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Controlling Consensual Sex Among Prisoners

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Despite recent legal advances for LGBT citizens, including the Supreme Court's recognition of a constitutional right to engage in private, consensual, same-sex sex, prisons continue to regulate sex in much the same way they have been doing since the nineteenth century. Nationwide, prisons bar consensual sex among prisoners, and those who violate this policy face severe punishment, including administrative segregation. Interviews with prison officials from twenty-three states uncover beliefs linking consensual sex with violence that places the overall security of the prison at risk. While supporting LGBT rights and the decriminalization of same-sex sex in society, officials insist that prisons are not suited for similar change. This article explains why prison officials have been so committed to this policy and argues that the time has come to reconsider prison regulation of consensual sex.

INTRODUCTION

Recent years have seen the expansion of legal rights for LGBT citizens, including marriage rights (*Obergefell v. Hodges* 2015), the end of "Don't Ask Don't Tell" in the military, and the decriminalization of private, consensual, same-sex sex (*Lawrence v. Texas* 2003). Despite these transformative developments, every prison at every security level nationwide maintains administrative rules barring consensual sex among prisoners, sex that, due to the ordering of our prisons, is usually same-sex sex.[1]

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1. Two field-typical iterations of sexual misconduct rules are found in the Georgia Department of Corrections' rule and the Iowa Department of Corrections' rule: "Participating in homosexual or any sexual behavior or activity with any person, male or female [is in violation of rules] and such behavior also puts you at risk to contract AIDS" (Georgia Department of Corrections 2012, 25); and, "An offender commits sexual misconduct when the offender proposes a sexual contact or relationship with another person through gestures, such as, kissing, petting, etc., or by written or oral communications, or engages in a consensual sexual contact or relationship. Gestures of a sexual nature designed to cause, or capable of causing, embarrassment or offense to another person shall also be punishable as sexual misconduct" (Iowa Department of Corrections 2006).

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Prisoners found in violation of the sexual misconduct rule may be issued harsh penalties. These include long-term placement in administrative segregation (i.e., solitary confinement); security classification changes; removal from prison employment, required vocational and educational courses, and substance abuse programming; and the loss of contact visits, telephone communication, community recreation, and access to religious services (Kunzel 2008; Hanssens, Moodie-Mills, Ritchie, Spade, and Vaid 2014; Borchert in press).

The rules' origin and long history, from the birth of the prison in the nineteenth century, are rooted in religious-moral panics about sexual perversions, deviance, and the ways homosexuality disorganizes society (Sykes 1958; Kunzel 2008; Borchert in press). Today, sexual misconduct rules remain in action and are, by default, homosexual status rules with broad implications for LGBT rights and citizenship.[2]

Why have prison officials failed to reconsider the rule and its punishments in light of LGBT progress and the decriminalization of consensual same-sex sex? This article attempts to answer that question. It is the only study ever to marshal interview data with state correctional department directors in order to build broad knowledge about prison policy and practice on consensual prison sex, the sexual misconduct rule, and its harsh punishments. Through twenty-six semistructured interviews, with twenty-three state-level correctional department directors and commissioners, and a subset of three assistant state directors, conducted during a fifteen-month period, from January 2013 to March 2014, I asked leaders to discuss their understanding of the sexual misconduct rule in light of myriad sociolegal changes for LGBT citizens, including the decriminalization of consensual same-sex sex.

Findings show that correctional leaders frame prison sex as dangerous for the safety and security of the prison. Prison leaders are in nearly unanimous agreement that prison sex is dangerous, whether that sex is consensual or coercive. Yet, my interviewees reveal that they are unaware of empirical evidence that consensual prison sex produces little violence as opposed to coercive sex (Hensley and Tewksbury 2002, 236). This demonstrates what organizations scholars (Meyer and Rowan 1977; Hagan 1989; Crank 1994) have termed a *tight coupling* between an organizational mythology, or institutional ethos, and its representation in administrative rules and practice.

2. In 2016 there exists a broad lexicon, with equally broad legal, political, and cultural connotations, used to describe individuals with identities, attractions, emotions, and sexual behaviors that do not adhere to the normative, heterosexual, cis-gender expectations held by law, culture, and society. Individuals may identify as lesbian, gay, or bisexual. Individuals may identify as transgender. In addition, there are individuals who engage in sexual behaviors with people of the same sex (men who have sex with men *aka* msm) but who do not identify as gay or bisexual. The article, while not paying short shrift to these identities, asks the reader to recognize that all of these identities have very real ties to the LGBT movement, starting at Stonewall, and its push for the decriminalization of private, consensual, same-sex sex that led to the victory in *Lawrence*. My interviews suggest that prison officials are aware of the these wide-ranging identities, but are less sure about how they work on the ground in the application of the sexual misconduct rule. Therefore, the work reflects a situation wherein these identities, in a way similar to *Lawrence*, have not reached behind prison walls.

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Furthermore, my findings show that prison officials fail to link actual risks of violence to perceived risks of violence in day-to-day prison life. For instance, penalties for gambling do not call for administrative segregation despite gambling's frequent association with violence among prisoners (Nixon, Leigh, and Nowatzki 2006; McEvoy and Spirgen 2012; Beauregard and Brochu 2013). By failing to compare the high levels of risk to institutional safety and security posed by gambling to the low levels of risk posed by consensual sex, correctional leaders are perpetuating a status regime that disparately punishes LGBT identity and desire, as well as same-sex sex, and continues the legacy of homophobia in US prisons.

