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***527** A PUNK'S SONG ABOUT PRISON REFORM

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"There is, ultimately, no prison rape issue. There is only the prison issue." [FN1]

Abstract

This article critiques prison reform from the perspective of a "jailhouse punk"--a male inmate who assumes a submissive "female" role in the inmate subculture. A punk's institutional life reveals an oppressive gender system that functions largely apart from the rule of law.

Following the introduction to the Article, Part II examines the site of masculine domination, the subterranean prison. Part III demonstrates that three gendered attributes of liberal legalism impair judicial scrutiny of the subterranean prison. Part IV examines the politics of prison rape and two pertinent federal laws, the Prison Litigation Reform Act of 1996 and the Prison Rape Elimination Act of 2003. Part V looks to George Fletcher's "second" constitution for guidance. It embraces public values similar to those advanced by feminist jurisprudence. These values can inform a new prison regime, one that counters gender oppression through a milieu grounded in civic virtue. Concluding remarks follow Part V.

I. Introduction

In his autobiographical essay, A Punk's Song, Stephen Donaldson ("Donny the punk") recounted his horrific ordeal in the bowels of the nation's capital. [FN2] Several dozen inmates mercilessly ***528** raped him during his first night in the District of Columbia jail. [FN3] His jailers were seemingly nowhere to be found. [FN4] When he next landed in jail, rather than face sexual assault, Donny "hooked up" with four white Marines. [FN5] He described their relationship as follows: "They provided me with protection and such things as stamps and snacks, in return wanting blowjobs ... and ass (in jail called 'pussy') ... ." [FN6] Donny had become a "punk"--a typically heterosexual inmate who assumes a submissive "female" role at the bottom of the inmate gender hierarchy. [FN7]

From the perspective of punks like Donny, what is the state of prison reform? While inmate handbooks suggest the existence of an orderly and legalistic prison, from a punk's perspective an oppressive gender system pervades institutional life and functions largely apart from the rule of law.

It is ironic that outsider scholarship [FN8] has ignored inmates and particularly inmates like Donny. [FN9] In prison, outlaws become outsiders: they experience exclusion from civil society. [FN10] ***529** As Justice Stevens lamented, "Prisoners are truly the outcasts of society. Disenfranchised, scorned and feared ... [and] shut away from public view, prisoners are surely a 'discrete and insular minority.'" [FN11]

This Article uses an analytical model affiliated with outsider scholarship--feminist legal theory. The social construction of gender, a mainstay of feminist legal theory, [FN12] occurs every time an inmate is stripped of his status as a "man" and

"made" into a "girl." Male prisons provide a laboratory to study gender and the reproduction of masculine domination.

Feminist legal methods examine institutions from a perspective informed by oppression. [FN13] As Davies and Seuffert contended, "members of oppressed groups who engage in struggles against oppressors produce 'truer' knowledge than members of the oppressor groups. This is because in order to survive, the oppressed group must understand the dimensions of the oppressive discourse and practices, as well as their own position in it." [FN14] Punks qualify as an oppressed group. As inmates, they belong to "the least sympathetic group of 'outsiders' in our constitutional ***530** jurisprudence." [FN15] And when an inmate is "made" into a punk, his fellow prisoners impose their own brand of ignominy upon him. [FN16]

Part II of this Article examines the site of masculine domination, the subterranean prison. In this milieu, Donny encountered a gender system that constructs some inmates as "real men," others as "girls," and privileges masculinity.

Part III examines the punk's constitution. Its emphasis on individualism and autonomy reflect masculine values. [FN17] In turn, the gendered attributes of liberal legalism--social contract, negative liberty, and bilateral individualism--find expression in the punk's constitution and impair judicial scrutiny of the subterranean prison.

Part IV addresses Congress and its curious relationship with punks. As inmates, punks should expect a hostile reception. After all, in 1996 Congress enacted the Prison Litigation Act, [FN18] which only compound the woes of punks by placing several obstacles between them and judicial relief. [FN19] On the other hand, punks should herald the passage of the Prison Rape Elimination Act of 2003. [FN20] A diverse coalition, which included conservatives and evangelicals, successfully lobbied for its passage. [FN21] One commentator described the legislation as "a perfect complement to [President Bush's] compassionate conservative ***531** agenda." [FN22] The Act's provisions acknowledge that prison rape is not part of the penalty for crime and mandate several countermeasures. [FN23]

Part V of the Article looks to Fletcher's "second" constitution for guidance. [FN24] Its grundnorm of equal concern and respect incorporates feminist public values. [FN25] These values can inform a new prison regime, one that counters gender oppression through a milieu grounded in civic virtue. Concluding remarks follow Part V.

II. A Punk's Prison

The years separating Donny's first night in jail in 1973 and his death by AIDS in 1996 [FN26] spanned an era of prison reform. By 1973 the hands-off doctrine [FN27] had collapsed, opening the prison to a federal judiciary grown anxious over the decaying ***532** state of the nation's jails and prisons. [FN28] A year later, in Wolff v. McDonnell, the Supreme Court declared that "there is no iron curtain drawn between the Constitution and the prisons of this country." [FN29] In 1996, Congress resurrected part of that iron curtain by passing the Prison Litigation Reform Act.

Today, an inmate's official introduction to prison life will be the handbook prepared by his keepers. Michigan's, for instance, addresses some forty-two topics in thirty-eight pages. [FN30] The content of these topics mirrors four decades of litigation [FN31] and several Supreme Court rulings. [FN32] Inmate handbooks describe a safe, clean, fair, and humane prison. [FN33]

***533** Inmate handbooks, however, say nothing of the subterranean prison. This prison exists just beneath the surface order maintained by custody staff. As in decaying inner-city neighborhoods, one encounters powerful gangs based on race, ethnicity, and geography. [FN34] Blacks often outnumber whites. [FN35] Regardless of skin color, most of its residents are young, [FN36] uneducated, [FN37] and impoverished. [FN38] A thriving, illicit economy breeds drug trafficking, violence, and staff corruption. [FN39] Outnumbered correctional officers accommodate inmate desires in exchange for the semblance of order. [FN40] Survival with dignity in this monkey cage monstrosity often requires a willingness to use violence. [FN41]

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***534** The ideal inmate of the subterranean prison embodies hypermasculinity--the magnification of masculinity as expressed through radical individualism, violence, and the will to dominate. [FN42] His hypermasculinity is relational, constructed by its opposition to femininity. [FN43] As Vojdik observed, "[g]ender is not a noun; gender is a verb--a process, a practice, a tool for marking and enforcing the bounds of gender within social structures such as the workplace, the state, and other institutions." [FN44]

Becoming a punk is a process of social construction imposed on weak, intimidated, or naïve inmates. When an otherwise heterosexual male inmate is coerced into assuming a "female" role, he has been "turned out." [FN45] His fellow inmates will now speak of him as a punk or a "penitentiary turn out." To deter attacks from other inmates, a punk may become the "wife" of an inmate and perform wifely duties, both domestic and sexual, in exchange for protection from other inmates. [FN46] However, the demarcation between "wife" and "slave" is a razor's edge literally and figuratively; he may be repeatedly sold to the highest bidder for his services, and he lives under the constant threat of violence should he forget his place in the prison gender hierarchy. [FN47]

