

2009

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Recommended Citation

14 Berkeley J. Crim. L. 329 (2009)

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Ad Law Incarcerated

Giovanna Shay[†]

INTRODUCTION: THE REGULATION OF “MASS INCARCERATION”¹

The United States has over two million prisoners,² the largest incarcerated population worldwide.³ Our nation has been described as a “carceral state” with a policy of “mass imprisonment,”⁴ and our vast prison system has been termed a “prison industrial complex.”⁵ Massive growth in the prison

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1. The term “mass incarceration” has entered the lexicon to describe the unprecedented use of incarceration in the United States. See, e.g., MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA* (2006). See also JEREMY TRAVIS, *BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY* xix (2005) (describing “mass incarceration” as “a phrase used by a number of commentators”).

2. The Sentencing Project, *News - Incarceration* (2008), <http://www.sentencingproject.org/template/page.cfm?id=107>.

3. PEW CENTER ON THE STATES, *ONE IN 100: BEHIND BARS IN AMERICA 2008* 5 (2008) (“[M]ore than 1 in 100 adults is now locked up in America.”); Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations*, N.Y. TIMES, Apr. 23, 2008, at A1.

4. See, e.g., GOTTSCHALK, *supra* note 1, at 1-17.

5. Craig Haney, *Counting Casualties in the War on Prisoners*, 43 U.S.F. L. REV. 87, 88 n.5 (Summer 2008). See also RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* 7 (2007) [hereinafter, “GILMORE, GOLDEN GULAG”] (situating the 500% increase in California’s prison population between 1982 and 2000 in

population over the last thirty years has had a severely disparate racial impact.⁶ The devastating effects of mass incarceration—on prisoners, their families, and communities—have been well-documented.⁷ Some commentators have suggested that the “prison-industrial complex” is the most recent in a series of regimes that have maintained racial subordination—an extension of slavery and *de jure* segregation,⁸ and a means of controlling the “remnants of the black ghetto.”⁹

This Article examines one part of the legal regime administering “mass incarceration” that has not been a focus of legal scholarship: prison and jail policies and regulation. Prison and jail regulation is the administrative law of the “carceral state,”¹⁰ governing an incarcerated population of millions, a majority of whom are people of color.¹¹ The result is an extremely regressive form of policy-making, affecting poor communities and communities of color most directly.¹² Indeed, if “the category of ‘inmate’ in the United States today

California’s changing political economy).

6. MARC MAUER & RYAN S. KING, THE SENTENCING PROJECT, UNEVEN JUSTICE: STATE RATES OF INCARCERATION BY RACE AND ETHNICITY 1 (July 2007) (“If current trends continue, one in three black males born today can expect to spend time in prison during his lifetime.”). While recent statistics show that the number of African-Americans serving time in state prisons for drug offenses fell 21.6% between 1999-2005, two-thirds of the people serving time in state institutions for drug crimes are African-Americans or Latinos. MARC MAUER, THE SENTENCING PROJECT, THE CHANGING RACIAL DYNAMICS OF THE WAR ON DRUGS 1-3 (2009).

7. See INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT (Marc Mauer & Meda Chesney-Lind eds., 2002) [hereinafter “INVISIBLE PUNISHMENT”]; Nekima Levy-Pounds, *From the Frying Pan Into the Fire: How Poor Women of Color and Children Are Affected by Sentencing Guidelines and Mandatory Minimums*, 47 SANTA CLARA L. REV. 285, 298 (2007) (“[W]hile African-Americans make up roughly thirteen percent of our nation’s population, African-American women account for thirty-five percent of the federal female prison population and forty-eight percent of state female prison populations.”); Tracey Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191 (1998); Dorothy Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271 (2004).

8. ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 22-39 (2003) (making a connection between slavery and the penitentiary in the United States, including the convict-lease system and “Black codes”); Kim Shayo Buchanan, *Impunity: Sexual Abuse in Women’s Prisons*, 42 HARV. C.R.-C.L. L. REV. 45, 48-49, 55-60 (2007) (drawing on Reva Siegel’s theory of status regime modernization to connect rape of African-American women in slavery to custodial sexual abuse of women prisoners); Loic Wacquant, *From Slavery to Mass Incarceration*, 13 NEW LEFT REV. 41 (Jan.-Feb. 2002) [hereinafter “Wacquant, *From Slavery to Mass Incarceration*”] (writing that “slavery and mass imprisonment are genealogically linked”); Loic Wacquant, *The New ‘Peculiar Institution:’ On the Prison as a Surrogate Ghetto*, 4 THEORETICAL CRIMINOLOGY 377 (Aug. 2000) [hereinafter “Wacquant, *Peculiar Institution*”].

9. Loic Wacquant in RACE, INCARCERATION, AND AMERICAN VALUES 57, 61-62 (Glenn Loury ed., 2008) [hereinafter: “RACE, INCARCERATION”].

10. Cf. GOTTSCHALK, *supra* note 1, at 1 (describing “the construction of the carceral state in America”).

11. HEATHER C. WEST & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, PRISON INMATES AT MIDYEAR 2008-STATISTICAL TABLES 17 (2009), available at <http://www.ojp.gov/bjs/pub/pdf/pim08st.pdf> (At mid-year 2008, sixty percent of 2,103,500 inmates in state or federal prisons, or in local jails, were Black or Hispanic.).

12. Cf. Gia B. Lee, *First Amendment Enforcement in Government Institutions and*

. . . [is] a racialized one,”¹³ corrections regulation may be conceived as a kind of racialized law-making. Although it has disparate impact, however, its effects extend beyond the communities most affected.

Corrections policies govern every area of prison life and many issues affecting prisoners’ families and neighborhoods. These include: medical and mental health care, visitation, telephone usage, mail, access to lawyers, sexual abuse policies, and programming such as vocational and educational courses. Some rules decide tremendously personal issues relating to core definitions of self. For example, corrections policies determine who is counted in a prisoner’s “family,” and thus may visit,¹⁴ and whether a prisoner is deemed male or female for housing purposes.¹⁵ Other policies, such as those regarding release and reentry, can have an important aggregate effect on free communities. With about 700,000 prisoners returning home annually,¹⁶ many of them going to concentrated areas of only a few city blocks, such rules can have a great impact on poor neighborhoods.¹⁷

Despite its importance, the area of corrections regulation is a kind of “no-man’s land.” In many jurisdictions, and in many subject areas, prison and jail regulations are formulated outside of public view. Because of the deference afforded prison and jail officials under prevailing constitutional standards, such regulations are not given extensive judicial attention. Nor do they receive much focus in the scholarly literature.¹⁸ The purpose of this Article is to

Programs, 56 UCLA L. REV. 1691, 1715, 1738-45 (2009) (arguing for a “free speech conditional deference model,” in which courts defer only to formal speech policies in prisons and other governmental institutions, in part because, “about one in three Black males in the United States will go to prison during his lifetime,” and “[i]n light of these numbers, it is clear that the nature and extent of speech rights within government institutions has a widespread, and sometimes severe or disproportionate, impact on the abilities of our nation’s communities to pursue autonomy and self-fulfillment”).

13. Sharon Dolovich, *Incarceration American-Style*, 3 HARV. L. & POL’Y REV. 237, 255 (2009) [hereinafter “Dolovich, *Incarceration American-Style*”]. See also Glenn C. Loury in RACE, INCARCERATION, *supra* note 9, at 36-37.

14. Kacy Elizabeth Wiggum, *Defining Family in American Prisons*, 30 WOMEN’S RTS. L. REP. 357 (2009).

15. See D.C. Dep’t of Corr., Gender Classification and Housing, Program Statement No. 4020.3 (Feb. 20, 2009) (“DOC shall classify an inmate who has male genitals as a male and one who has female genitals as a female, unless otherwise classified by the Transgender Committee consistent with this policy.”).

16. KAMELA MALLIK-KANE & CHRISTY VISHER, HEALTH & PRISONER REENTRY: HOW PHYSICAL, MENTAL & SUBSTANCE ABUSE CONDITIONS SHAPE THE PROCESS OF REINTEGRATION 1 (2008).

17. ERIC CADORA, CRIMINAL JUSTICE AND HEALTH AND HUMAN SERVICES: AN EXPLORATION OF OVERLAPPING NEEDS, RESOURCES AND INTERESTS IN BROOKLYN NEIGHBORHOODS (2002). See also Margaret E. Finzen, *Systems of Oppression: The Collateral Consequences of Incarceration and Their Effects on Black Communities*, 12 GEO. J. ON POVERTY L. & POL’Y 299, 320 (2005).

18. See Jonathan Simon, *The ‘Society of Captives’ in the Era of Hyper-Incarceration*, 4 THEORETICAL CRIMINOLOGY 285, 289 (Aug. 2000) (noting that “studies of prison social organization” have become less common “precisely during the time of the great expansion of

accord prison and jail regulation more sustained attention. Specifically, it argues that corrections policies should be subject to notice-and-comment rulemaking procedures, to promote transparency and democratic participation. Alternatively, courts should scrutinize regulations that are not promulgated pursuant to notice-and-comment rulemaking more carefully.

This Article proceeds in three parts. Part I first sketches the history of court involvement in prison reform, explaining that prison litigation made institutions more bureaucratic and increased the importance of corrections policies. It then outlines how the legal standards by which courts currently judge corrections policies extend deference to prison officials. Part II discusses the extent to which corrections policies are exempt from state administrative procedure acts: In many states, corrections regulations are exempt or partially exempt from the provisions of state administrative procedure acts. This Part then describes how both prisoners and free communities are affected by corrections policies. Part III argues that, because of this impact, corrections regulations should be subject to notice-and-comment rulemaking or, in the alternative, should be scrutinized more carefully by courts.

I. COURTS AND PRISON REGULATION

A. *Litigation and Bureaucratization*

The story of prison regulation is best understood against the backdrop of prison reform efforts.¹⁹ As corrections systems responded to litigation in the 1970s by becoming more bureaucratized, prison regulation became more important.²⁰ After significant victories in the 1970s and early 1980s,²¹ however, so-called “structural reform”²² prison litigation was restricted by

incarceration”). A few commentators, notably in recent years Professor Rachel Barkow, have considered the application of administrative law concepts to criminal justice agencies. See Rachel Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 721 n.4 (2005) (focusing on the design of sentencing commissions: “[w]hile scholars have analyzed the structure and design of agencies in a multitude of areas, the agencies responsible for criminal justice policy have commanded far less attention”); Rachel Barkow, *Institutional Design and the Policing of Prosecutors: Lessons From Administrative Law*, 61 STAN. L. REV. 869 (2009) (analyzing how administrative law principles could be used to check prosecutorial discretion); Rachel Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332 (discussing how the rise of the administrative law paradigm depressed use of jury nullification and executive clemency); Marya P. McDonald, *A Multidimensional Look at the Gender Crisis in the Correctional System*, 15 LAW & INEQ. 505, 535-44 (1997) (arguing that applying administrative law principles to review corrections officials’ actions is a good way to address unequal programming in women’s prisons).

19. See *infra* notes 21-80 and accompanying text.

20. *Id.*

21. See MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE 39-46 (1998).

22. OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION 9-10 (1978) (describing use of “structural injunction” as “seeking to effectuate the reform of a social institution”). See also Malcolm M. Feeley & Roger A. Hanson, *The Impact of Judicial Intervention on Prisons and*

judge-made doctrines²³ and, most decisively, by the 1996 Prison Litigation Reform Act (“PLRA”).²⁴ This transformation occurred under the guise of deference to an increasingly professionalized corrections establishment. While courts previously adopted an explicit “hands-off” policy towards prisons,²⁵ they now deferred to corrections authorities’ expertise.²⁶ Today, the resultant lack of scrutiny of corrections policies further reinforces the race and class hierarchies of mass incarceration.²⁷

However, courts’ deference to prison and jail rules is not finely calibrated. Judicial opinions often refer to corrections policies as if they are a monolithic block of regulations made through uniform processes.²⁸ In reality, the category of administrative documents containing corrections policies encompasses a wide-range of edicts, ranging from full-fledged state regulations subject to notice-and-comment rulemaking to informal memoranda circulated by sheriffs. When courts defer to corrections officials and their policies, they are deferring to judgments that are often unchecked by the type of rulemaking procedures that are the norm in other contexts.

Until the 1960s, federal courts adopted a “hands-off doctrine” with respect to prison and jail litigation.²⁹ Courts believed they were powerless “to supervise prison administration or to interfere with the ordinary prison rules or regulations.”³⁰ This “hands-off” attitude was a combination of “procedural and

Jails: A Framework for Analysis and a Review of the Literature, in COURTS, CORRECTIONS, AND THE CONSTITUTION: THE IMPACT OF JUDICIAL INTERVENTION ON PRISONS AND JAILS 12, 15 (John J. DiIulio, Jr. ed., 1990) (discussing Fiss’s concept of “structural reform” litigation).

23. FEELEY & RUBIN, *supra* note 21, at 46-50.

24. *Id.* at 382-83. The PLRA is codified in several different parts of the U.S. Code. Pub. L. No. 104-134, §§ 801-10, 110 Stat. 1321, 1321-66-77 (1996) (codified at 11 U.S.C. § 523 (2004); 18 U.S.C. §§ 3624, 3626 (2008); 28 U.S.C. §§ 1346, 1915, 1915A, 1932 (2003); 42 U.S.C. §§ 1997a-1997h (2009)).

25. See Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506, 508 (1963) [hereinafter “*Beyond the Ken*”].

26. See, e.g., *Turner v. Safley*, 482 U.S. 78 (1987).

27. See Buchanan, *supra* note 8, at 86; Michael B. Mushlin & Naomi Roslyn Galtz, *Getting Real About Race and Prisoner Rights*, 36 FORDHAM URB. L.J. 27 (2009).

28. See, e.g., *Turner*, 482 U.S. 78.

29. See James B. Jacobs, *The Prisoners’ Rights Movement and Its Impacts, 1960-80*, in NORVAL MORRIS & MICHAEL TONRY, CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 429, 433 (1980) [hereinafter “Jacobs, *The Prisoners’ Rights Movement*”] (“Until the 1960s the federal judiciary adhered to a ‘hands off’ attitude toward prison cases out of concern for federalism and separation of powers and a fear that judicial review of administrative decisions would undermine prison security and discipline.”); Ira P. Robbins, *The Cry of Wolfish in the Federal Courts: The Future of Federal Judicial Intervention in Prison Administration*, 71 J. CRIM. L. & CRIMINOLOGY 211, 211-13 (1980). See also *Beyond the Ken*, *supra* note 25, at 508, cited in Allison Brill, *Rights Without Remedy: The Myth of State Court Accessibility After the Prison Litigation Reform Act*, 30 CARDOZO L. REV. 645, 652-53 (2008). But see Alexander Reinert, *Eighth Amendment Gaps: Can Conditions of Confinement Litigation Benefit From Proportionality Theory?*, 36 FORDHAM URB. L.J. 53, 59-60 (2009) (collecting cases in which state courts, relying on state law provisions, invalidated sentences as “cruel and unusual”).

30. *Beyond the Ken*, *supra* note 25, at 506 (quoting *Banning v. Looney*, 213 F.2d 771 (10th Cir. 1954)).

substantive” legal doctrines.³¹ For example, one of the most important vehicles for prisoners’ suits is the civil rights statute 42 U.S.C. § 1983.³² Until *Monroe v. Pape* in 1961,³³ courts interpreted the “under color of state law” language of the civil rights statute 42 U.S.C. § 1983 not to provide a cause of action for abuses that violated state law,³⁴ and until the 1960s, prisoner complaints were also routinely thrown out because courts concluded that the Eighth Amendment did not bind the states.³⁵ Federal courts were also reluctant to intervene in prison-related matters based on concerns relating to federalism (in the case of state prisons),³⁶ separation of powers (when dealing with federal prisons),³⁷ or subverting prison discipline (in both).³⁸ As a result, courts declined to get involved,³⁹ even when prisoners alleged being “threatened, abused, [and] deprived of meals,”⁴⁰ being “placed in a barren cell for a period of almost three months,”⁴¹ or being wrongfully transferred to a mental institution.⁴²

The Civil Rights Movement of the 1960s and 70s brought about changes both in courts’ attitudes and formal doctrine.⁴³ It also initiated a period of class action litigation that reformed prisons and jails.⁴⁴ Continuing through the early 1980s, this first wave of prison litigation brought major victories for prisoners, eliminating reliance on inmate “trusties” (prisoners entrusted with authority over other inmates), brutal corporal punishment, and inhumane living conditions.⁴⁵ In the ten years following the first important prison case, prison

31. FEELEY & RUBIN, *supra* note 21, at 31.

32. 42 U.S.C. § 1983 (2007) (“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .”). See *Heck v. Humphrey*, 512 U.S. 477, 480 (1994) (describing § 1983 as one of “the two most fertile sources of federal-court prisoner litigation”).

33. *Monroe v. Pape*, 365 U.S. 167 (1961).

34. FEELEY & RUBIN, *supra* note 21, at 32, 37.

35. *Id.* at 33-34.

36. *Id.* at 34.

37. *Id.* at 34. See also *Beyond the Ken*, *supra* note 25, at 515.

38. *Beyond the Ken*, *supra* note 25, at 516-17.

39. *Id.* at 508-09 & n.12.

40. *Curtis v. Jacques*, 130 F.Supp. 920, 921 (W.D. Mich. 1954) (“The law is well established that Federal courts do not have the power, and that it is not their function or responsibility, to control or regulate the management of State prisons and the treatment and disciplining of prisoners, or to interfere with the conduct of State prisons by State authorities.”).

41. *Williams v. Steele*, 194 F.2d 32, 33-34 (8th Cir. 1952) (“[T]he courts have no power to supervise the discipline of the prisoners nor to interfere with their discipline, but only on habeas corpus to deliver from prison those who are illegally detained.”).

42. *In re Taylor*, 187 F.2d 852, 853 (9th Cir. 1951) (“It is not within the province of the courts to supervise the treatment of prisoners in federal penitentiaries.”).

43. FEELEY & RUBIN, *supra* note 21, at 39.

44. *Id.* at 34-46; Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 558-64 (2006) [hereinafter “Schlanger, *Civil Rights Injunctions*”].

45. FEELEY & RUBIN, *supra* note 21, at 51-73, 367. See also Schlanger, *Civil Rights*

conditions in some thirty-three jurisdictions were declared unconstitutional.⁴⁶

One major aspect of the civil rights reforms was the increased bureaucratization of prison systems.⁴⁷ Professional standards became more important, both as the benchmark used by courts and advocates to evaluate prison conditions and as a guide for prison officials seeking to avoid lawsuits.⁴⁸ “Written policies and procedures could be offered in court proceedings as deserving of deference, because they were at least rational”⁴⁹ As a result, “the operations of prisons and jails throughout the country are now governed by a[n] amalgam of statutes, regulations, and guidelines and are subject to greater accountability.”⁵⁰

Prison litigation also professionalized corrections management.⁵¹ Court-enforced settlements, known as consent decrees, “professionalized and bureaucratized by the terms they imposed, but also by their impact on who was interested in becoming or qualified to become an administrator.”⁵² A “new generation” of corrections administrators emerged, with a more professional, “nationally oriented correctional perspective.”⁵³

With so many state prison systems under some form of consent decree,⁵⁴ a

Injunctions, *supra* note 44, at 563-64 (writing that “among the areas affected were staffing, the amount of space per inmate, medical and mental health care, food, hygiene, sanitation, disciplinary procedures, conditions in disciplinary segregation, exercise, fire safety, inmate classification, grievance policies, race discrimination, sex discrimination, religious discrimination and accommodations, and disability discrimination and accommodations”).

46. FEELEY & RUBIN, *supra* note 21, at 39-40.

47. Jacobs, *The Prisoners’ Rights Movement*, *supra* note 29, at 458 (“The prisoners’ rights movement has contributed to the bureaucratization of the prison.”).

48. Susan Sturm, *The Legacy and Future of Corrections Litigation*, in *INCARCERATING CRIMINALS: PRISONS AND JAILS IN SOCIAL AND ORGANIZATIONAL CONTEXT* 48 (Timothy J. Flanagan, James W. Marquart & Kenneth G. Adams eds., 1998). See also FEELEY & RUBIN, *supra* note 21, at 162-63.

49. Margo Schlanger, *Operationalizing Deterrence: Claims Management (in Hospitals, a Large Retailer, and Jails and Prisons)*, 2 J. OF TORT LAW 1, 46 (2008).

50. Feeley & Hanson, *supra* note 22, at 26.

51. Malcolm M. Feeley & Van Swearingen, *The Prison Conditions Cases and the Bureaucratization of American Corrections: Influences, Impacts and Implications*, 24 PACE L. REV. 433, 435-36, 438 (2004).

52. Schlanger, *Civil Rights Injunctions*, *supra* note 44, at 563. See also JAMES B. JACOBS, *STATEVILLE: THE PENITENTIARY IN MASS SOCIETY* 73-104 (1977) (describing the “emergence of a professional administration” in the early 1970s at the Stateville Penitentiary in Illinois, including professionalization of the staff, the enactment of administrative regulations, and bureaucratization of the corrections agency); Feeley & Swearingen, *supra* note 51, at 455-65 (“[L]itigation promoted professionalization and facilitated opportunities for a new generation of administrators.”).

53. FEELEY & RUBIN, *supra* note 21, at 370. See also Feeley & Hanson, *supra* note 22, at 27 (discussing the role of correctional accreditation organizations); Vincent Nathan, *Have the Courts Made A Difference in the Quality of Prison Conditions? What Have We Accomplished to Date?*, 24 PACE L. REV. 419, 424 (2004) (“[J]udicial intervention has had a vast impact on the thinking and the mindset of correction administrators, as well as that of mid-level and line staff.”).

54. FEELEY & RUBIN, *supra* note 21, at 39-40.

reaction to federal court intervention followed.⁵⁵ In the 1980s and 1990s, the Supreme Court issued a number of opinions that were less prisoner-friendly,⁵⁶ and the Department of Justice under the administrations of Presidents Ronald Reagan and George H. W. Bush settled cases on terms unfavorable to prisoners.⁵⁷ In the PLRA, Congress decisively constrained prisoners' rights litigation⁵⁸ through restrictions on prospective relief,⁵⁹ consent decrees,⁶⁰ *pro se* filings,⁶¹ and attorney's fees.⁶² An invigorated exhaustion requirement⁶³ and a limitation on damages without a prior showing of a physical injury reduced claims further.⁶⁴

By the 1990s, a consensus had emerged that prison and jail litigation was "moribund."⁶⁵ The conventional wisdom was that the increasingly conservative federal bench had restricted such litigation through judge-made doctrines, which were ultimately codified by the PLRA.⁶⁶ In her empirical study of court filings, Margo Schlanger challenges this account, arguing that prison and jail litigation essentially remained steady through the late 1980s and early 1990s, before falling markedly only after Congress passed the PLRA.⁶⁷ Whichever version one accepts, the broad outline of the story remains the same: The long-standing "hands-off" doctrine was interrupted by a period of significant gains through civil rights litigation, followed by restrictions on such litigation.⁶⁸

Meanwhile, the prison population boomed. The number of incarcerated Americans increased by a factor of seven between 1970 and 2007, resulting in 1 of every 131 Americans being incarcerated in prison or jail by mid-year

55. *Id.* at 46-50 (describing the prison reform movement as "in retreat" since 1986).

56. *Id.* at 48-49 (discussing *Rhodes v. Chapman*, 452 U.S. 337 (1981), which concluded that double-celling was not, in and of itself, an Eighth Amendment violation, and *Wilson v. Seiter*, 501 U.S. 294 (1991), which held that an Eighth Amendment violation in the context of a prison riot required that the guard act "maliciously and sadistically").

57. *Id.* at 49-50.

58. *Id.* at 50. See HUMAN RIGHTS WATCH, NO EQUAL JUSTICE 8 (2009) ("The PLRA brought sweeping and unprecedented changes in the ability of prisoners to seek relief in court from conditions that threaten their health and safety or otherwise violate their legal rights.").

59. 18 U.S.C. § 3626(a)(1)(A) (2008).

60. 18 U.S.C. § 3626(b)(1), (b)(3) (2008).

61. 28 U.S.C. § 1915(b)(1), (g) (2003).

62. 42 U.S.C. § 1997e(d) (2009).

63. 42 U.S.C. § 1997e(a) (2009).

64. 42 U.S.C. § 1997e(e) (2009).

65. Schlanger, *Civil Rights Injunctions*, *supra* note 44, at 557-58, 566.

66. *Id.* at 566-67 (citing Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 21 (1997)) (Professor Schlanger disputes the traditional account that the PLRA "had already limited the availability of relief to prison and jail plaintiffs and allowed institutional defendants various ways out of entered decrees").

67. Schlanger, *Civil Rights Injunctions*, *supra* note 44, at 589.

68. See generally Susan N. Herman, *Slashing and Burning Prisoners' Rights: Congress and the Supreme Court in Dialogue*, 77 OR. L. REV. 1229 (1998) (describing restrictions on prisoners' rights by both the Supreme Court and Congress in the PLRA).

2007.⁶⁹ The causes of this expansion are much debated, but probably include the so-called war on drugs and other law-and-order initiatives, longer prison terms produced by sentencing reform, and victims' rights movements.⁷⁰

During this prison boom, the racial composition of America's prisons and jails changed from majority white to largely African-American and Latino.⁷¹ Commentators have noted that this change "coincided with" the "shift toward constitutional deference" in prisoners' rights doctrine.⁷² The racially disparate nature of mass incarceration leads Loic Wacquant to argue that it is better termed "the *hyper*-incarceration of one particular category: lower-class black men in the crumbling ghetto."⁷³ Some draw a direct connection between the end of *de jure* segregation and the subsequent incarceration boom, arguing that the prison has become a "juridical ghetto."⁷⁴

Prisons also changed in ways that were consistent with the bureaucratization of the system and the vast numbers of people incarcerated. Some systems continued to struggle with "old-fashioned" abuses, sub-standard conditions, and inadequate medical care.⁷⁵ But in other systems, inhumanity evolved, in part due to the rationalization of reform efforts.⁷⁶ Technologically advanced "supermax" prisons imposed solitary confinement⁷⁷ "through the use

69. The Sentencing Project, *News - Incarceration* (2008), <http://www.sentencingproject.org/template/page.cfm?id=107>.

70. See GOTTSCHALK, *supra* note 1, at 2, 18-40.

71. Wacquant in RACE, INCARCERATION, *supra* note 9, at 60 (writing that U.S. prisoners were 70% white and 30% "other" at the end of World War II, and 70% African-American and Latino and 30% white by 2000).