Leaders are also unaware of the religious-moral (and thus homophobic) origins of the rule in early prison orthodoxy and praxis (Sykes 1958; Kunzel 2008). They do not see the rule as homophobic but simply as a natural, unremarkable, logical, commonsense characteristic of quotidian prison life. The result is that the sexual misconduct rule is a robust, field-level habitus of the highest order. The rule is a norm, a political technique, and a disposition, with an identifiable history (Bourdieu 1989; Page 2013; Simon 2013). Prison leaders' strong, yet narrow, understanding of the sexual misconduct rule and punishments supports its brutal and hegemonic diffusion to every prison in the nation. The *longue-durée* of homophobia and the criminalization of same-sex sex in prison and society may be part of the answer to why our penal regime firmly believes in sexual misconduct rules and remains outside civil society on the issue of LGBT identity and same-sex sex.

An ironclad field-level habitus demonstrates why prison policy has not been moved by the legal revolution in LGBT rights that has taken place in recent decades. Here, findings expose potential limitations in the culture of organizations literature by showing that strong exogenous shocks may fail to induce change in total institutions such as prisons (Morrill 2008; Fligstein and McAdam 2011). The sexual misconduct rule in action confirms legal theoretical claims that prisons are powerful institutions, buffeted from exogenous shocks by their politically and judicially structured autonomy and a resilient, steely habitus (Berger 1978; Dunn-Giles 1993; Robertson 2000, 2006; Horwitz 2008; Shay 2010; Dolovich 2012).

The article proceeds with a brief review of the scant social science literature on the frequency or prevalence of consensual same-sex sex in prison facilities and the ways prison workers understand prison sex. I then provide various theoretical foundations that are useful for understanding the sexual misconduct rule and its punishments, present the data and analytic method, and then the findings. A discussion follows, integrating theoretical findings with current prison law. The article concludes with an admonition for prison leadership, advocates, and the judiciary to consider prison sex as within the scope of recent sociolegal progress.

LITERATURE REVIEW

A vibrant mythology of prison sex is part of our cultural landscape. Yet, scant research exists on the prevalence or frequency of consensual sexual behavior among prisoners. Research conducted in the New Jersey State Prison in the 1950s found that guards identified 35 percent of prisoners as having engaged in homosexual acts

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(Sykes 1958, 72). Consensual sex still occurs in today's prisons, yet contemporary research is troubled by a lack of conformity in measurement across the few empirical studies focusing on consensual prison sex. Findings reveal a wide range, from 14 percent to 65 percent, of prisoners who have engaged in consensual sex while incarcerated (Hensley and Tewksbury 2002).[3] The Bureau of Justice Statistics (2008, 2009) found that 7 percent of inmates sampled classified themselves as homosexual or bisexual. Thus, at a bare minimum, well over 100,000 prisoners are at risk of punishment associated with sexual misconduct rule violations. These estimates are almost certainly biased low.

Literature examining prison officials' attitudes about prison sex is even rarer. Historical scholarship has revealed an incessant religious-moral objection to same-sex sex throughout US prison history (Kunzel 2008). One study found that white female wardens provide higher estimates of consensual sexual activity among prisoners than their male counterparts, but also revealed that each group underestimates the prevalence of sexual activity among prisoners (Hensley and Tewksbury 2002). Recent work, following the promulgation of the Prison Rape Elimination Act of 2003 (PREA), has examined sexual violence between prisoners as well as the difficult environment transgender prisoners face while incarcerated, including the ways transgender identity confronts the organization and administration of the contemporary prison regime (Sumner et al. 2014; Sumner and Sexton in press). Empirical work has rarely examined sexual misconduct rules in light of LGBT progress. Yet, through a process of data triangulation between prisoner letters to an advocacy organization, official grievance documents, and electronic communications between Michigan prison officials, research has revealed a carceral environment characterized by harsh punishments for sexual misconduct rule violations, for both LGBT prisoners and those who do not identify as LGBT (Borchert in press). Additional work has revealed the difficulties LGBT men of color face in accessing housing units dedicated to protecting and providing services to LGBT prisoners inside the Los Angeles County Jail (Robinson 2011).

Turning toward broader questions of punishment logics, a coterie of California-based scholars have marshaled qualitative methods to bring new knowledge about punishment attitudes and the moral-ethical climate of the contemporary prison. Researchers have found that while California parole agents claim support for the rehabilitation and reformation of prisoners, these aims are not provided sufficient resources at the institutional level; a lack of dedicated funding thus forces individual parolees to fix themselves and to bear subsequently the brunt of failure through reincarceration (Lynch 2000). Links between correctional policy on the books and its day-to-day on-the-ground practice are explored in research on California parole agents, which found these agents follow a traditional law enforcement model based in autonomy and allegedly intuitive methods contrary to the official calculated risk models suggested by parole agent managers and the new penology (Lynch 1998).

3. For a review of empirical works estimating consensual sex among prisoners, coercive sex, and the levels of violence associated with each type, see Hensley and Tewksbury, which reveals that (1) "prison sexuality is a neglected area of research" (2002, 227); (b) "[s]exual activities among incarcerated persons, both male and female are common" (227); (c) coercive sex is more frequent among incarcerated men than incarcerated women; and (d) consensual sex rarely results in violence among prisoners.

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Calavita and Jenness (2015) have examined how prisoners and prison staff understand citizenship, legal rights, and legal consciousness. In interviews, CDCR employees praise the inmate grievance system for giving prisoners a voice within the prison. They simultaneously express "counterthemes of hostility toward prisoners who exercise their rights, the perception that rights have gone too far and the view that the operational realities of running a prison can trump prisoner rights" (Calavita and Jenness 2015, 183). While Calavita and Jenness do not focus on sexual misconduct rules specifically, additional work has noted marginalized LGBT prisoners using the grievance process in sexual misconduct rule violation cases in order to amplify their voices (Borchert in press).