***535** The "turning out" of a new inmate ensures the continuation of a hierarchical system of gender roles in the all-male prison community. The assailant becomes a "pitcher," a masculine role given high status. [FN48] By contrast, the "daddy" "courts, befriends, or patronizes weaker, inexperienced inmates into sexual gratification." [FN49] He occupies a lesser heterosexual role because he does not employ force. The inferior roles distinguish gay inmates from punks. The former consists of "fags"--the "natural" gay inmates; and "queens," who overtly display feminine mannerisms. [FN50] Below them lies the punk. [FN51]

The hierarchy described above both expresses and reproduces intermale power relationships. As Foucault wrote, "[p]ower means relations, a more-or-less organized, hierarchical, co-ordinated cluster of relations." [FN52] Relational power in prison privileges hypermasculine attributes by constructing various male and female roles and then subordinating the latter. Consequently, a commentator's observation about gender outside of prison applies to gender within prison: "Gender is more than role and characteristic differences attributed to biological sex; it is a structural experience of relational power reproduced through ideology." [FN53]

The symbiotic relationship between masculinity and dominance originates in cultural worlds occupied by inmates prior to and during their incarceration. [FN54] The inmate population largely ***536** reflects Western norms, which instruct males that masculinity must be aggressively acquired by controlling people and resources. [FN55] Also, much of the prison population had been raised in lower class subcultures that equate aggressiveness and domination with manly virtues. [FN56]

Imprisonment further fuels the need to affirm masculinity by subjecting inmates to an emasculating environment. [FN57] What Sykes called the "pains of imprisonment"--deprivations of liberty, autonomy, goods and services, personal safety, and contact with heterosexual female companions--represent "a set of threats or attacks which are directed against the very foundations of the prisoner's being [as a man]." [FN58] Foremostly, the lack of heterosexual relationships deprives inmates of a reference for defining masculinity and experiencing the status and power it bestows. [FN59] In addition, the many official rules governing when ***537** to eat, sleep, and otherwise partake of daily life represent "a profound threat to the prisoner's self image because they reduce the prisoner to the weak, helpless, dependent status of childhood." [FN60]

III. A Punk's Constitution

The gender system that oppresses punks has thrived amid the prison reform cases of the past four decades. [FN61] Blame partly lies with liberal legalism, [FN62] which several feminist scholars have described as "masculine." [FN63] As McClain explained, "[l]iberalism ***538** has been viewed as inextricably masculine in its model of separate, atomistic, competing indi-

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viduals establishing a legal system to pursue their own interests and to protect them from others' interference with their rights to do so." [FN64]

Liberal legalism contains three constructs--social contract, negative liberty, and bilateral individualism--that underpin the punk's constitution. According to Peller, social constructs "tell us what the Constitution meant to the Framers, what objective manifestations of their understanding we should take as relevant." [FN65] Examining the impact of these constructs on punks explains why the prison gender hierarchy remains largely outside the rule of law.

A. Social Contract

Can self-interested individuals, who have no choice but to live together, achieve security yet maintain their autonomy? [FN66] Locke and the Framers envisaged the social contract as the answer: a political authority would police the body politic, but the members of the body politic retained their natural rights. [FN67]

***539** Locke showed no sympathy for criminals, describing them as having "declared war against all mankind, and therefore may be destroyed as a lion or tyger, one of those wild savage beasts, with whom men can have no society nor security... ." [FN68] His characterization of criminals must have rung true for Virginia's judges charged with controlling young black men during the Reconstruction era. In Ruffin v. Virginia, [FN69] the Commonwealth's Court of Appeals in 1871 described inmates as "slave[s] of the state." [FN70] Having sustained "civiliter mortuus," [FN71] inmates had forfeited their constitutional rights.

While the courts long ago repudiated the "slave of the state" doctrine, the liberal contradiction between selfish pursuit and the demands of safety still shapes prison law. [FN72] The Supreme Court often characterizes inmates much like Hobbes described individuals in a state of nature, where they have a ravenous appetite for what pleases them. [FN73] For instance, in Block v. Rutherford, [FN74] the Supreme Court upheld a jail policy forbidding contact visits. [FN75] Speaking for the Court, Chief Justice Burger reasoned that even low-risk detainees possessed "propensities for violence, escape or drug smuggling." [FN76] Similarly, the Court in Hudson v. Palmer [FN77] described inmates as "antisocial ... and often violent." [FN78] Employing Hobbesian terminology, the Court ***540** feared that "a state of nature" would "take its course" if it subjected cell searches to Fourth Amendment scrutiny. [FN79] Lower courts have employed similar reasoning and terminology. [FN80]

On the other hand, the Supreme Court sees correctional officers in a different light. [FN81] They have become "train[ed]" professionals [FN82] exercising "considered" judgment [FN83] and "expertise," [FN84] who must be given deference. [FN85] The Court has failed to mention that guards construct prison gender roles along the same lines as inmates. [FN86] They too believe that "real men" ought to battle their tormentors and advise targeted inmates accordingly. [FN87] In turn, correctional officers sometimes ***541** will overlook disciplinary violations committed in the name of self-defense. [FN88] If would-be punks do not engage in combat, staff may decide that they "must be gay" [FN89] and are unworthy of protection. [FN90]

B. Negative Liberty

The Framers created rights against government, [FN91] making the Bill of Rights "a charter of negative rather than positive liberties." [FN92] Liberal theorists envisaged zones of autonomy, [FN93] ***542** where one could pursue private ends by judicious use of capital. [FN94]

Most inmates come to prison with little capital of any kind. About half of all inmates free a year or more before their arrest possessed incomes below $10,000 and nearly twenty percent reported incomes less than $3,000. [FN95] One-third lacked any

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employment at time-of-arrest and another twelve percent had only part-time employment. [FN96] Half dropped out of school before the eleventh grade and the typical inmate functions two or three grades below that level. [FN97] Three-fourths cannot read above an eighth grade level; half are functionally illiterate. [FN98] As many as 10% of the custodial population suffer from serious mental illness and anywhere from 15% to 40% experience moderate mental illness. [FN99] Substance abuse rates reach 80%. [FN100]

***543** While the Supreme Court in DeShaney v. Winnebago County Department of Social Services [FN101] acknowledged that states must assume "some responsibility" for an inmate's "safety and general well-being," [FN102] "some responsibility" means little responsibility within the framework of negative liberty. In Rhodes v. Chapman, [FN103] the Court ruled that inmates lacked a right to rehabilitation, and thus need not be educated, trained, or otherwise prepared for life inside or outside prison. [FN104] Subsequently, the Court in Wilson v. Seiter [FN105] and Farmer v. Brennan [FN106] refused to hold prison staff to an affirmative, proactive standard of what they ought to do to ensure the well being of inmates. For the Wilson and Farmer Courts, the Eighth Amendment [FN107] dictated a minimal standard of care: staff must respond to a high risk of injury only if they possess actual knowledge of the risk. [FN108]

Before Rhodes, lower federal courts were more willing to assume affirmative responsibility for inmates' welfare. [FN109] Several went so far as to rule that prison conditions contributing to recidivism inflicted cruel and unusual punishment. [FN110] For instance, ***544** the district court in Laaman v. Helgemoe [FN111] held that conditions of confinement in a New Hampshire prison made "degeneration probable and self-improvement unlikely" and thus served no valid penal purpose in violation of the Eighth Amendment. [FN112]

