No Prisoner Left Behind? Enhancing Public Transparency of Penal Institutions

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Andrea C. Armstrong*

ABSTRACT

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

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* Associate Professor of Law, Loyola University New Orleans College of Law. Yale (J.D.); Princeton (M.P.A). Thanks to the Dean of the College of Law, Loyola University New Orleans for financial support during the research and drafting of this paper. Thanks also to the Loyola Junior Faculty Forum and LatCrit XVI for the energetic comments and discussion on the ideas presented in this paper. W. David Ball, Aliza Cover, Robert Garda, Christian Halliburton, Johanna Kalb, and Charles Pouncy all provided thoughtful feedback on earlier drafts of this paper. Last, many thanks also to Brittany Beckner, Katherine Cochrane, Blair Williams and Victor Jones for their proactive and thoughtful research assistance.
INTRODUCTION

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

The public has no idea what happens behind prison walls. Prisons and jails are essentially “closed institutions holding an ever-growing disempowered population.”² In a democratic country, however, such as the United States, prisons are administered in our name and on our behalf. Prison is a critical, but neglected, element of our criminal justice system. There is at least a professed, if perhaps unrealized, commitment to transparency in our prosecution of crime.³ Statutes criminalizing conduct and detailing potential terms of punishment are (ideally) debated and decided in public by the legislature. Police often call for public assistance and tips when crimes occur. Police departments can be held publicly accountable for increased crime, officer misconduct, and failures to investigate. The courtroom doors are open to any interested individual. Criminal trials are structurally hardwired to involve the community through the selection and empowerment of residents as jurors.⁴ After the trial, however, even our professed commitment to transparency stops. While we, as a society, may have participated in the reporting, investigation, or

³ While the structure of our criminal trial process is structured against secrecy and government overreach, many aspects of the investigative process, such as prosecutorial charging decisions, remain hidden from public view.
⁴ Although structurally built in, the role of the juror in court is still particularly malleable. For example, the Equal Justice Institute has documented the continuing exclusion of African-Americans from serious crimes and capital murder juries in the South. See Illegal Racial Discrimination in Jury Selection, EQUAL JUSTICE INITIATIVE 5, 9-13 (Aug. 2010), available at http://www.eji.org/eji/raceandpoverty/juryselection.
prosecution of the crime, society is practically barred from evaluating the punishment itself.

Yet, it is vitally important that prison operations be transparent for social, economic, and constitutional reasons. Enhanced transparency is essential, not just for the prisoners themselves, but for those committed to anti-subordination principles and safer communities.

The lack of transparency has distinct implications for incarcerated populations. As of 2011, approximately 2.2 million people are incarcerated in prisons and jails nationwide.\(^5\) Our current incarceration policies touch millions of lives. Nationally, local jails admit approximately ten million people annually and state and federal prisons admit approximately seven hundred thousand people a year.\(^6\) Bruce Western and Becky Petitt have documented how incarceration exacerbates existing inequality, leading to invisible, cumulative, and intergenerational disadvantages,\(^7\) in effect life-long subordination.

Public education in the United States was once similarly non-transparent. \textit{Brown v. Board of Education}\(^8\) announced a new principle governing public schools, namely countering the subordination of African-Americans through integrated public school education. The federal government, faced with halting and uneven progress in reducing the black-white educational achievement gap, enacted a series of measures designed to increase transparency in public education through federal collection of state educational data, culminating in the \textit{No Child Left Behind Act of 2001} (NCLB).\(^9\) The NCLB’s actual impact on education is disputed. However, whether or not the NCLB succeeded in improving educational outcomes is beside the point for purposes of this paper. Rather, the clear innovation, following \textit{Brown} and entrenched in federal education laws, is the federal collection of data on the performance of students and local schools. The NCLB (and its forerunners to a lesser extent) have been successful in exposing and documenting subordination, even if the educational policies have not necessarily been successful in ending it.

This article is situated within a larger discussion urging greater external and internal oversight of penal facilities. In 2005, the Commission on Safety and Abuse in America’s Prisons, composed of corrections officials, former prisoners, civic officials, religious leaders, and academics, conducted a year-

\(^6\) Bruce Western & Becky Petitt, \textit{Incarceration and Social Inequality}, Dædalus, Summer 2010, at 8, 11.
\(^7\) Id. at 12.
long investigation on the state of America’s prisons. The Commission issued a final report detailing recommendations for improving prisons, including enhanced accountability measures. Since then, Michelle Deitch has provided incomparable leadership in publishing a 50-state survey of prison oversight mechanisms and inspiring other authors to examine prison accountability in international and domestic contexts. This article contributes to this ongoing conversation in three distinct ways. First, I take a different approach by arguing solely for enhanced transparency, leaving greater accountability as a separate project. Second, I present a normative argument for enhanced transparency based on anti-subordination principles. Many of the arguments for greater accountability are strategically based on policy concerns, but lack a strong normative framework for arguing why accountability is necessary. Last, I use a comparative lens to argue for a limited solution of enhanced data collection and publication by the Department of Justice. The goal of this article, therefore, is not to supplant the existing conversation, but rather add a unique perspective towards broader arguments for public engagement in prison operations.

In this article, I argue that federal school transparency measures provide a rudimentary and balanced framework for enhancing prison transparency. Drawing upon literature demonstrating that prison conditions themselves create a subordinated class, this article argues for a “No Prisoner Left Behind Act” that builds on the data collection success of the NCLB. The proposal is based on the experience of schools, a comparable institution, in the wake of Brown v. Board of Education. Schools and penal facilities are similar facially in terms of federal-state relations and public v. private operation of the institution. Courts have also treated both institutions similarly under the law by applying near identical deference standards and comparable duties and obligations on administrators of both schools and penal facilities. In Section I, this article examines transparency and the lack thereof in the operation of penal institutions. Section II discusses the anti-subordination principle, the role of transparency in anti-subordination analysis, and how prison conditions can foster life-long subordination. Section III argues that in certain respects schools and prisons are comparable institutions, facing similar challenges, and therefore that strategies to enhance transparency in schools

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12 See e.g., collection of essays on prison accountability published in 30 PACE L. REV. 1383, 1383-1686 (2010)(Issue 5 is dedicated to prison accountability efforts with 21 articles detailing different aspects of prison oversight).
13 Brown, 347 U.S. at 483.
may be relevant to enhancing transparency of penal institutions. Drawing on this comparative perspective, Section IV discusses the anti-subordination principles underlying school transparency and how federal data collection of state educational data can expose subordination. Based on the experience in schools, particularly with the NCLB, Section V proposes passage of a federal statute authorizing incentive funding for local and state provision of prison operations data.

I. TRANSPARENCY

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

A. Transparency Defined

Transparency, at its core, is simply the process of making the invisible or hidden visible or seen. This definition of transparency is narrow, akin to what Jack Balkin has described as “informational transparency.”14 Informational transparency is “knowledge about government actors and decisions and access to government information.”

Transparency, in its most limited definition of producing visibility, is integral to the democratic project. Democracy relies on popular participation, which in turn presupposes an informed electorate. When the electorate is forbidden information relevant to the voters’ participation in the democratic project, the lack of information can undermine the legitimacy of the democracy itself. As James Madison wrote in the context of education, “[a] popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both.”15 Madison was writing about public education, but this quote assumes a degree of transparency in a democratic government. In effect, Madison pre-supposes that once a person is educated, they will have access to the information required to participate accordingly, thus making the democracy representative.

Many areas of the law have embraced Justice Brandeis’ mantra that “sunshine is the best disinfectant.”

Recent changes in regulations have fostered greater transparency in financial transactions, particularly mortgages, consumer financing, and banking. In the area of intellectual property, “open source” advocates argue for transparent laws and contracts over traditional concepts of property. Corporations have urged greater transparency as an alternative to greater regulation, while shareholders of corporations seek transparency in corporate governance and decision-making.

Transparency, however, is not the same as accountability. The two concepts, transparency and accountability, while closely linked and often intertwined, have significantly different objectives. The objective of transparency is to make the visible hidden. The objective of accountability is to enforce adherence to identified standards. Part of the confusion stems from the relationship between transparency and accountability. Transparency, i.e. the visibility of information, is often incorporated into greater accountability measures, as in the No Child Left Behind Act of 2001. This reflects a common-sense notion that we need verifiable information for the subsequent accountability measures to be both effective and just. And often, the call for accountability is in reaction to a hidden practice, which once exposed, has created significant externalities such that accountability is required to prevent reoccurrence, which in turn creates a need for visible information.