THEORETICAL MOTIVATION

In this project, I attempt to locate the ways that prison officials understand the sexual misconduct rule by marshaling differentiated, yet complementary, theoretical perspectives. New institutionalist theory suggests that "products, services, techniques, policies and programs function as powerful myths, and many organizations adopt them ceremonially" (Meyer and Rowan 1977, 340). In the case of corrections, policies and programs dedicated to safety and security, as well as prisoner rehabilitation, are the overarching organizational myths that are shared universally across state departments of corrections. These perspectives suggest that rigid adherence to administrative rules frameworks represents tight couplings between organizational mythology and practice (Meyer and Rowan 1977). Thus we can ask, through an ideal-typical heuristic, how the sexual misconduct rule conforms to new institutionalist theoretical expectations. In this case, sexual misconduct rules represent "social processes, obligations, or actualities [that] come to take on a rule-like status in social thought and action" (Meyer and Rowan 1977, 341).

In contrast, criminal justice theory has traditionally understood organizational mythologies and behaviors as loosely coupled, revolving around rational calculations toward institutional efficiency (Hagan 1989). That being said, placing a prisoner in administrative segregation for a sexual misconduct rule violation is a costly, inefficient, and irrational economic choice for prison administrators (Johnson and Chappell 2014). Justice Thomas, in his *Lawrence* dissent, writes that "punishing someone for expressing his sexual preference through noncommercial consensual conduct with another adult does not appear to be a worthy way to expend valuable law enforcement resources" (*Lawrence v. Texas* 2003). In this light, why do prison officials fail to conform to criminal justice theoretical predictions in the case of prison sex?

Field theoretical perspectives complement organizations' perspectives, and may be the key to understanding the economic irrationality of penal institutions in this case by understanding sexual misconduct rules as a case of habitus constructed upon identifiable historical and cultural contingencies (Page 2013). Thus, in sexual misconduct rules we expect to recognize a set of "taken-for-granted assumptions, feelings and opinions about the purpose of imprisonment and related ideological issues" as habitus (Lerman and Page 2012, 510). A contribution is made here as penal field

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research has focused traditionally on prison workers within states, not on state-level prison leadership, who populate a national-level penal field by their shared job role. In addition, penal field theoretical perspectives have not been applied to question specific understandings of a particular prison rule or regulation such as the sexual misconduct rule.

To clarify, we have a unified, national-level penal field, which expands from previous theorizing on state-level penal fields (Page 2013). The field is broadened from the state level to a larger set of state correctional departments nationwide, consisting of shared understandings and dispositions among state correctional department leadership. An expansion of the penal field in this case can help us make sense of the sexual misconduct rule as a pervasive, irrational punishment logic and political technique. We can then understand the rule's strong across-organizational mythology, wherein a majority of correctional leaders nationwide reveal an extremely tight coupling between organizational mythology and practice in the case of consensual prison sex. Here sexual misconduct rules are so deeply embedded in prisons as organizations, despite their organizational irrationality, that this disposition is able to withstand powerful exogenous social forces, namely, the swift momentum for LGBT rights and the expanded legality of consensual same-sex sex in the United States, particularly since *Lawrence*.

Finally, looking to move forward from a national-level penal field overwhelmingly disposed to punish consensual same-sex sex, I marshal a strategic action field (SAF) theoretical framework, and its symbolic-interactionist heuristic, to identify slight disagreement among leaders in the ways they discuss, frame, and attempt to redefine prison sex (Fligstein and McAdam 2011). In other words, I dig for variance in the ways prison officials conceptualize prison sex in order to reveal emergent understandings that challenge dominant field-level dispositions and organizational mythologies. A key component of SAF theory is that power rests in the hands of incumbents (current prison administrators) at the field level with their connections to economic, political, judicial, and cultural resources (Fligstein and McAdam 2011). However, the past decades of LGBT rights expansion may provide forward-thinking administrators sufficient ideological strength to redefine the case of prison sex, thus responding in kind to social change as scholars of organizational culture suggest (Morrill 2008; Fligstein and McAdam 2011). If successful, their challenge would create a new field-level habitus and organizational mythology that is markedly less punitive and less homophobic, as well as increasingly rational (Fligstein and McAdam 2011).

DATA AND ANALYTIC METHOD

Over a period of eighteen months in 2013–2014, I recruited state-level correctional executives for semistructured, in-depth interviews. Prison officials are highly insular, and reaching these public officials through standard channels such as state or departmental websites is nearly impossible. In addition to security barriers, prison officials articulate a more formidable barrier to participation in sociological research through a generalized apprehension of interviews with sociologists, whom they view

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as inherently biased against their point of view. These barriers may be a factor in correctional officials' lack of visibility across the board, from journalistic projects to empirical social science research.

Crossing these barriers in order to conduct the research was facilitated by my personal familiarity, as a former prisoner, with the criminal justice system. Officials saw me as a correctional insider with perhaps less bias than other academics. I made it a point to ensure potential respondents were aware that I was not interested in broad generalizing regarding the correctional enterprise. In addition, my credentials with an R1 research university, including IRB approval of my research, helped with subject recruitment.

The real break for the project came in early 2013 when I was asked to attend the biannual meetings of the Association of State Correctional Administrators (ASCA) by then Chair of their Research and Best Practices Committee, Bryan Fischer, former Commissioner of the New York Department of Corrections. ASCA limits its membership to correctional officials, at the warden level or higher, and includes executives from federal, state, community, and private corrections corporations. A majority of state correctional department executives attend ASCA meetings and find them quite helpful in negotiating the conflict-filled terrain that is corrections. At their winter 2013 meetings, I was able to introduce myself to correctional leaders, discuss the proposed research, and answer questions about the project. ASCA meetings also provided me a central location where multiple subjects could be interviewed.