In turn, the Supreme Court in Bounds v. Smith [FN113] obligated the state to affirmatively assist inmates in gaining "adequate, effective, and meaningful" access to the courts. [FN114] Writing for the Court, Justice Marshall stated that "meaningful" access could be achieved by providing pro se petitioners the services of a law library. [FN115] The Court thus moved a step beyond Johnson v. Avery, [FN116] which allowed inmates to assist one another in preparing habeas corpus petitions. [FN117]

Today, however, punks encounter a Supreme Court committed to negative liberty. In Lewis v. Casey, [FN118] the Court "disclaim[ed]" language in Bounds directing "the State ... [to] enable the prisoner to discover grievances, and to litigate effectively once in court." [FN119] Writing for the majority, Justice Scalia concluded that the petitioning inmates lacked standing unless they demonstrated actual injury arising from impeded access to the courts. [FN120] Some of the petitioners had been locked down [FN121] and thereby denied use of the prison law library. [FN122]

***545** C. Bilateral Individualism

For the Framers, the self-defined, self-emancipated, and self-interested individual represents the human condition. [FN123] Rational and autonomous, [FN124] he enjoys choice of action [FN125] and thus possesses "[t]he vaunted independence of the deontological subject." [FN126] From this perspective, explained Carter, victimization is bilateral and individuated because it is defined in terms of "concrete, individual acts by identifiable transgressors." [FN127] Accordingly, "[a] victim is someone injured by someone else ... not the society as a whole ... ." [FN128]

In the hypermasculine prison, correctional officers and inmates alike embrace bilateral individualism in assigning responsibility for the punk's situation. A punk seeking help will likely be told to be a "man" and fight his tormentors. [FN129] Consequently, ***546** if he fails to fight, blame shifts to the punk: he has "chosen" to be a punk and revealed his unmanly weakness. [FN130]

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Bilateral individualism has also influenced the Supreme Court's application of the Eighth Amendment to prison conditions. In Farmer v. Brennan [FN131] the Court required the petitioner, a preoperative transsexual who had been raped by fellow inmates, to establish a "sufficiently serious" injury and bilaterally attribute that injury to an individual's deliberate indifference, a state-of-mind likened to criminal recklessness. [FN132] As a lower court later observed, deliberate indifference requires that the "[defendant personally] knew of ways to reduce the harm but knowingly declined to act, or that he [personally] knew of ways to reduce the harm but recklessly declined to act." [FN133]

The rape of Eugene Langston illustrates how this causal model excludes readily preventable harm from constitutional remedy. Inmate Langston had witnessed a gang-related murder while incarcerated in Illinois' notorious Joilet prison. [FN134] For the next four years he did his time in protective custody. [FN135] Then he assaulted a correctional officer, which led to his confinement in disciplinary segregation. [FN136] His keepers violated prison policy by assigning him a cellmate even though the unit had empty cells. [FN137] His cellmate had a history of sexually assaulting prisoners and he soon lived up to his reputation by raping ***547** Langston. [FN138] He brought suit but to no avail. The defendants who approved the assignment successfully disclaimed any prior knowledge of the rapist's history of sexual assault even though one defendant had earlier remarked to the Langston, "[D]amn, they're stupid, they know they wasn't supposed to put you and that boy in the same cell together ... ." [FN139]

IV. Punks and Congress

In 1996 and 2003 Congress enacted legislation expressly directed at prisoners' rights. Nonetheless, the objectives of the statutes differed greatly. Congress passed the first act to throttle the prison reform movement. Later, it crafted legislation to advance one of the unfulfilled goals of the prison reform movement--reducing custodial rape.

A. The Prison Litigation Reform Act of 1996

Following the demise of the hands-off doctrine, lower federal courts assumed control of numerous state prisons. [FN140] Rights and remedies became intertwined as federal judges read the open-ended language of the Eighth Amendment to reform the "totality" of prison conditions. [FN141] Employing comprehensive injunctions and consent decrees, judges assumed managerial functions. [FN142] Consequently, court-ordered prison reform acquired "***548** breadth and detail only to the courts' earlier role in dismantling segregation in the nation's public schools." [FN143]

Having abandoned "the received tradition" of passive adjudication, [FN144] lower federal courts eventually encountered a variant of what Bickel famously called "the countermajoritarian difficulty." [FN145] He contended that courts become "deviant institutions" when they frustrate majority will or engage in functions historically exercised by elected officials. [FN146] According to this argument, the prison reform cases crossed the line: elected state or federal officials, not courts, should have dictated the restructuring of penal institutions.

The Prison Litigation Reform Act of 1996 [FN147] (PLRA) sought to reign in remedial decrees and inmate lawsuits. Advocates of the legislation complained of "molly coddling" judges [FN148] eagerly running jails and prisons. [FN149] They reserved their harshest criticism ***549** for writ writers, [FN150] characterizing them as recreational litigators who flooded the federal civil docket with frivolous filings. [FN151] Huge majorities favored the Act in the House of Representatives and the Senate. [FN152]

The PLRA imposes significant opportunity costs upon punks as prospective litigants. [FN153] The Act's threshold requirement--exhausting the prison's grievance process as a prerequisite to a court filing [FN154]--represents a status degradation ceremony for punks. [FN155] Participation in the grievance process will necessitate their "coming out," that is, officially identifying themselves as "made" homosexuals who occupy a female gender role. Also, the punk as complainant will likely

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have to identify his assailants and thus become a snitch, [FN156] a contemptuous status ***550** in itself. [FN157] At the end of the day, the prison's administrative remedies may not provide punks with an adequate remedy, especially if they seek damages. [FN158]

Should a punk proceed in forma pauperis, the PLRA imposes several additional obstacles. The impoverished punk will be responsible for the filing fee. [FN159] If his case is dismissed as frivolous, he can lose unvested good time. [FN160] Unless he has a high value claim, a punk will experience difficulty in securing counsel because of restrictions on legal fees for prevailing plaintiffs. [FN161] The value of his claim, moreover, may be discounted in light of the following: (1) the PLRA will effectively bar damages for sexual harassment unless he establishes an accompanying physical injury; [FN162] (2) at trial, consensual sex on his part will ***551** likely be at issue; [FN163] (3) to prevail at trial he will have to prove deliberate indifference, [FN164] which is a "highly culpable mental state;" [FN165] and (4) if he loses at trial, the PLRA makes it more likely that he will be assessed defendant's costs. [FN166]

B. The Prison Rape Elimination Act of 2003

The passage of the Prison Rape Elimination Act of 2003 [FN167] (PREA) had been foreshadowed in 2002 by protests directed at a television advertisement. One newspaper described the advertisement as follows:
[A] 7-Up spokesperson hands out cans of soda to prisoners. When he accidentally drops a can, he quips that he won't pick it up, implying that to bend down is to risk being raped. Later in the ad, a cell door slams, trapping the spokesperson on a bed with another man who refuses to take his arm from around him. [FN168]

***552** The controversy arose out of the uncertainty whether men raped in prison should be regarded as legitimate victims. In a 1994 poll, one-half of the respondents agreed that "society accepts prison rape as part of the price criminals pay for their wrongdoing." [FN169] The stakes were high for punks: achieving victim-status provides "powerful moral leverage" for otherwise powerless men seeking redress. [FN170]

The organization once directed by Donny the punk, Stop Prisoner Rape, led some 100 groups in denouncing the 7-Up advertisement. [FN171] Executives of the soft drink company soon cancelled the promotional campaign. [FN172]