Nor does transparency automatically produce accountability. Underlying a broad idea of transparency is an assumption that information, once set free, will produce an informed and engaged public that will hold officials accountable. As Eric Fenster notes, this version of transparency assumes public interest and ready availability of the desired information. But transparency can create attention. The information to be transmitted may not exist in a particular form or may not have been assembled to provide broader overviews of a particular practice. Simply requiring the collection and transmittal of information, may however, bring certain trends to light.

16 Louis Brandeis, Other People’s Money and How Bankers Use It 92 (1914) (stating that “Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”).
18 Id.
19 Id.
20 Eric Fenster, The Opacity of Transparency, 91 Iowa L. Rev. 885 (2006). (Fenster critiques “transparency theory” by highlighting the complexity of the sender, the message, and the receiver).
22 Fenster, supra note ___, at 885-86.
23 Id.
24 Id.
discussed more fully in Section IV, this has certainly been the case in the educational context where requiring data collection on the performance of minority, disabled, and poor students has provided clear evidence of achievement gaps.

Even acknowledging that transparency is an important democratic goal, some critics have argued that enhanced transparency statutes are simply unnecessary in a democratic system. For example, Justice Scalia has argued institutional checks and balances between the executive, judiciary, and the legislature are sufficient to produce the required disclosure and if required, accompanying accountability.25 Not only will the institutions balance one another, members of the legislative and executive branches (and indeed in some states, members of the judiciary as well), so the argument goes, are also subject to electoral accountability. Yet, numerous sociological and psychological studies have questioned whether electoral accountability is overrated as a transparency-producing strategy, particularly for a specific or particular policy issue.26 Individuals use certain heuristics to simplify their choices, including overvaluing a particular issue over contrary views in other areas and substituting a candidate’s party as a proxy for actual actions taken.27 Moreover, triggering institutional checks and balances in the penal context faces unique obstacles. Prisoners are politically unpopular, thus a low priority for both the executive and legislative branches. The Prison Reform Litigation Act28 and standing doctrines29 frustrate the ability of the judiciary to publicly examine prison conditions.

B. Lack of Transparency in Penal Facilities

Currently, the public has little recourse for basic information on the operation of prisons and jails. Media access to prisoners and the prison is extremely limited and completely discretionary.30 Moreover, investigative reporting is generally in decline given the changing nature of media, news, and

26 See Glen Zaszewiski, Reason-Giving and Accountability, 93 MINN. L. REV. 1253, 1266-1277 (2009) (drawing from literature in political science, law, and the humanities to argue that specific political accountability unrealistic and instead proposes accountability based on required or expected “reason-giving” as the primary determinant of democratic accountability).
27 Id.
States rarely, on their own initiative, produce answers to questions like those above. Some individual state institutions produce annual reports, but those reports are cursory at best, listing the number incarcerated and their sentences, with little information on the actual participation in programming or access to medical and mental health treatment. Moreover, in a survey of prison oversight mechanisms in the U.S., Michele Deitch demonstrates that very few states involve members of the general public in oversight or in fact have any external oversight mechanism beyond general authority granted to the state department of corrections agency.

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

At the federal level, there is admittedly some data collected, but problems remain. For example, the Bureau of Justice Statistics conducts surveys of jails and prisons, providing one-day snapshots of staffing levels, programs, admissions and average populations. These surveys, however, are conducted only every five to seven years. There is also an annual survey of jails, but the survey covers only a nationally representative sample and only the most basic information on admissions, staffing, demographics, and

32 See e.g., LOUISIANA STATE PENITENTIARY, ANNUAL REPORT FY 2009-2010, on file with author (formerly online at http://www.corrections.state.la.us/LSP/docs/2010_Annual_Report.pdf, as cited in Andrea Armstrong, Slavery Revisited in Penal Plantation Labor, 35 SEATTLE L. REV. 869, 870 (2012)).
33 See Dietsch, supra note ___ . (50 state survey article)
34 Western & Pettit, supra note ___ at 11.
36 For an excellent summary of the strengths and weaknesses of federal, state, and non-governmental data collection efforts, see Gibbons and Katzenbach, supra note ___ at 529-532.
38 Id.
violence/deaths in custody.\textsuperscript{39} In addition, BJS is statutorily required to collect and analyze data on the “incidence and effects of prison rape” at representative facilities each calendar year.\textsuperscript{40} The BJS has recently released a new data program, the Correctional Statistical Analysis Tool, which allows for collation of existing data in some cases from 1978 to present.\textsuperscript{41} Although this tool shows promise, the types of information available is limited to population counts and a few demographic characteristics.

The current process for obtaining any useful information, even in this digital age, is byzantine, complex, and usually involves submission of public record requests.\textsuperscript{42} The Southern Center for Human Rights has zealously litigated for increased access to public documents, particularly in cases where excessive force is alleged and/or a prisoner has suffered severe bodily injury or death.\textsuperscript{43} The response to the requests is almost always the same: public access to the requested documents would threaten the security of the institution. Corrections officials have argued that release of the information could lead to prison riots, public disturbances, and increases in violent crime within the prison wall.\textsuperscript{44} Yet, corrections officials fail to see that release of the documents accompanied by transparent state efforts to curb abuses and punish wrongdoers could actually have the opposite effect.

Margo Schlanger and Giovanna Shay argue that the usual democratic methods for oversight are simply not present in the penal institution context.\textsuperscript{45} Moreover, they argue the only existing transparency mechanism for detention facilities, a civil lawsuit on behalf of inmates, is simply insufficient because the requirements of Prison Litigation Reform Act (PLRA) actively obstruct meritorious lawsuits.\textsuperscript{46} The PLRA requires any inmate complaint to be administratively exhausted, i.e. the prisoner must complete the internal complaint process including any appeals before they may file a civil lawsuit. The PLRA effectively internalized the inmate complaint process such that they occur almost exclusively behind the prison’s walls and thus out of public

\textsuperscript{42} In this author’s experience, even when a public records request is lodged, prisons often fail to respond (requiring civil suit to obtain the information) or cite security concerns. \textit{See also} Sarah Geraghty & Melanie Velez, \textit{Bringing Transparency and Accountability to Criminal Justice Institutions in the South}, 22 STAN. L. & POL’Y REV. 455 461-462 (2011).
\textsuperscript{43} \textit{See} Geraghty & Velez, \textit{supra} note ___ at 458-464.
\textsuperscript{44} \textit{Id.} at 460.
\textsuperscript{45} Schlanger & Shay, \textit{supra} note ___ at 139-140.
\textsuperscript{46} \textit{Id.} \textit{See also} David Fathi, The Challenge of Prison Oversight, 47 Am. Crim. L. Rev. 1453, 1454-1460 (2010)(discussing how courts and civil suits only provide at best an “ad hoc” and “haphazard” oversight function).
In addition, the PLRA requires that “no federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.” John Boston, the foremost expert on prison litigation, has interpreted the provision to allow for suit but to prohibit more than nominal damages where physical injury is lacking. But several courts have interpreted “physical injury” so narrowly as to preclude suits where inmates were humiliated, forced to parade naked or on leashes, or even the forced to inhabit unsanitary and soiled cells. Such restrictions limit the ability of relying on civil lawsuits to provide any measure of transparency on prison operations.

Many of the concerns about prisoner re-entry and humane treatment could be better addressed if the public had even a rudimentary knowledge of basic prison operations. What programming is offered by the prison and does it contribute to that prisoner’s eventual re-entry into society? What medical care is offered to prisoners and is preventive care emphasized over the more costly emergency urgent care? How are prisoners housed and to what extent do the housing or programming arrangements impact violence upon inmates? To what extent are prisoners forced to work and for whom? What training is required for prison employees and what rules govern the use of force in prison? How do prisons insure that inmates are treated not only humanely, but fairly as they serve their sentences of punishment? At best, a cursory search of major newspapers indicates that information about prisons is largely confined to accounts of escape attempts or budgetary cuts.

The lack of public transparency about prisons is further compounded by the general lack of oversight on prison operations in general. There are no federal or state mandatory standards for prison conditions, other than those constitutionally mandated and for specific populations (religious groups, the disabled or topics (prison rape). The American Correctional Association does provide institutional accreditation, but accreditation is

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50 See Geraghty & Velez, supra note ___ at 479-481.
51 See Andrea Armstrong, Slavery Revisited in Penal Plantation Labor, 35 SEATTLE L. REV. 869 (2012)(examining the branding of prisoners as slaves in modern forced plantation-style labor under the Eighth and Thirteenth Amendments).
53 U.S. CONST. amends. I, VIII, XIII & XIV.
54 Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc et seq.
voluntary, not mandatory, for most institutions.\[57\] As of 2010, there are “130 accredited jails (out of more than 3,300) and 590 accredited prisons throughout the country.”\[58\] In addition, critics question the impartiality of the accreditation process given the fee structure for membership in the association.\[59\] Moreover, neither the standards nor the accreditation reports are publicly available.\[60\] Members of the general public also do not participate in prison operations in an oversight capacity.\[61\] While individuals may serve on clemency boards, non-employee individuals generally do not serve on administrative, disciplinary, or internal appeals boards in penal facilities.