Following the meetings, my contact information was provided by former Michigan Department of Corrections Commissioner Patricia Caruso to correctional executives. Shortly thereafter, ASCA made a determination to support the research by sending an e-mail to its members, asking them to extend all courtesies to me in my research efforts. I contacted fifty state departments of corrections as well as the Federal Bureau of Prisons. Twenty-seven departments responded to my interview requests. Two departments opted out after initial contact. One department opted out after an internal IRB process. The Director of the Federal Bureau of Prisons, Charles Samuels, refused to be interviewed, explaining: "Our policies are our policies and they speak for themselves."

The data consist of twenty-six interviews conducted in 2013 and 2014 with head executives of twenty-three state departments of corrections nationwide, as well as interviews with three assistant directors/commissioners. Multiple states are represented from each region of the United States—Northeast (5), South (5), Midwest (5), and West (8). Each interview lasted between one and two hours, was conducted face-to-face or via telephone, and was recorded, transcribed, and de-identified for security and anonymity prior to analysis. Analysis of transcripts was subsequently conducted by hand and by using Atlas.TI qualitative data analysis software.

A note on the sample: correctional officials are predominately white men, thus eliminating any meaningful opportunity to examine differences based on gender or race. However, every effort was made to ensure that what little demographic variance exists among this population was represented in the data. I am confident that my ability to establish themes in these data (i.e., saturation) (LaMont and White

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2005) in itself indicates the validity of these data. Because of the limited frequency of both female executives and executives of color, providing full descriptive statistics of my respondents runs the risk of violating confidentiality and anonymity, perhaps placing them at risk for political retaliation. However, my sample does include individuals from these demographic categories. In addition, specifying state-level prison characteristics such as number of prisoners or prison facilities and their security levels poses the same risks to my subjects. Every effort has been made to deidentify these data. Yet, the unique and insular world of corrections may permit easy identification of some respondents. Subjects were advised of this possibility, particularly when detailing state-level events, and each provided both verbal and written consent for the interviews.

Theory abduction, a qualitative methodological tool used to expand existing theory or to induce new theory, structured the data analysis. Abduction is designed to situate the research question and possible findings within an array of known theory for constant comparison in order to develop new ideas to explain actions within the field. Here, in order to adjudicate prison administrators' understanding of prison sex, I filtered interview data through organizations, field theoretical, and criminal justice perspectives and continuously revisited the data through a sequence of possible theoretical expectations. In so doing, I sought to discover "anomalies, which are inevitably both empirical and theoretical, [which] then require the development of tentative new theories built on inductive conceptualization of this data through intensive coding and other methodological steps" (Timmermans and Tavory 2012, 179).

FINDINGS

The Unknown Origins of the Rule Among Correctional Leaders

As we moved from the gallows to prison-based punishment, the modern penitentiary emerged in the nineteenth century with the goal of transforming prisoners into productive, godly members of society through hard work and contemplation, enforced with rules prohibiting communication of any sort among prisoners (Foucault 1979; Kunzel 2008). Although sexual communication and activity did occur, prisoners and staff alike were "limited by the linguistic and cultural repertoire of their time to describe those acts" (Kunzel 2008, 38). Convicts and prison officials labeled same-sex sex among prisoners during this era primarily as a disgusting violation of Christian mores. *Criminal Intimacy* references a John Reynolds, describing the early Kansas State Penitentiary as chock full of "horrible and revolting practices of the mines" where "men[,] degraded to a plane lower than the brutes, are guilty of the unmentionable crimes referred to by the Apostle Paul in his letter to the Romans, chapter 1, verse 27" (Kunzel 2008, 29). This religious disgust for same-sex sex and nonconforming gender identity continued into the twentieth century, leading in the late 1930s to the promulgation of official rules barring sex among prisoners, as well as special segregation units such as "fairy wings" and "fag annexes" for homosexual prisoners (Kunzel 2008, 81).

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Thus, today's sexual misconduct rules have a long history, starting in nineteenth-century moral-religious prescriptions against sexual perversion, which evolved into a modern twentieth-century understanding of same-sex sex as a pathological, deviant, and disorganizing force—categorizations that were reflected in the inclusion of homosexuality in the *Diagnostic and Statistical Manual of Psychiatric Disorders* for the better part of the twentieth century.

Sexual misconduct rules have not changed much since those early years. However, the early panic surrounding HIV/AIDS in the late twentieth century did lead a number of states to rewrite their rules to focus on controlling same-sex sex in the name of public health, as HIV criminalization research has suggested (Hoppe 2013). In sum, sexual misconduct rules have become habitus, with attendant norms and political techniques dedicated to their enforcement, which are rooted in a profound organizational mythology, however irrational the rule in action may be (Meyer and Rowan 1977; Hagan 1989; Page 2013; Simon 2013).

Are prison officials aware of the history of sexual misconduct rules? To answer this question, I presented leaders with the following prompt:

> All institutions have rules barring sexual misconduct between prisoners—and of course between prisoners and staff—but specifically I'm talking about consensual behaviors between two prisoners. Could you tell me about the way that rule works and what you know about its history?

Respondents were unaware of its specific history and how it gained such a position of strength and durability in the organizational mythology of US prisons. Perhaps more importantly, they expressed concerns with nonconsensual sex among prisoners, noting that types of sex are at times tough to differentiate in a prison setting. A respondent from a southern state said:

> Well, the history of it, just like pretty much the history of any rule well, OK, there is a security issue, there is a safety issue, with the staff and the inmates, and I think, well, ya know you watch any of the old movies that is what drove it, the violence, not so much the consensual sex but what was non-consensual. And ya know, it's hard to tell the difference sometimes. I think years before my time is where that came up.

A respondent from a western state said he did know about the history of the rule.