72. Buchanan, *supra* note 8, at 81. See Loury, in RACE, INCARCERATION, *supra* note 9, at 13 (explaining that, beginning in the late 1960s, "opponents of the civil rights revolution sought to regain the upper hand by shifting to a new issue . . . a seemingly race-neutral concern over crime").

73. Wacquant, in RACE, INCARCERATION, *supra* note 9, at 59.

74. Dolovich, *Incarceration American-Style*, *supra* note 13, at 255-56 (quoting Wacquant, *Peculiar Institution*, *supra* note 8, at 383-84).

75. See Prison Abuse Remedies Act of 2007: Hearing on H.R. 4109 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the Comm. on the Judiciary, 110th Cong. 17-19 (2008) (testimony of Stephen B. Bright), available at <http://judiciary.house.gov/hearings/pdf/Brigt080422.pdf>. See also *Hope v. Pelzer*, 536 U.S. 730 (2002) (concluding that restraining an inmate to a hitching post was an Eighth Amendment violation).

76. Jacobs, *The Prisoners' Rights Movement*, *supra* note 29, at 462 (noting that "[l]ess punitive but possibly more intrusive mechanisms of control are now becoming more popular—closed circuit televisions, more frequent use of tear gas, sophisticated locking systems, and unit management which seeks to limit inmate movement and contact").

77. ALAN ELSNER, GATES OF INJUSTICE 154-55 (2004). See *Wilkinson v. Austin*, 545 U.S. 209 (2005) (describing "extreme isolation" in an Ohio supermax facility and concluding that prisoners possess a liberty interest in avoiding assignment there). See also James Forman, Jr., *Exporting Harshness: How the War on Crime Has Made the War on Terror Possible*, 33 N.Y.U. REV. L. & SOC. CHANGE 331, 350-351 (2009) (making a connection between the abusive conditions at Guantanamo Bay and the development of domestic supermax prisons); Mikel-Meredith Weidman, *The Culture of Judicial Deference and the Problem of Supermax Prisons*, 51 UCLA L. REV. 1505, 1512, 1526 (describing how "the typical supermax minimizes sensory stimulation and human contact" and how "[t]he Supreme Court has been particularly active in

of electronic surveillance, specially designed cell units and blocks, and rigidly organized protocols for staff communication with inmates.”⁷⁸ One former warden of a supermax has described such a facility as a “clean version of hell.”⁷⁹ Even in traditional prisons, routine imposition of arguably abusive but bureaucratically rationalized practices—such as strip and body cavity searches—routinized degradation.⁸⁰

Viewed in the long-term, the arc of this story reflects continuity as well as change. Although structural prison litigation undeniably has achieved important victories,⁸¹ the legal regimes that govern “mass incarceration” also illustrate aspects of what Reva Siegel has described as “preservation through transformation” or “status regime . . . modernization.”⁸² Siegel wrote that formal legal doctrines sanctioning spousal abuse, such as the “right of chastisement,” were abandoned in the nineteenth-century; but these doctrines were replaced by judicial rhetoric that preserved the status quo by emphasizing the sanctity of the home and that declined to intervene in domestic disputes.⁸³ She explains that “rules and reasons” of a legal system may be modified “to produce a new regime” that, although “formally distinguishable from its predecessor,” maintains existing status hierarchies.⁸⁴ In other words, when challenged by reform efforts, legal constructs may morph to preserve race and gender hierarchies.⁸⁵ Siegel concludes, “If a reform movement is at all successful in advancing its justice claims, it will bring pressure to bear on law makers to rationalize status-enforcing state action in new and less socially

developing standards of deference to constrain lower courts in prison cases”).

78. Simon, *supra* note 18, at 300-01 (citing Roy D. King, *The Rise and Rise of the Supermax: An American Solution in Search of a Problem*, 1 PUNISHMENT AND SOC’Y 163 (Oct. 1999)).

79. Comments of Robert Hood, former Warden at Florence, Colorado, federal Administrative Maximum facility, to CBS *60 Minutes*, quoted in Jules Lobel, *Prolonged Solitary Confinement and the Constitution*, 11 U. PA. J. CONST. L. 115, 116 (2008).

80. See DAVIS, *supra* note 8, at 63, 81 (arguing that “[s]exual abuse is surreptitiously incorporated into one of the most habitual aspects of women’s imprisonment, the strip search”). My thinking on this point was affected by comments by Cynthia Chandler, Executive Director of Justice Now, at the Feminist Legal Theory Workshop at Emory University, February 27-28, 2009. Cf. DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY 243 (1990) (recognizing that what separates incarceration from corporal punishment “is not a matter of the intrinsic levels of pain and brutality involved,” but rather “the *form* which that violence takes, and the extent to which it impinges on public sensibilities”).

81. Schlanger, *Civil Rights Injunctions*, *supra* note 44, at 563-64.

82. Reva B. Siegel, *The Rule of Love: Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2119-20 (1996). See also Buchanan, *supra* note 8, at 48-49 (applying Siegel’s theory of status regime modernization in the context of legal regimes countenancing sexual abuse of incarcerated women of color).

83. Siegel, *supra* note 82, at 2153 (“As courts addressed the regulation of marital violence in the wake of chastisement’s demise, judges raised concerns about invading the privacy of the marriage relationship . . .”).

84. *Id.* at 2180.

85. *Id.*

controversial terms.”⁸⁶

The concept of status regime modernization operates on a number of levels in the story of prison reform. First, mass incarceration and the legal regimes that govern it perpetuate status hierarchies of race, class, and gender that previously were supported by other social and legal institutions.⁸⁷ On another level, status regime modernization explains the story of prison reform over the last forty years; following a brief period of gains, new legal strictures have pushed us back in the direction of a “hands-off” approach.⁸⁸ Although courts may have rejected the formal doctrines underpinning the “hands-off” posture, deference to corrections officials and to their regulations has become the most recent incarnation of the “hands-off” policy.⁸⁹ Because of the racially disparate impact of mass incarceration, this updated “hands-off” policy now maintains status regimes of race and class.

B. Deference

Supreme Court case law defers to corrections officials and their policies; indeed, the Court treats prison and jail regulations as an undifferentiated monolith, according them deference without asking how they are formulated.⁹⁰

86. *Id.* at 2120.

87. See DAVIS, *supra* note 8, at 26 (identifying “the historical links between U.S. slavery and the early penitentiary system”); Wacquant, *From Slavery to Mass Incarceration*, *supra* note 8; Wacquant, *Peculiar Institution*, *supra* note 8; Lory, in RACE, INCARCERATION, *supra* note 9, at 36-37. See also Buchanan, *supra* note 8, at 49-50 (“The rationales, rules and results of contemporary prison law impunity evoke women’s exposure to sexual and gender violence under 19th century status regimes that contemporary courts and legislatures have long purported to reject.”).

88. Elizabeth Budnitz, *Not a Part of Her Sentence: Applying the Supreme Court’s Johnson v. California to Prison Abortion Policies*, 71 BROOK. L. REV. 1291, 1305 (2006) (concluding that *Turner* produced “a return to the earlier hands-off doctrine that paid vast deference to prison officials in determining prison policy”); Cheryl Dunn Giles, *Turner v. Safley and Its Progeny: A Gradual Retreat to the “Hands-Off Doctrine?”*, 35 ARIZ. L. REV. 219, 220 (1993) (arguing six years after *Turner* that the Supreme Court’s lax application of the standard was “a step backwards toward the historical ‘hands-off’ approach”).

89. At various junctures beginning in the late 1970s, and continuing through the 1990s, commentators have claimed that successive, increasingly harsh restrictions on prisoners’ substantive or procedural rights constitute a “return to” or a “new” “hands-off” doctrine. See Budnitz, *supra* note 88; Giles, *supra* note 88. See also Mark Berger, *Withdrawal of Rights and Due Deference: The New Hands Off Policy in Correctional Litigation*, 47 UMKC L. REV. 1, 2 (1979) (explaining how courts replaced the “hands-off” doctrine with limitations on prisoners’ substantive rights); Robbins, *supra* note 29, at 215 (arguing that *Bell v. Wolfish*, 441 U.S. 520 (1979), “reviv[ed] many aspects of the hands-off doctrine” through “judicial deference” to corrections authorities, signaling the “emergence of a new hands-off approach”).

90. Cf. Lorjean Golichowski Dei, *The New Standard of Review for Prisoners’ Rights: A “Turner” for the Worse?*, 33 VILL. L. REV. 393, 436 (1988) (noting that “the standard’s heavy emphasis on deference robs it of most of its bite” and that it is “to be applied uniformly to the whole range of challenges”); Richard H. Fallon, *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1301-03 (2006) (noting that the Supreme Court “has mandated a relaxed application even of this loose [*Turner*] standard” and that this demonstrates a sense that judges are ill-suited to conduct a cost-benefit analysis of prison

In its 1987 decision in *Turner v. Safley*,⁹¹ the Supreme Court articulated what is by now its familiar test for determining when a prison regulation that impinges on prisoners' constitutional rights passes muster. While courts rigorously scrutinize regulations that may implicate constitutional rights in other administrative law areas,⁹² in the prison context, courts defer even to regulations that impinge on constitutional rights.

Writing for the Court in *Turner*, Justice O'Connor surveyed prior case law regarding restrictions on prison unions, face-to-face visits with the media, and receipt of hardback books.⁹³ She wrote that "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution."⁹⁴ Nonetheless, she also recognized that "[r]unning a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government."⁹⁵ Particularly when a state prison system is involved, she wrote, "federal courts have . . . additional reason to accord deference to the appropriate prison authorities."⁹⁶

Justice O'Connor concluded that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."⁹⁷ She then set out the four factor test that has governed so much of prison litigation for the last twenty years: (1) whether there is a "valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it;" (2) "whether there [are] alternative means of exercising the right that remain open to prison inmates;" (3) "the impact accommodation of the asserted constitutional right will have on guards and other inmates;" and (4) "whether there are 'ready alternatives' to the regulation."⁹⁸ Applying this test in *Turner* itself, the Court struck down restrictions on inmate marriage,⁹⁹ describing the social significance of marriage.¹⁰⁰ However, *Turner* upheld restrictions on inmate-to-

litigation in the aggregate); James E. Robertson, *The Majority Opinion as the Social Construction of Reality: The Supreme Court and Prison Rules*, 53 OKLA. L. REV. 161 (2000) [hereinafter "Robertson, *The Majority Opinion*"] (discussing the *Turner* test and arguing that "the Supreme Court has constructed as social reality a set of assumptions about imprisonment that renders inmates unworthy of meaningful constitutional safeguards"); James E. Robertson, *The Rehnquist Court and the "Turnerization" of Prisoners' Rights*, 10 N.Y. CITY L. REV. 97, 121-22 (2006) [hereinafter "Robertson, *The Rehnquist Court*"].

91. *Turner*, 482 U.S. at 78.

92. See *infra* note 278.

93. *Turner*, 482 U.S. at 85-90.

94. *Id.* at 84.

95. *Id.* at 85.

96. *Id.*

97. *Id.* at 89.

98. *Id.* at 89-91.

99. *Id.* at 94.

100. See *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 417 (Conn. 2008) (relying on *Turner* to describe the social significance of marriage).

inmate correspondence, citing security concerns.¹⁰¹

The *Turner* test—the primary federal constitutional standard associated with challenges to prison and jail regulations—thus emphasizes deference to prison officials and the relative technical and administrative expertise of corrections authorities. It also acknowledges the “intractable” problems of prison administration and the comity concerns associated with federal judicial intervention in state court systems.¹⁰² The Court has applied *Turner* in a way that defers to corrections regulations as well; apart from overriding the restriction on inmate marriage in *Turner* itself, the Supreme Court has never invalidated a prison regulation analyzed under the test.¹⁰³

Significantly, the *Turner* test does not require courts to differentiate among types of prison and jail regulations, policies, and rules, creating a one-size-fits-all approach. As a result, lower courts apply *Turner* both in cases involving corrections regulations promulgated pursuant to notice-and-comment rulemaking¹⁰⁴ and in cases involving far more informal policies or practices.¹⁰⁵ For example, in a Fourth Circuit case applying *Turner* to uphold a “policy” of single-celling all gay male prisoners, the corrections “policy” at issue was the decision of a sergeant who reportedly said, “as long as I please my supervisor, what I say goes and whether or not it’s right, it’s non-grievable.”¹⁰⁶

One area, however, in which the Court has declined to apply *Turner*

101. 482 U.S. at 91-93.

102. *Id.* at 84-85.

103. *See, e.g.,* *Banks v. Beard*, 548 U.S. 521 (2006) (upholding restriction on newspapers and magazines); *Overton v. Bazzetta*, 539 U.S. 126 (2003) (upholding restrictions on visitation); *Shaw v. Murphy*, 532 U.S. 223 (2001) (upholding prohibition on inmate-to-inmate correspondence in which one prisoner gives legal advice to another); *Washington v. Harper*, 494 U.S. 210 (1990) (upholding policy regarding procedure for forcible medication of inmates); *Thornburgh v. Abbott*, 490 U.S. 401 (1989) (upholding restrictions on certain publications); *O’Lone v. Shabazz*, 482 U.S. 342 (1987) (upholding prison work detail regulations that resulted in Muslim inmates missing Jumu’ah services). In *Lewis v. Casey*, 518 U.S. 343, 361-63 (1996), a case involving the standard for access to courts claims, the majority emphasized that the remedial order entered by the district court was inconsistent with the “deferential standard” of *Turner*. *See also* Robertson, *The Rehnquist Court, supra* note 90, at 107-08 (discussing cases in which the Supreme Court had applied *Turner* up to that time). Lower courts also apply *Turner* deferentially. *See* Weidman, *supra* note 77, at 1521 (“Lower courts’ internalization and extension of the Supreme Court’s mandates mark the complete transformation of the hands-off tradition into a full-blown culture of judicial deference.”).

104. *Overton v. Bazzetta*, 539 U.S. 126, 129 (2003) (upholding restrictions on visitation imposed by Michigan Administrative Code, MICH. ADMIN. CODE r. 791.6609 (1980)).

105. *See* *Von Minden v. Jankowski*, 268 Fed. App’x 352 (5th Cir. 2008) (upholding under *Turner* a Washington County, Texas, county jail visitation rule prohibiting a father from visiting his son because the father had been detained pretrial on a marijuana possession charge for one day within the previous six months); *Veney v. Wyche*, 293 F.3d 726, 734 (4th Cir. 2002) (applying *Turner* to uphold regional jail policy of single-celling all gay male prisoners); *Bowman v. Beasley*, 8 Fed. App’x 175, 179 (4th Cir. 2001) (upholding under *Turner* a South Carolina Department of Corrections practice of segregating all HIV+ prisoners by moving them to a particular facility).

106. Brief of Appellant at *7, *Veney v. Wyche*, 2001 WL 3438545 (4th Cir. Dec. 10, 2001) (No. 01-6603).

deference is in examining an express racial categorization.¹⁰⁷ When confronted with a California Department of Corrections and Rehabilitation (“CDCR”) unwritten policy of racially segregating incoming prisoners on a temporary basis, the Court remanded for the lower court to apply strict scrutiny, the normal standard of review for race-based classifications.¹⁰⁸ It explained, “[P]ublic respect for our system of justice is undermined when the system discriminates based on race.”¹⁰⁹

Prison grievance policies, procedures by which prisoners can complain about problems to prison administrators, are accorded even greater deference than other rules. The PLRA requires that prisoners “exhaust” all available remedies before bringing federal claims to court.¹¹⁰ In a pair of decisions involving the PLRA exhaustion requirement, the Court has accorded prison and jail grievance policies great weight in determining which prisoners’ claims will be heard. In *Woodford v. Ngo*,¹¹¹ the Supreme Court considered the effect of procedural error on the PLRA requirement that prisoners exhaust all available administrative remedies before filing a lawsuit.¹¹² It concluded that the PLRA requires “proper exhaustion.”¹¹³ This requirement has significant consequences: Prisoners who miss a filing deadline or otherwise fail to comply with a procedural requirement in the prison grievance process might be forever barred from bringing their claim to court.¹¹⁴

In reaching its conclusion, the Court examined analogous concepts in administrative law and concluded that the PLRA “uses the term ‘exhausted’ to mean what the term means in administrative law.”¹¹⁵ The *Woodford* Court emphasized the purposes of administrative exhaustion: “Proper exhaustion demands compliance with an agency’s deadlines and other critical procedural rules because no adjudicative system can function effectively without imposing

107. *Johnson v. California*, 543 U.S. 499 (2005) (concluding that strict scrutiny should be applied to examine an unwritten California Department of Corrections and Rehabilitation policy segregating incoming inmates by race).

108. *Id.* at 509-10.

109. *Id.* at 511. Perhaps the express racial categorization in *Johnson* came too close to making manifest the racial hierarchies perpetuated in the criminal justice system, in a way that facially neutral prison regulations do not. *Cf.* *Washington v. Davis*, 426 U.S. 229, 242 (1976) (disparate impact based on facially neutral policies was insufficient to demonstrate an equal protection violation).

110. 42 U.S.C. § 1997e(a) (2009) (“No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.”).

111. 548 U.S. 81 (2006).

112. 42 U.S.C. § 1997e(a) (2009).

113. 548 U.S. at 93.

114. Kermit Roosevelt, *Exhaustion Under the Prison Litigation Reform Act: The Consequence of Procedural Error*, 52 EMORY L.J. 1771, 1810-13 (2003); Margo Schlanger & Giovanna Shay, *Preserving the Rule of Law in America’s Jails & Prisons: The Case for Amending the PLRA*, 11 U. PA. J. CONST. L. 139 (2009).

115. 548 U.S. at 93.

some orderly structure on the course of its proceedings.”¹¹⁶ Thus, *Woodford* ostensibly treated prison grievance policies like other agencies’ procedural rules even though prison policies often determine prisoners’ ability to seek redress for constitutional violations.¹¹⁷

However, in his concurrence in *Woodford*, Justice Breyer, an administrative law scholar, suggested that “administrative law . . . contains well established exceptions to exhaustion,” and these might apply in the PLRA context as well.¹¹⁸ Although there is some tension between Justice Breyer’s suggestion and other Supreme Court PLRA exhaustion precedent,¹¹⁹ his concurrence reminds us that if administrative law principles are going to be applied in the prison context, they should not be imported selectively.

In a follow-on case the next year, *Jones v. Bock*, the Supreme Court emphasized that “it is the prison’s requirements, and not the PLRA, that define the boundaries of proper exhaustion.”¹²⁰ Nonetheless, Chief Justice Roberts included language seemingly refuting the notion that the Court was returning to a “hands-off” posture. “Our legal system,” he wrote, “remains committed to guaranteeing that prisoner claims of illegal conduct by their custodians are fairly handled according to law.”¹²¹

In short, while asserting that courts remain open to prisoners’ constitutional claims, the Supreme Court has accorded corrections officials significant leeway, even when constitutional rights are implicated.¹²² Even while deferring to corrections rules, most Supreme Court case law does not differentiate among types of prison and jail regulations and policies. In fact,

116. *Id.* at 90-91.

117. See 2 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE, § 15.5, at 331 (4th ed. 2002) (describing the “constitutional right exception” to the exhaustion doctrine in non-PLRA administrative law contexts).

118. *Woodford v. Ngo*, 548 U.S. 81, 103-04 (2006) (Breyer, J., concurring) (noting exceptions to administrative exhaustion requirements for constitutional claims: futility, hardship, and inadequate or unavailable administrative remedies).

119. *Porter v. Nussle*, 534 U.S. 516, 532 (2002) (exhaustion required for “all inmate suits about prison life”); *Booth v. Churner*, 532 U.S. 731, 741 (2001) (PLRA exhaustion required regardless of “the relief offered through administrative procedures”).

120. 549 U.S. 199, 218 (2007).

121. *Id.* at 203.

122. Another major obstacle to prisoners’ rights suits is the high standard of liability for Eighth Amendment violations—the “deliberate indifference” standard. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994) (“[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.”). Prison policies are a focus of litigation in the Eighth Amendment context as well, particularly in the area of supervisory liability. See *Richardson v. Goord*, 347 F.3d 431 (2d Cir. 2003) (holding that, in the Second Circuit, supervisory liability may be demonstrated by: “(1) actual direct participation in the constitutional violation, (2) failure to remedy a wrong after being informed through a report or appeal, (3) creation of a policy or custom that sanctioned conduct amounting to a constitutional violation, or allowing such a policy or custom to continue, (4) grossly negligent supervision of subordinates who committed a violation, or (5) failure to act on information indicating that unconstitutional acts were occurring”).

corrections rules originate from a wide range of administrative and legal processes representing varying degrees of transparency and accountability. The next section describes how corrections regulations are often exempt from normal rulemaking procedures.

II. REGULATING CORRECTIONS

This Section surveys state administrative procedure act provisions regarding corrections policies¹²³ and then discusses some of the practical implications of corrections policies for prisoners, their families, and free communities.

A. Survey of Administrative Procedure Acts

State prisoners are the focus of this Article because they are by far the most numerous,¹²⁴ but it is useful to examine the regulation of federal prisons as a point of comparison. The U.S. Bureau of Prisons (“BOP”) is subject to the rulemaking requirements of the federal Administrative Procedure Act (“APA”).¹²⁵ “Informal” notice-and-comment rulemaking under the federal

123. Private prisons may be subject to department of corrections regulations through contract provisions, *Nichols v. TransCor America*, No. M2001-01889-COA-R9-CV, 2002 WL 1364059, at *8 (Tenn. Ct. App. 2002) (noting provisions of contract between State of Florida and TransCor stating that inmates who are transported by contractor shall be treated in accordance with the Department of Correction’s rules and regulations), but in other jurisdictions, they are not subject to state corrections regulations, *Moore v. Gaither*, 767 A.2d 278, 286-87 (D.C. 2001) (private Correctional Treatment Facility not subject to Lorton Regulations Approval Act governing District of Columbia prisons). Although regulation of private prisons is beyond the scope of this Article, commentators have urged additional administrative law and regulatory controls. See Alfred C. Aman, Jr., *Globalization, Democracy, and the Need for a New Administrative Law*, 10 IND. J. GLOBAL LEGAL STUD. 125, 126, 130-31 (2003) [hereinafter “Aman, *Globalization*”] (arguing that prison privatization creates a “democracy deficit” that can be bridged in part through extension of administrative law “values” to new “public/private arrangements”); Alfred C. Aman, Jr., *Privatization, Prisons, Democracy, and Human Rights: The Need to Extend the Province of Administrative Law*, 12 IND. J. GLOBAL LEGAL STUD. 511, 516 (arguing that “delegations of public functions to private bodies,” such as private prisons, “is a crucial area for administrative law reform and an important way of guarding against human rights violations”); Jack Beermann, *The Reach of Administrative Law in the United States*, in THE PROVINCE OF ADMINISTRATIVE LAW 171, 191-93 (Michael Taggart ed., 1997) (arguing that private prisons companies should be considered “state actors” subject to administrative law strictures); Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 439, 515 (2005) (“There ought to be benchmark standards of quality and humanity that apply to all prisons, set by state departments of corrections themselves—or if this arrangement would create too great a conflict of interest, then by an independent body.”).

124. The Bureau of Justice Statistics reported that at year-end 2007, 1.4 million people were incarcerated in state prisons (not including jails), while only 201,142 prisoners were in federal jurisdiction. BUREAU OF JUSTICE STATISTICS, CORRECTIONS STATISTICS, <http://www.ojp.usdoj.gov/bjs/correct.htm#findings> (last visited Oct. 30, 2009).

125. See 5 U.S.C. § 553 (2006). An amicus brief filed in a 2001 U.S. Supreme Court case involving a BOP regulation explained, “Certain BOP actions relating to determinations for individual prisoners are exempt from the APA’s requirements, but the exemption does not extend to the BOP’s rule-making activities.” Amicus Curiae Brief of the National Association of

APA essentially requires that the agency provide notice of the proposed rule, provide interested parties with an opportunity for comment, and explain the reasons behind the choices it made in the final version.¹²⁶ A federal court reviewing BOP regulations under the APA can strike down prison rules if they are “arbitrary and capricious,” or remand for a further statement of reasoning if the prison authority failed to provide an adequate rationale.¹²⁷

Like other federal agencies, however, the BOP need not comply with APA rulemaking procedures when it issues “interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice.”¹²⁸ These take the form of Program Statements and Institutional Supplements.¹²⁹ However, under the federal APA, “interpretive” rules and statements of policy are not meant to bind parties or affect substantive rights.¹³⁰

Criminal Defense Lawyers, Families Against Mandatory Minimums Foundation, and the Association of Federal Defenders in Support of Petitioner Christopher A. Lopez at 20, *Lopez v. Davis*, 531 U.S. 230 (2001) (No. 99-7504), 2000 WL 890320 (citing 18 U.S.C. § 3625 (2008) as “removing applicability of certain sections of the APA, but not Section 553, which establishes rule-making requirements”). 18 U.S.C. § 3625 states that “[t]he provisions of sections 554 and 555 [adjudication and ancillary proceedings] and 701 through 706 of title 5, United States Code, do not apply to the making of any determination, decision, or order under this subchapter.” *Cf. Lopez v. Davis*, 531 U.S. 230, 244 n.6 (2001) (addressing whether BOP possessed discretion to promulgate regulation barring felons convicted of using a firearm from early release, although declining to address the question of whether BOP had complied with APA). A 1977 decision of the 9th Circuit, *Clardy v. Levi*, 545 F.2d 1241 (9th Cir. 1977), held that BOP disciplinary hearings were not subject to the APA, creating a circuit split on whether the BOP was bound by the APA. *See also White v. Henman*, 977 F.2d 292 (7th Cir. 1992). More recent case law accepts that BOP rule-making, at least, as distinct from individual adjudication, is subject to the APA. *See Todd Bussert, Peter Goldberger & Mary Price, New Time Limits on Federal Halfway Houses*, 21 A.B.A. SEC. CRIM. JUST. 2 (Spring 2006) (describing litigation about whether the BOP had complied with the APA in changing rules regarding halfway house placement).