Academics, lawyers, and even some corrections officials agree that increased transparency in correctional administration is needed. The American Bar Association passed a resolution supporting enhanced public transparency in prison governance.\[62\] The Commission on Safety and Abuse in America’s Prison has urged greater transparency, noting “[m]ost correctional facilities are surrounded by more than physical walls; they are walled off from external monitoring and public scrutiny to a degree inconsistent with the responsibility of public institutions.”\[63\] The Prison Rape Elimination Act specifically calls for greater data collection in part to combat the hidden nature of sexual violence against prisoners.\[64\]

\[57\] David Bogard, Effective Corrections Oversight: What Can We Learn From ACA Standards and Accreditation, 30 PACE L. REV. 1646, 1649 (2010).
\[58\] Id. at 1649 (internal citations omitted).
\[59\] Lynn S. Branham, Accrediting the Accreditors: A New Paradigm for Correctional Oversight, 30 PACE L. REV. 1656, 1664 (2010)(noting that large institutions can affect the accreditation process by withdrawing their membership fees from the association); Bogard, supra note ___ at 1650.
\[60\] Bogard, supra note ___ at 1650.
\[61\] But see Anne Owers, Prison Inspection and the Protection of Prisoners’ Rights, 30 PACE L. REV. 1535, 1537-538 (2010)(describing Independent Monitoring Boards in the United Kingdom that are empowered to monitor prisons, have a statutory right of entry, and must exercise additional supervision of inmates in administrative segregation).
\[62\] Stephen J. Saltzburg, Report to the House Delegates, AMER. BAR ASSOC., CRIMINAL JUSTICE SECTION 1 (Aug. 2008), available at http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_policy_am08104b.authcheckdam.pdf (“RESOLVED, That the American Bar Association urges federal, state, local and territorial governments to develop comprehensive plans to ensure that the public is informed about the operations of all correctional and detention facilities . . . within their jurisdiction and that those facilities are accountable to the public.”).
\[63\] Gibbons and Katzenbach, supra note ___ at 15, 95 (2006).
\[64\] See 28 CFR § 115.87 (mandating facility, state, and federal data collection). See also Jamie Fellner, Ensuring Progress: Accountability Standards Recommended by the National Prison Rape Elimination Act, 30 PACE L. REV. 1625 (2010).
C. The Impact of the Lack of Transparency

It is no secret that minority racial groups – particularly African-American and Latino populations – are overrepresented in our criminal justice system. In 2008, one in eleven African Americans and one in twenty seven Latinos are under correctional control versus one in forty-five Caucasians.\footnote{One in 100: Behind Bars in America 2008, PEW CHARITABLE TRUSTS 6 (2008), available at http://www.pertrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing_and_corrections/one_in_100.pdf.} Indeed, as Michelle Alexander and others have argued, our current mass incarceration binge is distinctly tied to continuing attempts to subordinate and control minority racial groups.\footnote{See generally, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010); DOUGLAS BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSlavEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (2008); Loïc Wacquant, Class, Race, & Hyperincarceration in Revanchist America, Dædalus, Summer 2010, at 74 (arguing that mass incarceration is a misnomer since the effects of incarceration policies are experienced primarily by poor African-American men from impoverished urban areas).} According to the Bureau of Justice Statistics, in 2011, African-Americans and Hispanics, both males and females in all age groups, were incarcerated at higher rates than Caucasians in state and federal prisons.\footnote{U.S. Department of Justice, Bureau of Justice Statistics, Prisoners in 2011, 8, (December 2012) available at http://www.bjs.gov/content/pub/pdf/p11.pdf} For males in particular, who are by far the majority in prison facilities, African-Americans are incarcerated at rates of 3 to 9 times those of Caucasians, depending on the age group.\footnote{Id. (African-Americans are 9 times more likely to be incarcerated than Caucasians among prisoner age 18-19 and 3 to 5 times more likely to be incarcerated among prisoners 65 years and older.)} Prisoners identifying as Hispanic accounted for approximately 20% of the national prison population\footnote{James Forman Jr., Racial Critiques of Mass Incarceration: Beyond the New Jim Crow, 87 N.Y.U. L. REV. 21, 60 (2012); see also U.S. Department of Justice, supra note 62 at 1 (noting that as of December 2011, Hispanics were approximately 23% of the total state and federal prison population).} and are one in three of the federal prison population.\footnote{Michael Kane, Kristin Bechtel, Jesse Revicki, Erin McLaughlin & Janice McCall, Exploring the Role of Responsivity and Assessment with Hispanic and American Indian Offenders, 17 (2011) available at https://www.bja.gov/Publications/CRJ_Role_of_Responsivity.pdf (citing Bureau of Prisons (2011) Quick Facts about the Bureau of Prisons) } More than 60% of all state and federal prisoners are members of a racial minority group.\footnote{U.S. Department of Justice, supra note 62 at 7.}

The effect of the lack of public transparency is pronounced in the prison context since the lack of transparency has the potential to disproportionately affect specially vulnerable and traditionally excluded groups. For example, the Bureau of Justice only publishes their prison census
data in terms of race and gender, but not in terms of sexuality, physical or mental disability, or level of education – all groups that may require specific strategies or care. In addition, Michele Deitch notes the particular vulnerabilities of prisoners in segregation, those vulnerable to sexual assault, prisoners with mental and physical disabilities, and prisoners with serious medical needs within “an institution [that] has total control over the lives and well-being of individuals.”

As noted by Giovanna Shay, “[prison] is part of a symbiotic structure that reproduces disadvantage for certain groups within society.” Prison and jail conditions are a significant part of these disadvantages, as time incarcerated can lead to future unemployment, long-lasting medical and psychological issues, and social isolation.

The lack of transparency has economic costs as well. Prisons and jails are administered by virtue of our payment of taxes. The cost of incarceration continues to rise, even now in times of state budget deficits. Incarceration in the state of Georgia, for example, costs approximately $1 billion dollars per year.

Nationally, the Pew Center on States estimates that states spend approximately $51 billion a year, a figure that does not include federal incarceration expenditures. The total federal and state expenditures on corrections in 2010 may be as high as $80 billion per year. In an era of performance-based standards and outcomes, particularly for public institutions justifying expenditures during record deficits, prisons appear to have flown under society’s radar. Drug courts have become a prominent (and popular) strategy to reduce the incoming flow of incarcerated, but prisons have not been held publicly accountable for high rates of recidivism and low rates of rehabilitation for the outgoing flow of prisoners. In addition to the 2.2 million actually incarcerated in prisons and jails, an additional five million people were on probation or on parole in 2010. Moreover, the possibility of misuse of public funds is enhanced where there is little public oversight of funds. For example, in Alabama, a U.S. district court judge found that a sheriff

74 See Section IIB for further discussion.
improperly siphoned off $212,000 over three years from funds intended to feed detainees.\textsuperscript{79}

The current “see no evil” approach entails significant but hidden costs. Inmates suffer most directly, but conditions of incarceration affect their families, our communities, and society more generally. While enhanced transparency may or may not mitigate those costs, at a minimum we will be able to understand why mass incarceration policies are failing to make our prisoners and communities whole again.\textsuperscript{80}

II. ANTI-SUBORDINATION AND PRISONERS

Transparency is critical when employing an anti-subordination analysis of prisoners. Anti-subordination is a more robust view equality as compared to anti-discrimination. Employing this robust notion of equality, I argue that anti-subordination analysis applies equally to the incarcerated because at its core, anti-subordination is based on a person’s essential human dignity.