Accounts of victimization have long occupied center stage in the prison rape movement. The preeminent figure in the movement, Donny the punk, often recounted his victimization. [FN173] In the year preceding the Senate Hearings on the PREA, a heavily publicized Human Rights Watch report on male prison rape, No Escape, [FN174] devoted more than half of its ***553** word count to twelve case histories and numerous first-person accounts of sexual assault. [FN175] A month before Congress' vote on the PREA, Stop Prisoner Rape held a "Stories of Survival Event" on the Capitol grounds, which featured several "survivors" of prison rape. [FN176]

Moral entrepreneurs, however, stood at the forefront of the coalition advocating congressional action. [FN177] In 2001, Stop Prisoner Rape hired Lara Stemple as its director. [FN178] Unlike Donny the punk, she was not a victim of prison rape or a one-time prisoner. [FN179] Rather, Stemple had been active in human rights issues as a Harvard Law School student. [FN180] Following her graduation, she worked as an attorney at the Center for Reproductive Rights. [FN181]

Another moral entrepreneur, Michael J. Horowitz, fathered the Prison Rape Elimination Act. He had served in the Reagan Administration as General Counsel of the Office of Management and Budget. [FN182] Later, as a fellow at the Hudson Institute, he was described as a "veteran of political wars over human-rights issues such as religious persecution, genocide in Sudan, and international sex trafficking ... ." [FN183] By 2001, Horowitz ***554** began stitching together a coalition calling for a federal response to prison rape. [FN184]

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Horowitz reportedly "challenged" Charles Colson to bring evangelicals into his coalition. [FN185] An adviser to President Nixon, Colson had served a federal prison sentence for his part in Watergate break-in and cover-up. [FN186] Colson left prison as an evangelical and moral entrepreneur committed to prison reform. [FN187] He soon founded an organization that would express his religious and reformist views, Prison Fellowship Ministries. [FN188] Christianity Today would later praise Colson for "bridg[ing] ... evangelical faith and social activism." [FN189] His work on behalf of Prison Fellowship Ministries earned him the one million dollar Templeton Prize for Progress in Religion in 1993. [FN190]

Colson answered Horowitz's call for assistance. A Prison Fellowship staffer helped draft the legislation. [FN191] Colson hailed the proposed statute over the one thousand radio stations that carry his daily commentary to some three million persons. [FN192] On Capitol Hill he described the proposed law as "an acid test of how our society treats the downtrodden and demonstrates that even the rights of criminals should be protected." [FN193] Prison Fellowship's website reported that "thousands" responded by petitioning Congress to pass prisoner rape legislation. [FN194]

***555** In addition, a pillar of conservative politics, the National Review, ran a series of articles by Eli Lehrer on prison rape. Lehrer described prison rape as an "epidemic" that represented "a serious black mark on America's human-rights record." [FN195] In contrast to the Supreme Court's deferential treatment of prison administrators, [FN196] Lehrer found them "complicit in the prison-rape epidemic." [FN197] On the other hand, he rejected the "left-wing solution," "expanding prisoners' rights." [FN198]

In July of 2003, both the Senate and the House of Representatives unanimously approved the PREA. [FN199] It mandates the following: (1) annual surveys to determine the prevalence of rape; [FN200] (2) public hearings; [FN201] (3) a clearinghouse to aid state and local correctional staff in their efforts to counter prison rape; [FN202] (4) grants to states and local jurisdictions; [FN203] and (5) a commission to study prison rape and issue voluntary standards addressing the prevention of rape, treatment of its victims, and prosecution of assailants. [FN204]

The PREA speaks to a fear widely shared by males and thus transcends the social distance between inmates and male legislators. No ordinary fear, Sabo describes it as "darkest and most secret fear that straight, heterosexual men harbor--being 'butt-fucked' and unmanned by a more dominant male ... ." [FN205] Among whites, this fear gains additional currency from its racial dimension: several studies have shown that African-Americans ***556** commit a majority of prison rapes and whites are their usual victims. [FN206]

The PREA answers this "darkest and most secret fear" by conveying the following messages. Its loudest message--that prison rape is not part of the penalty--speaks to those who believe that prison rape is simply the price criminals pay for their deeds. [FN207] In defining punks and other raped inmates as legitimate victims, it counters rape myths that shift blame to the victim. [FN208] Lastly, despite years of political rhetoric extolling "getting tough" with offenders, [FN209] Congress' passage of the Act signifies that it is not indifferent to the plight of all inmates.

Like other symbolic legislation, the Act may have a limited impact. [FN210] A provision of the Act forbids the drafting and implementation of rape prevention standards that "impose substantial ***557** additional costs." [FN211] This provision will construct a financial wall between the Act and several conditions of confinement associated with high rates of rape, such as overcrowding, barracks housing, and high concentrations of offenders imprisoned for violent crimes. [FN212] Moreover, considerable "slippage" can occur in implementing standards. Branham contended that auditors "gloss over" apparent breaches of the American Correctional Association standards and sometimes file "incomplete or misleading reports." [FN213]

V. A Punk's Future

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The meek in prison do not inherit the earth, particularly if they are socially constructed as "girls." While the Prison Rape Elimination Act may blunt gender oppression, it fails to repudiate the masculine ethos of the punk's prison and the punk's constitution. A punk's hope for a better future lies elsewhere.

A. The Prison and "First" Constitution

Sherry argued that the American Revolution was fought in the name of a "republican vision," in which "a primary function of government is to order values and to define virtue, and thereby educate its citizenry to be virtuous." [FN214] The Founding Fathers, according to Sherry, believed that a virtuous public would keep liberty alive. [FN215] However, the experience of governing ***558** the new republic led to a distrust of the body politic. [FN216] The new government of 1787 would be founded on a different premise, the self-interested, atomistic individual. [FN217]

Punishments evolved in a similar trajectory. A "communal approach to punishment" prevailed in the American colonies of the seventeenth century. [FN218] The preferred sanctions sought to reunite the offender with the community through confession and repentance. [FN219] The colonists believed that no great social distance separated offender from non-offender; all people had been born to sin, making crime an inevitable feature of social life. [FN220]

"[R]iotous disorder" in the nation's fast growing cities of the early nineteenth century undermined public confidence in communal mechanisms of social control. [FN221] Imprisonment soon became the normative sanction for serious crime. [FN222] By 1833 Beaumont and Tocqueville spoke of the "monomanie of the penitentiary system, which to them seems the remedy for all the evils of society." [FN223]

The founders of the penitentiary envisaged a "total institution," [FN224] not unlike Hobbes' Leviathan. In practice, they got ***559** something quite different: "[i]n some institutions there is nearly total inmate control of the daily life of the inmate population and the custodial staff merely controls the walls." [FN225] Inmate power often holds sway in the modern subterranean prison because of intermittent supervision, [FN226] lack of defensible space, [FN227] and outnumbered and corruptible guards. [FN228]

The prison and the liberal legalism of the Constitution came to share much in common. Liberal legalism separates individuals from society in an epistemological sense, while the prison isolates offenders within prison walls. Liberal legalism champions the private life, and the prison hides the offender far from public view. Liberal legalism attributes agency to the offender, whom the prison punishes in the name of blameworthiness. The deprivation of the most valuable of liberal commodities, liberty, provides the prison with its stock-in-trade.