126. Steven Crowley, *Making Rules: An Introduction*, 93 MICH. L. REV. 1511, 1512-13 (1995) (describing informal rulemaking and contrasting it with “formal” rulemaking under the federal APA, which is required only in limited circumstances, and which includes a hearing and the taking of testimony). *Compare Arrington v. Daniels*, 516 F.3d 1106 (9th Cir. 2008) (concluding that BOP regulation regarding early release of prisoners who complete residential substance abuse program violated APA), *with Gatewood v. Outlaw*, 560 F.3d 843 (8th Cir. 2009) (concluding that BOP rule passed muster under the APA). *See also Grier v. Hood*, 46 Fed. App’x 433, 440 (9th Cir. 2002) (“[I]t is apparent that the procedures utilized to adopt the [BOP] regulation did not comply with the APA.”).

127. 5 U.S.C. §§ 701-06 (2006); 1 DAVIS & PIERCE, *supra* note 117, § 7.8, at 496-97. *See also Gatewood*, 560 F.3d at 846-48; *Alnoubani v. Fed. Bureau of Prisons*, 306 Fed. App’x 309 (7th Cir. 2009) (Under the APA, agency action can be reviewed to determine if it is arbitrary or capricious or if the agency fails to state a rationale.); *Arrington*, 516 F.3d at 1111-12.

128. 5 U.S.C. § 553(b)(3)(A) (2006). The federal APA also has substantive exemptions for rules pertaining to “military or foreign affairs,” for matters “relating to agency management or personnel or to public property, loans, grants, benefits or contracts,” and for “good cause,” 5 U.S.C. §§ 553(a)(1)-(2), (b)(B), (d)(3) (2006), although these exceptions have been criticized. *See* 1 DAVIS & PIERCE, *supra* note 117, § 7.10, at 503-06.

129. *See* Federal Bureau of Prisons, Policy and Forms, <http://www.bop.gov/policy/index.jsp> (last visited Oct. 30, 2009). *See also* Complaint, *Benkahla v. Fed. Bureau of Prisons*, (S.D. Ind. June 18, 2009) (No. 2:09-cv-00025).

130. *See* 1 DAVIS & PIERCE, *supra* note 117, §§ 6.3-6.4 at 316-49; Robert A. Anthony,

Thus, whether a BOP regulation is “interpretive or substantive”—whether it is an internal guideline clarifying a regulation or a true regulation—is a question often litigated by federal prisoners.¹³¹

State administrative law regimes vary.¹³² In some seventeen jurisdictions—including, *inter alia*, New York, Illinois, Michigan, and Wisconsin—the Department of Corrections (“DOC”) is bound by the provisions of the state administrative procedure act, including notice-and-comment rulemaking procedures,¹³³ for at least the most formal tier of rules

Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?, 41 DUKE L.J. 1311, 1315 (1992) (arguing that policy statements and interpretive rules should not be used to bind the public if they are not submitted to notice-and-comment rulemaking).

131. A federal prisoner confined in a highly restrictive “Communication Management Unit” (CMU) reserved for suspected terrorists recently filed suit alleging that the BOP promulgated substantive rules regarding placement in the CMUs through “Institutional Supplements,” thereby circumventing the notice-and-comment requirements of the APA. Complaint, *Benkahla v. Fed. Bureau of Prisons*, (S.D. Ind. June 18, 2009) (No. 2:09-cv-00025). See also *Ojeda v. Fed. Bureau of Prisons*, 225 Fed. App’x 285, 286 (5th Cir. 2007) (Change in the rule of an agency was discretionary and exempt from notice-and-comment requirements of the APA.); *Morrison v. Woodring*, 191 Fed. App’x 606 (9th Cir. 2006) (Security classifications are not subject to APA rulemaking procedures); *Williams v. Van Buren*, 117 Fed. App’x 985, 987 (5th Cir. 2004) (Compassionate release rule “is an interpretive rule that is not subject to the ‘notice and comment’ requirements of the APA.”); *Sample v. Watts*, 100 Fed. App’x 317 (5th Cir. 2004) (Because program statement “did not contradict or alter an existing rule of longstanding policy or practice, . . . the Administrative Procedures Act’s notice and comment requirements do not apply.”); *Hill v. Pugh*, 75 Fed. App’x 715 (10th Cir. 2003) (“Bureau of Prisons’ program statements . . . are ‘internal agency guidelines’ that are not ‘subject to the rigors of the [APA], including public notice and comment.’”); *Gunderson v. Hood*, 268 F.3d 1149 (9th Cir. 2001) (Because the BOP statement “did no more than ‘clarify or explain existing law,’ it was interpretive and thus not subject to the rigors of the APA.”). See generally Yana Dobkin, *Cabining the Discretion of the Federal Bureau of Prisons and the Federal Courts: Interpretive Rules, Statutory Interpretation, and the Debate Over Community Confinement Centers*, 91 CORNELL L. REV. 171, 188-98, 213 (2005) (describing litigation about whether changes to BOP halfway house placement rules were interpretive or substantive; noting that BOP rule-change in the form of a “[m]emorandum” was really a substantive rule that “offer[ed] no meaningful opportunity for input”).

132. Each state’s administrative procedure act rulemaking provisions regarding corrections, if any, are set out in a chart in the Appendix. This Article focuses on rulemaking procedures under state administrative procedure acts. There are also issues regarding whether certain hearings in prison settings are “contested cases” for which judicial review is available. See, e.g., *Clinton v. Bonds*, 816 S.W.2d 169 (Ark. 1991) (Inmates have a right to judicial review of constitutional questions, even if the state Administrative Procedure Act exempts prison disciplinary procedures from the definition of “contested cases.”); *Walén v. Dep’t of Corr.*, 505 N.W.2d 519 (Mich. 1993) (concluding that prison disciplinary hearings fall within definition of “contested case” for the purpose of FOIA, although such proceedings are exempted from some provisions of the state Administrative Procedure Act); *Al-Shabazz v. State*, 527 S.E.2d 742 (S.C. 2000). These questions are beyond the scope of this article.

133. See ALASKA STAT. §§ 44.280.030, 33.30.021 (2008); ARK. CODE ANN. § 16-93-1603(d)(2) (Supp. 2009); ILL. ADMIN. CODE tit. 2, § 850.120(c)-(d) (2002); IND. CODE ANN. § 11-8-2-5(b)(1) (West 2004); KY. REV. STAT. ANN. §§ 197.020, 196.035 (LexisNexis 1999); ME. REV. STAT. ANN. tit. 34-A, § 1402 (1988); MASS. GEN. LAWS. ANN. ch. 30A, § 1A (West 2001); NEB. REV. STAT. §§ 84-901 to -920 (2008); N.J. ADMIN. CODE § 10A:1-1.5(a) (2009); UTAH CODE ANN. § 64-13-10(2) (2008); VT. STAT. ANN. tit. 3, § 831(a) (2003). See also *Abdullah v.*

deemed “regulations.” Twenty-eight U.S. jurisdictions expressly exempt some rules affecting prisoners from the state administrative procedure act in whole or in part,¹³⁴ and about a half-dozen more have interpreted general exemptions to their state administrative procedure act to apply to some rules affecting prisoners.¹³⁵ Connecticut has done some of both.¹³⁶

These types of exemptions follow from revisions of the Model State Administrative Procedure Act. For instance, the 1961 Model State Administrative Procedure Act included an exemption to rulemaking procedures for regulations pertaining only to internal management of the agency, which was adopted by many jurisdictions.¹³⁷ The 1981 revision to the Model State Administrative Procedure Act not only included an exemption for “procedural requirements rules concerning only internal management that do not substantially affect procedural or substantive rights of any segment of the

Gunter, 497 N.W.2d 12, 860 (Neb. 1993); Jones v. Smith, 478 N.E.2d 191, 192-193 (N.Y. 1985); Weaver v. Dep’t of Corr., 720 A.2d 178 (Pa. Commw. Ct. 1998); Parker v. Gorczyk, 787 A.2d 494 (Vt. 2001); State ex rel. Clifton v. Young, 394 N.W.2d 769, 772-73 (Wis. Ct. App. 1986); Mich. Dep’t of Corr., Policy Directive 01.04.110 (July 01, 2007), *available at* http://www.michigan.gov/documents/corrections/01_04_110_199868_7.pdf; N.J. ADMIN. CODE § 10A:1-1.5(a) (2009); Ohio Dep’t of Rehab. and Corr., Notice Procedure, 5120: 2-1-01 (July 01, 2002) (referencing OHIO REV. CODE ANN. § 119.03 (LexisNexis 2007)), *available at* http://www.drc.ohio.gov/web/administrative_rules/documents/2-1-01.pdf; Oregon Dep’t of Corr., Rule No. 291-001-0020 (July 20, 2007), *available at* http://arcweb.sos.state.or.us/rules/OARS_200/OAR_291/291_01.html.

134. See, e.g., ALA. CODE § 41-22-3(9)(g)(1) (LexisNexis 2000); ARIZ. REV. STAT. ANN. § 41-1005(A)(7) (2004); CAL. PENAL CODE § 5058(c) (West 2008); COLO. REV. STAT. § 17-1-111 (2008); CONN. GEN. STAT. ANN. § 18-78a (West 2006); DEL. CODE ANN. tit. 11, § 4322(d) (2001); GA. CODE ANN. § 50-13-2(1) (2009); IDAHO CODE ANN. § 20-212 (1997); IOWA ADMIN. CODE r. 201-10.2(17A) (2009); KAN. STAT. ANN. § 77-415(f) (1997); MASS. GEN. LAWS ANN. ch. 30A, § 1A (West 2001); MINN. STAT. ANN. § 14.03(b)(1) (West 2005); MISS. CODE ANN. § 25-43-1.102(i)(ii)(6) (West 2006); MO. ANN. STAT. § 536.010(6)(k) (West 2008); MONT. CODE ANN. § 2-4-102(2)(a)(ii) (2009); NEV. REV. STAT. ANN. § 233B.039(1)(b) (LexisNexis 2007); N.H. REV. STAT. ANN. § 21-H:8 (LexisNexis 2008); N.M. STAT. ANN. § 14-4-2 (LexisNexis 2003); N.C. GEN. STAT. § 150B-1(d)(6) (2007); N.D. CENT. CODE § 28-32-01(11)(f) (1991); OKLA. STAT. ANN. tit. 75, § 250.4(A)(10) (West Supp. 2009); S.C. CODE ANN. § 1-23-10 (2005); S.D. CODIFIED LAWS § 1-26-1(8)(g) (2004); TENN. CODE ANN. § 4-5-102(10)(G) (2005); TEX. GOV’T CODE ANN. § 2001.226 (Vernon 2008); VA. CODE ANN. § 2.2-4002(B)(9)-(10) (2008); WASH. REV. CODE ANN. § 34.05.030(c) (West 2003); W. VA. CODE ANN. § 29A-1-3(c) (LexisNexis 2007); WYO. STAT. ANN. § 25-1-105(a) (2009).

135. See *Pierce v. Lantz*, 965 A.2d 576, 579-81 (Conn. App. Ct. 2009); *Caldwell v. State*, 821 So.2d 374 (Fla. Dist. Ct. App. 2002); *Tai v. Chung*, 570 P.2d 563 (Haw. 1977); *Peterson v. Michael*, 960 So.2d 1260 (La. Ct. App. 2007); *Massey v. Sec’y, Dep’t of Pub. Safety and Corr. Servs.*, 886 A.2d 585, 601 (Md. 2005); *Johnson v. State*, No. 99-1007, 2002 WL 1803931 (R.I. Super. Ct. 2002).

136. Connecticut expressly exempts certain regulations from notice-and-comment rulemaking, CONN. GEN. STAT. ANN. § 18-78a (West 2006), and a recent Connecticut decision has interpreted Connecticut law to exempt other rules, see *Pierce v. Lantz*, 965 A.2d 576, 579-81 (Conn. App. Ct. 2009) (concluding that DOC regulations regarding censorship of “sexually explicit materials and compact discs with parental advisory stickers” and price mark-up on items in prison commissary were not “rules” within the meaning of section 4-166 (13) of the Connecticut Statute).

137. *Massey*, 886 A.2d at 598.

public,” but also expressly excluded from rulemaking requirements rules “concerning only inmates of a correctional or detention facility.”¹³⁸

Among jurisdictions with a general state administrative procedure act exemption for rules regarding “internal management” of an agency, courts have differed in their interpretation of the provision. Courts in Connecticut, Rhode Island, and Tennessee have read such exemptions to exclude at least some prison regulations from notice-and-comment requirements.¹³⁹ The New York Court of Appeals took a different approach, writing in *Jones v. Smith* that prisoners are, in fact, the members of the “general public” affected by the department action.¹⁴⁰ The Michigan Supreme Court has agreed with the New York court, rejecting the argument that rules governing prisoners did not affect the general public. The Michigan Court wrote that “this belief seems to overlook the obvious public concern of humanitarian and civil rights groups [and] completely overlooks the concern of the Legislature.”¹⁴¹

Maryland’s highest court has twice interpreted an exemption for rules concerning only “internal management” that do not “affect directly the rights of the public or the procedures available to the public.”¹⁴² In both cases, the Maryland Court of Appeals concluded that the exemption did not apply to certain corrections regulations. In 2005, in *Massey v. Secretary, Department of Public Safety and Correctional Services*, the court concluded that this exemption did not apply to prison disciplinary regulations, which affect “fundamental rights.”¹⁴³ Nonetheless, *Massey* stated that many other prison rules were not subject to rule-making requirements. “[T]he myriad of rules governing the details of prison life—what inmates may wear, what they may or may not keep in their cells or on their persons, the rules governing security, sanitation, hygiene, phone calls, mail, and visits,” the court wrote—need not be

138. *Id.* at 599. See also ARTHUR E. BONFIELD, STATE ADMINISTRATIVE RULE MAKING § 3.3.5, at 94-95 (1986) (discussing section 3-116 of 1981 Model State Administrative Procedure Act). As this article was being written, the State Administrative Procedure Act Study Committee of the National Conference of Commissioners on Uniform State Laws was discussing a revised Model State Administrative Procedure Act. Its definition of “Rule” exempts internal policies in a number of ways but contains no specific exemption for rules affecting prisoners. As of May 18, 2009, section 102(27) of the National Conference of Commissioners on Uniform State Laws Model State Administrative Procedure Act discussion draft provides that the term “Rule” does not include, *inter alia*, “(A) statements concerning only the internal management of an agency and not affecting private rights or procedures available to the public.” Revised Model State Admin. Procedure Act § 102(27) (Proposed Draft 2009), http://www.law.upenn.edu/bll/archives/ulc/msap_a/2009mar_clean.htm.

139. See, e.g., *Pierce v. Lantz*, 965 A.2d 576, 579-81 (Conn. App. Ct. 2009); *Johnson v. State*, No. 99-1007, 2002 WL 1803931 (R.I. Super. Ct. 2002); *Abdur’rahma v. Bredsen*, 181 S.W.3d 292 (Tenn. 2005).

140. *Jones v. Smith*, 478 N.E.2d 191, 192-93 (N.Y. 1985).

141. *Martin v. Dep’t of Corr.*, 384 N.W.2d 392, 396 (Mich. 1986).

142. MD. CODE ANN., CORR. SERVS. § 2-109(c)(2) (LexisNexis 2008). MD. CODE ANN., STATE GOV’T § 10-101(g)(2)(i)(2) (LexisNexis 2004).

143. *Massey v. Sec’y, Dep’t of Pub. Safety and Corr. Servs.*, 886 A.2d 585, 598 (Md. 2005).

adopted as regulations.¹⁴⁴ Two years later, in *Evans v. State*, the court concluded that the exemption did not apply to lethal injection protocols, which affect not only the condemned but also correctional personnel and witnesses to the execution.¹⁴⁵

In its opinion interpreting the “internal management” exception, the Maryland Court of Appeals wrote that “there has been surprisingly little comment on the general meaning and scope of that exemption.”¹⁴⁶ It relied heavily on the few authorities to address the question, particularly state administrative law expert Arthur Bonfield, who commented that “agencies could too easily subvert public rulemaking requirements if they could avoid those procedures for anything they called an internal directive to staff.”¹⁴⁷ Bonfield characterized such exceptions as “very narrowly drawn” and meant “to assure that matters of internal agency management that are purely of concern to the agency and its staff are effectively excluded from normal rule-making . . . requirements.”¹⁴⁸ The policies that fell within this exemption, he wrote, were those that “face inwards.”¹⁴⁹

Litigation challenging lethal injection protocols in other states, including California, also has turned on the interpretation of specific state administrative procedure act exemptions. Like the Maryland case, the California litigation focused on whether lethal injection protocols were exempt as “internal” management regulations, or whether they had an effect “beyond [the prison’s] walls” and thus were subject to the state Administrative Procedure Act.¹⁵⁰ The First District of the California Courts of Appeal concluded that the lethal injection protocol was subject to the state Administrative Procedure Act.¹⁵¹ Courts in other states have reached different conclusions, reasoning that lethal injection protocols concern only inmates of a correctional facility, and thus fall within exceptions for rules regarding “internal management.”¹⁵²

144. *Id.* at 602.

145. *Evans v. State*, 914 A.2d 25, 80 (Md. 2007).

146. *Massey*, 886 A.2d at 598.

147. *Id.* at 599 (quoting Arthur Bonfield, *The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, the Rulemaking Process*, 60 IOWA L. REV. 61, 79 (1975)) (emphasis omitted).

148. *Id.* (quoting BONFIELD, *supra* note 138, § 6.17.02, at 402) (emphasis omitted).

149. *Id.* (quoting Bonfield, *supra* note 147, at 834).

150. *Morales v. Cal. Dep’t of Corr.*, 85 Cal. Rptr. 3d 724, 732 (Cal. Ct. App. 2008).

151. *Id.* See also *Bowling et al. v. Kentucky Dept. of Corr.*, 2007-SC-000021-MR (Nov. 25, 2009) (concluding that a lethal injection protocol was subject to Kentucky Administrative Procedure Act).

152. See, e.g., *Middleton v. Mo. Dep’t of Corr.*, 278 S.W.3d 193 (Mo. 2009) (concluding that lethal injection protocol was not a “rule” within the meaning of the Missouri Administrative Procedure Act because it fell within exemption for “a statement concerning only inmates of an institution under the control of the department of corrections”); *Abdur’rahma v. Bredesen*, 181 S.W.3d 292 (Tenn. 2005) (Lethal injection protocol is not a “rule” under the UAPA because the UAPA does not include “internal management of state government” or “statements concerning inmates of a correctional facility.”); *Porter v. Commonwealth*, 661 S.E.2d 415, 432-33 (Va. 2008) (Virginia execution procedures were not subject to the state Administrative Procedure Act because

Even if a state administrative procedure act ostensibly requires a corrections authority to make regulations pursuant to notice-and-comment rulemaking, there are still many corrections rules and policies promulgated outside of administrative law strictures that affect prisoners' substantive rights, as well as broader communities.¹⁵³ California permits "local" rules affecting only a single institution to be promulgated outside of notice-and-comment procedures.¹⁵⁴ Feeley and Swearingen have noted that California may overuse its "local rules" process,¹⁵⁵ producing negative consequences. For example, confusion can result when a prisoner is transferred and medical or psychiatric care practices vary between facilities.¹⁵⁶

Other jurisdictions with multiple tiers of rule-making also use informal processes heavily. While the Michigan Department of Corrections ("MDOC") must promulgate administrative regulations pursuant to its state administrative procedure act,¹⁵⁷ its policy directives are promulgated more informally (and there are about 189 policy directives on the MDOC web site). Ohio also has two tiers of regulations—administrative regulations promulgated pursuant to the state administrative code¹⁵⁸ and policy directives approved by the Commissioner.¹⁵⁹ The policy directives cover a wide range of critical areas, including medical and mental health care, inmate discipline, responding to inmate sexual assaults, religious practice, visitation, and mail.¹⁶⁰ In Alaska as well, regulations are promulgated pursuant to the procedures of the Alaska Administrative Procedure Act,¹⁶¹ but the Commissioner is also authorized to

it exempts "actions of agencies" relating to "inmates or prisoners."). *See also* Ark. Dep't of Corr. v. Williams, No. 08-1031 (Ark. Oct. 29, 2009) (noting that the Arkansas legislature amended section 5-4-617 of the Arkansas Code to exempt lethal injection protocols from the state Administrative Procedure Act); Jackson v. Danberg, C.A. No. 07M-09-141 RRC, 2008 WL 1850585 (Del. Super. Ct. 2008) (lethal injection protocol exempt from Administrative Procedure Act).

153. *See* Anthony, *supra* note 130, at 1315 (arguing that "[e]xcept to the extent that they interpret specific statutory or regulatory language . . . nonlegislative rules like policy statements, guidances, manuals and memoranda should not be used to bind the public," because they are not subject to notice-and-comment rulemaking) (emphasis omitted).

154. Malcolm M. Feeley & Van Swearingen, Reducing Litigation Exposure: An Evaluation of How the California Department of Corrections and Rehabilitation Responds to Court Orders and Anticipates Future Legal Issues 31-35 (June 25, 2008) (unpublished manuscript, on file with author).

155. *Id.*

156. *Id.* at 34.

157. *See* Mich. Dep't of Corr., Policy Directive 01.04.110 (July 01, 2007), available at http://www.michigan.gov/documents/corrections/01_04_110_199868_7.pdf.

158. *See* Ohio Dep't of Rehab. and Corr., Notice Procedure, 5120: 2-1-01 (July 01, 2002) (referencing OHIO REV. CODE ANN. § 119.03 (LexisNexis 2007)), available at http://www.drc.ohio.gov/web/administrative_rules/documents/2-1-01.pdf.

159. *See* Ohio Dep't of Rehab. and Corr., Department Directives, No. 01-COM-01 (Jan. 26, 2008), available at http://www.drc.ohio.gov/web/drc_policies/documents/01-COM-01.pdf.

160. Ohio Dep't of Rehab. and Corr., Policies, http://www.drc.ohio.gov/web/drc_policies/drc_policies.htm (last visited Oct. 30, 2009).

161. ALASKA STAT. § 44.28.030 (2008) ("The commissioner may adopt regulations to carry

promulgate a policy manual,¹⁶² which deals with issues including relations between the corrections department and tribal governments.¹⁶³

Another important area of corrections policy-making, both beyond the scope of extended discussion in this Article and not typically subject to state administrative procedure act rulemaking strictures, is policy-making in local jails. The Urban Institute reports that “over nine million people pass through America’s local jails each year.”¹⁶⁴ Many of these facilities are run by cities, counties, and local sheriffs. In some jurisdictions, state corrections departments promulgate administrative regulations setting standards for local jails (particularly those holding state inmates).¹⁶⁵ In other jurisdictions, jail policies are promulgated far more informally.¹⁶⁶ Although this Article does not capture this area of informal policy-making, it warrants further consideration.

While this Article focuses on state administrative rule-making provisions, the availability of judicial review of corrections rules, policies, and actions under state administrative procedure acts is also consequential, if for no other reason than to ensure that the rulemaking process is legitimate.¹⁶⁷ A comprehensive discussion of state administrative procedure act provisions for judicial review of corrections policies is beyond the scope of this Article; this is a potential area for future research.¹⁶⁸

out or assist in carrying out the powers and duties of the department.”); §§ 44.62.010-.630 (describing notice-and-comment rulemaking process); § 44.62.640 (a)(3) (defines “regulation”).

162. ALASKA ADMIN. CODE tit. 22, § 05.155(a) (2004) (“The department will maintain a manual comprised of policies and procedures established by the commissioner to interpret and implement relevant sections of the Alaska Statutes and 22 AAC.”). See *Mathis v. Sauser*, 942 P.2d 1117, 1123 nn.12-13 (Alaska 1997) (concluding that policy manual need not be promulgated pursuant to state Administrative Procedure Act).

163. Alaska Dep’t of Corr., Tribal Government-to-Government Relations, Index No. 107.01, (Apr. 22, 2002) (“This policy is to provide guidance to all departmental employees involved in any action that will significantly or uniquely affect federally recognized tribal governments in Alaska.”).

164. The Urban Institute, *The Transition from Jail to Community (TJC) Initiative* (2009), <http://www.urbaninstitute.org/projects/tjc/index.cfm>.

165. See IND. CODE ANN. § 11-12-4-1(a) (West 2004) (“The department shall adopt under [the state Administrative Procedure Act] minimum standards for county jails”); KY. REV. STAT. ANN. § 441.055 (LexisNexis 1999) (requiring the Department of Corrections to promulgate regulations pursuant to the state Administrative Procedure Act establishing minimum standards for jails for those counties that house state prisoners); W. VA. CODE ANN. § 31-20-9(a)(2) (LexisNexis 2003). New York City also has a Board of Correction that sets minimum standards for the City’s jails, pursuant to the City’s Administrative Procedure Act. See Martin F. Horn, *Jail Rules Must Be Updated*, N.Y. L.J., June 12, 2007, at 2; Michael B. Mushlin, John Horan, David Lenefsky, Madeline deLone, John M. Brickman, & Clay Hiles, *Independent Oversight of N.Y. Jails*, N.Y. L.J., May 17, 2007, at 2.

166. See, e.g., *Byar v. Lee*, 336 F. Supp. 2d 896, 906 (W.D. Ark. 2004) (County sheriff promulgated jail policies based on the Ten Commandments, which the district court concluded violated the Establishment Clause.).