A. Defining Anti-Subordination

The anti-subordination principle is a theory of critical legal theorists that focuses on whether structures, society, and the law are used to create and maintain a dominant group.\textsuperscript{81} The dominant group uses these tools to create and maintain privilege, accumulate and protect wealth, as well as set normative agendas that socially divide the dominant group from those less dominant. Professor Owen Fiss articulated one of the first iterations of the anti-subordination principle in his 1976 ground-breaking article “Groups and the Equal Protection Clause.”\textsuperscript{82} Fiss presciently distinguished between the anti-classification (or anti-discrimination) principle and the anti-subordination principle,\textsuperscript{83} with the latter allowing for deeper group based analysis, rather than

\textsuperscript{79} See Geraghty & Velez, supra note ___ at 463-464.
\textsuperscript{80} See Todd R. Clear & James Austin, Reducing Mass Incarceration: Implications of the Iron Law of Prison Populations, 3 HARV. L. & POL’Y REV. 307 (2009)(arguing that the link between crime reduction and incarceration are relatively weak and overshadowed by the societal costs).
\textsuperscript{81} Attempts to define groups, racial, gender, or otherwise, are necessarily mushy, but I find Professor Fiss’ definition to be the least mushy. He defines a social group as a collection of individuals with a group identity separate from its individual members and the “identity and well-being” of the group and its members is linked. Owen M. Fiss, Groups and the Equal Protection Clause, 5 PHIL. & PUB. AFF. 107, 148 (1976).
\textsuperscript{82} Id.
\textsuperscript{83} But see Jack M. Balkin & Reva B. Siegel, The American Civil Rights Tradition: Anticlassification or Antisubordination?, 58 U. MIAMI L. REV. 9 (2003) (arguing that while important for historical reasons, Fiss’ distinction is overstated because the anti-subordination values inform the application of the anti-discrimination principle).
formal equality. Any “state practice which aggravates [the group’s] subordinate position would be presumptively invalid” under an anti-subordination approach.

The anti-subordination principle became a central methodological inquiry for Critical Race theorists and the scope of the principle has since expanded to examine “whether a rule of law or legal doctrine, practice, or custom subordinates important interests and concerns” not just of racial minorities, but of all “outsider” or historically excluded groups, including for example the lesbian, gay and transgender populations. The anti-subordination principle is tied to “social mores” and dependent on context and history. Because of this deep connection to historical, existing, and incipient social hierarchies, the anti-subordination principle evolves to encompass groups perhaps previously unrecognized as unjustly subordinated. An immutable characteristic is not required for a group to be considered subordinated. Rather, as Sergio Campos argues, it is sufficient when the group faces persistent barriers or obstacles that are “generally unreasonable to overcome.”

A central tenet of an anti-subordination lens is a commitment that a person’s assignment to a particular group should not be indicative of their future status and potential. Subordination manifests in both “material and ideological dimensions.” Materially, a member of a subordinated group is likely to experience economic effects, such as lower income and reduced access to resources to improve his or her economic potential condition. Ideologically, a subordinated group member is cast as less-than; undeserving of equal access or treatment; and/or not worthy of basic human dignity. At its core, anti-subordination analysis focuses on substantive equality, with attention to both inputs and outputs as compared to anti-discrimination analysis, which focuses on formal equality (treating like items alike) and prohibiting suspect inputs, such as race-based motives.

84 Fiss, supra note ___ at 107.
85 Fiss, supra note ___ at 165.
88 See Balkin & Siegel, supra note 68, at 14-15.
B. The Subordination of the Incarcerated

It may seem counterintuitive to argue for applying the anti-subordination principle to prisoners. Penal institutions exist, at a minimum, to subordinate their convicted residents; to punish inmates by depriving them of certain rights and privileges; to maintain order and security by restricting rights. For some, prisoners are justly subordinated – their lesser status is earned through the commission and conviction of a crime. This argument, however, misunderstands the character of subordination.

Anti-subordination theory is broader than the anti-discrimination principle. Anti-subordination encompasses a broader idea of equality beyond treating similar persons the same. Instead, anti-subordination theory looks at the extent to which a group is excluded or otherwise marked as “lesser-than” with reference to that group’s basic humanity. Put differently, the extension of rights and privileges may be one indicator of subordinated status, but the harm is not the denial of rights. Instead, the harm is the implication of that denial for a person’s status within our society. And our constitution guarantees essential human dignity to all, even the incarcerated.92

This article focuses on the distinct implications of prison conditions in fostering subordination. I do not intend to minimize the disastrous impact of post-incarceration policies, such as restricting access to public services and benefits, scholarships, voting rights and employment,93 but rather to highlight how prisons conditions themselves can contribute to subordination. Sharon Dolovich has identified key features of our current incarceration policies, many of which have distinct implications for subordination, including “strict limits on visits and communication with family and friends on the outside;” “limited access to meaningful work, education, or other programming; little if any concern for the self-respect of the incarcerated; and ‘us’ versus ‘them’ dynamic between incarcerated and custodial staff; and increased reliance on solitary confinement for the purpose of punishment and control.”94 Our prisons and jails are rife with violence (by both inmates and correctional staff),95 inhumane and unconstitutional conditions,96 and failures to provide adequate medical and

92 See Armstrong, supra note ____ at 869 (discussing human dignity as core element of the Eighth and Thirteenth Amendments).
93 See generally Wacquant, supra note ____ at 76 (listing restrictions); and Forman, supra note ____, at 28-29 (listing restrictions).
95 See e.g., Gibbons & Katzenbach, supra note ____ at 385 (discussing interviews, testimony, and reports of violence in prisons and jails).
96 Id. (discussing prolonged solitary segregation of inmates, lack of medical care, and overcrowding)
mental health services. These conditions matter. Experiencing these conditions can have lasting effects, long after the period of incarceration is over.

Existing prison conditions can also generate crime. In Brown v. Plata, the U.S. Supreme Court recently upheld a lower court’s order to reduce the California prison population due to overcrowding. While Justice Kennedy’s opinion focused primarily on how overcrowding in California prisons negatively impacts the delivery of critical medical and mental health services, Justice Kennedy also noted that reducing overcrowding could in fact enhance public safety by mitigating prisons’ “criminogenic” aspects. Our prisons and jails are plagued with high rates of recidivism. California estimates that approximately 63.7% of felon inmates released return to state custody within three years. Delaware boasts similar rates for released inmates recommitted to state custody within three years. The failure to provide mental health care, drug treatment, medical care, and skills training significantly affects the ability of an ex-prisoner to successfully re-enter general society. A prisoner may emerge from prison not only without job skills, but also incapacitated for future work because of severe and lasting physical and mental health issues.

Ernest Drucker describes the physical and mental effects of incarceration, as currently practiced in America, as the “long tail of mass incarceration.” Significant and increased risk to HIV/AIDS, sexually transmitted diseases, hepatitis and tuberculosis constitutes one of the “enduring effects of punishment” long after a person has served their formal sentence. Significantly “over 40 percent of those in solitary confinement, a widely used disciplinary measure, develop major psychiatric disorders.”

In addition, the way we incarcerate prisoners can lead to “learned passivity,” where the “psychological process of adapting to life in an...
in institution where one is neither expected nor permitted to make decisions, where trust is a liability and intimacy a danger." 106 Taken together, prison conditions can strip a person of their basic humanity, and whether released or remaining in long-term incarceration, the person is more likely – not less – to commit future crimes.

Beyond the effects on future crime, serving a term of incarceration may be more severe than society intended. Our criminal sentences specify the time to be served and only distinguishes one aspect of the conditions of incarceration, namely whether the sentence is to be served at hard labor. 107 Our laws require the physical removal of a convicted offender from general society, but we simply don’t know what conditions govern the offender’s period of removal.

The case law is rife with examples of prison sentences that impose extreme punishment through unconstitutional prison conditions. The punishment exacted in these cases entails far more than simple the loss of liberty. One of the more recent Supreme Court cases decided the authority of judges to order release based on the unconstitutional overcrowding of inmates. 108 Another case considered the damages to be awarded to the family of a prisoner who died of penile cancer, which could have been identified and successfully treated earlier but for the state of California’s abysmal medical care for detainees. 109 Another relatively recent Supreme Court case considered an Alabama practice of hitching prisoners to a post in painful positions for hours without shade or water as punishment more akin to torture. 110 The Supreme Court invalidated a California prison practice of racially segregating incoming inmates, which according the Court imposes racial stigma and stereotype on inmates and may have increased the possibility of racial violence. 111 And these are only Supreme Court cases in the last decade.

The conditions of incarceration can have profound effects on the incarcerated, both those eventually released and those remaining in prison for life terms. The experience of being incarcerated, as currently being practiced

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106 Dolovich, supra note 89 at 248 (quoting psychologist Craig Haney)
107 Hard labor is a sentencing term that usually encompasses compulsory physical labor while imprisoned as a punishment for some crimes.
108 Brown v. Plata, 131 S.Ct. 1910, 1942 (2011) (describing a mental health inmate who was held for 24 hours in a telephone booth sized cage in his own urine because authorities lacked a “place to put him.” In addition, the Court notes, a “prisoner with severe abdominal pain died after a 5–week delay in referral to a specialist; a prisoner with “constant and extreme” chest pain died after an 8–hour delay in evaluation by a doctor; and a prisoner died of testicular cancer after a “failure of MDs to work up for cancer in a young man with 17 months of testicular pain.”) Id. at 1924-1925.
110 Hope v. Pelzer, 536 U.S. 730 (2002) (finding that handcuffing inmate to a hitching post for more than seven hours without water or sanitary breaks was cruel and unusual punishment).
in the United States, is to dehumanize individuals. Prison conditions significantly worsen a person’s ability to improve their economic and social prospects, even once released, leaving the former inmate as permanently subordinate within American society.