> We would need to go to our chief of prisons or our deputy director, they are much more intimately involved in the history of unwanted or consensual activity between inmates. It's something we work very closely on, especially since the passage of PREA, particularly aspects of that and the day-to-day implementation and the carrying out of the disciplinary nature of those cases.

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Similarly, a director from a northeastern state confessed to no knowledge of the rule's history.

> I've been here for several decades and it's always been in place since I've been here. I can't say exactly how it came to be. I know that from my point of view, one of the reasons that we have it is because it is so difficult to tease out what is consensual and what is coercive in that kind of environment and so it is better for us to draw a bright line.

Thus, respondent's broad-based lack of knowledge about the rule's origins, or even its mythology, contribute to understanding the rule as a field-level disposition and part of the habitus of the penal field.

The Organizational Mythology of Sexual Misconduct Rules

Respondents are remarkably committed to the sexual misconduct rule, as 81 percent believe the rule is necessary to ensure the safe and secure operation of prison facilities. Their conceptualization of the rule illustrates how "institutional rules function as myths which organizations incorporate, gaining legitimacy, resources, stability, and enhanced survival prospects" (Meyer and Rowan 1977, 340). In fact, the nineteenth- and twentieth-century correctional logics that viewed gender nonconformity and same-sex sex as perverted, deviant, disorganizing forces to the prison still live in the contemporary mythologies and dispositions of mass incarceration in 2016.

A commissioner leading a prison system in an eastern state suggests an enduring prison culture is deeply tied to the long-lasting rule. The commissioner justified the rule by arguing that prisons are unique places with special needs.

> You can hardly compare prison settings and the dynamic of what happens in the prison with what happens in society at large. In prisons, cultures are such that there is a lot of control. Inmates want to control other inmates. Inmates want to coerce other inmates for certain things and so we have to be able to protect offenders. So we do not accept or acknowledge consensual sexual relationships between offenders. You can hardly compare the prison setting with the population at large.

Prisons may certainly be unique, but the origins of the rule and its continued maintenance remain rooted in a pathology of same-sex sex as unnatural and disruptive, at least in the prison setting, couched in recurring themes or mythologies, which insinuate that prison staff cannot differentiate between coercive and consensual sex.

A director from a northeastern state concurred, saying, "question[s] of free-will and choice become very complicated when you are living in a small space where you might be assigned a cellmate and you can't just get up and walk away from that cellmate." Certainly. But that response is about coercive, not consensual, sex.

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Again, leaders use this distraction to support the mythology of sexual misconduct rules. Officials do not explicitly reveal homosexual animus as in previous decades. However, they do reveal opposition to what homosexuals *do*, as well as same-sex sexual activities of non-LGBT identifying prisoners.

One director from a northeastern state elaborated: "We aren't going to give a pass to somebody who is engaging in sexual activity with somebody else." A commissioner from a southern state said: "Professionally it's not difficult to reconcile because I think it goes to the good order of the institution."

Some leaders believe the rule in its current form is no longer needed. These are the challengers to incumbent beliefs that SAF theory suggests (Fligstein and McAdam 2011). Nineteen percent of my respondents suggest a looser coupling between the rule on the books and the rule in action. They recognize, and have witnessed, that consensual, same-sex sex does happen in prisons, and suggest that societal developments in LGBT rights are playing a part in their understanding. In so doing, leaders suggest that comparisons between prison and society are possible and that parsing consensual from coercive prison sex is possible, despite PREA's emergent mythology that differentiation is impossible.

A director from a western state discusses this possibility, saying that there is a difference between "drama and trauma" and that "in both our male and female facilities we have to be very mindful of that," suggesting that a spat or a quarrel between individuals who are having sex is not to be equated with sexual violence, rape, and the significant trauma sexual assaults generate.

A southern director confronted the unfounded notion that the rule is needed to prevent the transmission of STIs (a disorganizing force), saying: "We test people for sexually transmitted [diseases] coming and going. Coming in the system and going out of the system we don't see any change in the number of HIV. Data would indicate that you don't have any preponderance of increased transmission of sexually transmitted disease."

Illogical on the Books and in Action

How do prison officials view the rule in relation to another prison rule that is similarly motivated? As I have noted, the guiding organizational mythologies in prisons claim the rule is necessary for the safety and security of the prison—that the sexual misconduct rule prevents prison violence, fights, drama, or messiness that disorganize prison life. I therefore wanted prison officials to confront the irrationality of the rule (Hagan 1989) and to consider the sexual misconduct rule alongside a rule designed to advance the same safety goals: the rule against gambling. In so doing, officials directly confront the mythology and habitus of the rule as well.

A director from a western state explained that gambling among prisoners was not permitted

> [m]ostly because it leads to fights and to violence . . . . You can have your own personal standards as to whether gambling is right or wrong.

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> However, what I've seen over my career is that gambling leads to violence inside of our organization and also leads to bullying and what we used to term as "tier bossing." There is nothing positive that can come out of that.

Researchers have confirmed the director's concerns. If they do not "end up in the infirmary or dead," prisoners with gambling debts sometimes commit another infraction in order to be sent to segregation with the goal of saving their own lives or preventing vicious beatings (McEvoy and Spirgen 2012, 74). Scholars estimate that at least 50 percent of prisoners are involved in gambling (Hensley and Tewksbury 2002; Nixon, Leigh, and Nowatzki 2006; McEvoy and Spirgen 2012; Beauregard and Brochu 2013).

While the two rules are similarly motivated, they elicit vastly different levels of punishment, with gambling rarely landing a prisoner in extended solitary confinement (McEvoy and Spirgen 2012; Borchert in press). When a prisoner is ticketed and punished for gambling, the "most common outcome ... is loss of commissary or recreational privileges" (McEvoy and Spirgen 2012, 73). Furthermore, despite the risks to institutional safety and security gambling poses, prison officials chronically underenforce antigambling regulations. McEvoy and Spirgen (2012, 73) found that "fifty percent of staff often ignore complaints of gambling."