167. Cf. Feeley & Swearingen, *supra* note 154, at 37 (describing the value of oversight of rulemaking).

168. In some states, corrections authorities are excluded entirely from all provisions of the state administrative procedure act or from the definition of “agency,” thereby exempting their

B. The Impact on Prisoners, Their Families, and Free Communities

Given the millions of incarcerated people and the hundreds of thousands of prisoners returning home each year, it is now more important than ever to subject prison and jail regulations to public scrutiny. This section describes the breadth and range of such policies, including their effects on prisoners, their families, and free communities. The purpose is to demonstrate why at least some corrections policies—perhaps those limiting prisoners’ substantial rights and those affecting outside communities—should be subject to notice-and-comment rulemaking.¹⁶⁹

actions from all provisions of the state administrative procedure act, including judicial review of final “agency” action. *See* IDAHO CODE ANN. § 20-212 (1997); IDAHO CODE ANN. § 67-5201(2) (1995); MONT. CODE ANN. § 2-4-102(2)(a)(ii) (2009); NEV. REV. STAT. ANN. § 233B.039(1)(b) (LexisNexis 2007); N.D. CENT. CODE § 28-32-01(2)(m) (Supp. 2009); TEX. GOV’T CODE ANN. § 2001.226 (Vernon 2008); VA. CODE ANN. § 2.2-4002(B)(9)-(10) (2008); WASH. REV. CODE ANN. § 34.05.030(c) (West 2003); *Harrison v. Tex. Dep’t of Criminal Justice*, 164 S.W.3d 871, 876 (Tex. Crim. App. 2005) (holding that section 2001.226 of the Texas Administrative Procedure Act “expressly bars” judicial review of a Department of Criminal Justice disciplinary proceeding). Other states, like Colorado, Kansas, and Wyoming, expressly exclude corrections policies from state administrative procedure act provisions for judicial review. COLO. REV. STAT. §§ 17-1-111, 24-4-106 (2008); KAN. STAT. ANN. § 77-603(c)(1)-(3) (1997); WYO. STAT. ANN. § 25-1-105(a) (2009) (“The promulgation of substantive rules by the department, the conduct of its hearings and its final decisions are specifically exempt from all provisions of the Wyoming Administrative Procedure Act including the provisions for judicial review . . .”). *See also Stanhope v. State*, 825 P.2d 25, 26 (Ariz. Ct. App. 1991) (holding that a prisoner classification decision is not “subject to judicial review under the Arizona Administrative Review Act”); *Quigley v. Fla. Dep’t of Corr.*, 745 So. 2d 1029, 1031 (Fla. Dist. Ct. App. 1999) (holding that under the state Administrative Procedure Act a prisoner was not entitled to judicial review of DOC statement of reasons for rule forbidding prisoners to retain notarized documents, and concluding that the prisoner’s “only avenue for judicial review is to seek declaratory or other relief in circuit court”). State administrative procedure acts sometimes provide for a form of judicial review or “declaratory judgment” specific to rulemaking; if corrections policies are exempt from rulemaking, such an action presumably would not be available. *See, e.g.*, ALA. CODE § 41-22-10 (LexisNexis 2000); ARIZ. REV. STAT. ANN. § 41-1034 (2004); CAL. GOV’T CODE § 11350 (West 2005); CONN. GEN. STAT. ANN. § 4-175 (West 2007); GA. CODE ANN. § 50-13-10 (2009); HAW. REV. STAT. ANN. § 91-7 (LexisNexis 2007); MD. CODE ANN., STATE GOV’T § 10-125 (LexisNexis 2004); MO. ANN. STAT. § 536.050(1) (West 2008); N.H. REV. STAT. ANN. § 541-A:24 (LexisNexis 2006); N.M. STAT. ANN. § 12-8-8 (LexisNexis 1998); N.C. GEN. STAT. § 150B-4 (2007); N.D. CENT. CODE § 28-32-42(2) (Supp. 2009); OKLA. STAT. ANN. tit. 75, § 306 (West 2008); R.I. GEN. LAWS § 42-35-7 (2007); S.C. CODE ANN. § 1-23-150(a) (2005); S.D. CODIFIED LAWS § 1-26-14 (2004); TEX. GOV’T CODE ANN. § 2001.040 (Vernon 2008); VA. CODE ANN. § 2.2-4026 (2008); WASH. REV. CODE ANN. § 34.05.514 (West 2003). One such form of declaratory judgment was provided in the 1961 Model State Administrative Procedure Act. BONFIELD, *supra* note 138, § 9.2.1, at 556.

169. My purpose here is not to evaluate these policies, and certainly not to rate implementation and compliance in real life. The existence of policies—even regulations subject to state administrative procedure act requirements—does not guarantee that a corrections system will be well-run. The Michigan Department of Corrections (MDOC), for example, has 189 policy directives on its web site, but the inadequacies of its health care system are infamous. *See, e.g.*, Elizabeth Alexander, *Prison Health Care, Political Choice, and the Accidental Death Penalty*, 11 U. PA. J. CONST. L. 1 (2009) (focusing on Michigan’s DOC).

1. *The effect on prisoners*

Prison and jail policies affect almost every area of prisoners' lives.¹⁷⁰ Classification,¹⁷¹ disciplinary,¹⁷² and grievance policies¹⁷³ all have a tremendous impact on how prisoners serve their sentence and what recourse they have to courts and other authorities. Corrections policies govern medical and mental health care,¹⁷⁴ including prenatal and OB/GYN care,¹⁷⁵ shackling of women in labor and delivery,¹⁷⁶ and access to abortion.¹⁷⁷ Prison sexual

170. Robertson, *The Majority Opinion*, *supra* note 90, at 167 ("Prison rules are wide-ranging in scope."). This Article focuses only on written regulations, rules, and policies. Unwritten custom can be of critical significance in all organizations, but perhaps especially in corrections, where the discretion and judgment of line staff can greatly affect prisoners' daily lives. *Cf.* JOHN J. DI IULIO, JR., *GOVERNING PRISONS: A COMPARATIVE STUDY OF CORRECTIONAL MANAGEMENT* 238 (1987) ("In most prisons, what correctional officers do and how they do it depends largely on their personalities or temperaments. They must exercise judgment on a wide range of matters.").

171. *See, e.g.*, Ala. Dep't of Corr., Classification of Inmates, Admin. Reg. 400 (Nov. 10, 2004), available at <http://www.doc.state.al.us/docs/AdminRegs/AR400.pdf>; Colo. Dep't of Corr., Offender Classification, Admin. Reg. 600-01 (Oct. 15, 2009), available at https://exdoc.state.co.us/userfiles/regulations/pdf/0600_01.pdf; Conn. Dep't of Corr., Offender Classification, Admin. Dir. 9.2 (July 1, 2006), available at <http://www.ct.gov/doc/LIB/doc/PDF/AD/ad0902.pdf>; D.C. Dep't of Corr., Classification, Program Statement No. 4090.3D (Sept. 9, 2009), available at http://doc.dc.gov/doc/frames.asp?doc=/doc/lib/doc/program_statements/4000/PS_4090_3D_Classification_9809.pdf.

172. *See, e.g.*, Ala. Dep't of Corr., Disciplinary Hearing Procedures for Major Rule Violations, Admin. Reg. 403 (Jan. 30, 2003), available at <http://www.doc.state.al.us/docs/AdminRegs/AR403.pdf>; Conn. Dep't of Corr., Code of Penal Discipline, Admin. Dir. 9.5 (Jan. 1, 2008), available at <http://www.ct.gov/doc/LIB/doc/PDF/AD/ad0905.pdf>; Tenn. Dep't of Corr., Policies & Procedures, Uniform Disciplinary Procedures, Index No. 502.01 (Oct. 1, 2007), available at <http://www.state.tn.us/correction/pdf/502-01.pdf>.

173. *See, e.g.*, Conn. Dep't of Corr., Inmate Administrative Remedies, Admin. Dir. 9.6 (Jan. 31, 2009), available at <http://www.ct.gov/doc/LIB/doc/PDF/AD/ad0906.pdf>; D.C. Dep't of Corr., Inmate Grievance Procedures, Program Statement No. 4030.1F (Jan. 21, 2008), available at http://doc.dc.gov/doc/frames.asp?doc=/doc/lib/doc/program_statements/4000/ps_4030_1f_inmate_grievance_procedures_1_21_08.pdf; Tenn. Dep't of Corr., Policies & Procedures, Inmate Grievance Procedures, Index No. 501.01 (Sept. 15, 2007), available at <http://www.state.tn.us/correction/pdf/501-01.pdf>.

174. *See, e.g.*, D.C. Dep't of Corr., Health Services, Program Statement No. 6000.1D (Feb. 28, 2008), available at http://doc.dc.gov/doc/frames.asp?doc=/doc/lib/doc/program_statements/6000/PM_6000_1D_Medical_Mgmt_Final_022808.pdf; Tenn. Dep't of Corr., Policies & Procedures, Inmate Co-payment for Health Services, Index No. 113.15, at 6 (Feb. 15, 2008), available at <http://www.state.tn.us/correction/pdf/113-15.pdf> (providing for a co-pay of three dollars for medical visits initiated by the inmate, including an initial request for a pregnancy test, optometry services, and treatment for "self-injurious behavior").

175. *See* DIANA KASDAN, ACLU REPRODUCTIVE FREEDOM PROJECT, STATE STANDARDS FOR PREGNANCY-RELATED HEALTH CARE IN PRISON (2008), available at <http://72.3.233.244/reproductiverights/gen/pregnancycareinprison.html> (collecting department of corrections policies regarding a range of reproductive issues, and comparing them with national standards); Ellen M. Barry, *Bad Medicine: Health Care Inadequacies in Women's Prisons*, 16 CRIM. JUST. 38 (Spring 2001).

176. AMNESTY INTERNATIONAL, ABUSE OF WOMEN IN CUSTODY: SEXUAL MISCONDUCT AND SHACKLING OF PREGNANT WOMEN (2006).

177. *See, e.g.*, ILL. ADMIN. CODE tit. 20, § 415.30(j) (2007), available at <http://www.ilga.gov/>

violence and custodial sexual abuse, the subjects of extensive advocacy and litigation,¹⁷⁸ are also targeted by prison policies.¹⁷⁹ In light of the growing

commission/jcar/admincode/020/020004150000300R.html; *Roe v. Crawford*, 514 F.3d 789 (8th Cir. 2008) (applying *Turner* to strike down a Missouri policy that refused to transport women prisoners for elective abortions); Colo. State Dep't of Corr., Birth Control, Pregnancy, Child Placement, and Abortion, Admin. Reg. 700-12 (Nov. 1, 2008), http://exdoc.state.co.us/userfiles/regulations/pdf/0700_12.pdf; Mass. Dep't of Corr., Health Services Division, Special Health Care Practices, 103 DOC 620.04 (July 1, 2004), <http://www.mass.gov/Eeops/docs/doc/policies/620.pdf>; Budnitz, *supra* note 88, at 1298-99 (describing state corrections departments' policies on prisoners' access to abortion). See also Ark. Bd. of Corr., Prenatal Care/Pregnant Inmates/Residents, Admin. Reg. No. 829 (Aug. 1, 2000), http://www.adc.arkansas.gov/adcar_pdf/AR829.pdf. The Arkansas policy does not use the word "abortion." It states that the purpose of the policy is "to ensure that pregnant inmates/residents of the Department of Correction and the Department of Community Punishment are provided comprehensive health care services necessary to reach term or to interrupt pregnancy in accordance with applicable statutes, standards and regulations." *Id.*

178. See generally Jeff Seidel, *Sexual Assaults on Female Inmates Went Unheeded*, DETROIT FREE PRESS, Jan. 4, 2009 (describing litigation in which the State of Michigan paid more than \$50 million in a case alleging rampant systemic sexual abuse of women prisoners by male guards); Brenda V. Smith, *Reforming, Reclaiming or Reframing Womanhood: Reflections on Advocacy for Women in Custody*, 29 WOMEN'S RTS. L. REP. 1 (2007); Brenda V. Smith, *Sexual Abuse of Women in United States Prisons: A Modern Corollary of Slavery*, 33 FORDHAM URB. L. J. 571 (2006).

179. See CAL. CODE REGS. tit. 15, §§ 3007, 3401.5 (2008), available at http://www.cdcr.ca.gov/Regulations/Adult_Operations/docs/Title15-2008.pdf ("Inmate Sexual Behavior" and "Employee Sexual Misconduct"); Ala. Dep't of Corr., Inmate Sexual Offenses & Custodial Sexual Misconduct, AR 454 (May 22, 2008), available at <http://www.doc.state.al.us/docs/AdminRegs/AR454.pdf>; Ariz. Dep't of Corr., Department Order Manual, Sexual Misconduct and Sexual Assaults, No. 125.01 (June 2, 2009), available at http://www.adc.state.az.us/Jill_100_125.aspx#125.01; Conn. Dep't of Corr., Sexual Assault Prevention Policy, Admin. Dir. 6.12 (Aug. 15, 2009), available at <http://www.ct.gov/doc/LIB/doc/PDF/AD/ad0612.pdf>; D.C. Dep't of Corr., Elimination of Sexual Abuse, Assault, and Misconduct, Program Statement No. 3350.2E (Feb. 21, 2007), available at http://doc.dc.gov/doc/frames.asp?doc=/doc/lib/doc/program_statements/3000/PS_3350.2E_PRISON_RAPE_ELIMINATION_2-21-07.pdf; Ky. Dep't of Corr., Policies & Procedures, Sexual Abuse/Assault Prevention and Intervention, Policy No. 14.7 (Feb. 3, 2006), available at <http://www.corrections.ky.gov/NR/rdonlyres/EFF984A4-958F-4DA2-96E8-4CD391BFCD75/107408/1495.pdf>; Mass. Dep't of Corr., Sexually Abusive Behavior Prevention & Intervention Policy, 103 DOC 519 (Aug. 5, 2007), available at <http://www.mass.gov/Eeops/docs/doc/policies/519.pdf>; Mich. Dep't of Corr., Prohibited Sexual Conduct Involving Prisoners, Policy No. 03.03.140 (July 9, 2007), available at http://www.michigan.gov/documents/corrections/03_03_140_199869_7.pdf; Minn. Dep't of Corr., Prison Rape Elimination Act, Policy 202.057 (May 5, 2009), available at http://www.doc.state.mn.us/DocPolicy2/html/DPW_Display_TOC.asp?Opt=202.057.htm; Nev. Dep't of Corr., Sexual Crimes and Sexual Misconduct: Prevention, Reduction and Investigation, AR 155 (May 8, 2008), available at <http://www.doc.nv.gov/ar/pdf/AR155.pdf>; N.H. Dep't of Corr., Sexual Harassment, Policy and Procedure Directive 2.39 (Feb. 1, 2008), available at <http://www.nh.gov/nhd/doc/documents/2-39.pdf>; N.M. Corr. Dep't, Offender Protection Against Abuse and Sexual Misconduct; Reporting Procedures, CD-150100 (Jan. 28, 2009), available at <http://corrections.state.nm.us/policies/current/CD-150100.pdf>; Ohio Dep't of Rehab. and Corr., Inmate Sexual Assault and Misconduct, No. 79-ISA-01 (July 1, 2005), http://www.drc.ohio.gov/web/drc_policies/documents/79-ISA-01.pdf; Oklahoma Prison Rape Elimination Act, OP-030601 (2008), <http://www.doc.state.ok.us/Offtech/op030601.pdf>; Penn. Dep't of Corr., Sexual Harassment of or Sexual Contact with Inmates, Policy No. DC-ADM 008 (July 25, 2008), available at http://www.cor.state.pa.us/standards/lib/standards/DC-ADM_008_Sexual_Harassment_of_or_Sexual_Contact_with_Inmates.pdf; Wyo. Dep't of Corr., Protection

number of female prisoners¹⁸⁰ and litigation on their behalf,¹⁸¹ some jurisdictions have adopted non-discrimination policies,¹⁸² or policies regarding so-called “gender-responsive” programming.¹⁸³ Corrections policies even address the gender categorization of prisoners for the purposes of housing.¹⁸⁴ In short, prison regulations affect issues ranging from a prisoner’s core definition of self to how she will serve her time and when she will be released.

2. *The impact on prisoners’ families*

Policies affecting prisoners’ families and children are even more appropriately formulated through procedures that permit public input. Prison policies can greatly affect the extent of family contact and can even define who is considered a part of a prisoner’s “family.”

From Sexual Misconduct Against Offenders, Policy and Procedure No. 3.402 (Jan. 14, 2008), available at <http://doc.state.wy.us/Media.aspx?mediaId=34>.

180. JOANNE BELKNAP, *THE INVISIBLE WOMAN: GENDER, CRIME & JUSTICE* (2000); MEDA CHESNEY-LIND, *THE FEMALE OFFENDER: GIRLS, WOMEN & CRIME* (1997); Ryan S. King, *Moving Toward a Gender-Appropriate Response in the Criminal Justice System*, 33 *NEW ENG. J. ON CRIM. & CIV. CONFINEMENT* 3 (2007); Marsha L. Levick & Francine T. Sherman, *When Individual Differences Demand Equal Treatment: An Equal Rights Approach to the Special Needs of Girls in the Juvenile Justice System*, 18 *WIS. WOMEN’S L.J.* 9 (Spring 2003). See also SILJA J. TALVI, *WOMEN BEHIND BARS: THE CRISIS OF WOMEN IN THE U.S. PRISON SYSTEM* (2007).

181. *Compare* *Roubideaux v. N.D. Dep’t of Corr. and Rehab.*, 570 F.3d 966 (8th Cir. 2009) (concluding no equal protection and no Title IX violation in provision of programming at male and female facilities), *Klinger v. Dep’t of Corr.*, 107 F.3d 609, 612, 614 (8th Cir. 1997) (holding no Title IX violation because comparing male and female prisoners is like comparing “apples to oranges”), and *Women Prisoners v. District of Columbia*, 93 F.3d 910, 925-26 (D.C. Cir. 1996) (concluding no equal protection violation because male and female prisoners were not “similarly situated”), *with* *Jeldness v. Pearce*, 30 F.3d 1220, 1227-28 (9th Cir. 1994) (Title IX applies to prisons and requires equality, not just parity), and *Glover v. Johnson*, 478 F. Supp. 1075 (D. Mich. 1979) (concluding that lack of programming and educational opportunities for female prisoners violated equal protection).

182. Mass. Dep’t of Corr., *Female Offender Services*, 103 DOC 425 (July 23, 2008), <http://www.mass.gov/Eeops/docs/doc/policies/425.pdf>; Minn. Dep’t of Corr., *Parity for Female Offenders*, Policy No. 102.210 (Dec. 4, 2007), available at http://www.doc.state.mn.us/DocPolicy/2/html/DPW_Display_TOC.asp?Opt=102.210.htm; Okla. Dep’t of Corr., *Female Offender Management*, OP-090501 (June 17, 2008), <http://www.doc.state.ok.us/Offtech/op090501.pdf>.

183. See Cassandra Shaylor, *Neither Kind Nor Gentle: The Perils of ‘Gender Responsive Justice,’* in PHIL SCRATON & JUDE MCCULLOCH, *THE VIOLENCE OF INCARCERATION* 147-48 (2008) (criticizing “gender-responsive” programming as reinforcing gender stereotypes and a binary notion of gender).

184. D.C. Dep’t of Corr., *Gender Classification and Housing*, Program Statement No. 4020.3 para. 2(a) (Feb. 20, 2009) (“DOC shall classify an inmate who has male genitals as a male and one who has female genitals as a female, unless otherwise classified by the Transgender Committee consistent with this policy.”). See also Sydney Tarzwell, *The Gender Lines Are Marked With Razor Wire: Addressing State Prison Policies and Practices for the Management of Transgender Prisoners*, 38 *Colum. Hum. Rts. L. Rev.* 167, 190-206 (2006) (summarizing then-existing state policies regarding transgender prisoners); Gabriel Arkles, *Safety and Solidarity Across Gender Lines: Rethinking Segregation of Transgender People in Detention*, 18 *Temp. Pol. & Civ. Rts. L. Rev.* 515, 525-27 (2009); Dean Spade, *Keynote Address: Trans Law & Politics on a Neoliberal Landscape*, 18 *Temp. Pol. & Civ. Rts. L. Rev.* 353, 353 (2009).

With an unprecedented number of prisoners, there is increasing evidence of the effects of incarceration for prisoners' families, and particularly their children.¹⁸⁵ More than two million American children have an incarcerated parent.¹⁸⁶ The children of the incarcerated bear "material and psychological burdens";¹⁸⁷ they are more likely to experience mental health issues and are vulnerable to foster care placement.¹⁸⁸ Ultimately, they are at heightened risk of being incarcerated themselves.¹⁸⁹

Not surprisingly, commentators emphasize the importance of maintaining prisoners' family ties, through letters, phone calls, and visits.¹⁹⁰ Corrections regulations affect all three modes of communication. Maintaining telephone contact is especially important because facilities are frequently located far from major population centers.¹⁹¹ Yet collect calls from prison are often prohibitively expensive, in part because of rates determined by contracts between corrections officials and phone companies.¹⁹² Prison telephone policies range from an eight-page policy for the Michigan Department of Corrections to a one-and-a-half-page policy for the State of Wyoming. These policies also include provisions for monitoring, call lists, and the duration and frequency of calls.¹⁹³

185. See TODD CLEAR, *IMPRISONING COMMUNITIES* 93-106 (2007); TRAVIS, *supra* note 1, at 119 ("[P]rison places an indescribable burden on the relationships between [incarcerated] parents and their children."); Donald Braman, *Families and Incarceration*, in *INVISIBLE PUNISHMENT*, *supra* note 7, at 117 ("[T]he dramatic increase in the use of incarceration over the last two decades has in many ways missed its mark, injuring the families of prisoners often as much as and sometimes more than criminal offenders themselves."). See generally Philip M. Genty, *Damage to Family Relationships as a Collateral Consequence of Parental Incarceration*, 30 *FORDHAM URB. L.J.* 1671 (2003).

186. Dolovich, *supra* note 13, at 247.

187. *Id.*

188. Megan Comfort, *Punishment Beyond the Legal Offender*, 3 *ANN. REV. L. & SOC. SCI.* 271, 280 (2007).

189. Dolovich, *supra* note 13, at 247; Nkechi Taifa & Catherine Beane, *Integrative Solutions to Interrelated Issues: A Multidisciplinary Look Behind the Cycle of Incarceration*, 3 *HARV. L. & POL'Y REV.* 283, 289 (2009) (quoting a study finding that "forty-six percent of jail inmates had a family member who had been incarcerated").

190. See Christy A. Visher, *Returning Home: Emerging Findings and Policy Lessons About Prisoner Reentry*, 20 *FED. SENT'G REP.* 93 (Dec. 2007) ("[M]aintaining family connections through letters, phone calls, and personal visits has been shown to reduce recidivism rates.").

191. Genty, *supra* note 185, at 1673 ("[S]ixty-two percent of incarcerated parents in state prisons and eighty-two percent in federal prison are incarcerated more than one hundred miles from their homes.").

192. See *Walton v. N.Y. State Dep't of Corr. Servs.*, 863 N.E.2d 1001 (N.Y. 2007) (Prisoners' families challenged proposed phone rates before New York's Public Service Commission and in a lawsuit); MEDIA JUSTICE FUND, *CRIMINAL CHARGES: EXCESSIVE PRISON PHONE RATES TAKE A TOLL ON INNOCENT FAMILIES*; National Association of Criminal Defense Lawyers, *N.Y. Prisons Make Millions Profiteering on Inmate Phone Calls*, 31 *CHAMPION* 8 (Jan.-Feb. 2007) (2009).

193. Mich. Dep't of Corr., *Prisoner Telephone Use, Policy Directive No. 05.03.130* (Jan. 1, 2009), available at http://www.michigan.gov/documents/corrections/05_03_130_295734_7.pdf; Wyo. Dep't of Corr., *Administrative Regulations, Inmate Telephone Use, Policy No. 2.403*

Corrections policies can also closely regulate family visitation.¹⁹⁴ For instance, Michigan's policy regarding the conduct of contact family visits—a policy directive and not an administrative regulation—imposes specific limits on physical contact:

During contact visits, physical contact between prisoners and visitors is prohibited except for one kiss and one embrace between a prisoner and each of his/her visitors at the beginning and end of each visit and when a picture is being taken. In addition, a prisoner and his/her visitor are permitted to have their arms around the shoulders of one another and may hold hands. A prisoner who is a parent also may appropriately touch and hold his/her child if under two years old and bottle feed his/her infant while visiting.¹⁹⁵

Such restrictive regulations can frighten children and inhibit visitation.¹⁹⁶

However, the effects of these prison rules on prisoners' families extend beyond direct limitations on visitation. When visiting prison or jail, prisoners' relatives are exposed repeatedly to correctional policies and norms, which can affect their behavior and habits.¹⁹⁷ This produces "a form of socialization to carceral norms,"¹⁹⁸ a kind of "secondary prisonization."¹⁹⁹ Later, when prisoners return home, their families are affected by the "psychological impact of confinement on the offender";²⁰⁰ formerly incarcerated parents employ discipline methods akin to those imposed in a corrections setting.²⁰¹

Corrections regulations can even define who is in a prisoner's "family." For example, provisions of the MDOC administrative regulations restrict visits by minor members of a prisoner's extended family: Children are forbidden to visit unless they are an emancipated minor or the child, step-child, grandchild, sibling, step-sibling, or half-sibling of the prisoner.²⁰² The policy specifically forbids visitation by a prisoner's child if the prisoner's parental rights have been terminated.²⁰³ These rules were challenged and ultimately upheld in a

(2009), available at <http://doc.state.wy.us/Media.aspx?mediaId=21>.

194. California's visitation policy comprises eight sections of the California Administrative Code. CAL. CODE REGS. tit. 15 §§ 3170-78 (2007). Because visitation policies affect both prisoners and visitors, they may not be exempt under state administrative procedure act exceptions for rules regarding only "inmates." BONFIELD, *supra* note 138, § 6.17.7, at 414.

195. Mich. Dep't of Corr., Policy No. 05.03.140(V) (Oct. 1, 2007), available at http://www.michigan.gov/documents/corrections/05_03_140_210434_7.pdf.