***560** B. The Prison and the "Second" Constitution

In Our Secret Constitution, Fletcher argues the Civil War gave birth to a "second American constitution." [FN229] Whereas the "first" Constitution embraced liberal legalism and its constituent elements of social contract, negative liberty, and bilateral harm, [FN230] the "second" constitution represented republican ideals of "organic nationhood, equality of all persons, and popular democracy." [FN231] Tragically, the Supreme Court in the Slaughter-House Cases [FN232] suppressed the "second" constitution. [FN233]

Fletcher's "second" constitution contains elements of feminist jurisprudence. By charging government with an "active role in protecting and securing the autonomy of its citizens," [FN234] this constitution embraces the positive liberty advocated by West. [FN235] Moreover, the grundnorm of the "second" constitution, equal concern and respect, [FN236] surely incorporates McClain's notion of "caring" as a public value [FN237] and Lacey's belief that "respectful relationships" fosters a civil

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society. [FN238]

Achieving equal concern and respect in prison involves more than enforcing the Equal Protection Clause. [FN239] It also entails***561** acting virtuously. "Virtues," observed Loder, "dispose a person to act well and develop her character in fruitful ways." [FN240] Instilling virtue in inmates is not a new goal: in his acclaimed book, Laboratories of Virtue, Miranze described the origins of penitentiary in Philadelphia and its founding principle--nurturing civic virtue in inmates. [FN241]

Cullen, Sundt, and Wozniak have advocated a prison regime that pursues this old objective. They envisage a "virtuous [prison] milieu." [FN242] All inmate activities, such as prison employment and community service, would be geared to "giv[ing] back to victims and communities" [FN243] as well as providing inmates with "an opportunity to be virtuous." [FN244] Idleness would be banished in favor of broad range of programs, including meaningful work. [FN245] Inmates themselves would have an "obligation" not to reoffend and toward that end could enroll in rehabilitation programs grounded on "criminological research and the principles of effective correctional intervention." [FN246] Virtuous people, that is, "upstanding community people," would mentor inmates and otherwise serve as role models. [FN247]

Cullen, Sundt, and Wozniak contend that Prison Fellowship's faith-based prison communities possess attributes similar to their "virtuous prison." [FN248] For instance, its pre-release program in Texas provides inmates with work, support groups, mentoring, substance abuse counseling, and life skills. [FN249] Day and evening programming immerse inmates in a therapeutic ***562** environment, which precludes participation in the subterranean prison. [FN250]

VI. Conclusion

In his seminal history of Illinois' Stateville penitentiary, Jacobs asserted that prison governance had evolved from an authoritarian model into a bureaucratic model. [FN251] He posited that this transformation occurred in conjunction with "the unfolding of mass society," in which marginalized groups "pressed for admission into the societal mainstream." [FN252]

But the "unfolding of mass society" has bypassed the prison's gender hierarchy. Rather than enjoying the full rights of citizenship, punks possess a constitution that has not experienced Reconstruction: they can be bought and sold for the pleasure of "real men."

Punks need Fletcher's "second" American constitution. Their protection begins with implementing the grundnorm of this constitution, equal concern and respect. While respectful, virtuous relationships among inmates may seem a romantic goal, "[t]here is no substitute for humanistic thinking as an ameliorative counterforce on prison matters ... . It is a function intrinsically compatible with impact, credibility, and reform." [FN253]

[FNa1]. Distinguished Professor of Corrections at Minnesota State University and editor-in-chief of the Criminal Law Bulletin. This article is dedicated to the memory of Stephen Donaldson and to the human rights organization he led, Stop Prisoner Rape.

[FN1]. Donald Tucker (the pen name of Stephen Donaldson), A Punk's Song: View From the Inside, in Male Rape: A Casebook of Sexual Aggressions 58, 72 (Anthony M. Scacco, Jr. ed., 1982).

[FN2]. Id.

[FN3]. Id. at 59-61.

[FN4]. See id.

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[FN5]. See id. at 63-64.

[FN6]. See Tucker, supra note 1, at 64.

[FN7]. See William K. Bentley & James M. Corbett, Prison Slang 60 (1992) (defining "punk"); see also Robert W. Dumond, The Sexual Assault of Male Inmates in Incarcerated Settings, 20 Int'l J. Soc. 135, 139 tbl.2 (1992) (delineating the inmate gender hierarchy and the role of the punk). Punks are distinguished from "fags," who are "true" homosexuals. Hence, it is said that punks are "made" while fags are "born." See Bentley & Corbett, supra, at 59 (defining "fag').

[FN8]. See Mari J. Matsuda, Public Response to Racist Speech: Considering the Victim's Story, 87 Mich. L. Rev. 2320, 2324 (1989) (describing outsider jurisprudence as "the pragmatic use of law as a tool of social change, and the aspirational core of law as the human dream of peaceable existence").

[FN9]. See Don Sabo et al., Gender and the Politics of Punishment, in Prison Masculinities 3 (2001) (observing that feminists "have been curiously silent about men in prison"). However, feminists are not alone in their neglect of gender in men's prisons. Criminologists have largely stayed clear of the subject and prison sex researchers have struggled to gain academic respectability. See Richard Tewksbury & Angela West, Research on Sex in Prison During the Late 1980s and Early 1990s, 80 Prison J. 368, 368 (2000) (discussing the status of prison sex researchers).

[FN10]. Becker first employed the term "outsiders" in his book of the same name. See Howard S. Becker, Outsiders (1966). He used the term to convey that persons deemed deviant were excluded from mainstream social life. Becker indicated that one's new status could become his master status, which overrides all other statuses one might possess. See id. at 33; see also Erving Goffman, Stigma: Notes on the Management of Spoiled Identity 3-8 (1963) (arguing that denial of respect and regard spoils your public identity).

[FN11]. Hudson v. Palmer, 468 U.S. 517, 557 (1984) (Stevens, J., dissenting).

[FN12]. See Valorie K. Vojdik, Gender Outlaws: Challenging Masculinity in Traditionally Male Institutions, 17 Berkeley Women's L.J. 68 (2002).

Seeking to reframe the sameness/difference dilemma, feminist legal scholars have focused on gender as a social construction, criticizing courts for conflating sex, gender, and sexual orientation, and urging courts to disaggregate sex and gender. Drawing on postmodern feminist theory, some have argued that "sex" refers to the biological or physical characteristics distinguishing men and women, while "gender" usually refers to the cultural attributes or attitudinal characteristics that are associated with the biological categories of male and female. Under this definition, gender refers to those socially constructed behaviors, both descriptive and normative, that correspond to the categories of male and female in our society.

Id. at 85-86 (citations omitted).

[FN13]. See, e.g., Katharine T. Bartlett, Feminist Legal Methods, 103 Harv. L. Rev. 829, 872 (1990) (stating that "[t]he experience of being a victim therefore reveals truths about reality that non-victims do not see"); Ann Scales, Feminist Legal Method: Not So Scary, 2 UCLA Women's L.J. 1, 27-28 (1992) (describing the "looking to the bottom" method).

[FN14]. Margaret Davies & Nan Seuffert, Knowledge, Identity, and the Politics of Law, 11 Hastings Women's L.J. 259, 270 (2000).

[FN15]. Pamela S. Karlan, Bringing Compassion Into the Province of Judging: Justice Blackmun and the Outsiders, 71 N.D. L. Rev. 173, 176 (1995).