In contrast, consensual same-sex sex in our prisons is not as prevalent as gambling, nor does consensual sex deliver a commensurable level of risk to the safety and security of the institution, and the life and limb of prisoners, as inmate gambling does. So, I asked my respondents to compare the punishments for each type of rule violation. The response from a director of a southern state reveals the central tendency among my respondents.

> **Author**: So, do you think the rules against gambling have the same motivation?
> **Respondent**: That's a great question. Gambling is a learned human behavior. Sex is an innate behavior in my opinion. So, I don't think it has the same motivation.
> **Respondent**: How did you come up with that question?
> **Author**: The reason is that when I've asked these two questions, the response to the sexual misconduct question is that "it's messy, it creates a lot of problems—violence, drama" and my understanding is that gambling does the same thing. There are a lot of fights in prison over gambling, over debts from gambling whether its football or pinochle or whatever. But the punishments are very different. So, if somebody engages in something sexual they can get a significant amount of time in Ad Seg [administrative segregation], but with gambling the time in Ad Seg is generally pretty low. So, I'm trying to negotiate an understanding of the discrepancy in punishment if the rules have similar motivations.
> **Respondent**: That is a question I will ponder for weeks now.

The differences generated from this comparison between prisoner behaviors that elicit wildly disparate levels of prison violence and disorder continue to make

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it difficult to separate the contemporary sexual misconduct rule from its original intent; namely, to wipe out the unmentionable sin or scourge of same-sex sexual perversion and deviance as its primary motivation. The sexual misconduct rule's strong organizational mythology, durable habitus, and its irrationality are rooted in historical moral-ethical codes, even if today's administrators fail to reveal that connection in their understanding of the contemporary rule.

This comparison between sexual misconduct rules and gambling rules reveals that certain correctional practices are so tightly wound up in the organizational mythology of the prison, as prison legend, that they escape anything approaching rational considerations or commonsense comparisons to other rules on the books and in action. Here, similarly motivated rules (correctional policies and practices) are loosely coupled with each other, presenting an illogical hodge-podge of punishments that seemingly make little sense.

Social Change and the Persistence of the Rule

So far, I have revealed the deep, illogical mythology of the sexual misconduct rule. I wanted to find out next if changing social and legal tides on LGBT identity and same-sex sex motivated officials to challenge or to reconsider the rule and its punishments (Morrill 2008; Fligstein and McAdam 2011). Has sociolegal progress in this area produced challengers to the sexual misconduct rule as field habitus? I asked:

> So, society has generally moved away from policing sexual behavior between consenting adults as part of wider societal acceptance of LGBT citizens. How do you understand the current rule in that context?

Directors have difficulty reconciling personal preferences with prison policy. A director of a midwestern state system noted that LGBT prisoners may have to leave their freedoms at the prison gate. "We're always receiving new offenders who are openly gay or openly lesbian. And they walk into the prison for the first time and go 'Oh, I've got to change my M.O. here, I'm going to be singled out.'"

A commissioner from a second southern state agreed that times have changed in broader society but noted that prison brings a different set of considerations.

> I agree, that times have changed. Not only is it no longer illegal but it is so much more accepted now then it was. But it's just like anything else. Cigarettes you can smoke outside. Alcohol outside. It's not so much that we're saying that it's such a horrible thing that you take a drink or have a same-sex relationship, we're saying it is not right for people to be victims, for staff and with each other and I think that's probably the biggest issue.

A director from a Western state integrates these perspectives in the following response:

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> That's a great question. I think part of it is that although those types of laws are not enforced on the outside it does not necessarily mean that inside a correctional facility that those types of relationships couldn't cause a problem for us. I don't see. I feel torn here because I truly believe that it's a person's complete right to love who they want, that's none of my business. However, when I have to run a correctional facility, my views are not the only ones that I'm concerned with, especially in regards to the safety and security of the facility.

To sum it up, a deep desire to not even venture into figuring out what prison sex is about, what prison sex is a case of, is revealed by this southern director.

> The facility itself and the operations, there's just not room for it. There's just not room for it. We start intertwining things. We all know that sex, whether it's in the facility or in society, that there are so many other things that happen when sex is a part of it; good and bad. It goes both ways. And in the environment we're working in, with the folks were working with, with the offenders getting more violent, sex is used as a tool and that makes it a little bit risky to have that in an institutional setting.

While the majority of administrators do not reveal an inclination to buck deep-seated organizational norms and mythologies, a subset indicates that correctional officers sometimes use "discretion" (Maynard-Moody and Musheno 2000), and decide not to ticket or write up prisoners for engaging in consensual sex (perhaps due to the negotiations noted above) that could result in severe punishments such as long-term administrative segregation. Here, "some officers may fail to enforce regulations if the define acts as consensual homosexuality rather than coercive acts of violence" (Eigenberg 2000, 416). This tendency is revealed in the following response:

> So, I would say to you at the local level, at the facility level, policy may say one thing, and I doubt if many directors would say that to you, but when you have that local team who works that facility every day of the week—they know who has a relationship and who doesn't. They know the different lifestyles, who's committed to those lifestyles, who's not, they know if there is a permanent relationship occurring and they don't write 'em up—because they get it, they understand it and so you don't see a lot of write ups if somebody is in a relationship and it's a healthy relationship. So everybody knows it and they keep it low key.

So, in the end, can we or can't we differentiate? What are the qualities of officers, or the characteristics of certain prison facilities that help prison staff to determine if a sexual event is coercive or consensual? A subset of my subjects suggest that if prison workers understand that differentiating between coercive and consensual sex in a prison setting is possible, this new understanding may prevent prisoners from being punished for consensual sex. Again, these new perspectives may serve to challenge and dislodge antiquated, mythological notions about prison sex.