196. Amy Fettig, *Women Prisoners: Altering the Cycle of Abuse*, 36 A.B.A. SEC. HUM. RTS. 2, 3 (Spring 2009)

197. Comfort, *supra* note 188, at 279.

198. *Id.*

199. *Id.*

200. *Id.* at 281.

201. *Id.*

202. Mich. Dep't of Corr., Policy No. 05.03.140(J)(4) (Oct. 1, 2007), available at http://www.michigan.gov/documents/corrections/05_03_140_210434_7.pdf.

203. *Id.* at Policy No. 05.03.140(J)(4)(1).

2003 Supreme Court case, *Overton v. Bazzetta*.²⁰⁴ The *Bazzetta* plaintiffs pointed to the importance of extended family (including cousins, nieces, and nephews), as well as the benefits of maintaining a parent-child relationship despite the termination of parental rights.²⁰⁵ Nonetheless, the Supreme Court upheld the regulations under *Turner*, concluding that they were reasonably related to a legitimate penological interest, and writing that this was “not an appropriate case” in which to “further elaborat[e]” on constitutional protections for family ties.²⁰⁶

Another example of how corrections regulations define “family” is whether same-sex partners are permitted to participate in overnight “family” or “conjugal” visits.²⁰⁷ In 2007, under threat of litigation, and following a notice-and-comment period, California amended its regulation to include registered domestic partners in the definition of “immediate family,” thus permitting same-sex partners to participate in overnight visits.²⁰⁸ The Mississippi DOC, by contrast, restricts such visits to opposite-sex marriages.²⁰⁹ Aside from being challenged through litigation, regulations defining and affecting families should be subject to input from prisoners’ partners and kin in more jurisdictions.

3. Repercussions in free communities

Policies potentially affecting free communities are most suitable for notice-and-comment rulemaking. Mass incarceration has tremendous effects on poor communities of color,²¹⁰ as does prisoner reentry.²¹¹ Because some communities are so enmeshed in the criminal justice system—consider the so-called “Million Dollar Blocks”²¹² in which the State spends at least that much on incarceration annually—these policies can have a real effect on public

204. 539 U.S. 126 (2003) (reviewing challenge to rule 791.6609 of the Michigan Administrative Code).

205. See Brief of the Respondents, *Overton v. Bazzetta*, 539 U.S. 126 (2003) (No. 02-94), 2003 WL 469673; Brief of the Public Defender Service for the District of Columbia et al. as Amici Curiae Supporting Respondents, *Overton v. Bazzetta*, 539 U.S. 126 (2003) (No. 02-94), 2003 WL 469578.

206. 539 U.S. at 131.

207. See Wiggum, *supra* note 14.

208. *Id.* at 369 & n.85 (citing CAL. CODE REGS. tit. 15, § 3000 (2009)).

209. *Id.* at 374.

210. CLEAR, *supra* note 185, at 106-20; TRAVIS, *supra* note 1, at 120 (“[I]n those communities where incarceration rates are high, the experience of having a mother or father in prison is now quite commonplace, with untold consequences for foster care systems, multigenerational households, social services delivery, community norms, childhood development, and parenting patterns.”); Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623, 628 n.22 (2006) (citing Roberts, *supra* note 7, at 1276 (“Research in several cities reveals that the exit and reentry of inmates is geographically concentrated in the poorest, minority neighborhoods.”)).

211. See CADORA, *supra* note 17; TRAVIS, *supra* note 1, at xvii (describing prisoner reentry as “an unprecedented challenge for our society”).

212. GOTTSCHALK, *supra* note 1, at 20.

health and the local economy.²¹³ Alan Elsner has written that “we cannot separate ourselves from those who are behind bars,”²¹⁴ because the “vast majority of inmates” eventually return to the community.²¹⁵ “Society is profoundly influenced by the abuses they suffer or perpetrate,” he writes.²¹⁶ “[T]he skills they pick up—whether legitimate or criminal—the diseases they contract and the treatment they receive or do not receive”²¹⁷ all affect the communities to which prisoners return.

Policies (or the lack of policies) addressing management of certain medical issues can have repercussions for broader communities. The return of large numbers of prisoners with poorly managed chronic conditions and mental health issues can strain existing community health networks.²¹⁸ Jails in large metropolitan areas like New York, Los Angeles, and Chicago have become the “nation’s largest mental health facilities.”²¹⁹ Whether prisoners receive appropriate mental health care—or are treated and housed in ways that exacerbate their illness²²⁰—has implications for whether they will make a successful return to the community. Chronic mental health problems that are not adequately treated “frustrate the process of reintegration for released prisoners and foster[] recidivism, unemployment, homelessness for the former prisoner, and economic and emotional strain on his family and community.”²²¹

Other types of infectious disease—such as drug-resistant TB, Hepatitis C, and HIV—can spread quickly in prisons that are poorly managed.²²² The spread of these diseases within institutions can have catastrophic results beyond the gates:

213. DINA ROSE & TODD CLEAR, *INCARCERATION, REENTRY & SOCIAL CAPITAL: SOCIAL NETWORKS IN THE BALANCE* 183 (2002), available at http://www.urban.org/uploadedpdf/410623_SocialCapital.pdf (arguing that “concentrated coercive mobility damages neighborhoods because it diminishes available levels of social capital and collective efficacy”).

214. ELSNER, *supra* note 77, at 15.

215. *Id.*

216. *Id.*

217. *Id.*

218. John V. Jacobi, *Prison Health, Public Health: Obligations & Opportunities*, 31 AM. J.L. & MED. 447, 448 (2005).

219. *Id.* at 452 (quoting Nicholas Freudenberg, *Jails, Prisons & the Health of Urban Populations: A Review of the Impact of the Correctional System on Community Health*, 78:2 J. URBAN HEALTH 214, 220 (2001)).

220. See Jamie Fellner, *A Corrections Quandary: Mental Illness and Prison Rules*, 41 HARV. C.R.-C.L. L. REV. 391, 402-405 (2006) (describing how prison disciplinary rules often fail to take account of the symptoms of mental illness, and how placement in disciplinary segregation can aggravate mental illness).

221. Jacobi, *supra* note 218, at 467. See also William J. Rich, *The Path of Mentally Ill Offenders*, 36 FORDHAM URB. L.J. 89, 112-13 (2009) (discussing reentry problems for the mentally ill).

222. Dolovich, *supra* note 13, at 246 (“Severe overcrowding in often unhygienic conditions, together with what is frequently an absence of institutional strategies for preventing the spread of disease, means that prisoners face infection rates for HIV, hepatitis C, tuberculosis, and even staph that are far in excess of infection rates outside the prison.”).

Almost all of the two million prisoners now in prisons and jails will return to their communities one day. If, due to poor prison health care, they return with uncontrolled syphilis, tuberculosis, HIV, and other infectious conditions, they will likely infect many around them. In these circumstances, prisons and jails serve as “epidemiological pumps,” amplifying infectious conditions, perhaps even transforming them into treatment-resistant strains, and then sending them out into society for distribution. It is in the interest of all in society to prevent the population health effects that demonstrably flow from mistreatment of the health conditions of prisoners.²²³

Department of Corrections policies may cover HIV treatment and discharge planning,²²⁴ as well as preventing the spread of tuberculosis²²⁵ and communicable blood-borne infections.²²⁶ DOC policies may also cover other medical and mental health care.²²⁷ All of these policies should be subject to input from community and public health organizations.

Release and reentry planning is another suitable area for notice-and-comment. As incarceration rates have skyrocketed, boosting the numbers of returning prisoners, reentry issues have become more important.²²⁸ These returning prisoners are concentrated in the poorest communities, compounding

223. Jacobi, *supra* note 218, at 448. See also TRAVIS, *supra* note 1, at 188 (arguing that prison health officials have “an obligation to society as a whole” to develop “policies that reduce transmission [of communicable diseases] within the communities to which the prisoners return”); Comfort, *supra* note 188, at 282; NATIONAL PRISON RAPE ELIMINATION COMMISSION, REPORT 15 (June 2009) (recommending that Congress fund research “into whether consensual and/or non-consensual sexual activity in the correctional system plays a role in infecting populations outside of corrections with HIV/AIDS and other sexually transmitted infections.”).

224. See, e.g., Tenn. Dep’t of Corr., AIDS: Education, Prevention, and Case Management, Index No. 113.45 (July 1, 2009), available at <http://www.state.tn.us/correction/pdf/113-45.pdf> (“Inmates currently on medication regimens shall be provided at least a fourteen (14) day supply, or their current supply of prescribed medication, whichever is greater.”).

225. Mich. Dep’t of Corr., Policy Nos. 03.04.100, 03.04.115 (Feb. 14, 2005), available at http://www.michigan.gov/corrections/0,1607,7-119-1441_44369---,00.html (“Health Services” and “Control of Tuberculosis”); Minn. Dep’t of Corr., Tuberculosis Control for Applicants, Employees, Contractors, Volunteers & Students, Policy No. 105.180 (May 5, 2009), available at http://www.doc.state.mn.us/DocPolicy2/html/DPW_Display_TOC.asp?Opt=105.180.htm.

226. Mich. Dep’t of Corr., Control of Communicable Bloodborne Diseases, Policy No. 03.04.120 (July 3, 2000), available at http://www.michigan.gov/documents/corrections/03_04_120_180946_7.pdf; Minn. Dep’t of Corr., Bloodborne Pathogen Exposure Control Plan, Policy No. 105.170 (Dec. 4, 2007), available at http://www.doc.state.mn.us/DocPolicy2/html/DPW_Display_TOC.asp?Opt=105.170.htm.

227. See Tenn. Dep’t of Corr., Access to Health Care, Index No. 113.30 (Feb. 15, 2008), available at <http://www.state.tn.us/correction/pdf/113-30.pdf>; Tenn. Dep’t of Corr., Inmate Co-Pay, Index No. 113.15 (Feb. 15, 2008), available at <http://www.state.tn.us/correction/pdf/113-15.pdf>; Tenn. Dep’t of Corr., Medical Transfer, Index No. 113.04 (Feb. 1, 2009), available at <http://www.state.tn.us/correction/pdf/113-04.pdf>; Tenn. Dep’t of Corr., Substance Abuse Services Delivery, Index No. 113.95 (Mar. 15, 2008), available at <http://www.state.tn.us/correction/pdf/113-95.pdf>.

228. See TRAVIS, *supra* note 1, at xvii.

the strain.²²⁹ Again, jurisdictions have a range of policies regarding transition and release planning, ranging from ambitious plans to provide “a comprehensive, collaborative, seamless reentry strategy,”²³⁰ to fairly simple instructions for release procedures (e.g., verify identity, return personal effects, and issue “gate pay” and “dress-out clothing”).²³¹

Many of the policies discussed in this section have an impact beyond prison walls. Some address prisoners’ treatment, affecting many people who will someday return to free communities. Others affect the families and children of prisoners while they are incarcerated. Still others have a direct effect on the nexus between prisons and the free world. Because of the great impact of such policies, they should be promulgated according to procedures that promote transparency and public input.

III. THE CASE FOR NOTICE-AND-COMMENT RULEMAKING (OR LESS DEFERENCE)

A. *The Value of Notice-and-Comment Rulemaking.*

In light of their significant impact, critical corrections regulations should be subject to notice-and-comment rulemaking or should be awarded less deference by courts, at least when they affect prisoners’ substantive rights or impact free communities.²³² Administrative law scholars have noted that the benefits of notice-and-comment rulemaking include transparency and

229. See, e.g., NANCY G. LAVIGNE & VERA KACHNOWSKI WITH JEREMY TRAVIS, REBECCA NASER & CHRISTY VISHER, A PORTRAIT OF PRISONER REENTRY IN MARYLAND 2 (2003), available at http://www.urban.org/UploadedPDF/410655_MDPortraitReentry.pdf (59% of prisoners released in Maryland in 2001 returned to Baltimore City, and most of them returned to a few poor neighborhoods in Baltimore, some of which received more than 200 prisoners in a year—more than many Maryland counties.); Roberts, *supra* note 7, at 1276 (“72% of all of New York State’s prisoners came from only 7 of New York City’s 55 community board districts” and “53% of Illinois prisoners released in 2001 returned to Chicago.”).

230. Mass. Dep’t of Corr., Reentry Policy, 103 DOC 493 (Oct. 15, 2008), available at <http://www.mass.gov/Eeops/docs/doc/policies/493.pdf>.

231. Neb. Dep’t of Corr. Serv., Release Preparation, No. 209.01 (Mar. 1, 1980), available at <http://www.corrections.state.ne.us/policies/files/ar209.01.pdf>.

232. Prison grievance policies should be among the rules subject to rulemaking procedures. It is true that federal APA exempts agencies’ procedural rules from notice-and-comment rulemaking. 1 DAVIS & PIERCE, *supra* note 117, § 6.5, at 350-53 (describing distinction between substantive and procedural rules). However, prison grievance policies are more than mere “bureaucratic housekeeping,” or instructions for navigating prison procedures. Cf. CORNELIUS KERWIN, RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY 23 (1995). They affect prisoners’ substantive rights, routinely determining whether they will be able to seek relief for claimed constitutional violations. Accordingly, they should not automatically be deemed solely “procedural” and exempt from notice-and-comment rulemaking. See *Pickus v. U.S. Bd. of Parole*, 507 F.2d 1107, 1112 (D.C. Cir. 1974) (rejecting argument that Board of Parole rules were mere statements of agency policy or procedural rules, on the grounds that they “substantially affect[] the rights of persons subject to agency regulations”).

accountability, information-gathering, and democratic participation.²³³ Notice-and-comment rulemaking permits agencies to solicit information and technical expertise.²³⁴ In addition, rulemaking “provid[es] an effective way for members of the public to organize.”²³⁵ Rulemaking procedures can also improve political accountability by permitting the chief executive and legislature to monitor agencies’ work.²³⁶ Thus, a notice-and-comment period should enhance both the “accuracy” and the “legitimacy” of the resultant rule.²³⁷

Given the vast numbers of incarcerated people, transparency, accountability, and democratic participation in corrections policies are more important than ever. Other avenues for democratic participation are closed to prisoners and their communities, in ways both legal and practical.²³⁸ Under state felon disenfranchisement laws, some 5.3 million Americans have lost the right to vote; this figure includes 1.4 million, or about 13% of all African-American men.²³⁹ Disenfranchisement is not the only way that mass incarceration reduces the political power of poor communities; because the incarcerated are counted as residents in the jurisdictions in which they are

233. KERWIN, *supra* note 232, at 53 (writing that the “core elements” of rulemaking are “information, participation, and accountability”). *See also* BONFIELD, *supra* note 138, at §§ 5.2.1, 5.2.2 & 5.2.3, at 144-50 (describing the benefits of rulemaking as promoting rules that are “lawful,” “technically sound,” and “politically responsible”); CARY COGLIANESE, HEATHER KILMARTIN & EVAN MENDELSON, *TRANSPARENCY AND PUBLIC PARTICIPATION IN THE RULEMAKING PROCESS 2-5* (July 2008) (arguing that an “optimal” level of public participation can improve “legitimacy” and result in “more informed policy decisions”); 1 DAVIS & PIERCE, *supra* note 117, at § 6.8 (describing the “many advantages of rules and rulemaking” as including “political accountability” and “fairness”); Crowley, *supra* note 126, at 1518-19. *See also* Lee, *supra* note 12, at 1747-50 (identifying benefits of formal speech policies in First Amendment context as promoting “internal management”, “public accountability”, and “intergovernmental accountability”).

234. Arthur E. Bonfield, *Mandating State Agency Lawmaking by Rule*, 2 B.Y.U. J. OF PUB. L. 161, 170 (1988) (“Agencies making policy by rule are . . . likely to have access to a broader base of relevant information.”).

235. Arthur Earl Bonfield, *The Quest for an Ideal State Administrative Rulemaking Procedure*, 18 FLA. ST. U. L. REV. 617, 618 (1991); Bonfield, *supra* note 234, at 170 (“[N]otice and comment procedures typically used in the state agency rulemaking process permit and facilitate intervention in that process by members of the general public.”).

236. *See* BONFIELD, *supra* note 138, § 4.2.3, at 108 (noting that the governor and state legislative committees can more easily track rulemaking than some other forms of agency lawmaking); 1 DAVIS & PIERCE, *supra* note 117, § 7.11, at 511 (noting that rulemaking is “transparent” and the notice of a proposed rule gives other political actors an opportunity to affect policy).

237. Anthony, *supra* note 130, at 1373.

238. *See* Aman, *Globalization*, *supra* note 123, at 126 (“[P]risoners, as well as other needy citizens in our society, are not likely to have much impact in normal political arenas; accordingly, they have particular needs for transparency and participation in the processes that affect them directly.”). *Cf.* Lee, *supra* note 12, at 1715 (noting interaction between incarceration rates and the ability of communities “to pursue autonomy and self-fulfillment”).

239. THE SENTENCING PROJECT, *FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES* (2008), available at http://www.sentencingproject.org/doc/publications/fd_bs_fdlawsinus.pdf.

imprisoned for the purposes of legislative reapportionment,²⁴⁰ their home districts lose political influence.²⁴¹

Agency rulemaking is one avenue of participation that should remain open. At a minimum, a comment period permits participation by community leaders, social scientists, nonprofit social service agencies, medical and mental health care providers, corrections professionals, corrections officers' unions, and faith-based organizations. Notice-and-comment rulemaking could serve as an organizing tool for the families of prisoners²⁴² or even as a means of gauging the views of prisoners.²⁴³ In order for notice-and-comment procedures to be effective, interested parties must take advantage of them to attempt to affect policy and educate corrections authorities.

The utility of a notice-and-comment period for soliciting technical expertise was demonstrated recently in the process that led to the promulgation of the National Prison Rape Elimination Commission ("NPREC") proposed model standards. The NPREC, created by the Prison Rape Elimination Act of 2003,²⁴⁴ was charged with drafting model standards for combating prison sexual violence; the standards will be finalized and promulgated by the Attorney General.²⁴⁵ NPREC solicited public comments on its proposed standards, producing important changes in a number of areas.²⁴⁶ The NPREC

240. Marie Gottschalk, *The Long Reach of the Carceral State: The Politics of Crime, Mass Imprisonment, and Penal Reform in the United States and Abroad*, 34 LAW & SOC. INQUIRY 439, 444 (2009).

241. Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation and the Debate Over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1161 (2004) (collective effect of felon disenfranchisement laws is to "penalize not only actual wrong-doers, but also the communities from which incarcerated prisoners come and the communities to which ex-offenders return by reducing their relative political clout").

242. Thanks to Molly Ryan Strehorn, WNEC Law '09, for this suggestion. See also GILMORE, GOLDEN GULAG, *supra* note 5, at 181-248 for an account of advocacy efforts by a group of prisoners' families.

243. See CITIZENS UNITED FOR A RESPONSIBLE BUDGET, 2007-2008 POLICY BRIEF: HOW "GENDER RESPONSIVE PRISONS" HARM CALIFORNIA'S WOMEN AND CHILDREN 15-16 (2007), available at <http://www.nicic.org/Library/022859> (including comments of women prisoners in opposition to proposed "gender-responsive" strategy believed to include prison expansion). The public and inmates should also be able to participate in rulemaking regarding penal institutions in order to enhance "public understanding and acceptance" of corrections rules. Carl A. Auerbach, *Administrative Rulemaking in Minnesota*, 63 MINN. L. REV. 151, 245 (1979).

244. 42 U.S.C. § 15606(a) (2008).

245. See NATIONAL PRISON RAPE ELIMINATION COMMISSION, REPORT (June 2009), available at http://nprec.us/files/pdfs/NPREC_FinalReport.PDF. After the Attorney General promulgates standards, states that fail to adopt them can lose a portion of their federal funding for prisons. 42 U.S.C. § 15607(c)(2) (2008) (providing that a state's funding under grant programs for prison purposes shall be reduced by 5% for each fiscal year unless the chief executive officer certifies that the corrections authority is in full compliance with national standards, or will use 5% of grant funds to achieve full compliance). As this Article goes to press, the Attorney General is considering the Commission's proposed model standards. Although the standards may be amended before they are promulgated, the Commission's process is a useful case study.

246. Thanks to Melissa Rothstein and Darby Hickey of Just Detention International for sharing information and analysis regarding the NPREC comment period.

process differed from typical agency rulemaking in some ways, since it was the product of a special commission made up of political appointees with a common mission. Nonetheless, it demonstrated the potential utility of a public comment period.

Some changes to the NPREC standards made them more clear and attainable. For example, the original draft NPREC standards required “continuous direct sight and sound supervision of inmates necessary to prevent sexual abuse.”²⁴⁷ Corrections officials objected to this rule as overly burdensome,²⁴⁸ and prisoners’ rights advocates commented that the supervision need not literally be continuous.²⁴⁹ Accordingly, the standard was changed to require supervision “necessary to protect inmates from sexual abuse.”²⁵⁰

The final proposed standards responded more fully to other concerns that were familiar to the Commission and addressed in the original draft, but that were amplified in the comment period. One such example concerned the type of prisoner complaints that would be deemed proper exhaustion for the purpose of the PLRA exhaustion requirement. Commentators and advocates have decried the PLRA exhaustion requirement as a bar to court intervention in cases of custodial sexual abuse.²⁵¹ The original draft standard addressed this issue by stating that “[a]ny report of sexual abuse made at any time after the abuse, which names a perpetrator and is made in writing to the agency” would be deemed to satisfy the PLRA exhaustion requirement; it also mandated that corrections agencies make available at least one outside avenue of reporting.²⁵² During the comment period, litigators reiterated the problems their clients

247. STANDARDS FOR THE PREVENTION, DETECTION, RESPONSE, AND MONITORING OF SEXUAL ABUSE IN ADULT PRISONS AND JAILS § PP-1, at 18 (Nat’l Prison Rape Elimination Comm’n, Proposed Draft 2008) [hereinafter “DRAFT PROPOSED NPREC STANDARDS”] (on file with author).

248. Legal Aid Society Prisoners’ Rights Project, Comments on the Draft National Prison Rape Elimination Commission Standards for the Prevention, Detection, Response, and Monitoring of Sexual Abuse in Adult Prisons and Jails 22 (2008) (on file with author) (“We have been told that correctional personnel read this Standard to require one-on-one supervision of inmates . . .”). See also American Correctional Association, Comments on Proposed Prison Rape Elimination Standards and Practices 3 (2008) (on file with author) (deleting the word “continuous” from the proposed standard mandating sight and sound supervision of inmates “necessary to prevent sexual abuse”).

249. Legal Aid Society Prisoners’ Rights Project, *supra* note 248, at 22 (“There is nothing to be gained by this confusion, or by leaving jail and prison officials in the impossible position of either claiming compliance with a Standard that they believe that they cannot meet or of acknowledging deficiencies and risk losing funding.”). See also Letter from Sylvia Rivera Law Project to the Nat’l Prison Rape Elimination Comm’n 4 (July 7, 2008) [hereinafter Sylvia Rivera Law Project] (on file with author) (“We believe that the language of the standards should be revised to clarify that sight and sound supervision need not always be literally continuous in every situation in order to prevent sexual abuse.”).

250. STANDARDS FOR THE PREVENTION, DETECTION, RESPONSE, AND MONITORING OF SEXUAL ABUSE IN ADULT PRISONS AND JAILS, § PP-3, at 10 (Nat’l Prison Rape Elimination Comm’n 2009) [hereinafter “FINAL PROPOSED NPREC STANDARDS”].

251. Schlanger & Shay, *supra* note 114, at 148-49.

252. DRAFT NPREC STANDARDS, *supra* note 247, § RE-1, at 33.

encountered with exhaustion requirements. Clients who reported sexual abuse through outside channels offered by a corrections agency before filing suit were deemed by the State and by a federal district court not to have properly exhausted, because they failed to file a grievance.²⁵³

The final proposed standard made more explicit the types of complaints that will be deemed acceptable for PLRA exhaustion purposes and the time when exhaustion will be deemed complete. It stated that an inmate has exhausted administrative remedies for purposes of the PLRA when the agency makes a final decision on a report of abuse or, if no decision is issued, ninety days after the report has been made, “regardless of whether the report was made by the inmate, made by a third party, or forwarded from an outside official or office.”²⁵⁴ The discussion accompanying the final proposed standards explained more fully the problems with the PLRA exhaustion regime, namely that (unless modified by the new NPREC standard)²⁵⁵ it essentially makes the institution’s grievance deadline the statute of limitations for claims of sexual abuse.²⁵⁶

The final proposed NPREC standards also demonstrated the educative potential of comments, particularly in provisions concerning LGBT prisoners. Some comments by LGBT advocates resulted in concrete changes to the standards. For example, the final proposed standards prohibit the automatic segregation of LGBT prisoners as well as the isolation of vulnerable prisoners,²⁵⁷ an issue that the original draft standards had addressed in the

253. Legal Aid Society Prisoners’ Rights Project, *supra* note 248, at 7 (describing how the exhaustion decision in *Amador v. Superintendents of the Department of Correctional Services*, No. 03 CV 00650, 2007 WL 4326747 (S.D.N.Y. Dec. 4, 2007) “reflects some of the obstacles to the use of litigation to redress patterns of sexual abuse by staff”).

254. FINAL PROPOSED NPREC STANDARDS, *supra* note 250, § RE-2, at 34. The final proposed standard also contained a provision for “seeking immediate protection from imminent sexual abuse”; such complaints are deemed exhausted forty-eight hours after a prisoner has notified a staff member of a need for protection. *Id.*

255. FINAL PROPOSED NPREC STANDARDS, *supra* note 250, § RE-2, at 34 (“A report of sexual abuse triggers the ninety-day exhaustion period regardless of the length of time that has passed between the abuse and the report.”). The final proposed standard on audits also was more specific. *Compare* DRAFT PROPOSED NPREC STANDARDS, *supra* note 247, at § SA-2 (providing that the chief executive of each jurisdiction “must certify the agency’s compliance with these standards based on results from annual audits of the standards conducted by independent auditors . . .”) with FINAL PROPOSED NPREC STANDARDS, *supra* note 250, § AU-1 (requiring publicly available independent audits “at least every three years.”).

