 (Cal. 1994) (amending CAL. PENAL CODE § 289.6).

[259] *See* CAL. PENAL CODE § 289.6 (West 2016) (stating that any sexual activity between officers and inmates is a "public offense," regardless of whether the inmate consented).

[260] I say suspect, rather than characterizing it as a de facto victimization, in order to respect an inmate's own characterization of the encounter. Some may feel victimized or otherwise coerced, while others may believe they acted with their own agency given the constraints of their environment. In general, our society has come to accept the fact that it is legally problematic for an inmate to "consent" to sex with a corrections officer, by making it a criminal offense. *See* PENAL § 289.6.

Penal Code now criminalizes "staff sexual misconduct" makes it even less likely that an inmate would face any punishment for "consensual" relations.[261] If a male guard rapes a female inmate, there is no consensual sex ban applicable to her because she cannot legally consent to sexual activity with a guard. The rape shield statute does not protect her, despite the lack of any rationale for excluding her. In light of the power differential between officers and inmates, applying the jailhouse exclusion in cases where an officer is accused of assaulting an inmate reinforces the statute's symbolic sanctioning of prison rape.

Additionally, applying the exclusion to all of the crimes that the rape shield statute covers is overinclusive. The jailhouse exclusion was tacked on to the expansion of the rape shield statute because of concerns about inmates making false reports in order to escape criminal repercussions for being caught having consensual sex.[262] The rationale used to justify the jailhouse exclusion simply cannot extend to the other sexual crimes listed in the statute that do not have parallel custodial facility subdivisions that criminalize consensual conduct. Thus, applying the exclusion to rape, gang rape, and rape by foreign object unnecessarily perpetuates the pre-rape-shield status quo for inmates alleging those charges. While this is true for the jailhouse exclusion as a whole, it is even stronger where the exclusion's net is cast unjustifiably wide. These victims should not be subject to a different level of protection simply because the Penal Code only prohibits certain sexual activity in jail and prison. In fact, the legislative history of the jailhouse exclusion suggests that the legislature considered this issue at an earlier point.[263]

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[261] A lack of consequences for the inmate eliminates his or her motive to make a false report. Furthermore, if there is no physical evidence, an officer has little to gain by claiming the encounter was consensual rather than denying it outright, as consensual sexual activity with an inmate would lead to the officer's termination or possible criminal sanctions. *See* PENAL § 289.6 ("Anyone who is convicted of a felony violation of this section who is employed by a department, board, or authority within the Youth and Adult Correctional Agency shall be terminated."). If the officer does not use a consent defense, there is no criminal sanction that the inmate could be motivated to avoid. The fact that the jailhouse exclusion applies to guard-on-inmate assaults is also troubling given that an inmate's prior sexual conduct with other inmates would have even less relevance regarding consent than if the defendant was a fellow inmate. The jailhouse exclusion's rationale is thus a very poor fit in the context of guard-on-inmate sexual assault.

[262] I use the term sex to include oral contact and penetration of both the vagina and anus. The California Penal Code separates into separate crimes rape (defined as sexual intercourse perpetrated by male genitalia on female genitalia), sodomy, oral copulation, and penetration by a foreign object. PENAL §§ 261 (rape), 286 (sodomy), 288a (oral copulation), 289 (foreign object penetration); People v. Holt, 937 P.2d 213, 250 (Cal. 1997) (defining sexual intercourse for the purposes of the rape statute as "[a]ny penetration of the male sex organ into the female sex organ, however[] slight").

[263] An analysis of the construction of S.B. 1929, Senator Watson's earlier attempt to

It is important to note that the ACLU's motive-to-fabricate concern only implicates the sodomy and oral copulation statutes. If one partner claims he or she was forced after a truly consensual encounter was discovered by the authorities—for there should be no report if it was consensual—the offense would not be transformed into a charge of rape. This is because the California Penal Code does not currently recognize rape as gender-neutral; rather, rape involves penile penetration of a vagina. A false allegation would move the offense from the consensual sex in detention provision of the sodomy or oral copulation statute, a misdemeanor, to one of its forcible provisions, a felony.