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Yet, despite broad social change, administrators seem to be comfortable reducing LGBT identity or same-sex desire as similar to needing a cigarette or wanting a drink. Their basic understanding is supported by an emergent mythology constructed by PREA, which claims prison staff do not have the capacity to differentiate between coercive and consensual sex. Findings show that on entering prison, an out and proud individual with rights and liberties will likely be confronted with a durable mythology and habitus of social control based in nineteenth-century moral-religious sexual dogma. These outdated beliefs held by institutional incumbents are provided a strong assist by the twenty-first-century confusion between coercive and consensual sex that has been promulgated in PREA.

The Power to Make Change

Despite this intransigent habitus and organizational mythology, and the emergence of PREA, I needed to find out if it was actually within the power of correctional department executives to align correctional policy and practice with the current landscape of rights for LGBT citizens and the decriminalization of same-sex sex. In this light, administrators can step in as field-level challengers to incumbents' orthodoxy and praxis on prison sex (Fligstein and McAdam 2011). One midwestern director noted that:

> In general, you have your order and memorandums that are unique to the facility due to the specifics of each institution—for example the physical plant and lay out of each facility is different. We're like most systems, we're fully ACA accredited so you have an annual review and so at the local level, orders are reviewed to see if they are in compliance with the ops and policies at the state level. If there are any major changes then my executive staff sits down to review them with our general counsel.

A director from an eastern state confirms this general process, noting that: "We have a policy unit, and it writes policy. Each institution has facility-specific standard operation procedures which cannot be inconsistent with policy, but they can adapt policy to the unique circumstances of that particular institution." In addition, each of the directors notes that if the state has a particular statute that guides the prison rule, then the legislative committees that oversee the state corrections department may become involved and in this case a number of states require a notice of a comment period for stakeholders and the public to comment on the proposed changes to prison policy and practice.

The short answer here is that it is within the power of state correctional department directors and commissioners to effect change to administrative rules in the prisons they oversee. Whether unilaterally, by executive committee, or by a dedicated committee selected to engage in new rules promulgation or changes to existing rules, executives of state departments of corrections do have the power to effect changes to not only sexual misconduct rules and their associated

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punishments, but also all other prison rules that affect the daily lives of the prisoners under their care and the staff in their employ.

DISCUSSION

Sexual Misconduct Rules and Punishments as Field Habitus

Findings reveal a steely habitus in the national level penal field that supports the sexual misconduct rule in policy and practice. The organizational mythology, field habitus, and irrationality of the rule are so strong that they avoid logical comparisons to similarly motivated rules such as administrative rules barring gambling among prisoners. The sexual misconduct rule lives within an identifiable carceral history, politics, and culture that has solidified the rule into a hegemonic, field-level disposition, representing a nearly flawless archetype of ironclad penal habitus. The rule in action, or the living mythology of the rule, provides the sexual misconduct rule, its punishments, and other prison rules such as the gambling rule, an unremarkable and nearly uncontested life in the minds of incumbent prison officials and the court that defers to their views.

A director from a southern state reveals the strength of this field habitus, as well as the strong link between the rule on the books and the rule in action by saying:

> I think that throughout the US you'll find that consensual sexual behavior between prisoners is prohibited. It does not mean that the rules do not get violated. Yes, they do get violated. But, when they're violated the sanctions, in most jurisdictions, the sanctions are swift and certain. So, we do not accept or acknowledge consensual sexual relationships between offenders.

There is further support, provided by officials who believe that the rule is culture—and what is habitus if it is not a durable form of culture, with rules, boundaries, norms, beliefs, practices, and dispositions? This Western director notes:

> I think it's part of the culture. You've gone to different states, and I don't know which states you've interviewed, but in this state and the neighboring states, prisons are about culture and it's hard to change culture over time.

Perhaps the clearest path to revealing the durable organizational mythology or habitus in prison rule frameworks is in the contrast between the disparate risks associated with gambling and consensual sex, and their completely illogical and irrational punishments, which have been revealed in previous works (Hensley and Tewksbury 2002; McEvoy and Spirgen 2012; Borchert in press). There really is no other way to account for the variance in punishments than to believe that gambling is not confrontational for prison officials, while same-sex sex remains confrontational to the durable religious-moral and homophobic norms and practices that live in our penal field; norms that have recently been buttressed by PREA.

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Deference and the Life of the Rule

In the case of sexual misconduct rules and their punishments, current prison law in the form of deference reifies this outdated, illogical, organizational mythology and habitus. The rules are rooted in the best thinking of nineteenth- and twentieth-century prison leadership, people who viewed same-sex sex as a perversion of the highest order and similarly believed that simply being homosexual (a word yet to be invented in the early days of the rule) made a prisoner eligible for long-term solitary confinement across the entirety of his or her prison sentence (Kunzel 2008).

Why defer to the best thinking of the 19th century in this case? Legal scholars have called for research to interrogate the utility of deference on the ground, in correctional practice, and to theorize the ways in which it operates, including how deference shapes conditions of confinement (Berger 1978; Dunn-Giles 1993; Robertson 2000, 2006; Horwitz 2008; Shay 2010; Dolovich 2012). Deference allows rules such as the sexual misconduct rule and its punishments to go without question in the mind of prison officials, at court, and in the imagination of our citizenry who know little about the daily life of the prison and its sexual orderings.