256. FINAL PROPOSED NPREC STANDARDS, *supra* note 250, § RE-2, discussion at 35 (“Policies that require inmates to navigate a complicated grievance procedure within a short time after the abuse can result in the dismissal of meritorious legal claims by victims of sexual abuse.”).

257. FINAL PROPOSED NPREC STANDARDS, *supra* note 250, § SC-2, at 30 (“Lesbian, gay, bisexual, transgender, or other gender-nonconforming inmates are not placed in particular facilities, units or wings solely on the basis of their sexual orientation, genital status, or gender identity. Inmates at high risk for sexual victimization may be placed in segregated housing only as a last resort and then only until an alternative means of separation from likely abusers can be arranged.”).

discussion section and that advocates had urged making a part of the standards themselves.²⁵⁸ To facilitate appropriate methods of protecting at-risk prisoners, the final proposed standard on screening lists specific pieces of information that are to be elicited at intake (*e.g.*, the inmate's sexual orientation and perception of vulnerability),²⁵⁹ another suggestion made by advocates for LGBT prisoners.²⁶⁰ Also in response to comments from LGBT advocates,²⁶¹ the final proposed standards use the term "gender non-conforming" to refer to persons who may not identify as LGBT but whose gender expression does not match gender stereotypes.²⁶² Indeed, the terms "gender identity," "gender non-conforming," and "transgender," which had been absent from the original draft standards, were included in the definition section of the final proposed standards.²⁶³ In a gain for the transgender community, the discussion accompanying the final proposed standards suggests that corrections officials refrain from automatically assigning inmates housing based on their birth gender or genital status,²⁶⁴ language likely prompted by suggestions.²⁶⁵

Other comments offered by LGBT advocates were not adopted, such as a plea that corrections officials acknowledge consensual sex among inmates and provide condoms.²⁶⁶ Nonetheless, raising these issues has the potential to

258. Lambda Legal Defense and Education Fund, Comments on Standards for Adult Prisons and Jails 8 (2008) ("The portions of the Discussion section stating that vulnerable inmates should be housed in the least restrictive setting possible and must have access to the same privileges and programs as inmates housed in general population are so crucial for safety and well-being that they should be reflected in the Standards themselves and not simply in the Discussion section."); Sylvia Rivera Law Project, *supra* note 249, at 12 (arguing against the automatic segregation of transgender prisoners).

259. FINAL PROPOSED NPREC STANDARDS, *supra* note 250, § SC-1, at 27 (providing in part that "[a]t a minimum, employees use the following criteria to screen male inmates for risk of victimization: mental or physical disability, young age, slight build, first incarceration in prison or jail, nonviolent history, prior convictions for sex offenses against an adult or child, sexual orientation of gay or bisexual gender nonconformance (*e.g.*, transgender or intersex identity), prior sexual victimization, and the inmate's own perception of vulnerability").

260. Transgender, Gender Variant & Intersex Justice Project et al., Comments on Standards for Adult Prisons and Jails 13 (2008) ("The Classification scheme needs to have more specifics, and include a set of 'must have' pieces of information, such as the person's gender identity, their concerns and wishes, etc.").

261. Lambda Legal Defense and Education Fund, *supra* note 258, at 3.

262. FINAL PROPOSED NPREC STANDARDS, *supra* note 250, § SC-2, at 30-31.

263. *Compare Id.*, glossary at 3-7, with DRAFT PROPOSED NPREC STANDARDS, *supra* note 247, glossary at 10-15.

264. FINAL PROPOSED NPREC STANDARDS, *supra* note 250, § SC-2, discussion at 31 ("The Commission also strongly urges agencies to give careful thought and consideration to the placement of each transgender inmate and not to automatically place transgender individuals in male or female housing based on their birth gender or current genital status.").

265. Lambda Legal Defense and Education Fund, *supra* note 258, at 8 ("We recommend specifying that the housing preference of transgender inmates to be placed in male or female general population (or alternative settings) should be taken into consideration when making placement decisions.").

266. For example, LGBT advocates had urged the Commission to acknowledge the existence of consensual sex between prisoners and to provide condoms. Lambda Legal Defense and

educate some Commissioners (and corrections professionals) about the concerns of members of a community and their advocates.

Corrections rulemaking procedures can provide a forum for debate about issues of great public importance. After challenges to lethal injection procedures under state administrative procedure acts succeeded in California and in Maryland,²⁶⁷ these states commenced promulgating lethal injection protocols pursuant to notice-and-comment rulemaking. In Maryland, the rulemaking process promises to be a debate about both treatment of the accused and the death penalty itself.²⁶⁸ In California, public hearings and notice-and-comment also have become a debate about the death penalty.²⁶⁹ Arguably, exchanging views about capital punishment in the context of state rulemaking promotes democratic participation and political accountability more than airing these issues in federal litigation.²⁷⁰

Given the utility of notice-and-comment procedures, state administrative procedure act exceptions for “internal” policies should not be interpreted too broadly, and they certainly should not encompass all corrections regulations.²⁷¹ Aside from prisons, there are other entities whose regulations apply to largely “closed” systems that could affect public health and safety. Nuclear power plants, for example, affect public health and safety and are subject to notice-and-comment rulemaking provisions.²⁷² Moreover, as discussed in Part II.B, even prison rules focused at inmates—for example, rules about security, visitation, mail, and medical and mental health care—affect free communities.²⁷³

Education Fund, *supra* note 258, at 2. They also had asked that transgender prisoners be permitted to identify the gender of those best qualified to search them, and that language regarding pregnancy and vaginal penetration be made gender-neutral so as to include transgender men. These suggestions were not adopted. Transgender, Gender Variant & Intersex Justice Project et al., *supra* note 260, at 5-6, 11, 21.

267. *Morales v. Cal. Dep’t of Corr.*, 85 Cal. Rptr. 3d 724 (Cal Ct. App. 2008) (concluding that lethal injection protocol was subject to provisions of California’s Administrative Procedure Act); *Evans v. State*, 914 A.2d 25 (Md. 2006) (concluding that lethal injection protocol was not adopted in accordance with provisions of the Administrative Procedure Act and thus “may not be used until such time as they are properly adopted”).

268. Laura Smitherman, *Maryland Moves Toward Resuming Executions: O’Malley Reluctantly Approves New Protocols for Carrying Out Death Penalty*, BALTIMORE SUN, June 25, 2009; John Wagner, *Md. Panel Slows Down Draft of Execution Rules*, WASH. POST, Oct. 12, 2009.

269. Carol J. Williams, *Death Penalty Opponents Speak Out*, L.A. TIMES, June 30, 2009, at A4.

270. *Baze v. Rees*, 128 S. Ct. 1520, 1542 (2008) (Alito, J., concurring) (arguing that Eighth Amendment litigation regarding methods of execution is being used as a means of halting the death penalty through “litigation gridlock”). *But see* Ty Alper, *The Truth About Physician Participation in Lethal Injection*, 88 N.C. L. REV. (forthcoming 2009) (rejecting notion that lawyers advocating humane methods of execution are merely seeking abolition).

271. *Massey v. Sec’y, Dep’t of Pub. Safety and Corr. Servs.*, 886 A.2d 585, 599 (Md. 2005) (quoting BONFIELD, *supra* note 138, § 6.17.02, at 402).

272. *Cf. Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519 (1978).

273. BONFIELD, *supra* note 138, § 6.17.7, at 414 (arguing that in states in which rules

Whether prison and jail regulations are subjected to some type of formal vetting process should determine how much deference they are accorded by courts.²⁷⁴ If the reasoning of *Turner* is that running a prison requires “expertise” and “planning,”²⁷⁵ such qualities are more clearly demonstrated when corrections officials follow the same types of rulemaking processes that other government agencies observe.²⁷⁶ In the context of federal prison litigation, in which comity is so important, deference to state corrections regulations is arguably more appropriate when those regulations are promulgated pursuant to state administrative law procedures.²⁷⁷

In federal administrative law, the amount of deference accorded agency rules depends, in part, on the procedures used to promulgate them. Of course, outside of the corrections context, unlike under *Turner*, rules that impinge on constitutional rights are not entitled to deference.²⁷⁸ More generally, “legislative” rules, enacted pursuant to APA notice-and-comment rulemaking procedures, have the force of law and may “impose distinct obligations on members of the public.”²⁷⁹ By contrast, “interpretive” rules, or policy statements that are promulgated without notice-and-comment, are accorded

affecting only inmates are exempt from state administrative procedure acts, visitation restrictions are not exempt from notice-and-comment rulemaking because they affect visitors as well as prisoners).

274. Lee, *supra* note 12, at 1752-53, 1773 (arguing that “formal speech policies” in government institutions such as prisons do not merit judicial deference unless they “result from an open and deliberative process,” including “reasonable notice and an opportunity to comment,” and suggesting that this will not be true in prison systems that are exempt from notice-and-comment rulemaking); Cf. WILLIAM F. FOX, UNDERSTANDING ADMINISTRATIVE LAW 320 (2003) (arguing in the federal APA context that interpretive rules should receive less deference from courts than substantive rules because they have not “survived the fire of notice and comment”).

275. Giles, *supra* note 88, at 85.

276. Before the Civil Rights of Institutionalized Persons Act (“CRIPA”) was amended by the PLRA, it required prisoners to exhaust administrative remedies only when those administrative procedures were certified as “plain, speedy, and effective,” 42 U.S.C. § 1997e(a)(1)(2009). See *Porter v. Nussle*, 534 U.S. 516, 523-24 (2002).

277. Cf. *Lewis v. Casey*, 518 U.S. 343, 361 (1996) (emphasizing the need for “local experimentation” and “adequate consideration [for] the views of state prison authorities”); *Preiser v. Rodriguez*, 411 U.S. 475, 491 (1973) (“It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons.”).

278. See 33 CHARLES ALAN WRIGHT & ANDREW D. LEIPOLD, FEDERAL PRACTICE AND PROCEDURE § 8351 (4th ed. 2008) (“When a regulation affects fundamental rights, review will be more searching and will assure that the rule is narrowly tailored to serve a compelling state interest.”). See, e.g., *Reno v. Flores*, 507 U.S. 292, 301-02 (1993) (Substantive due process “forbids the government to infringe certain ‘fundamental’ liberty interests at all . . . unless the infringement is narrowly tailored to serve a compelling state interest.”); *Preminger v. Sec’y of Veterans Affairs*, 517 F.3d 1299, 1305, 1310-11 (Fed. Cir. 2008) (“[W]e review the constitutionality of a regulation without deference to the agency.”). See also 5 U.S.C. § 706(2)(B) (2006) (directing courts to invalidate any agency action “contrary to constitutional right, power, privilege or immunity”); BONFIELD, *supra* note 138, § 9.2.12(a), at 573-74 (explaining that section 5-116 of the 1981 Model State Administrative Procedure Act “provides that an agency rule is invalid if the rule is unconstitutional on its face or as applied”).

279. 1 DAVIS & PIERCE, *supra* note 117, § 6.4, at 325.

deference based on their “power to persuade.”²⁸⁰ Factors in this analysis include “the thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements.”²⁸¹ In the corrections context as well, it makes sense to reward transparent and participatory rulemaking processes with deference and subject rules issued under more opaque and informal processes to greater scrutiny.

B. Anticipating Criticisms of Notice-and-Comment Rulemaking.

A number of criticisms may be leveled at the notion of subjecting prison and jail regulation to the requirements of state administrative procedure acts. Some might fear that further bureaucratic requirements will undermine prison security. However, regulations governing many high risk industries and activities—including highway safety,²⁸² emissions policies,²⁸³ and drug approval²⁸⁴—are promulgated through normal administrative procedure act-type proceedings.

Another criticism is that promulgating corrections rules under notice-and-comment procedures is simply impractical. Prison officials might get bogged down in paperwork.²⁸⁵ There are just too many rules governing prisons and jails, this argument goes, and corrections agencies are too intimately involved in the lives of prisoners to make rules under notice-and-comment procedures.²⁸⁶ A related argument is that members of the public are not “directly affected” by prison rules and such rules are better left to prison officials who have corrections expertise.²⁸⁷

To the extent that members of the public were not affected by prison rules when the 1981 Model State Administrative Procedure Act was promulgated, it is much less true today, given skyrocketing incarceration rates. As discussed in this Article, mass incarceration directly affects millions of prisoners and, by extension, their families and communities. Now more than ever, there is a need

280. *Id.* § 6.4, at 325, 335.

281. *Skidmore v. Swift*, 323 U.S. 134, 140 (1944) (“The weight of [rulings, interpretations, and opinions of the agency] will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”). *See also* *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001) (“[A]n agency’s interpretation may merit some deference whatever its form, given the ‘specialized experience and broader investigations and information’ available to the agency.”).

282. *Cf.* JERRY MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* 10-11 (1990) (describing NHTSA rulemaking history and movement away from rulemaking and towards reliance on auto recalls).

283. *See, e.g.,* *Massachusetts v. EPA*, 549 U.S. 497 (2007).

284. *Cf. Wyeth v. Levine*, 129 S. Ct. 1187 (2009).

285. *Adams v. Dep’t of Corr.*, 469 So.2d 164, 165 (Fla. Dist. Ct. App. 1985) (“[R]ulemaking was not intended to affect fundamental prison administration or inundate each prison superintendent with unrelenting paperwork.”).

286. BONFIELD, *supra* note 138, § 6.17.7, at 416.

287. *Id.*

for public participation in corrections rulemaking. Public participation is especially important in areas like prisoner release, reentry, and medical and mental health care, all of which can have an impact on outside communities.

Certainly, some states already engage in notice-and-comment rulemaking for many types of corrections regulations without apparent problem.²⁸⁸ To reduce administrative burden, state legislatures adopting notice-and-comment could limit the categories of corrections rules subject to rulemaking. Public input could be restricted to policies that have the greatest impact on families, communities, and prisoners' substantial rights.²⁸⁹ States abolishing blanket exemptions could also adopt pared-down procedures for corrections regulations. The procedural complexity of state administrative procedure act notice-and-comment provisions vary widely, providing a number of models.²⁹⁰

Others might ask whether imposing more onerous rulemaking requirements on prison and jail regulation will prompt corrections officials to stop promulgating such regulations and revert to more informal policies. For instance, the Supreme Court noted in *Sandin* that a constitutional due process analysis focused on the wording of corrections regulations produced "disincentives for States to codify prison management procedures."²⁹¹

Although this type of retrenchment may happen on the margins, corrections has become so professionalized over the past forty years that wholesale reversion to informal processes seems unlikely.²⁹² Indeed, Feeley and Swearingen have written that "no one—prison inmate or correctional officer alike—would now seriously entertain the idea of turning back the clock to the pre-bureaucratic prison [because] the awesome new problems

288. For example, the CDCR web site lists policies that are pending notice-and-comment. http://www.cdcr.ca.gov/Regulations/Adult_Operations/Pending_Rules_Page.html (last visited Oct. 30, 2009). Proposed rule changes are also listed on the Wisconsin Department of Corrections web site, <http://www.wi-doc.com/> (last visited Oct. 30, 2009). On the Wisconsin experience with corrections rule-making, see Walter J. Dickey, *The Promise and Problems of Rulemaking in Corrections: The Wisconsin Experience*, 1983 WIS. L. REV. 285, 304-22 (1983) (describing initial experience of corrections rulemaking under state Administrative Procedure Act during four-year period beginning in 1978, and identifying benefits including "clear identification of program objectives," reduction of unwarranted complexity in rules, "revision of policy to comply with existing legal requirements," and "more effective training of correctional staff").

289. Cf. *Pickus v. U.S. Bd. of Parole*, 507 F.2d 1107, 1112 (D.C. Cir. 1974) (concluding that Board of Parole rules were subject to notice-and-comment rulemaking because they "substantially affect[] the rights of persons subject to agency regulations"); 1 DAVIS & PIERCE, *supra* note 117, §§ 6.3-6.4, at 316-49 (distinguishing between "legislative" rules, which are subject to notice-and-comment rulemaking and have the force of law, and "interpretive" rules and policy statements).

290. Contrast CAL. GOV'T CODE § 11346.9(a)(3) (West 2005) (requiring "a summary of each objection or recommendation made regarding the specific adoption, amendment, or repeal proposed, together with an explanation of how the proposed action has been changed to accommodate each objection or recommendation, or the reasons for making no change"), with MD. CODE ANN., STATE GOV'T § 10-113 to -114 (LexisNexis 2004) (requiring that a unit indicate changes in the text of a proposed or adopted regulation).

291. *Sandin v. Conner*, 515 U.S. 472, 482 (1995).

292. See *supra* notes 51-53.

confronting prisons can be handled as well as they have been only as a consequence of the enhanced capacities brought about by increased bureaucratization.”²⁹³ Other forces bolster professionalization; federal statutes like the Prison Rape Elimination Act (“PREA”) provide incentives for the promulgation of policies,²⁹⁴ as do professional accreditation organizations.²⁹⁵

More generally, administrative law scholars have warned that rulemaking procedures can lead to “ossification” or even “petrification,” causing agencies to cease issuing or amending rules.²⁹⁶ This might be the result if legislatures impose onerous rulemaking requirements, or reviewing courts require detailed statements of reasons.²⁹⁷ Possible ways of addressing this problem include designing a notice-and-comment rulemaking procedure for the corrections context that includes only critical elements or limiting judicial review.²⁹⁸ It seems unlikely, however, that courts will impose overly rigorous requirements on corrections officials, given the long-standing norm of nearly complete deference.

There is also reason to think that the rulemaking process in the corrections context would be simpler than in other administrative law contexts. Unlike other regulated areas,²⁹⁹ there are relatively few well-funded and powerful interests groups in corrections (guards’ unions being one),³⁰⁰ which would reduce the complexity and potential for abuse of the notice-and-comment process.³⁰¹ State corrections rules are unlikely to be the subject of thousands of

293. Feeley & Swearingen, *supra* note 51, at 470-71.

294. See also Feeley & Swearingen, *supra* note 51, at 451 (discussing how federal statutes like the Civil Rights of Institutionalized Persons Act (CRIPA) and the Violent Crime and Law Enforcement Act of (1994) provide national standards for corrections and promote professionalization).

295. FEELEY & RUBIN, *supra* note 21, at 162-63.

296. See 1 DAVIS & PIERCE, *supra* note 117, § 7.11, at 511-13; MASHAW & HARFST, *supra* note 282, at 10-11, 172-201 (describing rulemaking deadlock at NHTSA); Richard J. Pierce, *Rulemaking and the Administrative Procedure Act*, 32 TULSA L.J. 185, 195-96 (1996) (quoting Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385 (1992)).

297. 1 DAVIS & PIERCE, *supra* note 117, § 7.8, at 492-96.

298. 1 DAVIS & PIERCE, *supra* note 117, § 7.12, at 369 (“If the Court perceives value in rules and wants to preserve rulemaking as a tool potentially available to agencies, it must limit the power of lower courts to compel agencies to accompany rules with detailed and encyclopedic discussions of all issues, comments, data disputes, and alternatives.”).

299. Thomas O. McGarity, *supra* note 296, at 1397 (explaining that informal rulemaking has provided “powerful political constituencies” with “ample opportunity to mobilize against” proposed rules, and that “regulatees and their trade associations,” as well as “environmental and consumer groups” have “fiercely resisted the rulemaking process, seeking to lard it up with procedural, structural, and analytical trappings that have the predictable effect of slowing down the agency”).

300. See GILMORE, GOLDEN GULAG, *supra* note 5, at 125 (describing the role of the California prison guards’ union in advocating the expansion of the California prison system). Cf. Dolovich, *supra* note 123, at 523-24 (discussing lobbying efforts by private corrections companies).

301. See BONFIELD, *supra* note 138, § 2.1.2, at 31 (noting that state agencies on the whole

pages of comments by hundreds of sophisticated parties, like in EPA or FDA rulemaking proceedings.³⁰² Using online procedures could also simplify the process, while simultaneously increasing transparency and opportunities for participation.³⁰³

A different type of concern is that by focusing on the regulation of mass incarceration, we inadvertently strengthen an ever more bureaucratized prison system, one that is clothed with an illusion of legitimacy.³⁰⁴ Certainly, the existence of regulations alone does not guarantee good implementation, and the proliferation of bureaucratic procedures can in fact undermine effective management.³⁰⁵ Bad actors will no doubt ignore policies.³⁰⁶ Nonetheless, many commentators have concluded that, on balance, increased bureaucracy protects prisoners and improves their living conditions, albeit at the cost of some flexibility.³⁰⁷

A related danger is that, while notice-and-comment rulemaking may be officially required, in actuality, it may be circumvented or gutted.³⁰⁸ For example, Feeley and Swearingen surveyed the CDCR rulemaking process and found that the CDCR overused exceptions to California Administrative

deal with less affluent people, who are often not represented by lawyers).

302. Cf. 1 DAVIS & PIERCE, *supra* note 117, § 7.4, at 444 (describing rulemaking proceedings in federal agencies).

303. See Barbara H. Brandon & Robert D. Carlitz, *Online Rulemaking and Other Tools for Strengthening Our Civil Infrastructure*, 54 ADMIN. L. REV. 1421, 1442-43 (2002) (discussing increased transparency and exchange of information as among the benefits of online rulemaking). See, e.g., New Jersey Department of Corrections' Home Page, <http://www.state.nj.us/corrections> (last visited Oct. 22, 2009).

304. Feeley & Swearingen, *supra* note 51, at 468 (noting that "there is an irony in . . . seeking to protect individual rights by strengthening prison administration").

305. The National Commission on Correctional Health Care (NCCHC) has stated that the Michigan Department of Corrections medical system was "one of the most bureaucratic systems we have ever encountered," to the detriment of its ability to provide adequate health care. See Alexander, *supra* note 169, at 14.

306. See, e.g., *Stewart v. Lyles*, 66 Fed. App'x 18, 20 (7th Cir. 2003) (describing how corrections officers at the Illinois Stateville prison conducted strip and body cavity searches on male prisoners in front of other inmates and female supervisors, and when told of a policy forbidding such searches, the officers said that they did not "care about the paper," until a female supervisor intervened on the prisoners' behalf).

307. Feeley & Swearingen, *supra* note 51, at 468. See also Sturm, *supra* note 48, at 49 ("Many scholars argue that the move toward bureaucracy has led to safer, less arbitrary, and more human institutions.").

308. I thank faculty reviewer Malcolm Feeley for pushing my thinking on this point and for sharing his unpublished manuscript with the results of his study, Feeley & Swearingen, *supra* note 154. See also Marjorie Cohn, *The Evisceration of the Attorney-Client Privilege in the Wake of September 11, 2001*, 71 *FORDHAM L. REV.* 1233, 1234, 1244 (2003) (describing how then-Attorney General Ashcroft promulgated, without notice-and-comment, "emergency interim" BOP regulation permitting government to eavesdrop on attorney-client conversations); Susan N. Herman, *Introduction: David G. Trager Public Policy Symposium: Our New Federalism? National Authority and Local Autonomy in the War on Terror*, 69 *BROOK. L. REV.* 1201, 1223 (2004) (describing how, in the wake of 9/11, INS Commissioner, without notice-and-comment, "signed an emergency interim regulation superseding state law by prohibiting state jail officials from disclosing the identities of the detainees held on behalf of the INS").

Procedure Act rulemaking.³⁰⁹ Local rules are completely exempt from the California Administrative Procedure Act and emergency rules are exempt for 160 days.³¹⁰ Between 1996 and 1999, the CDCR passed 76% of its rules through the emergency procedure,³¹¹ a troublingly high percentage. In response, the California Law Revision Commission recommended that emergency rules be subjected to review by the Office of Administrative Law.³¹² Subsequently, in the period from 2005 to 2007, the percentage of rules adopted through the emergency procedure dropped to 20%.³¹³

On the other hand, some might argue that more formal rulemaking procedures ultimately will limit prison officials' ability to exercise judgment. Administrative law scholars have described the trade-offs of limiting discretion.³¹⁴ An often-criticized example of an effort to restrict discretion and promote transparency in the criminal justice realm was sentencing reform. In the 1980s, the federal system, followed by many states, implemented sentencing guidelines.³¹⁵ Although liberal reformers had championed guidelines as a means of reducing unwarranted disparity,³¹⁶ a byproduct of this set of reforms was increased harshness and the elimination of judges' ability to grant individualized mercy.³¹⁷ Certainly, there is danger in reducing individual discretion. However, prison and jail systems already have policies and regulations; this Article argues that those regulations should be subject to greater public input. Moreover, sentencing reform was accompanied by other measures that ratcheted up sentences, including mandatory minimums and "three-strikes" statutes, at a moment when America was bent on exacting punishment.³¹⁸ There is no inherent reason why greater rationality should produce increased harshness.

309. Feeley & Swearingen, *supra* note 154, at 31-38.

310. *Id.* at 29-30.

311. *Id.* at 37.

312. *Id.*

313. *Id.*

314. See KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE* 25 (1969) (describing the importance and danger of discretion in a criminal justice context).

315. See Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223 (1993).

316. Stith & Koh, *supra* note 315, at 226-30 (describing how "liberal reformers" advocated replacing indeterminate sentencing with sentencing guidelines).

317. See Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1956 (1988) ("To rectify the guidelines' principal shortcomings, the Commission should propose to Congress specific amendments designed to increase judges' discretion to consider a broad range of individual offender characteristics."). Of course, the guidelines were later declared advisory by the U.S. Supreme Court. *United States v. Booker*, 543 U.S. 220 (2005) (concluding that the mandatory nature of the sentencing guidelines violated the Sixth Amendment).

318. See ELSNER, *supra* note 77, at 18-23 (describing the combined effects of the "war on drugs," mandatory minimum sentences, and "three-strikes" laws); MARC MAUER, *THE RACE TO INCARCERATE* 56-78 (1999) (describing how the "tough on crime" movement of the Reagan/Bush years continued through the Clinton administration).