The anti-subordination principle is not a theorized in the abstract. Rather, the principle requires that anti-subordination analysis incorporate historical and contextual factors to ensure that law is not viewed in isolation. Moreover, anti-subordination analysis should be “informed by practice, by active engagement with developments on the ground.”

Information about actual practices and outcomes is critical to effectively stymie what can be pervasive patterns of domination. Transparency, as a method to expose these practices and outcomes, is then an integral part of advancing an anti-subordination agenda.

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

Second, increasing transparency can enhance institutional legitimacy and enhance the professionalization of corrections. Third, increased transparency can enhance prison efficiency by increasing the costs of non-compliance, creating personal incentives for individual employees, and increasing the probability of detecting diversion of resources.

III. SCHOOLS AND PRISONS AS COMPARABLE INSTITUTIONS

Schools and prisons are much more similar than you would think. Ask a public school student who enters her school each morning through a metal detector; the student whose bag is searched by security before entering homeroom; the entire class of students sitting dutifully at their desks, watching security guards or police patrolling the halls through the glass window of the

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112 Mutua, supra note ___ at 375.
113 See Gibbons and Katzenbach, supra note ___ at 494-499 (noting testimony by former wardens on how greater openness could have improved conditions).
116 Deitch, supra note 67 at 292 (special populations piece).
classroom door. Henry A. Giroux, a critical pedagogical scholar, argues that in Chicago “schools came to resemble prisons, illustrated most visibly in the ever-increasing use of police and security guards along with a professionalized security apparatus in school buildings—metal detectors, surveillance cameras, and other technologies of fear and containment.” At a minimum, in some public schools, the difference between schools and prisons— from a student’s perspective—is decidedly murky.

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

A. Facial similarities

One key similarity between schools and prisons is the government’s near supply-side monopoly over both prisons and schools. Although the rate is increasing, 2009 data indicates that private prisons only house 8% of our nation’s incarcerated. Thus the provision of corrections is almost

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117 Henry A. Giroux, Obama’s Dilemma: Postpartisan Politics and the Crisis of American Education, 79 HARV. ED. REV. 250 (2009) (this account doesn’t even include reports indicating that the combination of an increase in security officers in schools and heavy-handed school discipline, which can criminalize what were previously minor disciplinary infractions, has funneled school children (disproportionately minority) directly into prison); see, e.g., Catherine Y. Kim & I. India Geronimo, Policing in Schools: Developing a Governance Document for School Resource Officers in K-12 Schools, AMERICAN CIVIL LIBERTIES UNION (Aug. 2009), available at http://www.aclu.org/files/pdfs/racialjustice/whitepaper_policinginschools.pdf.

118 See, e.g., Annie Gowen, Training a lens on school security, WASH. POST, Apr. 5, 2013, at A6 (noting students in Baltimore “say their high schools, among an estimated 10,000 nationwide with police on campus, feel like prisons”); but see Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 664 n.3 (1995) (disputing dissent’s claim that the majority opinion upholding suspicion-less drug testing of school athletes equates the Fourth Amendment rights of schoolchildren and prisoners).

exclusively performed by local, state, and federal agencies. Similarly, approximately 10% of this nation’s students receive their education from private schools, leaving the vast majority in state or locally-run educational institutions.120

Another similarity is the federal role in both schools and prisons. Both schools and prisons are within the traditional province of states, not the federal government. These areas are uniquely within the state’s purview under the state’s constitutional obligation to provide for the “health, welfare, and safety” of its people. Moreover, that power is reserved to the states under Tenth Amendment, which states that any power not specially delegated to the federal government in the Constitution is reserved to the state.121 Nevertheless, the federal government plays a role, albeit to different extents, in both education and penal facilities by collecting data or distributing funding or forging consensus on common goals.

There are also several similarities between the populations of schools and penal institutions. First and foremost, both prisoners and schoolchildren must remain in the custody of the institution. Compulsory attendance laws require that children of a certain age must attend school, unless the parents decide to home school their children or attendance at school interferes with other fundamental rights.122 Prisoners are also legally committed to the custody of the state for the duration of their court-ordered sentence.

Second, schoolchildren and incarcerated people do not retain their full panoply of constitutional rights within institutional walls. Students “do not ‘shed their constitutional rights … at the schoolhouse gate.’”123 Similarly, “prisoners do not shed all constitutional rights at the prison gate.”124 Nevertheless, for both populations, these rights are limited. “The constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.”125 Similarly, the penal environment dictates the “necessary withdrawal or limitation of many

121 U.S. CONST. Amend. X.
122 See Wisconsin v. Yoder, 406 U.S. 205 (1972)(acknowledging importance of a state’s compulsory education law, but holding that Amish high-school aged children need not attend if it interferes with their religion).
124 Sandin v. Conner, 515 U.S. 472, 485 (1995) (holding that placement in administrative segregation must be an “atypical and significant hardship” to implicate a liberty interest protected by the Due Process Clause of the Fourteenth Amendment).
privileges and rights.” 126 Both populations are subject to different legal standards for violations of certain rights, as compared to a non-incarcerated adult, but both populations retain those rights not inconsistent with educational or penal institution.

Last, both populations are subject to administrative disciplinary measures as well. [students and prisoners can be disciplined for misbehavior, students can be sent to “solitary”, seclusion and restraint can be used in schools (a huge area where congress has recently tried to get some sunshine),]

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

B. Deference to administrators

The U.S. Supreme Court accords substantial deference to the decisions of both school and prison administrators. “We must accord substantial deference to the professional judgment of prison administrators, who bear a significant responsibility for defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them.” 127 Similarly, school boards are responsible for determining what may or may not constitute appropriate conduct in the classroom. 128 “. . . [T]he Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.” 129

Deference to prison administrators is prudent, according to the Court, because running prisons requires special knowledge and professional judgment of prison administrators. 130 In addition, courts extend deference because prisons are a combined function of the legislative and executive functions.

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126 Johnson v. California 543 U.S. 499, 510 (2005) (quoting Price v. Johnston, 334 U.S. 266, 285, 68 (1948)). Johnson held that the right to be free from racial discrimination was subject to strict scrutiny and is a right retained within the prison walls.
129 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511, 513 (1969) (holding that absent evidence that wearing of black armbands to protest the war in Vietnam substantially or materially disrupted school activities, regulation prohibiting wearing of armbands was unconstitutional exercise of school authority and violated of First Amendment).
Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of the government. Prison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint.131

Despite the broad language exempting the judiciary from close oversight of prison administrations, which perhaps conveniently also ignores the role of the judiciary in the criminal justice system as a whole, the Court nevertheless acknowledges a duty where fundamental questions of constitutionally-guaranteed rights are protected.132

The standard governing prison decision-making is notably low in light of this broad deference extended to prison administrators. Prison practices and regulations must only be “reasonably related to legitimate penological interests.”133 In a series of cases, the Court has recognized rehabilitation, maintaining internal order and discipline, discouraging inmate misbehavior, safety of prisoners, security from unauthorized access and escape, and deterrence of crime as legitimate penological interests.134 Indeed, these legitimate penological interests are intended to further the societal goal of incarceration, and become essentially the duties that prisons owe to the prisoners, the state, and thereby the general public.

Schools, too, receive substantial deference. “Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.”135 Indeed, courts should defer and “refrain from attempting to distinguish between rules that are important to the preservation of order in the schools and rules that are not.”136 The standard governing school decision-making is almost an exact replica of the prison standard. A

131 Turner, 482 U.S. at 84-85; Procunier, 416 U.S. at 405.
132 Procunier, 416 U.S. at 405; Lewis, 518 U.S. at 362, 365; Bell, 441 U.S. at 562.
133 Beard, 548 U.S. at 528. One exception to this standard is the right to not be discriminated against on account of one’s race, which is reviewed under strict scrutiny. See generally Johnson v. California, 543 U.S. 499 (2005).
136 New Jersey v. T.L.O., 469 U.S. 325, 342 (1985) (holding the search of a student’s purse is governed by the Fourth Amendment, but that the search need only be reasonable and does not require probable cause).
school’s actions must be “reasonably related to legitimate pedagogical concerns.”\textsuperscript{137}

The deference extended to school administrators is parallel to the concerns motivating deference to prisons. Courts “lack[] the experience to appreciate what may be needed.”\textsuperscript{138} “School officials have a specialized understanding of the school environment, the habits of students, and the concerns of the community, which enables them to formulate certain common-sense conclusions about human behavior.”\textsuperscript{139}