CONCLUSION

This project has demonstrated that prison leaders during the era of mass incarceration maintain strong beliefs about the meaning of consensual same-sex sex in US prisons. None of my respondents were able to detail the origin of the sexual misconduct rule, where it started, its original meanings, or how the rule has survived since the birth of the US prison. These strong beliefs are illustrative of a profound field-level habitus, and a nearly unbreakable, super-tight coupling between the organizational mythology and organizational practice of safety and security and the sexual misconduct rule. This mythology, and the emergent mythology of PREA, tells prison leadership that consensual sex is a highly dangerous activity for prisoners with the strong potential to disorganize prison life and that consensual same-sex sex is worthy of harsh punishment.

Findings also show, at least in the case of similarly motivated rules, that prison officials are not marshaling data to motivate prison practice. Sexual misconduct rules seem to defy the trend toward evidence-based practices in our prisons. If prison leaders had marshaled data, perhaps the punishments for gambling—which produces much more institutional disorder and risk—would be at least commensurable with the punishments for something as seemingly harmless as a kiss or oral sex. This comparison reveals the illogic and irrationality between similarly motivated rules on the books and the ways they operate in action, which runs contrary to criminal justice perspectives' predictions (Hagan 1989). The conclusion here is that there is really no plausible alternative but to understand the rule as rooted in a deep set of norms (habitus) bearing the mark of the rule's early history, with its attendant political techniques to prevent sexual perversions, pathology, and sin.

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Together, this mythology, this history, this irrationality make the rule a robust, field-level habitus of the highest order during the era of mass incarceration.

The toughest finding to grab is how the emergent mythology of PREA serves to reinforce prison sex as pathological and disorganizing by its suggestion that differentiating between coercive and consensual sex among prisoners is nearly impossible, and that for that reason alone, the rule must remain. PREA's emergent mythology links well to the durable habitus of punishing prison sex. Yet, nearly 20 percent of leaders interviewed claim that differentiating between consensual and coercive sex is common in the daily life of the prison. Unfortunately, consensual sex is not possible within PREA standards. In every prison facility I have visited from 2014–2016 (well over thirty), I have seen PREA brochures, booklets, and inmate-painted murals on prison walls notifying prisoners that "No mean[s] no. And Yes is Not Allowed." Clearly, the sexual misconduct rule lives on with PREA as its new partner.

The homogeneity, diffusion, and hegemony of the sexual misconduct rule cannot be debated. However, even in conservative southern states, prison officials are finding the rule difficult to reconcile with the realm of expanding rights. These prison officials, following SAF theoretical predictions, could form a powerful bloc to dislodge the mythology surrounding prison sex in order to challenge the beliefs of correctional and judicial incumbents. This dissonance, common among respondents, is represented well by this southern commissioner, who says, "I feel torn here, because I truly believe that it's a person's right to love who they want, that's none of my business." Certainly, love does not always involve sex, but we can get the meaning of what he is conveying in this remark. This dissonance, between a changing society and a static prison environment, may be why a subset of respondents seems ready to challenge the decades-old meanings associated with sexual misconduct rules and their associated harsh punishments.

The case at hand provides leverage to show how complementary theoretical perspectives can go beyond competition to form a fuller understanding of punishment orthodoxy and praxis. In the case of the sexual misconduct rule, new institutionalist theory (Meyer and Rowan 1977; Hagan 1989; Crank 1994), criminal justice perspectives (Hagan 1989), and field theoretical perspectives (Bourdieu 1989; Lerman and Page 2012; Page 2013) have been marshaled in a complementary fashion to demonstrate that the rule is clearly a homosexual status rule. The rule, created by religious moral codes of the nineteenth century, extended by the mid-twentieth century's focus on homosexuality as psychiatric and medical pathology, as well as a strong disorganizing force for prisons and society, is penal field habitus, a potent organizational myth, and is increasingly irrational if we consider broad societal progress since Stonewall and *Lawrence*.

Today, the rule lives in the minds of the majority of prison officials as a viable, unremarkable, and untroubling, commonsense aspect of daily prison life. Couched in PREA's emergent mythology, which holds that consensual sex is never allowed, prisons nationwide continue to punish prisoners for something as seemingly minor as a kiss (Borchert in press). This is ridiculous.

Now is the time for the courts to step away from Turner v. Safley's "jurisprudence of evasion" (Dolovich 2012, 249), and the Prison Litigation Reform

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Act, to grant broader prisoner access to our courts in order to interrogate conditions of confinement, including sexual misconduct rules and their punishments, forcefully. The court, taking the advice of myriad legal scholars, would do well to compare rules to rules, to see how they work in action, and to determine their origin. In this way, the court can avoid being considered pro mass incarceration, with all of its attendant issues, of which sexual misconduct rules are just one. It is time to bring evidence to bear that demonstrates the very minimal risk to institutional safety and security posed by consensual sex in a prison setting in order to reveal the disparate punishment of LGBT prisoners and those who engage in consensual same-sex sex. In so doing, US prisons could then end their run as institutions that actively criminalize and punish same-sex sex (a part of LGBT identity and desire) among consenting adults.

A respondent from an eastern state claims: "We are change agents. That's what we do. We have to continually look at things and decide if we need to change in some way. . . . Ya know, things have to change. We can't be sitting here stagnant and thinking that we're still doing a great job." It is time to move beyond the PLRA and deference as our guiding jurisprudence in prison law cases. Without substantive review, which allows prisoner voices to be heard at court, US prisons will continue to remain disproportionately punitive for those who engage in same-sex sex, and particularly LGBT prisoners. If we view prisons as a collective, democratic project, we must challenge, renegotiate, and redefine the case of consensual prison sex between same-sex individuals. Prisoners must be understood as a part of broader sociolegal change for LGBT citizens that we have seen since Stonewall and *Lawrence*. The sexual misconduct rule is mythology. It is an archaic homosexual status rule. It must be reconsidered in this light, to reshape conditions of confinement, and to eradicate its damages to prisoners and society.

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