3. The Credibility Exception Makes the Jailhouse Exclusion Unnecessary

Finally, the jailhouse exclusion is completely unnecessary due to the credibility exception in California's rape shield statute. This exception allows a defendant to litigate whether the jury can hear any evidence involving past sexual conduct offered to impeach a victim's credibility.[264]

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amend the Robbins Rape Evidence Law, indicates that the most logical reading of the "custodial facility" amendment would have limited it to prosecutions under the Penal Code sections for sodomy and oral copulation. The first version of S.B. 1929 did not contain the custodial facility exclusion, and it simply added Penal Code sections 286 (sodomy), 288a (oral copulation), and 289 (rape by foreign object) to the list that already contained sections 261 (rape) and 264.1 (rape in concert). S.B. 1929, 1979-80 Reg. Sess. (Cal. 1980) (as introduced Mar. 10, 1980). Penal Code sections 286, 288a, and 289 were separated out from sections 261 and 264.1 when the custodial facility amendment was added, indicating that it only applied to the new sections. S.B. 1929, 1979-80 Reg. Sess. (Cal. 1980) (as amended Mar. 10, 1980) (amending statute to read "in any prosecution under Section ~~261, 264.1, 286. 288a, or 289 of the Penal Code, or for~~ ~~assault~~ *261 or 264.1 of the Penal Code, or under Section 286, 288a or 289 of the Penal Code, except where the crime occurred in a custodial facility, or for assault* with intent to commit . . ."). The legislative history of S.B. 23, the bill that ultimately passed, indicates that the legislature meant for the jailhouse exclusion to apply to all of the listed Penal Code Sections. *See* Senate Committee on Judiciary Bill Analysis, S.B. 23 (Cal. 1981–82), at 3 ("[S]hould not evidence of an inmate's reputation or prior conduct be admissible in the jailhouse-rape situation?").

[264] California's approach to the rape shield statute separates evidence of the victim's past sexual conduct into two categories based on whether the defendant wants to use it to prove consent or to attack the victim's credibility. Galvin, *supra* note 40, at 894. The credibility exception balances the victim's right to privacy against the defendant's due process rights through a hearing where the judge decides what evidence the defendant may present, including the kinds of questions permitted. *See supra* notes 42–44 and accompanying text. *See also id.* The ability to impeach a victim using past sexual history explicitly includes "[t]he existence or nonexistence of a bias, interest, or other motive." CAL. EVID. CODE § 780 (West 2016) ("Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to . . . [t]he existence or nonexistence of a bias, interest, or other motive."). *See also id.* § 782(a) (detailing procedure to be followed "if evidence of sexual

The credibility exception would allow a falsely accused defendant to present evidence to the court to support his or her claim that the victim had a motive to fabricate, including the consensual sex in prison ban. The court would then decide what evidence, if any, the jury could hear.[265] So long as there is enough evidence to convince a judge that it is even plausible, the credibility exception would remedy the concern identified by the ACLU. Additionally, it is important to note that evidence of prior sexual encounters *with the defendant* is admissible under another exception to the rape shield statute.[266]

The solution to the problem identified by the ACLU and "remedied" by the jailhouse exclusion had *already existed* in the structure of the credibility provision crafted in order to secure the passage of the Robbins Rape Evidence Law. The credibility exception thus made the jailhouse exclusion pointless and superfluous from its inception.

C. The Jailhouse Exclusion Should Be Repealed

The California Legislature could easily alleviate the Evidence Code's disparate treatment of victims of prison rape—victims for whom the state has an *affirmative responsibility* to prevent assaults—by repealing the jailhouse exclusion. It would require amending section 1103(c)(1) of the Evidence Code, which contains the general rape shield statute and its jailhouse exclusion. The most comprehensive and logical solution would be for the legislature to repeal the jailhouse exclusion entirely. If the California Legislature cannot achieve a complete repeal of the jailhouse exclusion, a second-best solution would be to amend the jailhouse exclusion to narrowly

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conduct of the complaining witness is offered to attack the credibility of the complaining witness under Section 780").