Exempting corrections regulation from important mechanisms of public oversight deprives us of a much-needed accountability mechanism.³¹⁹ The point is not to increase the sheer volume of regulation, but to enact policies through transparent mechanisms with opportunity for public input. The need for public accountability is particularly great in what Justice Kennedy has described as the “hidden world of punishment.”³²⁰ Former Oklahoma Warden Jack Conley told the Commission on Safety and Abuse in America’s Prisons that “[w]hen we are not held accountable, the culture inside the prisons becomes a place that is so foreign to the culture of the real world that we develop our own ways of doing things.”³²¹

Of course, greater opportunities for public participation will not necessarily translate into more enlightened corrections regulations. Our current policy of mass incarceration illustrates this point: Commentators have described how criminal punishment has become more punitive since the 1960s, fueled in part by racial fears and stereotypes.³²² However, eliminating democratic participation is not the solution to this problem. The answer is “more politics”³²³—to engage in the administrative process and facilitate the participation of relatively disadvantaged affected communities in commenting on corrections policy.

Nonetheless, some might counter (with considerable force) that only decarceration will solve the problems of America’s prisons.³²⁴ With America’s

319. COMMISSION ON SAFETY AND ABUSE IN AMERICA’S PRISONS, CONFRONTING CONFINEMENT 79-88 (2006), available at http://www.prisoncommission.org/pdfs/Confronting_Confinement.pdf (discussing need for both external oversight and internal accountability measures).

320. Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003), available at http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html, in TRAVIS, *supra* note 1, at 3. Cf. Austin Sarat & Conor Clarke, *Beyond Discretion: Prosecution, the Logic of Sovereignty and the Limits of Law*, 33 LAW & SOC. INQUIRY 387, 412-13 (June 2008) (describing a “legal borderland” as a place where “meaningful constraints on officials meet their limits”).

321. COMMISSION ON SAFETY AND ABUSE IN AMERICA’S PRISONS, *supra* note 319, at 6. Margaret Winter, Associate Director of the ACLU National Prison Project, told the Commission that what prisons need is “light, light, and more light.” *Id.* at 77. In its report, the Commission recommended additional measures to ensure accountability. *Id.* at 6-7.

322. See Steven E. Barkan & Steven F. Cohn, *Why Whites Favor Spending More Money to Fight Crime: The Role of Racial Prejudice*, 52 SOCIAL PROBLEMS 300, 301, 310 (2005) (summarizing research suggesting that public opinion and specifically racial prejudices motivated “get tough” crime policies, and analyzing data from the General Social Survey to conclude that racially prejudiced whites favor increased spending on crime control). Thanks to Valerie Jenness for raising this point.

323. My thinking on this point was influenced by comments by James Forman, Jr., who made a plea for “more politics, less law” in presenting his paper *Isolation, Empathy, and Crime*, at the LatCrit XIV conference on Oct. 3, 2009.

324. Professor Todd Clear spoke of the need to focus on reversing mass incarceration. Audio Recording: Symposium on The Road to Prison Reform: Treating the Causes and Conditions of Our Overburdened System, held by the Connecticut Public Interest Law Journal, (Feb. 6, 2009), available at <http://www.law.uconn.edu/content/road-prison-reform> (follow “Download the MP3” hyperlink under Panel 2). See David Cole, *Can Our Shameful Prisons Be Reformed?* 56 NEW

imprisoned population topping the charts, we should focus on decarceration, rather than adjusting to a system of mass incarceration.³²⁵ Although there have been encouraging moves in that direction, accelerated by the cost burden of mass incarceration in the context of a global economic recession,³²⁶ the need for transparency in corrections policy-making persists, even if the United States pursues a policy of decarceration. Until our reliance on mass incarceration is reduced, prison and jail regulations will continue to have a major impact on poor communities. So long as prisons and jails exist, the policies that regulate them should be subject to public scrutiny.

CONCLUSION

Corrections regulations are administrative law incarcerated. When we ignore corrections policies, we turn a blind eye to a body of law that directly governs millions of Americans. If courts fail to analyze such rules with rigor, or delegate to them the final say over whether prisoners will be heard by courts, they reinforce the race, class, and gender hierarchies of mass incarceration.³²⁷ These failings will surely haunt us, for the injustices done in prisons and jails can seep out. With the world's largest incarcerated population, we cannot countenance a "hands-off" doctrine in any form. It is time that we subject prison and jail regulation to greater public scrutiny.

YORK REV. BOOKS, November 19, 2009 (arguing for a reduction in the U.S. prison population on both practical and moral grounds). See also Sylvia Rivera Law Project, *supra* note 249, at 5 ("The more investment we as a society make in our prisons and jails and the less in real resources for our communities, the more human beings end up incarcerated and the more violence happens both inside and outside of correctional facilities.").

325. Todd R. Clear & James Austin, *Reducing Mass Incarceration: Implications of the Iron Law of Prison Populations*, 3 HARV. L. & POL'Y REV. 307, 316-24 (2009) (urging sentencing reform to reduce the number of people who go to prison and the length of time they stay there). See also MICHAEL JACOBSON, *Downsizing Prisons* (2005); Marie Gottschalk, *Dismantling the Carceral State: The Future of Penal Policy Reform*, 84 TEX. L. REV. 1693, 1696 (2006) ("My vision of penal reform is premised on not just halting the expansion of the carceral state but on dismantling it."); David Rudovsky, *A Closing Keynote: A Comment on Mass Incarceration in the United States*, 11 U. PA. J. CONST. L. 207, 214 (2009) ("We ought to be doing more than just tinkering at the edges.").

326. On August 4, 2009, a panel of three federal judges ordered the CDCR to reduce its prison population by nearly 43,000 prisoners, concluding that overcrowding stemming from "tough-on-crime politics" had created unconstitutional conditions in the system. *Coleman v. Schwarzenegger*, No. Civ. S-90-0520, 2009 WL 2430820, at *115-16 (E.D. Cal. Aug. 4, 2009); Carol J. Williams, *State gets Two Years to Cut 43,000 from Prisons*, L.A. TIMES, Aug. 5, 2009, at A1. Changes are being discussed in Washington, D.C. as well. On March 26, 2009, Senator Jim Webb introduced a bill in the U.S. Senate to establish a commission to overhaul America's criminal justice system and reduce our reliance on incarceration, the National Criminal Justice Commission Act of 2009, S. 714, 111th Cong. (2009). Senator Webb's website cites the fact that the U.S. has 5% of the world's population, but 25% of the incarcerated prisoners, and states that "America's criminal justice system has deteriorated to the point that it is a national disgrace." <http://webb.senate.gov/email/criminaljusticereform.html> (last visited Oct. 30, 2009).

327. Cf. Buchanan, *supra* note 8, at 49-50; Siegel, *supra* note 82, at 2119-20; Loury, *supra* note 9, at 36-37.

APPENDIX

Jurisdiction	Exempt from State Administrative Procedure Act Rulemaking? <small>328</small>	Source of Information
Alabama	Express exemption from rulemaking	ALA. CODE § 41-22-3(9)(g)(1) (2000): The term “rule” does not include rules relating to “the conduct of inmates of public institutions and prisoners on parole.” ³²⁹
Alaska	Bound by rulemaking	The Commissioner may adopt “regulations,” under sections 44.28.030 and 33.30.021 of the Alaska Statute, ³³⁰ which are defined under the Alaska Administrative Procedure Act and subject to notice-and-comment rulemaking. ALASKA STAT. § 44.62.640(a)(3) (2008). The Commissioner may also direct the development of a manual of “policies and procedures,” ALASKA ADMIN. CODE tit. 22, § 05.155 (2004), which are not subject to notice-and-comment rulemaking, ³³¹ and which address many

328. The chart characterizes corrections rules as “exempt” or “partially exempt” if there is an argument that they are exempt from rulemaking procedures under the state administrative procedure act. It should not be interpreted as a definitive statement that all corrections regulations are exempt from state administrative procedure act requirements. Jurisdictions that are described as “bound” are those that require a tier of rules be promulgated as regulations pursuant to notice-and-comment rulemaking. Those jurisdictions might also have other corrections policies—perhaps more numerous and equally important—that are not subject to the provisions of the state administrative procedure act.

329. See *Gerthoffer v. Ala. Dep’t of Corr.*, 973 So.2d 355, 358-59 (Ala. Civ. App. 2007) (discussing Alabama Code, ALA. CODE § 41-22-3(9)(g)(1) (2000), exemption).

330. ALASKA STAT. §§ 44.28.030, 33.30.021 (2008). See *McGinnis v. Stevens*, 570 P.2d 735, 741 (Alaska 1977) (Commissioner is “under a legislative mandate” to promulgate regulations governing Alaska’s prisons.).

331. *Wilson v. State, Dep’t of Corr.*, 127 P.3d 826, 828-29 (Alaska 2006) (“When an administrative regulation is adopted under statutory authority, we review the regulation to determine whether it is ‘consistent with and reasonably necessary to carry out the purposes of the statutory provisions conferring rule-making authority on the agency’ and whether it is ‘reasonable and not arbitrary’ considering the legislative purpose.”); *Mathis v. Sausser*, 942 P.2d 1117, 1123 nn.12-13 (Alaska 1997) (“Policies and procedures of state agencies need not conform to formal requirements of the APA.”). See also *Moody v. State, Dep’t of Corr.*, No. S-12303, 2007 WL 3197938, at *1 (Alaska 2007) (Alaska Administrative Procedure Act does not permit judicial review of DOC administrative decision, but court will review “fundamental constitutional question[s]”).

		substantive areas.
Arizona	Express exemption from rulemaking	State Administrative Procedure Act exempts any “rule or substantive policy statement concerning inmates or committed youth of a correctional or detention facility.” ³³²
Arkansas	Bound by state Administrative Procedure Act	Bound by the state Administrative Procedure Act. ³³³
California	Express partial exemption from rulemaking	Rules of “general application” are subject to State Administrative Procedure Act procedures, <i>see</i> CAL. GOV’T CODE § 11346 <i>et seq.</i> (West 2005), while rules that affect only a single institution may be exempt. ³³⁴ <i>See</i> CAL. PENAL CODE § 5058(c) (West 2008) (“The following are deemed not to be ‘regulations’ as defined in Section 11342.600 of the Government Code: (1) Rules issued by the director applying solely to a particular prison or other correctional facility, provided that the following conditions are met: (A) All

332. ARIZ. STAT. § 41-1005(A)(7) (2004). *See also* Stanhope v. State, 825 P.2d 25, 26 (Ariz. Ct. App. 1991) (concluding that a prisoner classification decision is not “subject to judicial review under the Arizona Administrative Review Act”). *But see* Malumphy v. MacDougall, 610 P.2d 1044 (Ariz. 1980) (DOC regulations dealing with inmate classification are not just “internal” because “the unfiled regulations materially affect the type of existence a sentenced prisoner will endure, which ranges from ‘intensive’ custody, twenty-four-hour lockup, to ‘trusty.’ Regulations of this type which affect such important interests are the type of regulations which must be filed with the Secretary of State.”); Wilkinson v. State, 838 P.2d 1358, 1360 (Ariz. Ct. App. 1992) (“The DOC’s religious visitation rules concern not just the inmates, but also the religious leaders who visit them.”).

333. Eldridge v. Bd. of Corr., 768 S.W.2d 534, 535-36 (Ark. 1989) (“[T]he Administrative Procedure Act . . . applies to the various boards, commissions, departments, officers, or other authorities of the State of Arkansas, with such exceptions as are set forth in Ark. Code Ann. § 25-15-202(1)(B). The Department of Correction is not excepted and is therefore subject to the Act.” However, the selection of a site for a correctional facility was not a “rule” within the meaning of the Act.). *But see* Ark. Dep’t of Corr. v. Williams, No. 08-1031 (Ark. Oct. 29, 2009) (noting that the Arkansas legislature amended section 5-4-617 of the Arkansas Code to exempt lethal injection protocols from the state Administrative Procedure Act); Clinton v. Bonds, 816 S.W.2d 169, 171 (Ark. 1991) (ARK. CODE ANN. § 25-15-212(a) (2002): judicial review of contested cases is not available to inmates, but Arkansas Supreme Court says inmates have a right to review of fundamental constitutional questions.).

334. Morales v. Cal. Dep’t of Corr., 85 Cal. Rptr. 3d 724 (Cal. Ct. App. 2008) (Lethal injection protocol is “regulation” within the meaning of state Administrative Procedure Act and does not fall within “single prison” or “internal management” exceptions); Stoneham v. Rushen, 203 Cal. Rptr. 20, 22-24 (Cal. Ct. App. 1984) (“standardized classification point-scoring system” was a rule that had to be promulgated in accordance with the Administrative Procedure Act; judicial review was to determine whether regulation was within scope of agency’s statutory authority and for arbitrariness).

		rules that apply to prisons or other correctional facilities throughout the state are adopted by the director pursuant to Chapter 3.5 . . . (B) All rules except those that are excluded from disclosure to the public . . . are made available to all inmates confined in the particular prison or other correctional facility to which the rules apply and to all members of the general public . . .”). ³³⁵
Colorado	Express exemption from rulemaking	COLO. REV. STAT. § 17-1-111 (2008): “The provisions of this title relating to the placement, assignment, management, discipline, and classification of inmates shall not be subject to section 24-4-103 [rulemaking], 24-4-105 [hearings], or 24-4-106 [judicial review], C.R.S.” Colo. Dep’t of Corr., Administrative Regulation 100-01 (April 15, 2009), <i>available at</i> https://exdoc.state.co.us/userfiles/regulations/pdf/0100_01.pdf : “All ARs are policies and guidelines only; therefore, they are exempt under Title 24 of the Colorado Revised Statutes, unless specifically stated in an AR that it is subject to a public hearing.”
Connecticut	Express partial exemption from rulemaking	CONN. GEN. STAT. ANN. § 4-166(13) (West 2007): The term “regulation” “does not include (A) statements concerning only the internal management of any agency and not affecting private rights or procedures available to the public” ³³⁶ § 18-78a (West 2006): The state Administrative Procedure Act “shall apply to

335. Also exempt are short-term criteria for placing inmates in new facilities or facilities subject to closure and issues relating to security and investigations. CAL. PENAL CODE §5058(c)(2)-(3) (West 2008). Compare *Faunce v. Denton*, 213 Cal. Rptr. 122 (Cal. Ct. App. 1985) (holding that rules regarding the amount of property prisoners could have in their cells were rules of general application affecting population of men in custody and so subject to the state Administrative Procedure Act), with *In re Garcia*, 79 Cal. Rptr. 2d 357 (Cal. Ct. App. 1998) (holding that correspondence regulation was a local regulation exempt from the Administrative Procedure Act).

336. *Pierce v. Lantz*, 965 A.2d 576, 579-81 (Conn. App. Ct. 2009) (concluding that DOC regulations regarding censorship of “sexually explicit materials and compact discs with parental advisory stickers” and price mark-ups on items in prison commissary were not “rules” within the meaning of section 4-166(13) of the Connecticut Statute).

		<p>the Department of Correction, except that in adopting regulations in regard to riot control procedures, security and emergency procedures, disciplinary action or classification the Department of Correction shall not be required to follow the procedures in sections 4-168, 4-168a, 4-168b, 4-172, 4-173, 4-174 and 4-176. The Attorney General, the legislative regulation review committee and the General Assembly, in complying with their duties in accordance with sections 4-169, 4-170 and 4-171, shall not make such regulations in regard to riot control procedures and security and emergency procedures public.”³³⁷</p> <p>Section 4-166(2) also excludes Department of Correction hearings from the definition of “contested case.” § 4-166(2) (West 2007).</p>
Delaware	Express exemption from rulemaking	<p>DEL. CODE ANN. tit. 11, § 4322(d) (2001): The “Department of Correction Policies and Procedures, including any Policy, Procedure, Post Order, Facility Operational Procedure or Administrative Regulation adopted by a Bureau, facility or department of the Department of Correction shall be confidential, and not subject to disclosure except upon the written authority of the Commissioner.”³³⁸</p>
District of Columbia	Rules approved by legislature	<p>D.C. CODE § 24-211.02 (2001): “The Department of Corrections with the approval of the Council of the District of Columbia shall have power to promulgate rules and regulations for the government of such institutions and to establish and conduct industries, farms, and other activities, to classify the inmates, and to provide for their proper treatment, care, rehabilitation, and</p>

337. *Beasley v. Comm’r of Corr.*, 718 A.2d 487, 495 (Conn. App. Ct. 1998).

338. *Jackson v. Danberg*, C.A. No. 07M-09-141 RRC, 2008 WL 1850585 (Del. Super. Ct. 2008), *aff’d*, 962 A.2d 256 (Del. 2008) (noting that the DOC has never promulgated a regulation under the state Administrative Procedure Act).

339. *Cf. Walton v. District of Columbia*, 670 A.2d 1346 (D.C. 1996) (discussing *Lorton*

		reformation.” ³³⁹ But Program Statements for the D.C. DOC are not subject to notice-and-comment procedures. http://doc.dc.gov/doc .
Florida	Partial exemption from rulemaking	Provisions of section 120.54 of the Florida Statute (Rulemaking) apply to Department of Corrections with respect to rules of general applicability, ³⁴⁰ but not rules affecting only a single facility. ³⁴¹ There is no judicial review under the Administrative Procedure Act. ³⁴²
Georgia	Express exemption from state Administrative Procedure Act	The “Board of Corrections and its penal institutions” are exempt from the definition of “agency.” GA. CODE ANN. § 50-13-2(1) (2009).
Hawaii	Partial exemption from rulemaking	Exempt under section 91-1(4) of the Hawaii Statute. HAW. REV. STAT. ANN. § 91-1(4) (LexisNexis 2007) (The term “rule” does not include “regulations concerning only the internal management of an agency and not affecting private rights of or procedures available to the public”). ³⁴³
Idaho	Express partial exemption from state Administrative Procedure Act	IDAHO CODE ANN. § 20-212 (1997): “The state board of correction shall make all necessary rules All rules of the board shall be subject to the review of the legislature But no other provisions of

Regulations Approval Act).

340. FLA. STAT. ANN. § 120.54 (West 2008); *Dep’t of Corr. v. Holland*, 469 So. 2d 166, 167 (Fla. Dist. Ct. App. 1985) (Policies that have “breath and application throughout the prison system” must be promulgated pursuant to § 120.54, but policy regarding winter clothes affecting only single prison was exempt.). *See also* *Osterback v. Agwunobi*, 873 So. 2d 437 (Fla. Dist. Ct. App. 2004) (concluding that repeal of regulation regarding environmental conditions was invalid exercise of rulemaking authority); *Alexander v. Singletary*, 626 So. 2d 333 (Fla. Dist. Ct. App. 1993) (Policy should have been adopted by rule.).

341. *Adams v. Dep’t of Corr.*, 469 So. 2d 164 (Fla. Dist. Ct. App. 1985) (Procedures regarding obtaining copies for prisoners need not be promulgated pursuant to state Administrative Procedure Act.).

342. *Caldwell v. State*, 821 So. 2d 374 (Fla. Dist. Ct. App. 2002); *Quigley v. Fla. Dep’t of Corr.*, 745 So. 2d 1029 (Fla. Dist. Ct. App. 1999); *Hargrove v. Dep’t of Corr.*, 601 So. 2d 623 (Fla. Dist. Ct. App. 1992) (Prisoner was limited to grievance system to challenge Florida Department of Corrections interpretation of its visitation rules.).

343. “The legislative history of [the Hawaii Administrative Procedure Act] discloses that policy decisions regarding state penal institutions were considered to be regulations that involved only the internal management of these institutions.” *Tai v. Chung*, 570 P.2d 563, 564 (Haw. 1977).

		chapter 52, title 67, Idaho Code, [Idaho Administrative Procedure Act] shall apply to the board, except as otherwise specifically provided by statute.” Also, section 67-5201(2) provides that “agency” does not include “state board of correction.” § 67-5201(2) (1995).
Illinois	Bound by state Administrative Procedure Act	ILL. ADMIN. CODE tit. 2, § 850.120(c)-(d) (2002): contemplates rulemaking pursuant to the Illinois Administrative Procedure Act, 5 ILL. COMP. STAT. 100/1-1 <i>et seq.</i> (2008). ³⁴⁴ But facility rules need not be promulgated under the state Administrative Procedure Act. ³⁴⁵
Indiana	Bound by rulemaking	The Commissioner is authorized to adopt “departmental rules” under the state Administrative Procedure Act, IND. CODE ANN. § 11-8-2-5(b)(1) (West 2004), and is required to develop policies “for committed persons, for administration of facilities, and for conduct of employees,” § 11-8-2-5(a)(8). ³⁴⁶ <i>But see</i> § 4-21.5-2-5(6) (West 2002) (exempting from the definition of “agency action” an “agency action related to an offender within the jurisdiction of the department of correction”).
Iowa	Express partial exemption from rulemaking	Iowa Administrative Code, IOWA ADMIN. CODE r. 201-10.2(17A) (2009), sets out procedures for rulemaking by the Department of Corrections, but also recognizes an exemption in the Iowa Code, IOWA CODE ANN. § 17A.2(11)(k) (West 2005), which states that the term “rule” does not include

344. In one case, a court concluded that the director of the Department of Corrections had abused his discretion in refusing to grant good time credit based on an unwritten policy, saying it was in violation of rulemaking policies under the Illinois Administrative Procedure Act, Corrections Code, and Administrative Code. *Guzzo v. Snyder*, 762 N.E.2d 663, 667-68 (Ill. App. Ct. 2002).

345. *Cannon v. Quinley*, 815 N.E.2d 443, 451-52 (Ill. App. Ct. 2004).

346. *But see Conquest v. State Employee’s Appeals Comm’n*, 565 N.E.2d 1086 (Ind. 1991) (holding that a policy regarding hours for home visitation of parolees was not subject to requirements of state Administrative Procedure Act under section 4-22-2-13(c)(1) of the Indiana Code, which exempts rules which relate solely to internal policy, procedure, or organization.).

		“[a] statement concerning only inmates of a penal institution.” ³⁴⁷
Kansas	Express partial exemption from rulemaking	Although Kansas corrections agencies are subject to the provisions of the rules and regulations filing act, KAN. STAT. ANN. § 77-437 (1997), the state Administrative Procedure Act rulemaking provisions exempt rules that “relate[] to the emergency or security procedures of a correctional institution,” § 77-415(4)(f). Orders of wardens also are exempt from an alternate modified rulemaking procedure for rules exempted from normal rulemaking. § 77-421a (providing that “[t]his section shall not apply to orders issued by directors of correctional institutions under KSA § 75-5256 [orders of wardens]”). ³⁴⁸ Another provision which exempts any rule or regulation which “[r]elates to the internal management or organization of the agency,” § 77-415(4)(a), has been interpreted to exempt some corrections rules. ³⁴⁹ Section 77-603(c)(2) further provides that the Kansas judicial review act does not apply to agency actions “concerning the management, discipline or release of persons in the custody of the secretary of corrections.”
Kentucky	Bound by rulemaking	The Secretary of the Department of Corrections is entrusted with the authority to promulgate “administrative regulations,” KY.

347. See also *Wycoff v. Iowa Dist. Court*, 580 N.W.2d 786 (Iowa 1998) (IAPA has no application to prison disciplinary hearings.). But see *Brummer v. Iowa Dep’t of Corr.*, 661 N.W.2d 167, 168 n.1 (Iowa 2003) (reviewing Department of Corrections sex offender evaluation under judicial review provision of Iowa Administrative Procedure Act, IOWA CODE ANN. § 17A.19 (West 2005)).

348. However, section 77-421(b) of the Kansas statute provides that the Department of Corrections may permit inmates to be heard regarding a proposed rule or regulation that is the subject of hearings under this section, although it is not required to do so. KAN. STAT. ANN. § 77-421(b) (1997).

349. See *Vinson v. McKune*, 960 P.2d 222 (Kan. 1998) (Rules regarding offender privileges are exempt.). See also *Gilmore v. McKune*, 940 P.2d 78, 83 (Kan. Ct. App. 1997) (“Under K.S.A. 77-421a, orders issued by the director of a correctional facility are not subject to the filing and publication requirements of K.S.A. 77-415 *et seq.*, before taking effect. However, K.S.A. 1996 Supp. 75-5256(b) requires that the warden’s orders, other than those relating to emergency or security procedures, be published and made available to all inmates.”).

		REV. STAT. ANN. §§ 197.020, 196.035 (LexisNexis 1999), which are defined in Chapter 13A of the Kentucky Statute, and promulgated under the rulemaking procedures of that section. The Department of Corrections also has a Policies & Procedures Manual, which is incorporated by reference into the Kentucky Administrative Regulations, 501 KY. ADMIN. REGS. 6:020 (2008), and which is developed internally, <i>available at</i> http://www.corrections.ky.gov/about/chapter.htm . ³⁵⁰ Requirements of the state Administrative Procedure Act regarding administrative hearings do not apply to prison adjustment or grievance hearings. KY. REV. STAT. ANN. § 13B.020(3)(c)(2) (LexisNexis 2003). ³⁵¹
Louisiana	Partial exemption from rulemaking	Policies that apply only to a particular institution are exempt, ³⁵² but other policies constitute “rules” within the meaning of the state Administrative Procedure Act. ³⁵³
Maine	Bound by rulemaking	ME. REV. STAT. ANN. tit. 34-A, § 1402 (1988): The commissioner shall establish rules in accordance with the Maine Administrative Procedure Act, title 5, chapter 375. <i>But see</i> ME. REV. STAT. ANN. tit. 5, § 9051 (2002) (stating that adjudicatory proceedings “involving correctional

350. *But see* KY. REV. STAT. ANN. § 197.020(3) (LexisNexis 1999) (“The department may promulgate administrative regulations in accordance with KRS Chapter 13A to implement a program that provides for reimbursement of telehealth consultations.”).

351. *But see* Hughes v. Ky. Dep’t of Corr., No. 2007-CA-001068-MR, 2008 WL 1921627, at *2 (Ky. Ct. App. 2008) (“Kentucky has developed a standard of ‘some evidence’ for judicial review of prison disciplinary proceedings.”).

352. Peterson v. Michael, 960 So.2d 1260 (La. Ct. App. 2007) (“[A] posted policy for a particular facility, like DWCC’s Posted Policy #53 [relating to “strip cell” procedure], does not have to be formally promulgated in the Louisiana Register.”).