The standard for extended deference to schools is premised in part on the openness of the school environment. Potential abuses of authority are curbed by the possibility of criminal or civil sanctions and students are protected by the “openness of the school environment.”\textsuperscript{140} Such concerns are not present in the prison context, although the Court appears to assume that some degree of openness is present. The Court in Pell says that the Court and the general public have the opportunity to monitor the condition of prisons and that the Department of Corrections does routine monitoring for the general public.\textsuperscript{141} Justice Stevens, in his dissent in Pell, reiterates the importance of the public’s interest in being informed about prisons.\textsuperscript{142}

\textbf{C. Duties and obligations of administrators}

Prisons and schools also have similar duties and obligations to the populations they serve and more broadly to society. Both prisons and schools, for example, have a duty to provide for the security of their respective populations. In the context of schools, the Supreme Court has recognized a danger to schoolchildren from speech that may reasonably be viewed as encouraging illegal drug use.\textsuperscript{143} Noting the “special characteristics of the school environment and the government interest in stopping student drug abuse,” the Court held that schools may reasonably restrict such speech.\textsuperscript{144} Indeed, a concurrence by Justices Alito and Kennedy goes even further by recognizing a school’s “greater authority to intervene before speech leads to violence.”\textsuperscript{145} Schools, they argue, can be places of special danger and

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\textsuperscript{139} Id. at 385 (Thomas, J., concurring in part and dissenting in part).
\textsuperscript{140} Ingraham v. Wright, 430 U.S. 651, 677-78 (1977).
\textsuperscript{142} Id. at 840.
\textsuperscript{143} Morse v. Frederick, 551 U.S. 393 (2007).
\textsuperscript{144} Id.
\textsuperscript{145} Id. at 425.
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therefore the duty of school administrators to protect students is heightened in the context of illegal drug use. For example, the Court has recognized a duty to restrain students from assaulting one another, abusing drugs and alcohol, and committing other crimes. Although not formally recognized as a “duty to protect,” public school administrators are uniquely positioned to provide “a degree of supervision and control that could not be exercised over free adults.” This “comprehensive authority” to protect is rooted, in part, in the vulnerability of school children. For example, in a case upholding a principal’s authority to discipline a student for holding a banner ostensibly promoting the use of marijuana, the Court noted how schoolchildren are particularly susceptible to peer pressure.

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

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

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146 Id.
149 Id.
150 Morse, 551 U.S. at 408.
151 U.S. CONST. amend. VIII. The same duty governs the treatment of pre-trial detainees through the Due Process Clause.
153 Id. at 834.
154 Id.
155 Id. at 833.
which learning can take place. 156 Similarly, in prisons, maintaining an orderly environment is a legitimate penological goal. 157 Maintaining order, like schools, is important to advance other institutional goals, such as security and rehabilitation. 158

While courts have routinely rejected arguments equating a school’s in loco parentis status with that of a prison-inmate custodial relationship, 159 there are nevertheless similarities in the relationships between the institutions and their respective populations. Both schools and prisons have custodial relationships with their respective populations. That custodial relationship creates duties on the administrators of both institutions. In the context of schools, the Court has recognized that schools have a duty beyond that of providing a basic textbook education. “Inescapably, like parent, they are role models. The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct . . .” 160 Schools, for example, have a duty to protect children entrusted into their care from lewd or obscene speech and “stand in loco parentis over the children.” 161 Children have been “committed to the temporary custody of the State as schoolmaster.” 162 For penal facilities, the state has affirmatively taken on additional duties and obligations by virtue of taking custody of the offender. For example, the state must provide nutritionally adequate food and sufficient potable water. 163 The state, under both constitutional and statutory law, must also provide minimally adequate clothing and a hygienic and sanitary environment. The Court has held that 18 U.S.C. §4042 imposes a duty on prisons to provide “safekeeping, care, and subsistence for all persons charged

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157 Overton v. Bassetta, 539 U.S. 126, 129 (2003) (holding that restrictive visitation policies did not violate an inmate’s Eighth Amendment rights and were rationally related to legitimate government concerns).
158 See id. (noting that order is disrupted by possibility of visitors smuggling drugs into the facility, which in turn can threaten an inmate’s rehabilitation or lead to violence).
161 Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995); see also id. at 684 (“school authorities act in loco parentis when protecting children from lewd speech”); but see Ingraham v. Wright, 430 U.S. 651, 662 (1977) (refusing to apply Eighth Amendment analysis to corporal punishment in public schools and noting that “the concept of parental delegation has been replaced” by the idea that the State derives its authority over school children by virtue of compulsory education laws).
162 Vernonia, 515 U.S. at 665 (also noting that the public school system undertook the drug-testing policy as “guardian and tutor of children entrusted to its care”).
with offenses against the state.”¹⁶⁴ Prisons have a constitutional duty to provide medical care to prisoners under the Eighth Amendment barring cruel and unusual punishment.¹⁶⁵ In addition, prisons have a constitutional duty to provide “access to the courts” by “assist[ing] inmates in the preparation and filing of meaningful legal papers” through the provision of “adequate law libraries or adequate assistance from persons trained in the law.”¹⁶⁶

Even the arduous protections accorded by the Due Process Clause of the Fourteenth Amendment are lessened in both the prison and school contexts. A prison’s or school’s duty is substantially less in providing notice and an opportunity to be heard than in other contexts. For students facing suspension, due process requires only that a student be given written or oral notice of charges, an explanation of the evidence, and an opportunity to present the students’ side of events.¹⁶⁷ The notice is required in part because school officials “frequently act on the reports and advice of others; and the controlling facts and the nature of the conduct under challenge are often disputed.”¹⁶⁸ In prisons, the majority of due process claims have arisen around prison disciplinary measures, such as placement in administrative segregation. In these cases, the traditional Mathews balancing test¹⁶⁹ is preceded by determining whether or not the discipline presents an “atypical and significant hardship” within the context of ordinary prison life.¹⁷⁰ If the punishment does present an atypical hardship, then the discipline implicates a liberty interest and a court can then balance the three Mathews factors: private interest, state interest and the risk of erroneous deprivation.¹⁷¹ In Wilkinson, an inmate challenged his placement in administrative segregation and the U.S. Supreme Court held that though the inmate had a liberty interest at stake, the existing procedures provided sufficient due process.¹⁷² Similar to schools, the Ohio prison provided notice of discipline and associated facts and an opportunity to

¹⁶⁴ United States v. Muniz, 374 U.S. 150, 165 (1963). Note that this does not give the federal government the “authority to physically supervise the conduct of a jail’s employees; it reserves to the U.S. only the right to enter the institution at reasonable hours for the purpose of inspecting and determining the condition under which federal offenders are housed.” Id.
¹⁶⁶ Bounds v. Smith, 430 U.S. 817, 828 (1977). Notably, this obligation is not as broad as it first appears. The Court has subsequently held that this constitutional duty does not necessarily include photocopying or the training of library staff. Moreover, the alleged inadequacy must specifically result in harm to the prisoners. Lewis v. Casey, 518 U.S. 343, 346 (1996).
¹⁶⁸ Id. at 580.
¹⁶⁹ Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (concluding that determining the appropriate level of due process requires balancing the private interest, the state interest, and the risk of erroneous deprivation).
¹⁷¹ Mathews, 424 U.S. at 335.
¹⁷² Wilkinson, 545 U.S. at 224, 228.
rebut the facts. Neither schools nor prison require the hearing to mimic a formal adversarial hearing before a judge, with counsel, or use judicial evidentiary standards.\textsuperscript{173}

\textbf{D. Similar but not identical}

There are important differences between the two institutions as well. First and foremost, prisons and schools are not subject to the same constitutional requirements. Public school disciplinary policies are not subject to the Eighth Amendment, prohibiting cruel and unusual punishment.\textsuperscript{174} The U.S. Supreme Court has explicitly held that the Eighth Amendment applies only to those convicted of a crime and thus unavailable to challenge corporal punishment in public schools.\textsuperscript{175} The Court has also held that the Fourth Amendment governs searches in public schools (albeit with a lesser standard), but not at all to searches in prisons because prisoners lack a realistic expectation of privacy while incarcerated.\textsuperscript{176}

There are numerous other practical differences as well. Excepting juvenile detention facilities, prisons incarcerate adults and schools have custody of minors. Students attend school by virtue of compulsory attendance laws, but prisoners are incarcerated due to specific prior acts. Most inmates remain within the institutional walls for twenty-four hours a day, seven days a week, while students spend part of each and every day outside of school grounds. I agree with the Court’s opinion that “the prisoner and the schoolchild stand in wholly different circumstances, separated by the harsh facts of criminal conviction and incarceration.”\textsuperscript{177} The point is not to argue that schools and prisons are identical or that school children and prisoners are identical. Rather the point is to note the similarity between the two types of institutions, particularly with respect to some of the challenges the administrators of these institutions face.