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[FN16]. Harry E. Allen et al., Corrections in America: An Introduction 247 (10th ed. 2004) (describing punks as "outcasts" from the prison social structure).

[FN17]. See supra notes 12-13 and accompanying text (discussing feminist legal theory).

[FN18]. Prison Litigation Reform Act of 1995, Pub. L. No. 104-34, 110 Stat. 1321 (1996).

[FN19]. See infra notes 200-04 and accompanying text (discussing the features of the Act).

[FN20]. See The Prison Rape Elimination Act of 2003, Pub. L. No. 108-79, 117 Stat. 972 (2003). President Bush signed into law the Act on September 4, 2003. See Stop Prisoner Rape, Press Release: Prison Rape Elimination Act Becomes Federal Law (Sept. 4, 2003), at http:// www.spr.org/en/pressreleases/2003/0904.html (last visited Sept. 17, 2003).

[FN21]. See Congressman Frank R. Wolf in the Newsroom, June 29, 2002, at http://www.house.gov/wolf/news/2002/07-29-prisonrapetestify.html (last visited Dec. 1, 2002) (listing groups supporting the Prison Rape Elimination Act).

[FN22]. See Eli Lehrer, The Most-Silent Crime, Nat'l Rev. Online (Apr. 29, 2003), at http://www.nationalreview.com/comment/comment-lehrer042903.asp (last visited Feb. 10, 2003).

[FN23]. See infra notes 201-05 and accompanying text (discussing the provisions of the Prison Rape Elimination Act).

[FN24]. George P. Fletcher, Our Secret Constitution (2001).

[FN25]. See infra notes 229-38 and accompanying text (examining the "second" constitution).

[FN26]. Stop Prisoner Rape, Press Release: Stephen Donaldson, 49--Led Reform Movement Against Jailhouse Rape (July 19, 1996), at http://www.spr.org/en/doc_ 96_sprobit.html (last visited Aug. 29, 2003).

[FN27]. The hands-off doctrine constituted judge-made policy in the federal judiciary. It directed federal courts not to adjudicate prisoner suits. Three justifications were advanced for the hands-off doctrine: (1) judges lacked expertise in prison matters; (2) judicial intervention would undermine the authority of prison staff; and (3) federalism rendered interference in the operations of state prisons inappropriate. See, e.g., Bethea v. Crouse, 417 F.2d 504, 505-06 (10th Cir. 1969) ("We have consistently adhered to the so-called 'hands-off' policy ... ."); Douglas v. Sigler, 386 F.2d 684, 688 (8th Cir. 1967) ("[C]ourts will not interfere with the conduct, management and disciplinary control of this type of institution except in extreme cases."); United States ex rel. Yaris v. Shaughnessy, 112 F. Supp. 143, 144 (S.D.N.Y. 1953) ("[I]t is unthinkable that the judiciary should take over the operation of ... prisons."); Garcia v. Steele, 193 F.2d 276, 278 (8th Cir. 1951) ("[C]ourts have no supervisory jurisdiction over the conduct of the various institutions... ."); Note, Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts, 72 Yale L.J. 506, 507 (1963) (examining the justifications for the doctrine); Note, Constitutional Rights of Prisoners: The Developing Law, 110 U. Pa. L. Rev. 985, 986-87 (1962) ("[C]ourts have been so influenced by the dogma of the independence of prison authorities that judicial intervention has been limited to the extreme situation.").

[FN28]. Among other things, Branham and Krantz attributed the collapse of the hands-off doctrine to: 1) attorneys committed to prison reform; (2) riots and other disturbances that illuminated wrongs inflicted on inmates; and (3) the Supreme Court's commitment to protecting powerless minority groups. See Lynn S. Branham & Sheldon Krantz, Cases and Materials on the Law of Sentencing, Corrections, and Prisoners' Rights 283 (5th ed. 1997). The lower federal courts soon abandoned the

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hands-off doctrine and expanded prisoners' rights. See, e.g., Woodhouse v. Virginia, 487 F.2d 889, 890 (4th Cir. 1973) (ruling that inmates are entitled to protection from inmate-on-inmate attack); Thomas v. Brierley, 481 F.2d 660, 661 (3d Cir. 1973) (ruling that racial discrimination is prohibited); Fitzke v. Shappell, 468 F.2d 1072 (6th Cir. 1972) (ruling that inmates are entitled to medical care); Corby v. Conboy, 457 F.2d 251 (2d Cir. 1972) (ruling that inmates are entitled to access to courts); Walker v. Blackwell, 411 F.2d 23, 24-25 (5th Cir. 1968) (ruling that inmates are entitled to right to religious freedom); Wright v. McMann, 387 F.2d 519, 526-27 (2d Cir. 1967) (ruling that inmates are entitled to protection from debasing segregation conditions).

[FN29]. 418 U.S. 539, 555-56 (1974).

[FN30]. Mich. Dep't of Corr., Prisoner Guidebook (1999).

[FN31]. See Macolm M. Feeley & Edward L. Rubin, Judicial Policy Making in the Modern State 30-51 (1998) (providing an overview of court rulings addressing prisoners).

[FN32]. See, e.g., Sandin v. Conner, 515 U.S. 472, 483-85 (1995) (holding that procedural safeguards arise when disciplinary sanctions are a "dramatic departure from the basic conditions [of the sentence]" or impose "atypical and significant hardships"); Thornburgh v. Abbott, 490 U.S. 401, 419 (1989) (holding that inmates possess a limited right to receive publications); O'Lone v. Estate of Shabazz, 482 U.S. 342, 350-52 (1987) (holding that inmates possess a limited right to religious freedom); Turner v. Safley, 482 U.S. 78, 91 (1987) (holding that inmates possess a limited right to receive and send correspondence); Hudson v. Palmer, 468 U.S. 517, 530 (1984) (holding that inmates possess a limited right to privacy); Vitek v. Jones, 445 U.S. 480, 487-88 (1980) (holding that involuntary transfer of inmates to mental hospitals "implicates a liberty interest protected by the Due Process Clause."); Bounds v. Smith, 430 U.S. 817, 828-29 (1977) (holding that inmates possess a right of meaningful access to the courts).

[FN33]. See, e.g., Mich. Dep't of Corr., Prisoner Guidebook (1999); Mass. Dep't of Corr. Facilities, M.C.I. Concord, Inmate Orientation Handbook (1998); Mont. State Prison, A Guide to Adjustment (1998); Neb. Dep't of Corr. Servs., Rules and Regulations (1998); N.H. State Prison, Manual for the Guidance of Inmates (1998); N.D. Dep't of Corr. & Rehab., Prisons Div., Inmate Handbook (1998); Pa. Dep't of Corr., Inmate Handbook (2003).

[FN34]. See Mary E. Pelz, Gangs, in Encyclopedia of American Prisons 213, 215 (Marilyn D. McShane & Frank D. Williams III eds., 1996) (examining prison gangs).

[FN35]. See Bureau of Justice Statistics, U.S. Dep't of Justice, Bull. No. NCJ 200248, Prisoners in 2002 9 (2003) (reporting that blacks comprised 45% of state and federal prisoners, with whites making up 34.2%), available at http:// www.ojp.usdoj.gov/bjs/pub/pdf/p02.pdf.