[265] Several commentators rightly criticized the way the California approach muddles the distinction between consent and credibility evidence when the rape shield law was first passed, fearing that the exception would swallow the rule. *See supra* notes 45–49 and accompanying text. Thankfully, California judges have carefully policed the use of the credibility exception and rejected what they see as "back door" attempts to introduce evidence on the issue of consent. *See, e.g.*, People v. Rioz, 207 Cal. Rptr. 903, 911–12 (Cal. Ct. App. 1984) ("Great care must be taken to insure that this exception to the general rule barring evidence of a complaining witness' prior sexual conduct . . . does not impermissibly encroach upon the rule itself and become a 'back door' for admitting otherwise inadmissible evidence."). Despite the fact that it would be a weak argument due to the lack of prosecution of consensual sex between inmates, the theoretical motive to avoid criminal liability could convince a judge to admit evidence of an inmate's sexual history. Although the motive to fabricate, which is the threat of prosecution for consensual sex, is not suddenly more plausible because of evidence of past consensual encounters—and is no more relevant than chastity evidence—the argument would be that it shows that the defendant is willing to have consensual sex with other inmates. For the reasons discussed above in Part IV.A, this is troublesome.

[266] EVID. § 1103(c)(3).

link its scope to its rationale.

Repealing the jailhouse exclusion altogether is a comprehensive response to the California rape shield statute's disparate treatment of victims. It would involve deleting the phrase "except where the crime is alleged to have occurred in a local detention facility . . . or in a state prison" to eliminate the jailhouse exclusion.[267] This is also the most logical solution given that the jailhouse exclusion sends a symbolic message that is incongruent with PREA, that its rationale is now moot, that it is overinclusive, and that it is also completely unnecessary due to the credibility exception. If a defendant truly has evidence of a complainant's motive to fabricate, as the legislature was concerned—and the most convincing motive to fabricate would have to do with the specific situation and character of the complainant, not simply his status as a prisoner—the credibility exception to the rape shield statute provides for a way to present that evidence to a jury. The key difference is that the credibility exception would give the victim the procedural protection of a hearing in front of the judge prior to the evidence being brought out in open court, as it does for all other sexual assault victims.

Amending the jailhouse exclusion to narrow its scope (and thus impact) would be a second-best and imperfect solution. Amending, rather than repealing the jailhouse exclusion neither erases the impact of its message nor prevents its possible chilling effects—nor does it change the fact that its rationale is moot, or that the exclusion is overinclusive and unnecessary. Yet an amendment to limit when the exclusion applies would be better than nothing at all if repeal is politically infeasible.[268]

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[267]The text of section 1103(c)(1) is reproduced below, with the language to be removed struck:

> Notwithstanding any other provision of this code to the contrary, and except as provided in this subdivision, in any prosecution under Section 261 [rape], 262 [spousal rape], or 264.1 [gang rape] of the Penal Code, or under Section 286 [sodomy], 288a [oral copulation], or 289 [rape by foreign object] of the Penal Code, or for assault with intent to commit, attempt to commit, or conspiracy to commit a crime defined in any of those sections, ~~except where the crime is alleged to have occurred in a local detention facility, as defined in Section 6031.4, or in a state prison, as defined in Section 4504,~~ opinion evidence, reputation evidence, and evidence of specific instances of the complaining witness' sexual conduct, or any of that evidence, is not admissible by the defendant in order to prove consent by the complaining witness.

EVID. § 1103(c)(1).

[268] My proposed amendment would limit the jailhouse exclusion in two ways: first, it would apply only to the Penal Code sections prohibiting sex in prison, and second, only where the act is also alleged to have been *committed by force or violence*. This proposed revision to section 1103(c)(1) is as follows:

> (c)(1) Notwithstanding any other provision of this code to the contrary, and except as provided in this subdivision, in any prosecution under Section 261 [rape], 262 [spousal rape], or 264.1 [gang rape] of the

> Penal Code, or under Section 286 [sodomy], 288a [oral copulation], or 289 [rape by foreign object] of the Penal Code, or for assault with intent to commit, attempt to commit, or conspiracy to commit a crime defined in any of those sections, except *under Section 286(e)* [consensual sodomy in jail or prison], *or 288a(e)* [consensual oral copulation in jail or prison] *of the Penal Code if such offense was committed by force or violence*, opinion evidence, reputation evidence, and evidence of specific instances of the complaining witness' sexual conduct, or any of that evidence, is not admissible by the defendant in order to prove consent by the complaining witness.