\textbf{IV. ANTI-SUBORDINATION AND SCHOOL TRANSPARENCY}

\textbf{A. History of enhancing transparency in schools}

\textsuperscript{173} See id. at 229 (noting prior prison cases where lesser due protections upheld); Goss, 419 U.S. at 583 (noting that formal adversarial hearings could overwhelm a school’s administrative system and make suspensions an ineffective and resource-draining disciplinary tool).

\textsuperscript{174} Ingraham v. Wright, 430 U.S. 651, 662 (1977).

\textsuperscript{175} Id.

\textsuperscript{176} New Jersey v. T.L.O., 469 U.S. 325 (1985).

\textsuperscript{177} Id. at 338 (quoting Ingraham, 430 U.S. at 669).
Brown v. Board of Education is often heralded as the first Supreme Court case to employ anti-subordination analysis. While parts of the opinion hew strictly to an anti-classification analysis, the Warren Court opinion points to a broader harm in justifying the end of “separate but equal” schools. Segregating children by race “generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.” The Warren and later Burger courts perceived subordination as a product of discrimination.

Brown was only the beginning of a decades-long effort by the federal government to desegregate schools nationwide. Initial attempts to desegregate schools were quickly stymied. In the early 1960’s, Congress passed a pair of laws to counter integration obstacles in education: the Civil Rights Act of 1964 and the Elementary and Secondary Education Act of 1965. The two acts were passed as part of President Johnson’s “War on Poverty.” “The 1960s reform treated integration and monetary distribution as individual pieces of the puzzle to achieve quality education and economic parity” as part of a broader anti-subordination strategy. The ESEA “had as its sole objective, the funding of educational programs that would benefit poor children” but was strongly associated with outcomes for minority children. Douglass Cater, special assistant to President Lyndon Johnson, noted that the “segregation issue” had held up federal education reform laws prior to the ESEA, but that passage of the 1964 Civil Rights Act had eliminated the need to have a separate “civil rights proviso” in the proposed ESEA legislation. Title I funds were only available to schools that were not de jure segregated due to the Civil Rights Act provision barring federal funding for segregated spaces.

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179 Brown v. Bd. of Educ. of Topeka, Shawnee Cnty., Kan., 347 U.S. 483 (1954) (for example, the Court discusses how use of race to divide who attends what school is irrational).
180 Id. at 493.
181 Campos, supra note __, at 585-86.
185 Havard, supra note 179, at 125 n.14.
The funds provided by ESEA under Title I were allegedly used to finance school busing programs, while also providing incentives for Southern states in particular to desegregate. While President Johnson’s legislation sought to improve conditions for the poor, as Patrick McGuinn and Frederick Hess note, “it was also recognized at the time, [poor children] were concentrated in the inner cities and were often from racial minority groups.” The ESEA was the carrot and the Civil Rights Act was the stick in the administration’s anti-discrimination strategy.

The ESEA marked the federal government’s largest foray into education at the time and earmarked funds under Title I for supplemental education spending on programs to benefit poor school children. Under pressure from Senator Robert Kennedy, the draft ESEA legislation was amended to include a reporting requirement for programs receiving Title I funding. Senator Kennedy’s primary concern was that parents of low-income and minority families, who traditionally lacked political influence, should have information on the success (or failure) of a Title I funded program. Moreover, once armed with that information, parents would be able to hold their elected officials accountable for the success of the program. This initial reporting requirement has evolved into annual reports from local educational agencies to a state educational agency, which then is responsible for forwarding the data to the federal government in return for funding.

Federal data collection is a critical aspect of the ESEA, although the depth and breadth of the data has changed over time. In an exhaustive study of reporting under the ESEA for the first ten years, Milbrey McLaughlin concludes that although the data generated was initially anecdotal and at times even undermining to achieving actual accountability of Title I funds, the initial reporting requirement has led to an expectation of data collection and

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188 Cater Interview, supra note 182, at 12-13.
191 Id.
193 Id. at 3.
194 Id. at 1-4.
195 Id.
transparency as time passes. One study of the first five years of ESEA implementation found that it was impossible to create a national picture of education, since each state had different reporting formats and student outcome measurements. A model reporting system was subsequently put in place to standardize the information received and the ability of the federal government to get an accurate sense of Title I programming. This is extraordinary for an area once thought to be solely within the state’s province.

B. The No Child Left Behind Act

Since the passage of the ESEA, Congress has periodically reauthorized the law, maintaining its core purpose, but also modifying the program. The latest iteration of Title I is the No Child Left Behind Act of 2001. Goodwin Liu has described the NCLB as a “civil rights statute” for its focus on disparate educational outcomes and the associated lack of a requirement for discriminatory intent to create a legal obligation to remedy the disparate effect. The core of the NCLB is the requirement that a school show “adequate yearly progress” in education, as part of their annual comprehensive reform plan, or risk losing Title I funding. To achieve this aim, the law specifies a number of guidelines and transparency measures. For example, the law requires that states report on “steps to ensure that poor and minority children are not taught at higher rates than other children by inexperienced, unqualified, or out-of-field” teachers.

One of the more prominent features of the NCLB Act is its requirement to generate and disseminate data at the school and district level regarding students’ performance on standardized tests and graduation rates. In addition, schools must also break down the performance data for the “following categories: ethnic and racial groups, low-income students, students with disabilities, and students with limited English proficiency.” States receiving

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196 Id. at 117-120.
198 Id. at 18.
203 Darden, supra note ___, at 707.
Title I funding are required to produce “report cards” that include each school’s testing scores and the report cards are made public.204 In Fall 2011, the Obama administration has acknowledged some of the difficulties in the NCLB Act and instead has allowed for states to submit “ESEA Flexibility” waivers.205 Schools must still follow certain mandates, including continued data collection and dissemination, even if they receive a waiver, to continue receiving funding. The waivers remove two of the most controversial accountability provisions for states, namely that states achieve 100% student proficiency by 2014 and that states implement specific policies for those schools that fail to make adequate yearly progress for two years in a row.206 In return, schools must develop standards and evaluation for teachers and administrators that factor in student achievement and focus on college and career standards and assessment.207

Without a doubt, the No Child Left Behind Act is controversial.208 Teachers and scholars alike have criticized the Act for an excessive focus on testing outcomes,209 which in many cases has led to “teach[ing] to the test” in classrooms across the nation.210 Others have questioned whether the NCLB actually achieves its aims of minimizing achievement gaps in education.211 And numerous authors have documented how the NCLB’s compromise of enhanced federal data collection and dissemination with state-controlled standards has immunized states from real accountability for improving education.212


205 Bell & Meinelt, supra note ___ at 12.


207 Id.

208 See López, supra note ___, at 103-106 (summarizing arguments for and against the NCLB Act).

209 See Havard, supra note ___, at 137.

210 López, supra note ___, at 106.

211 See Havard, supra note ___, at 123; Bell & Meinelt, supra note ___, at 123.

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

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

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

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213 To the extent that the data collection policies have been criticized, the criticism centers on what type of data is collected, such that by focusing on test scores, we increase and emphasize standardized testing in the classroom. See Damon Todd Hewitt, Reauthorize, Revise, and Remember: Refocusing the No Child Left Behind Act to Fulfill Brown’s Promise, 30 YALE L. & POL’Y REV. 169, 174 (2011).
214 Heise, supra note ___, at 121.
215 Liu, supra note ___, at 101-103 (although Liu supports the data generation aspect of NCLB, he does question whether the data transparency – in an age of highly segregated schools in areas of concentrated poverty – accurately reflects the structural forces that lead to unequal schooling opportunities); Heise, supra note ___, at 139 (noting that the NCLB at least has made the costs and benefits of educational policy “more transparent”).
217 20 U.S.C. § 1232g
218 To the extent that many public schools still provide a sub-standard education, I would argue that data dissemination is not the cause, but rather our antiquated funding system and structural segregation are more to blame.
has not been a product of transparency, but rather the accountability portion of the latest iteration of federal education law.

V. ENHANCING PENAL INSTITUTION TRANSPARENCY

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

Although our public schools are far from perfect, the federal approach to increasing transparency of school operations has at a minimum enhanced our understanding of how schools succeed and fail in educating our children. Given the lack of consistent data on the operation of jails and prisons, particularly with regard to medical issues, employment, and education, a federal approach to increasing transparency in our penal facilities is desperately needed.