[FN36]. Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics, 2002 500 tbl.6.27 (2003) (reporting that 66% of prisoners in 2002 were under age 35), available at http:// www.albany.edu/sourcebook/1995/pdf/t627.pdf.

[FN37]. See James E. Robertson, Psychological Injury and the Prison Litigation Reform Act: A "Not Exactly," Equal Protection Analysis, 37 Harv. J. on Legis. 105, 133 (2000) ("Fifty percent left school before the eleventh grade. Three of every four inmates cannot read above an eighth grade level and as many as half may be functionally illiterate.").

[FN38]. See id. at 133 ("Of those persons who had been free for a year or more before their arrest, fifty percent had incomes under $10,000 and nineteen percent reported incomes less than $3,000.").

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[FN39]. See David P. Kalinich, Contraband, in Encyclopedia of American Prisons 111-15 (Marilyn D. McShane & Frank D. Williams III eds., 1996) (examining contraband in prison and the underground prison economy).

[FN40]. Richard A. Cloward, Social Control in the Prison, in Theoretical Studies in the Social Organization of the Prison 35-41 (1960) (identifying three informal patterns of social accommodation: over goods and services, information, and status).

[FN41]. See, e.g., Paul W. Keve, Prison Life And Human Worth 54 (1974) (describing the American prison as a "barely controlled jungle"); Matthew Silberman, A World of Violence: Corrections in America 2 (1995) (describing contemporary prison life as a "world of violence in which weakness is shunned and strength is worshipped"); James E. Robertson, Surviving Incarceration: Constitutional Protection From Inmate Violence, 35 Drake L. Rev. 101, 106 (1985-86) (positing that "the fear of violence is the lingua franca of the contemporary prison"); Peter Scharf, Empty Bars: Violence and the Crisis of Meaning in Prison, in Prison Violence in America 27, 28 (Michael C. Braswell et al. eds., 2d ed. 1994) (observing that "[r]apes, beatings, knifings, and killings are common occurrences in many prisons"); Hans Toch, Study and Reducing Stress, in The Pains of Imprisonment 25, 41 (Robert Johnson & Hans Toch eds., 1982) (describing prisons as "human warehouses with a junglelike underworld").

[FN42]. See, e.g., Carl Bryan Holmberg, The Culture of Transgression: Initiations into the Homosociality of a Midwestern State Prison, in Prison Masculinities 78, 89 (Don Sabo et al. eds., 2001) (describing the social relationships among men in prison as "magnify[ing] masculinity, taking it to the extremes of hypermasculinity"); Wilbert Rideau & Billy Sinclair, Prison: The Sexual Jungle, in Male Rape: A Casebook OF Sexual Aggressions 3, 5 (Anthony M. Scacco, Jr. ed., 1982) (describing the prison as "ultramasculine").

[FN43]. See infra note 59 and accompanying text (describing how the absence of heterosexual relationships leads men to question their masculinity).

[FN44]. Vojdik, supra note 12, at 90.

[FN45]. See Bentley & Corbett, supra note 7, at 60 (defining "turning a person out" as "[c]hanging a person's sexual habits from heterosexual to homosexual"); Rideau & Sinclair, supra note 42, at 5 (describing a "turning-out" as "stripping the male-victim' of his status as 'man'").

[FN46]. See Stephen "Donny" Donaldson, A Million Jockers, Punks, and Queens, in Prison Masculinities 118, 120 (Don Sabo et al. eds., 2001) (describing "wifely chores").

[FN47]. See, e.g., Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976).
One 20-year-old inmate, after relating that he has been told by medical experts that he has the mind of a five year old, testified that he was raped by a group of inmates on the first night he spent in an Alabama prison. On the second night he was almost strangled by two other inmates who decided instead that they could use him to make a profit, selling his body to other inmates.
Id. at 325.

[FN48]. Dumond, supra note 7, at 139 tbl.2.

[FN49]. Id.

[FN50]. See id.

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[FN51]. See id.

[FN52]. Michel Foucault, The Confession of the Flesh, in Power/Knowledge: Selected Interviews & Other Writings, 1972-1977 194, 198 (Colin Gordon ed., Colin Gordon et al. trans., 1980).

[FN53]. Leslie Bender, Gender Equality in the Legal Procession: Sex Discrimination or Gender Inequality?, 57 Fordham L. Rev. 941, 948 (1989) (citations omitted).

[FN54]. Clemmer argued that all inmates experience "prisonization," a process of assimilation and socialization into the prison subculture. Donald Clemmer, The Prison Community, in Correctional Contexts 109, 111 (James W. Marquart & Jonathan R. Sorensen eds., 1997). Later, Sykes added that prisonization functions to lessen the deprivations of liberty, goods and services, heterosexual relationships, autonomy, and security. See Gresham M. Sykes, The Society of Captives 65-83 (1958). Irwin and Cressey challenged Sykes' deprivation thesis by contending that the normative composition of the inmate subculture was imported into the prison by inmates and reflected their pre-prison experiences. John Irwin & Donald R. Cressey, Thieves, Convicts and the Inmate Culture, 10 Soc. Probs. 142, 142-55 (1962).

[FN55]. Jean Lipman-Blumen, Gender Roles and Power 55 (1984); see also Carolyn Newton, Gender Theory and Prison Sociology: Using Theories of Masculinity to Interpret the Sociology of Prisons for Men, 33 Howard J. Crim. Just. 193, 198 (1993) ("[T]he ideal of dominance and power ... are part of the definition of masculinity ... .").

[FN56]. See, e.g., Daniel Lockwood, Prison Sexual Violence 105 (1980) (attributing prison sexual violence in large part to a lower class subculture of violence, which is dominated by blacks who equate masculinity with power and domination); Wayne S. Wooden & Jay Parker, Men Behind Bars 14- 15 (1982) ("The value structure of the lower-class subcultures found in prison, regardless of their ethnic background, places extreme emphasis on maintaining and safeguarding the inmate's manhood and manliness--his machismo.").

[FN57]. See, e.g., Sykes, supra note 54, at 65-79 (arguing that the hardships of prison lead the inmate to question his competency as an adult male); Kevin N. Wright, The Violent and Victimized in a Male Prison, in Prison Violence in America 103, 119 (Michael C. Braswell et al. eds., 2d ed. 1994) ("The literature suggests that prison violence is related to the threat incarceration poses to the individual's identity and particularly his sense of masculinity.").

[FN58]. Sykes, supra note 54, at 65-79.

[FN59]. See id. at 71-72.

A society composed exclusively of men tends to generate anxieties in its members concerning their masculinity ... . The inmate is shut off from the world of women which by its very polarity gives the male world much of its meaning. Like most men, the inmate must search for his identity not simply within himself but also in the picture of himself which he finds reflected in the eyes of others; and since a significant half of his audience is denied him, the inmate's self image is in danger of becoming half complete, fractured, a monochrome without the hues of reality.

Id.

[FN60]. Id. at 75.

[FN61]. See infra notes 142-46 and accompanying text (citing cases and discussing prison reform through consent decrees and injunctive relief).

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[FN62]. See Gerald B. Wetlaufer, Systems of Belief in Modern American Law: A View from Century's End, 49 Am. U. L. Rev. 1 (1999), for a description of liberalism:

(1) the social universe is comprised of individuals who are essentially independent and autonomous of one another and who should be understood to pre-exist society and the state; (2) liberty and autonomy may be the first principles from which we ought to work; (3) among the most basic rights, freedoms, and liberties that those individuals may hold is the right of property and, within a particular realm, the right to choose freely; and (4) the proper role of the state is to protect the rights of these individuals and to provide a mechanism for the mediation of their conflicting desires.