353. Hills v. Cain, 764 So. 2d 1048, 1050 (La. Ct. App. 2000) (Institution’s policy that an inmate must “specifically request that a tape recording be preserved for possible judicial review of a disciplinary action” is a “rule” within the meaning of Louisiana Statute, LA. REV. STAT. ANN. § 49:951(6) (2003)); Rivera v. State, 727 So. 2d 609, 612-13 (La. Ct. App. 1998) (Department failed to follow Administrative Procedure Act in issuing disciplinary rules); Sims v. Wackenhut, 708 So. 2d 1140, 1141 (La. Ct. App. 1998) (“The Department of Public Safety and Corrections operates according to rules and regulations that it promulgated pursuant to the Administrative Procedure Act.”).

		facilities” are not covered by the provisions of the Maine Administrative Procedure Act).
Maryland	Partial exemption from rulemaking	The Department of Public Safety and Correctional Services and DOC are subject to the provisions of the Maryland Administrative Procedure Act, ³⁵⁴ but the exemption for rules affecting “internal management” can encompass “the myriad of rules governing the details of prison life.” ³⁵⁵
Massachusetts	Bound by rulemaking provisions; partial exemption from state Administrative Procedure Act	MASS. GEN. LAWS ANN. ch. 30A, § 1A (West 2001): “The department of correction shall be subject to sections one through eight, inclusive, and shall not otherwise be subject to this chapter” The non-exempt sections include rulemaking and judicial review of regulations, but not adjudicative proceedings.
Michigan	Bound by rulemaking	MDOC Policy Directive 01.04.110 states that administrative rules are promulgated under the Administrative Procedure Act and have the force of law. ³⁵⁶ Policy Directives clarify and implement administrative rules and are signed by the director. There are 189 policy directives on the MDOC web site.
Minnesota	Express exemption from rulemaking	MINN. STAT. ANN. § 14.03, subd. 3(b)(1) (West 2005): Definition of a “rule” for purposes of the administrative procedure

354. *Massey v. Sec’y, Dep’t of Pub. Safety and Corr. Servs.*, 886 A.2d 585, 602 (Md. 2005). *See also Evans v. State*, 914 A.2d 25, 76-81 (Md. 2006) (recognizing that DPSCS and DOC are subject to provisions of state Administrative Procedure Act, and that exemption exists for rules that do not have “general application,” concern “only the internal management of DOC,” and do not “directly affect the rights of the public,” but concluding that lethal injection protocol is not exempt); *Watkins v. Sec’y, Dep’t of Pub. Safety and Corr. Servs.*, 831 A.2d 1079, 1086 (Md. 2003) (“The Administrative Procedure Act governs our review of decisions of the Grievance Office, an entity within the Department of Public Safety and Correctional Services.”).

355. *Massey*, 886 A.2d at 602.

356. Inmates are also members of the public and so prison disciplinary rules are subject to the state Administrative Procedure Act, MICH. COMP. LAWS ANN. § 24.207(g) (West 2004). *Martin v. Dep’t of Corr.*, 384 N.W.2d 392 (Mich. 1986). *See also Spruyette v. Owens*, 475 N.W. 2d 382, 386 (Ct. App. Mich. 1991) (“Both this court and our Supreme Court have repeatedly held that the Department of Corrections is an agency subject to the rule-making provisions of the act,” and so hearing officer who acted based on an “improperly promulgated policy directive” was not entitled to qualified immunity). *But see Walen v. Dep’t of Corr.*, 505 N.W.2d 519 (Mich. 1993) (concluding that FOIA applies to prison disciplinary proceedings despite the fact that the legislature had exempted such hearings from the definition of “contested case” in some portions of the Administrative Procedure Act, *see* MICH. COMP. LAWS ANN. § 24.315(2) (West 2004)).

		does not include “rules of the commissioner of corrections relating to the release, placement, term, and supervision of inmates serving a supervised release or conditional release term, the internal management of institutions under the commissioner’s control, and rules adopted under section 609.105 governing the inmates of those institutions.” ³⁵⁷
Mississippi	Express exemption from rulemaking	MISS. CODE ANN. § 25-43-1.102(i)(ii)(6) (West 2006) (exempting from definition of “rule” “[a] regulation or statement directly related only to inmates of a correctional or detention facility”). ³⁵⁸
Missouri	Express exemption from rulemaking	Section 536.010(6)(k) of the Missouri Statute exempts from the definition of “rule” a “statement concerning only inmates of an institution under the control of the department of corrections and human resources or the division of youth services.” ³⁵⁹ MO. ANN. STAT. § 536.010(6)(k) (West 2008).
Montana	Express exemption from state Administrative Procedure Act	Mont. Dep’t of Corr., Policy No. 20.2.101 (Jan. 14, 2000), <i>available at</i> http://www.mtrules.org/gateway/RuleNo.asp?RN=20.2.101 : “[T]he department of corrections is exempt from the Montana Administrative Procedure Act in the areas of the supervision and administration of any

357. *Weber v. Hvass*, 626 N.W.2d 426 (Minn. Ct. App. 2001) (concluding that a rule recovering the cost of confinement from inmates was exempt from the state Administrative Procedure Act). *See also* MINN. STAT. ANN. § 14.03, subd. 2 (West 2005) (providing that “[t]he contested case procedures of the Administrative Procedure Act . . . do not apply to . . . the commissioner of corrections”).

358. Mississippi courts provide judicial review of some MDOC administrative decisions. *See, e.g.*, *Horton v. Epps*, No. 2008-CP-00430-COA, 2009 WL 1058631 (Miss. Ct. App. 2009) (judicial review of determination regarding trustee status); *Lyons v. Epps*, No. 2007-CP-01194-COA, 2009 WL 920633 (Miss. Ct. App. 2009) (judicial review of sentence computation denied for failure to timely file appeal).

359. *Middleton v. Mo. Dep’t of Corr.*, 278 S.W.3d 193 (Mo. 2009) (Lethal injection protocol was exempt from provisions of state Administrative Procedure Act.) “In order for there to be a ‘contested case’ within the meaning of the Administrative Procedure Act, providing for judicial review of an agency decision in a contested case, a prior hearing requirement must be imposed by statute, municipal charter ordinance or constitutional provision.” *State v. Brackman*, 737 S.W.2d 516, 518 (Mo. Ct. App. 1987) (Prison adjustment committee is not an “agency” and its decision to reclassify and transfer a prisoner was not a “contested case” subject to judicial review.).

		<p>penal institution with regard to the institutional supervision, custody, control, care and treatment of youths or prisoners”</p> <p>MONT. CODE ANN. § 2-4-102(2)(a)(ii) (2009): “‘Agency’ means an agency, as defined in 2-3-102, of the state government except that the provisions of this chapter do not apply to the following: . . . the supervision and administration of a penal institution with regard to the institutional supervision, custody, control, care, or treatment of youths or prisoners.”</p>
Nebraska	Bound by rulemaking	Bound by rulemaking procedures of Nebraska Administrative Procedure Act, NEB. REV. STAT. §§ 84-901 to -920 (2008). ³⁶⁰
Nevada	Express exemption from state Administrative Procedure Act	“The following agencies are entirely exempted from the requirements of this chapter: . . . the Department of Corrections” NEV. REV. STAT. ANN. § 233B.039(1)(b) (LexisNexis 2007).
New Hampshire	Express partial exemption from rulemaking	N.H. REV. STAT. ANN. § 21-H:8 (LexisNexis 2008): “The commissioner shall . . . [a]dopt all rules of the department, pursuant to RSA 541-A [Admin. Procedure Act], whether the rulemaking authority delegated by the legislature is granted to the commissioner, the department or any administrative unit or subordinate official of the department either by this chapter or by existing statutes.” He shall also “adopt such reasonable internal practices and procedures, which shall not be considered rules subject to the provisions of RSA 541-A, as may be necessary to carry out the duties of the department and its

360. *Abdullah v. Gunter*, 497 N.W.2d 12, 16 (Neb. 1993) (concluding that inmate’s claim that policy was invalid because not properly promulgated in compliance with the Nebraska Administrative Procedure Act was moot because the policy subsequently was promulgated in accordance with the act). *See also* *Dailey v. Neb. Dep’t of Corr. Servs.*, 578 N.W.2d 869 (1998) (noting that judicial review of prison disciplinary hearings is provided under the state Administrative Procedure Act, NEB. REV. STAT. § 83-4,123 (2008), although Administrative Procedure Act rules do not apply to disciplinary proceedings themselves).

		divisions.” <i>See also</i> § 541-A:21(I)(j), (aa) (LexisNexis 2006) (exempting from state Administrative Procedure Act rules relative “to credit for good conduct of prisoners” and “to internal practices and procedures in the department of corrections”). ³⁶¹
New Jersey	Bound by rulemaking	N.J. ADMIN. CODE § 10A:1-1.5(a) (2009): “Department of Corrections rules are promulgated pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 <i>et seq.</i> , and NJAC 1:30.” ³⁶²
New Mexico	Express partial exemption from rulemaking	State Rules Act, N.M. STAT. ANN. § 14-4-2 (LexisNexis 2003) states that the term rule does “not include rules relating to the management, confinement, discipline or release of inmates of any penal or charitable institution.” ³⁶³ The New Mexico Administrative Procedure Act, N.M. STAT. ANN. § 12-8-2(G)(3) (LexisNexis 1998), also provides that the term “rule” does not pertain to “regulations concerning only the management, confinement, discipline or release of inmates of state penal, correctional, public health or mental institutions.”
New York	Bound by rulemaking	The New York State Administrative Procedure Act excludes “the state division of parole and the department of correctional services” from the definition of “agency,”

361. Knowles v. N.H. Dep’t of Corr. Comm’r, 538 F. Supp. 2d 453, 459 n.8 (D. N.H. 2008) (“In 2007, the New Hampshire Legislature enacted a statutory scheme which exempted certain of the DOC’s practices and procedures from the procedural requirements of the APA.”). The year before this statutory revision, the New Hampshire Supreme Court had concluded that a 1994 recodification had repealed an exemption for DOC policies, except for those “relative to credit for good conduct of prisoners,” an exception which included the disciplinary rules challenged in that case. *Gosselin v. N.H. Dep’t of Corr.*, 907 A.2d 944, 946-47 (N.H. 2006). The *Gosselin* court interpreted Section 541-A:21 (I) to exempt authority granted under these provisions from both rulemaking and adjudicatory requirements of the state Administrative Procedure Act. *Id.* at 947.

362. Hampton v. Dep’t of Corr., 765 A.2d 286 (N.J. Super. Ct. App. Div. 2001) (Regulations regarding custody classification were invalid because not promulgated pursuant to state Administrative Procedure Act.). *See also* Maqbool v. N.J. Dep’t of Corr., 2008 WL 2356687 (N.J. Super. Ct. App. Div. 2008) (judicial review of a classification decision); Lewis v. Dep’t of Corr., 2007 WL 846335 (N.J. Super. Ct. App. Div. 2007) (judicial review of disciplinary proceeding).

363. *See also* Lopez v. LeMaster, 61 P.3d 185 (N.M. 2002) (limiting judicial review of prison disciplinary proceeding to constitutional due process violations); Johnson v. Francke, 734 P.2d 804 (N.M. Ct. App. 1987) (exempting disciplinary rules from state rules act).

		<p>“except for purposes of article two of this chapter.” N.Y. A.P.A. LAW § 102(1) (McKinney 2009). Article 2 addresses rulemaking procedures. § 201.</p> <p>The New York State Administrative Procedure Act exempts from the definition of “rule” those rules “concerning the internal management of the agency which do not directly and significantly affect the rights of or procedures or practices available to the public.” § 102.2(b)(i).</p> <p>However, this exception has been interpreted not to constitute an exemption for rules affecting prisoners in <i>Jones v. Smith</i>, 478 N.E.2d 191, 191 (1985) (Disciplinary rules are not exempt from provisions of State Administrative Procedure Act, because regulations that affect a prisoner’s liberty interest are not matters of “organization” or “internal management,” and because prisoners were the members of the “general public” over which the Department exercises “direct authority”).³⁶⁴</p> <p>Many administrative decisions of the N.Y. Dept. of Corrections, including prison disciplinary hearings, are reviewed under “Article 78” proceedings, N.Y. C.P.L.R. 7803 (Consol. 2008).³⁶⁵</p>
North Carolina	Express exemption from rulemaking	Section 150B-1(d)(6) of the North Carolina Statute exempts from rulemaking: “The Department of Correction, with respect to matters relating solely to persons in its custody or under its supervision, including prisoners, probationers, and parolees.” N.C.

364. See also *McAllister v. Jones*, 514 N.Y.S.2d 532 (N.Y. App. Div. 1987) (Failure to file a rule with the Secretary of State precluded basing a disciplinary procedure on it.). *But see Ciotoli v. Goord*, 683 N.Y.S.2d 683, 685 (N.Y. App. Div. 1998) (Because disciplinary rules regarding prisoner drug testing were “flexible” rather than “fixed” rules of “general principle,” they were not required to be filed with the Secretary of State); *Abreu v. Coughlin*, 555 N.Y.S.2d 889 (N.Y. App. Div. 1990) (Urinalysis procedure form was not a “rule” within the meaning of the state Administrative Procedure Act.); *Baker v. Scully*, 550 N.Y.S.2d 365 (N.Y. App. Div. 1990) (Time card rules and regulations need not be filed with Secretary of State).

365. Thanks to John Boston for sharing information about New York.

		GEN. STAT. § 150B-1(d)(6) (2007). Section 150B-1(e)(7) also exempts the Department of Correction from the “contested case” provision of the state Administrative Procedure Act.
North Dakota	Express exemption from state Administrative Procedure Act and from rulemaking	“A rule concerning only inmates of a correctional or detention facility” is exempted from the North Dakota Administrative Agencies Practice Act, N.D. CENT. CODE § 28-32-01(11)(f) (1991). ³⁶⁶ It also exempts from the definition of “agency” the “department of corrections and rehabilitation except with respect to the activities of the division of adult services under chapter 54-23.4 [crime victims compensation fund],” § 28-32-01(2)(m) (Supp. 2009).
Ohio	Bound by rulemaking	Administrative regulations are subject to promulgation under Ohio Code, OHIO REV. CODE ANN. § 119.03 (LexisNexis 2007), according to the Notice Procedure 5120:2-1-01. Policy Directives may be promulgated by the Commissioner, <i>see</i> Ohio Dep’t of Rehab. and Corr., Department Directive 01-COM-01, <i>available at</i> http://www.drc.ohio.gov/web/drc_policies/documents/01-COM-01.pdf . ³⁶⁷
Oklahoma	Express exemption from rulemaking	OKLA. STAT. ANN. tit. 75, § 250.4(A)(10) (West Supp. 2009): “The Department of Corrections, State Board of Corrections, county sheriffs and managers of city jails shall be exempt from Article I of the Administrative Procedures Act with respect to . . . prescribing internal management procedures for the management of the state

366. *See* Jensen v. Little, 459 N.W.2d 237, 239 (N.D. 1990) (“[W]e believe the Penitentiary’s disciplinary rules promulgated under the Director of Institutions are exempt from the procedures of the Administrative Agencies Practice Act.”).

367. *See* State v. Brown, 804 N.E.2d 1021, 1023 (Ohio Ct. App. 2004) (“This court has specifically found that the ODRC is not an agency whose decisions are subject to judicial review by appeal pursuant to RC 119.12.”). *But see* Linger v. Ohio Adult Parole Authority, No. 97APE04-482, 1997 WL 638411, at *2 (Ohio Ct. App. 1997) (“Appellant is correct that some functions of the Ohio Department of Rehabilitation and Correction are subject to R.C. Chapter 119 [judicial review provisions of the state APA].”).

		prisons, county jails and city jails and for the management, supervision and control of all incarcerated prisoners.” ³⁶⁸
Oregon	Bound by rulemaking	Policy on Rules Development, No. 291-001-0020, says that the DOC adopted the AG’s Model Rules of Procedure under the Administrative Procedure Act pursuant to ORS 183.341, and provides a list of agencies to which proposed rules are sent. ³⁶⁹ <i>But</i> section 183.335(3)(c) of the Oregon Statute provides that “the Department of Corrections and the State Board of Parole and Post-Prison Supervision may adopt rules limiting participation by inmates in the proposed adoption, amendment or repeal of any rule to written submissions.” OR. REV. STAT. § 183.335(3)(c) (2007).
Pennsylvania	Bound by rulemaking	<i>Weaver v. Dep’t of Corr.</i> , 720 A.2d 178 (Pa. Cmlth. 1998) (rejecting claim that inmate medical services co-pay regulations were invalid, concluding that the Department of Corrections had complied with Commonwealth Documents Law and the Regulatory Review Act; noting the distinction between agency regulations that must be promulgated through rulemaking and policies, which need not). ³⁷⁰
Rhode Island	Partial exemption from rulemaking	Subject to Administrative Procedure Act, R.I. GEN. LAWS § 42-35-3 (2007), but there are exemptions because the term “rule” does not

368. OKLA. STAT. ANN. tit. 75, § 250.4(B)(11) (West 2008): further exempts from Article II of the state Administrative Procedure Act, which deals with individual adjudication, “[t]he supervisory or administrative agency of any penal, mental, medical or eleemosynary institution, only with respect to the institutional supervision, custody, control, care or treatment of inmates, prisoners or patients therein.” *See Canady v. Reynolds*, 880 P.2d 391, 398 (Okla. Crim. App. 1994) (concluding that prisoner cannot appeal loss of good time credits through state Administrative Procedure Act, but that relief may be available through habeas corpus).

369. *See Kellas v. DOC*, 145 P.3d 139 (Or. 2006) (Oregon Supreme Court concluded that father of prisoner possessed standing under section 183.400 of the Oregon Statute to file petition for review challenging application of rules regarding credit for time son had served on house arrest.).

370. *Chimenti v. Pa. Dep’t of Corr.*, 720 A.2d 205, 211 (Pa. Commw. Ct. 1998) (Rule regarding monitoring of inmate phone calls was a policy statement and not a “regulation” within the meaning of the Pennsylvania Administrative Procedure Act.). *See also Richardson v. Beard*, 942 A.2d 911, 913 (Pa. Commw. 2008) (A prisoner could file a petition for review of DOC policy without first filing grievance because he was not raising federal claims.).

		include “(1) statements concerning only the internal management of an agency and not affecting private rights or procedures available to the public, or (2) declaratory rulings issued pursuant to Section 42-35-8, (3) intra-agency memoranda, or (4) an order.” ³⁷¹ § 42-35-1(8).
South Carolina	Express exemption from rulemaking	S.C. CODE ANN. § 1-23-10(4) (2005) (exempting from the definition of “regulation” orders “of the supervisory or administrative agency of a penal, mental, or medical institution, in respect to the institutional supervision, custody, control, care, or treatment of inmates, prisoners, or patients”). ³⁷²
South Dakota	Express partial exemption from rulemaking	Rules affecting inmate disciplinary matters are exempt from the definition of “rule.” S.D. CODIFIED LAWS § 1-26-1(8)(g) (2004). ³⁷³ <i>See also</i> § 1-15-20 (“The Department of Corrections at any time may promulgate rules, pursuant to chapter 1-26 [state Administrative Procedure Act], concerning: (1) Public contact with inmates through telephone and mail services and visits; (2) Inmate release date calculations; (3) Standards for parole supervision and parolee contact; (4) Federal and out-of-state inmates housed in state correctional facilities; and (5) Inmate accounts. The department may prescribe departmental policies and procedures for the management of its institutions and agencies, including inmate disciplinary matters. Inmate disciplinary matters consist of all matters relating to

371. *L’Heureux v. State Dep’t of Corr.*, 708 A.2d 549, 553 (R.I. 1998) (“[T]he APA is not applicable to classification proceedings, disciplinary proceedings, or rule making dealing with the internal affairs of the ACI by the DOC.”); *Johnson v. State*, No. 99-1007, 2002 WL 1803931 (R.I. Super. Ct. 2002) (Administrative Procedure Act did not apply to method for calculating good time under internal management exception).

372. *But see Al-Shabazz v. State*, 527 S.E.2d 742, 758 (S.C. 2000) (Although prison disciplinary hearings are not subject to all Administrative Procedure Act provisions, prisoners may obtain judicial review under the act.)

373. Inmates are also excluded from procedures for petitioning an agency to promulgate, amend, or repeal a rule, § 1-26-13, or for petitioning an agency for a declaratory ruling, § 1-26-15.

		individual inmate behavior and to all matters relating to the maintenance of order, control, and safety within any institution under the supervision of the Department of Corrections.”).
Tennessee	Express exemption from rulemaking	“Statements concerning inmates of a correctional or detention facility” are exempt from the UAPA, TENN. CODE ANN. § 4-5-102(10)(G) (2005). Section 4-5-106(b) also exempts “[d]isciplinary and job termination proceedings for inmates” from the definition of “contested case.” ³⁷⁴ § 4-5-106(b).
Texas	Express exemption from rulemaking	Administrative Procedure Act states: “This chapter does not apply to a rule or internal procedure of the Texas Department of Criminal Justice or Texas Board of Criminal Justice that applies to an inmate or any other person under the custody or control of the department or to an action taken under that rule or procedure.” TEX. GOV’T CODE ANN. § 2001.226 (Vernon 2008).
Utah	Bound by rulemaking	UTAH CODE ANN. § 64-13-10(2) (2008) (“[t]he department may make rules in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, to carry out the provisions of this chapter.”).
Vermont	Bound by rulemaking	Title 3, section 831(a) of the Vermont Statute does not exempt the Vermont Department of Corrections from rulemaking procedures. ³⁷⁵ VT. STAT. ANN. tit. 3, § 831(a) (2003).
Virginia	Express exemption from	VA. CODE ANN. § 2.2-4002(B) (2008) (“Agency action relating to the following

374. *Abdur’rahman v. Bredesen*, 181 S.W.3d 292 (Tenn. 2005); *Mandela v. Campbell*, 978 S.W.2d 531, 535 (Tenn. 1998) (Disciplinary policies and procedures are exempt from requirements of Tennessee Uniform Administrative Procedures Act.). *See also Clark v. Rose*, 183 S.W.3d 669, 674 (Tenn. Ct. App. 2005) (noting that although inmate disciplinary proceedings are exempt from review under the UAPA, non-disciplinary actions may be reviewed under the statute).

375. *Parker v. Gorczyk*, 787 A.2d 494 (Vt. 2001) (concluding that furlough policy generally applicable to prisoners was not exempt from rulemaking procedures). *Contra King v. Gorczyk*, 825 A.2d 16 (Vt. 2003) (policy directive regarding “random inmate drug testing” did not constitute a “rule” subject to the requirements of the Vermont Administrative Procedure Act because it did not “affect or alter the individual rights and obligations of plaintiff”). These decisions provided judicial review under Vermont Rules of Civil Procedure 74 and 75, respectively.

	rulemaking	subjects shall be exempted from the provisions of [the Administrative Procedure Act][:] . . . [i]nmates of prisons or other such facilities or parolees therefrom . . . [and] [t]he custody of persons in, or sought to be placed in, mental, penal or other state institutions as well as the treatment, supervision, or discharge of such persons.” ³⁷⁶
Washington	Express exemption from state Administrative Procedure Act	Wash. Dep’t of Corr., Policy Development and Implementation, DOC 100.100 (Aug. 17, 2009), <i>available at</i> http://www.doc.wa.gov/policies/showFile.aspx?name=100100 ; WASH. REV. CODE ANN. § 34.05.030 (West 2003) (“This chapter shall not apply to . . . [t]he department of corrections or the indeterminate sentencing review board with respect to persons who are in their custody or are subject to the jurisdiction of those agencies.”).
West Virginia	Partial express exemption from rulemaking	Section 29A-1-3(c) of the West Virginia Code provides that the provisions of the state Administrative Procedure Act “do not apply to rules relating to or contested cases involving the conduct of inmates or other persons admitted to public institutions. . . . Such rules shall be filed in the state register in the form prescribed by this chapter and be effective upon filing.” W. VA. CODE ANN. § 29A-1-3(c) (LexisNexis 2007). <i>But see</i> § 31-20-9(a)(2) (LexisNexis 2003) (providing that the Jail Standards Commission promulgate legislative rules under West Virginia Administrative Procedure Act to implement

376. *See also* Porter v. Commonwealth, 661 S.E. 2d 415, 432-33 (Va. 2008) (concluding that Virginia execution procedures were not subject to Virginia Administrative Procedure Act because “the Virginia Department of Corrections is an agency whose sole purpose is related to inmates of prisons,” and “is thus exempt from the strictures of the APA”). However, the Virginia Department of Corrections has promulgated “public participation guidelines” for rulemaking regarding non-exempt provisions, including provision for a notification list, public hearings, regulatory advisory panels, petitions for rulemaking, and public comment. *See* 6 VA. ADMIN. CODE § 15-11-10 *et seq* (2009).

377. *State ex rel. White v. Parsons*, 483 S.E.2d 1, 10 (W. Va. 1997) (concluding that Jail Correctional Facilities Standards Commission had failed to adequately consider the views of the

		minimum standards for jails). ³⁷⁷
Wisconsin	Bound by rulemaking	Rules adopting procedures for good time forfeiture were invalid unless promulgated pursuant to the Administrative Procedure Act, WIS. STAT. ANN. § 227.01 (West 2009), because they were rules of general applicability. State ex rel. <i>Clifton v. Young</i> , 394 N.W.2d 769, 772-73 (Wis. App. 1986). ³⁷⁸
Wyoming	Express exemption from state Administrative Procedure Act	WYO. STAT. ANN. § 25-1-105(a) (2009): “The department of corrections shall adopt rules and regulations necessary to carry out its functions. The promulgation of substantive rules by the department, the conduct of its hearings and its final decisions are specifically exempt from all provisions of the Wyoming Administrative Procedure Act including the provisions for judicial review. . . . The department’s rules shall be filed in the office of the secretary of state.”

Commissioner of Corrections in promulgating a complete ban on tobacco products at jail facilities).

378. WIS. STAT. ANN. § 227.03(4) (West 2009) provides: “The provisions of this chapter relating to contested cases do not apply to . . . proceeding[s] involving the care and treatment of a resident or an inmate of a correctional institution.”