This would link the jailhouse exclusion to its rationale by limiting it to the prohibition against sex in prison, and only applying it where one partner alleges rape. ACLU Letter, *supra* note 101. The ACLU was concerned about an inmate's consensual partner accusing him or her of rape to avoid consequences for having sex. One would think that this inmate would face rape charges. But without evidence of force, he or she may also face prosecution under the prison sex ban because it is easier to prove than rape. This flips the illogical proposals by Robbins and the Senate Judiciary Committee that would have excluded the evidence in the ACLU's scenario, but admitted it for other crimes where consent cannot even be a defense. *See* S.B. 2044, 1975–76 Reg. Sess. (Cal. 1976); S.B. 1712, 1977–78 Reg. Sess. (Cal. 1978); S.B. 500, 1978–79 Reg. Sess. (Cal. 1979); Senate Committee on Judiciary Bill Analysis, S.B. 1929 (Cal. 1979–80) (suggesting amendment that read "or under Section 286 or 288a of the Penal Code if such offense was committed by force or violence . . ."). The rape shield statute would apply when neither partner alleges force or duress. Consent can never be a defense under the prison sex ban. This is still a troublesome solution compared to repealing the jailhouse exclusion entirely. It would reintroduce the loophole that Senator Watson's amendment set out to fix: if a prosecutor charges an inmate both under the prison sex ban and with rape, a judge could let in evidence of the victim's past sexual behavior. The exclusion would also apply where a prosecutor only charges an alleged rape under the prison sex ban, because it is easier to prove.

It would also be possible to make two broader amendments to the jailhouse exclusion. The broader the amendment, the less it would limit the effects of the jailhouse exclusion. One would limit the jailhouse exclusion to the sections prohibiting sex in prison:

> (c)(1) Notwithstanding any other provision of this code to the contrary, and except as provided in this subdivision, in any prosecution under Section 261 [rape], 262 [spousal rape], or 264.1 [gang rape] of the Penal Code, or under Section 286 [sodomy], 288a [oral copulation], or 289 [rape by foreign object] of the Penal Code, or for assault with intent to commit, attempt to commit, or conspiracy to commit a crime defined in any of those sections, except *under Section 286(e)* [consensual sodomy in jail or prison], *or 288a(e)* [consensual oral copulation in jail or prison] *of the Penal Code*, opinion evidence, reputation evidence, and evidence of specific instances of the complaining witness' sexual conduct, or any of that evidence, is not admissible by the defendant in order to prove consent by the complaining witness.

A final possibility would merely limit the jailhouse exclusion to sodomy and oral copulation, Penal Code sections 286 and 288a:

This Article's recommendation of repealing the exclusion is preferred over amending; it would silence the message the statute currently sends regarding the value of preventing prison rape and protecting victims' dignity. This step would not have any ramifications for the legislature's original rationale due to the rape shield statute's credibility exception. It is thus the most logical solution.

CONCLUSION

California's rape shield legislation was a leader in the national transformation of the admissibility of a rape victim's prior sexual history as character evidence. Yet the Robbins Rape Evidence Law left a loophole for defendants charged with multiple sex offenses, and in fixing this oversight, the California Legislature expanded and contracted the protection of its rape shield statute. Even if the defense chooses not to impeach the victim using his or her past sexual history, or if the judge excludes such evidence on relevancy or prejudice grounds, the statute remains the vehicle of an unintended but clear message that not all victims are equal. It also may serve to chill reporting and prosecution of these assaults, running counter to the very policy behind the Robbins Rape Evidence Law and, later, the Prison Rape Elimination Act. This is also troubling given the disparate impact of prison rape on lesbian, gay, bisexual, and trans* inmates. The California Legislature can remedy this slight and send a new message about the importance of eliminating prison rape by repealing the jailhouse exclusion from the California Evidence Code. This simple step would "begin to make clear that any sexual violation will be addressed in the same way, no matter where it occurs[,] and that an individual's status as a prisoner does not make him or her less of a victim than someone who is not in custody."[269]

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

[269] Thompson, *supra* note 191, at 176.