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BAR NONE? PRISONERS’ RIGHTS IN THE MODERN AGE


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Bar None? Prisoners’ Rights in the Modern Age

Daniel S. Medwed†

The American public is perhaps more sensitized to the flaws in our criminal justice system than at any time in our history. News accounts of wrongful convictions, racial profiling, violent police-citizen encounters, and botched executions have called into question the policies of a nation that imprisons more people than any other developed nation—upwards of 1.5 million people housed in state or federal prisons according to the Bureau of Justice Statistics. To some extent, this period of questioning and reflection has produced gains; we have witnessed a modest shift away from mandatory minimum sentenced and toward the decriminalization of some narcotics. Parole boards have shown a rising awareness that inmates’ claims of innocence should not be held against them in their release decisions. Even more, some states—most notably, Michigan—have formulated innovative re-entry programs to assist prisoners in making the perilous transition from their cell blocks to residential and commercial blocks in neighborhoods throughout the country. These events have prompted some observers to envision an end to mass incarceration in the United States.

Yet this vision is a mirage. Despite all of the talk about criminal justice reform and “decarceration,” we still live in a country

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‖ See, e.g., Dennis Schrantz, Coordinating Community Development: The Heart of Michigan’s Prisoner Reentry Initiative, CORR. TODAY MAG., Apr. 2007, at 42-49.
where large swaths of people, especially young men of color, languish behind bars or under the restrictions of probation, parole, or some other form of community supervision. This is likely to remain the case absent dramatic changes to policing practices, wealth inequalities, and the lobbying tactics of corrections officials and affiliated industries. The danger with the decarceration rhetoric is that it deflects attention from those who continue to suffer under horrid conditions of confinement. Indeed, this Symposium explores the contemporary prison experience against this complicated backdrop and asks a fundamental question: what are the gravest problems that inmates face during an era in which many people might naively think that the situation has improved?

The first article and the student note look at factors that contribute to the current, sorry state of our prison system: excessive sentencing and the “school-to-prison pipeline.” Michael Meltzner’s fantastic speech in the inaugural Hugo Adam Bedau lecture leads things off, noting that excessive sentencing is an epidemic. To Meltzner’s sage eyes, recent criminal justice reforms are minuscule—“the penal equivalent of a climate change policy that focuses on better curbside recycling.” Meltzner is particularly critical of life without the possibility of parole sentences and argues that inmates staggering under the weight of such sentences may be less fortunate than death row prisoners whose cases often receive zealous defense lawyering and increased vigilance from the bench. Next, Leah Porter’s well-designed Note hones in on a recent Massachusetts educational reform that on its surface seems to help close the school-to-prison pipeline for urban youth but that upon closer reflection fails to protect an important sub-group of that population, namely, juveniles formally found to be delinquent.

The next three articles focus on the hazards of daily life, especially the risks of sexual violence and the hurdles that victims must overcome to obtain even a modicum of justice. In PREA’s Peril, Giovanna Shay follows up on her previous groundbreaking work on the Prison Rape Elimination Act by pointing out problems in the law’s implementation and the threat of unintended consequences.

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6 See generally Glaze & Kaebele, supra note 2.
Among her many observations, Shay cites the statute’s meager enforcement mechanisms and reported occurrences indicating that officials have used the law to justify the harassment of inmates perceived to be LGBT.9 Gabriel Arkles’s thoughtful article echoes some of Shay’s PREA work and moves beyond that legislation to take a broader look at sexual violence in prison. Arkles puts forth an expansive and creative definition of sexual violence that includes “official carceral sexual violence, particularly searches, certain nonmedical interventions, and prohibitions on consensual sex.”10 Arkles concludes with an innovative concept for a statutory scheme replete with a compensation structure and an oversight committee elected by inmates.

The final piece in this troika consists of a recent Note by Chrisiant Bracken who trains her budding scholarly eye not on sexual violence per se but on draconian policies that curtail the reproductive rights of men. Bracken examines, in particular, the chemical castration of male sex offenders and restrictions on the availability of assisted reproductive technologies for men. Courts have afforded deference to these practices, causing Bracken to ask why limits on the fundamental right to procreate “withstand lower level of scrutiny when applied in a prison context.”11

Finally, an excellent paper authored by a team led by Leo Beletsky evaluates a dilemma that some offenders encounter upon their release: the possibility of a drug overdose caused by prescription opioids and heroin. People recently released from a correctional setting are “almost 130 times more likely to die of an overdose than the general population, particularly in the immediate two weeks after release.”12 Drawing upon cutting-edge overdose prevention policies from the international arena, Beletsky et al., recommend a number of concrete reforms for domestic re-entry programs, among them, tapping into federal funds potentially available through the Affordable Care Act.

What the papers in this Symposium make clear is that pris-

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12 Leo Beletsky, Lindsay LaSalle, Michelle Newman, Janine Paré, James Tam and Alyssa Tochka, Fatal Re-Entry: Legal and Programmatic Opportunities to Curb Opioid Overdose Among Individuals Newly Released from Incarceration, 7 NE. U. L. J. 149 (2015).
Oners in this country face an array of challenges even during an era of purported decarceration and criminal justice reform. Excessive sentences, poor treatment of delinquent youth in public schools, sexual violence, compromised reproductive rights, and slipshod re-entry programs persist as concerns for prisoners and their advocates in the United States. These issues lay at the core of the social justice mission of Northeastern University School of Law. In the years ahead, I suspect that students and faculty will continue to champion the interests of a population that is among the most vulnerable and oppressed in the nation.