Why a federal approach? Our penal facilities are a national issue. Increased mobility from state to state can lead to negative externalities among states. Once a person is released, he can relocate to another state so long as he complies with the terms of his post-incarceration supervision. Both the federal government and states have started housing prisoners for incarceration out of state and many of these prisoners will return home after release.219 But think of the people we are releasing, who have not only served a sentence for their crime, but in fact may be serving a life sentence even after released. Former inmates may emerge worse off in terms of their medical and mental health, employment and social skills. Studies have documented how influxes of the recently incarcerated can impact communities, leading possibly to additional economic and social costs. And these costs are not necessarily borne by the

219 Judith Resnik, Harder Time, SLATE MAGAZINE, July 25, 2013, http://www.slate.com/articles/news_and_politics/jurisprudence/2013/07/women_in_federal_prison_are_being_shipped_from_danbury_to_aliceville.html (describing plans to move inmates currently located in a female-only federal prison in Danbury, Connecticut to a prison in Alabama)(last accessed Aug. 30, 2013). Due in part to Prof. Resnik and the Liman Fellows at Yale University, the proposed transfer has been indefinitely halted. See Daniela Altimari, Transfer of Female Inmates Halted, HARTFORD COURANT, B3 (Aug. 15,2013)(noting that the transfer has been temporarily halted).
region where the inmate was housed. Beyond these economic and social externalities, penal facilities are part of our broader criminal justice system. With hundreds of thousands of inmates released each year, their receiving communities learn second-hand on the true nature of justice in the U.S.

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

Under a federal approach to penal transparency, provision of annual data would be voluntary under an incentive-based approach similar to Title I. Federal spending on education is only 10% of overall education spending, and yet, has been enormously successful in gaining the participation of all 50 states. Given that prisoners are generally less politically popular than children, the total funds dedicated to incentivizing participation is likely to be smaller. Nevertheless, even small amounts might be compelling, particularly to smaller jails with tighter budgets. The budgets of correctional facilities have been slashed in recent years. A federal law – and set-aside of funds – could incentivize prisons and jails to collect and disseminate annual data specifically identified by statute. A federal agency, such as the Department of Justice (DOJ), which is primarily responsible for corrections issues, could collect the data, much like the Bureau of Justice in DOJ currently does with more limited and ad hoc information.

Creating a transparency incentive program can also clarify federal responsibilities regarding state and local inmates. One of the byproducts of the passage of the ESEA was the creation of a cabinet level position for Education in 1980 to manage hundreds of programs. The position makes one department responsible for receiving and disseminating information. A similar structure is already present, since the Attorney General holds a cabinet level position representing the Department of Justice. The responsibility for addressing prisoners’ rights, however, is muddled. The Bureau of Justice Statistics is currently the primary federal repository for data collection, but does not appear to be directly linked to the Special Litigation section of the Civil Rights Division of DOJ. The Special Litigation section handles matters related to incarceration, law enforcement, the disabled, reproductive access, and religious worship. Compare this grab-bag of issues to other clearly

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220 Gibbons and Katzenbach, supra note ___ at 524.
221 McGuinn & Hess, supra note ____ at 11.
defined areas within the Civil Rights Division, such as education, voting, housing, etc. And because incarceration issues are housed within a grab bag of matters, there is enormous discretion on how much attention is paid to incarceration issues. As with the passage of the ESEA, creating a program for states to share critical information about their penal institutions implicates creating a focal point for the receipt of that information as well.

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

Critics would argue that enhanced transparency in prisons can be actually harmful. Michael Campbell and Heather Schoenfeld argue that the current mass incarceration boom was due in part to the politicization of crime within a federal-state incentive loop.222 Voters across the nation passed variations of “three-strikes” laws and state legislatures supported mandatory sentences.223 That politicization fostered special interest groups and enhanced the group’s influence on crime legislation.224 In a national poll of voters for their revenue and reduction preferences, 48% supported reducing funding for state prisons over raising property or business taxes.225 Defendants and prisoners are not necessarily the most sympathetic population and perhaps greater transparency in prison operations would actually lead to worse prison conditions.

This stands in stark contrast to the expectations of the general public of our nation’s prisons and jails. In 2012, eighty-seven percent of respondents agreed that “we must increase access to treatment and job training programs so [people in prison] can become productive citizens once they are back in the

223 See id.
224 Id. at 1398 (noting the growing influence of police associations, prosecutors’ associations, corrections officers’ unions, and victims’ groups).
225 Public Opinion on Sentencing and Corrections Policy in America, PEW CENTER ON THE STATES 3 (March 2012), available at http://www.pewstates.org/uploadedFiles/PCS_Assets/2012/PEW_NationalSurveyResearchPaper_FINAL.pdf (noting that raising property taxes only garnered 23% support and raising business taxes 43%).
community.” Of that 87%, 66% strongly agreed with the statement. Over three-quarters of the respondents supported that statement, regardless of whether they identified as Democrat, Independent, or Republican. A 2006 poll by the National Council on Crime and Delinquency provides even stronger evidence of societal support for greater, not less, rehabilitation services. Voters, by an 8 to 1 margin, supported rehabilitative services for prisoners as compared to a punishment-only system. Eighty-one percent of respondents supported providing rehabilitative services during incarceration and seventy-six percent were in favor of providing rehabilitative services after incarceration. In fact sixty-six percent of respondents attribute a high recidivism rate to the failure to improve life skills during incarceration. Eighty-two percent of respondents link access to job training to successful reintegration post-incarceration. A poll conducted for the Open Society Institute in 2001 indicates that sixty-six percent of respondents support requiring education and job training for prisoners. Clearly the public expects prison conditions to foster rehabilitation and I would argue that given these expectations, greater transparency showing these expectations unmet would not lead to greater or additional harm.

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

226 Id. at 7.
228 Id. at 3.
229 Id. at 3.
230 Id. at 6.
231 Id. at 5 (but note that 47% percent support planning an inmate’s re-entry only 6 months to a year prior to release; 44% support initiating re-entry planning at sentencing).
correctional staff all bear on the type of environment a prisoner experiences and would not threaten the orderly operation of the prison.

Collecting information and thereby enhancing transparency of penal facilities is a delicate endeavor. Simply the act of collecting can imply policy choices and frame political arguments.\(^{233}\) Initially, the key areas for enhanced transparency should include physical safety, medical, institutional employment/education, internal discipline, and recidivism. Each of these categories could include hundreds of data points ranging from classifying the types of grievances filed by type and noting resolution percentages for those grievances to the number of video-recorded forced cell extractions to the types of internal punishment for offenses and/or number of hearings held to contest segregation to participation numbers of inmates in available work and educational programming. Each of these data points should be accompanied by offender characteristic information including an offender’s security classification, race, gender, age, total time incarcerated and remaining term of sentence. Through adding these demographics, we can paint a more vibrant picture of the replication (or more optimistically the elimination) of patterns of privilege and subordination.

**CONCLUSION**

“[G]overnment by secrecy benefits no one. It injures the people it seeks to serve, it injures its own integrity and operation. It breeds mistrust, dampens the fervor of its citizens, and mocks their loyalty.”\(^{234}\) Secrecy can also be costly financially; the cost of classifying documents and then protecting those documents classified as “secret” was 7.2 billion dollars in the 2004 fiscal year alone.\(^{235}\)

Our current lack of information about the operation of penal facilities is costly as well. Economically, our current focus mass incarceration is disastrously expensive. Given the extremely high recidivism rates, we create a self-fulfilling prophecy of ongoing high levels of incarceration, due in part to subordinating prison conditions in these facilities. Improving prison
conditions is integral to reducing mass incarceration through lowering recidivism rates.236

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

Clearly a balance must be struck in determining how much transparency is required. State institutions, such as schools and prisons, must be allowed to function and to continue to serve the important societal goals. And transparency that would in effect hold the prison hostage, “rendering the state a prisoner of the public’s gaze,”237 would undermine the purpose of the institution itself. Transparency is not an all or nothing enterprise; there can be varying degrees of transparency in terms of the information disclosed and to whom the information is disclosed.238 The experiences of schools in terms of public transparency show that a balance can be achieved. Schools, by allowing for significant discretion while also creating routines and structural mechanisms to hardwire transparency into the operation of the educational institution, demonstrate that such a balance is possible.

We, as a society, cannot start a conversation about prison conditions without knowing how prisons currently operate. At the time of writing, hundreds of inmates across California are reduced to engaging in a month-long hunger strike to protest administrative segregation placement and conditions. For many inmates, this is their only option to make public the subordinating conditions of their daily lives. Yet, “[o]ur treatment of prisoners, even the most dangerous and irredeemable, is a fundamental expression of American values.”239 When we create a life-long subordinate class of people, we pervert our national commitment to equality.

236 Forman Jr., supra note ___, at 66-67; see also section IIB, supra, discussing the relationship between recidivism and prison conditions.
238 Schauer, supra note ___, at 1345-46.