Id. at 9; see also, e.g., Scott Cummings, Affirmative Action and the Rhetoric of Individual Rights: Reclaiming Liberalism as a "Color-Conscious" Theory, 13 Harv. BlackLetter L.J. 183, 187-90 (1997) (describing the tenets of liberalism); Jonathan Turley, Introduction: The Hitchhiker's Guide to CLS, Unger, and Deep Thought, 81 Nw. U. L. Rev. 593, 601-02 (1987) (describing general features of liberalism).

[FN63]. See, e.g., Linda C. McClain, Atomistic Man Revisited: Liberalism, Connection, and Feminist Jurisprudence, 65 S. Cal. L. Rev. 1171, 1173 (1992) ("One of the major strains of feminist jurisprudence has criticized American law, and the liberal jurisprudence and political philosophy on which it is said to be grounded, as male or masculine."); Deborah L. Rhode, Feminist Critical Theories, 42 Stan. L. Rev. 617, 628 (1990) (observing that critical feminist theorists view liberal legalist concepts as "peculiarly masculine constructs"); Suzana Sherry, Civic Virtue and the Feminine Voice in Constitutional Adjudication, 72 Va. L. Rev. 543, 543 (1986) ("[W]hile the masculine vision parallels pluralist liberal theory, the feminine vision is more closely aligned with classical republican theory, represented in its various forms by Aristotle, Machiavelli, and Jefferson."); Robin West, Jurisprudence and Gender, 55 U. Chi. L. Rev. 1, 2 (1988) (arguing that "liberal legalism ... is essentially and irretrievably masculine"); cf. Catharine A. MacKinnon, Toward a Feminist Theory of the State 238 (1989) ("From a feminist perspective, male supremacist jurisprudence erects qualities valued from the male point of view."); Kenneth L. Karst, Woman's Constitution, 1984 Duke L.J. 447, 486 (1984) ("The men who wrote the Constitution in 1787 designed a framework for governing society as it was perceived by men and run by men."); see generally Lisa R. Pruitt, A Survey of Feminist Jurisprudence, 16 U. Ark. Little Rock L.J. 183, 184 (1994) (observing that feminist jurisprudence often "avoids 'theory' altogether, choosing instead to focus upon the practical reality of women's experience and concerns").

[FN64]. McClain, supra note 63, at 1173 (footnote omitted).

[FN65]. Gary Peller, The Metaphysics of American Law, 73 Cal. L. Rev. 1151, 1174 (1985).

[FN66]. See, e.g., Clare Dalton, An Essay in the Deconstruction of Contract Doctrine, 94 Yale L.J. 997, 1006 (1985) ("Liberalism's obsession with, and inability to resolve, the tension between self and other suggests that our stories about politics, policy, and law will be organized along dualities reflecting this basic tension."); West, supra note 63, at 7 ("Physical separation from the other entails not just my freedom; it also entails my vulnerability. Every other discrete, separate individual--because he is the 'other'--is a source of danger to me and a threat to my autonomy.").

[FN67]. See John Locke, Second Treatise of Government 11 (C.B. Macpherson ed., Hackett Publ'g Co. 1980) (1690); see also Karst, supra note 63, at 486 (characterizing the framing of the Constitution as a "relentlessly contractual" affair).

[FN68]. Locke, supra note 67, at 11 (emphasis omitted).

[FN69]. 62 Va. 790 (1871).

[FN70]. Id. at 796.

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[FN71]. Id.

[FN72]. See Duncan Kennedy, The Structure of Blackstone's Commentaries, 28 Buff. L. Rev. 205, 211-12 (1979) (describing the liberal man's yearning for both autonomy and security as the "fundamental contradiction" in liberal thought); but see Jules L. Coleman & Brian Letter, Determinacy, Objectivity, and Authority, 142 U. Pa. L. Rev. 549, 574-74 (1993) (footnotes omitted) (asserting that there is no contradiction in liberal thought but merely a question of the boundaries of "legitimate coercion").

[FN73]. See Thomas Hobbes, Leviathan 185-86 (C.B. MacPherson ed., Penguin Books 1968) (1651) (describing the state of human kind in a state of nature as one of "continuall feare, and danger of violent death; And the life of man, solitary, poor, nasty, brutish, and short").

[FN74]. 468 U.S. 576 (1984).

[FN75]. Id. at 585-89.

[FN76]. Id. at 586; see also Farmer v. Brennan, 511 U.S. 825, 833 (1994) ("Having incarcerated 'persons [with] demonstrated proclivit[ies] for antisocial criminal, and often violent, conduct'... .") (quoting Hudson v. Palmer, 468 U.S. 517, 526 (1984)).

[FN77]. 468 U.S. 517 (1984).

[FN78]. Id. at 526.

[FN79]. Id.; see generally U.S. Const. amend. IV (prohibiting unreasonable searches and seizures).

[FN80]. See, e.g., Burrell v. Hampshire County, 307 F.3d 1, 7 (1st Cir. 2002) (describing inmates as having "'demonstrated proclivities for antisocial, criminal, and often violent, conduct'") (quoting Farmer v. Brennan, 511 U.S. 825, 833-34 (1994)); Garrett v. Statman, 254 F.3d 946, 949 (10th Cir. 2002) (same); Skinner v. Uphoff, 234 F. Supp. 2d 1208, 1214 (D. Wyo. 2002) (same); Wells v. Jefferson County Sheriff's Dep't, 159 F. Supp. 2d 1002, 1010 (S.D. Ohio 2001) (same).

[FN81]. See C.B. Macpherson, The Political Theory of Possessive Individualism: Hobbes to Locke, (1962) (examining the attributes of the atomistic liberal man).

[FN82]. Bell v. Wolfish, 441 U.S. 520, 548 (1979) (quoting Pell v. Procunier, 417 U.S. 817, 827 (1974)).

[FN83]. O'Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1987).

[FN84]. Pell v. Procunier, 417 U.S. 817, 827 (1974).

[FN85]. See, e.g., Turner v. Safley, 482 U.S. 78, 89 (1987) (embracing a deferential attitude toward the actions of prison staff because "such a standard is necessary if 'prison administrators ..., and not the courts, [are] to make the difficult judgments concerning institutional operations'") (quoting Jones v. N.C. Prisoners' Labor Union, 433 U.S. 119, 128 (1977)); Block v. Rutherford, 468 U.S. 576, 589 (1984) (chastising the trial court for substituting its notions of proper jail administration for that of "experienced administrators"); N.C. Prisoners' Labor Union v. Jones, 433 U.S. 119, 126 (1977) (evoking a policy of "wide-ranging deference to ... the decisions of prison administrators"); Pell v. Procunier, 417 U.S. 817, 827 (1974) (stating that "courts should ordinarily defer to their expert judgment in such matters").

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[FN86]. See Lockwood, supra note 56, at 53 (observing that staff come from similarly "cultural origins" and are part of the prison community).

[FN87]. See, e.g., Lee H. Bowker, Prison Victimization 13 (1980) (observing that some correctional officers "tell them to fight it out"); Lockwood, supra note 56, at 53 (observing that staff "hold norms supporting 'masculine' responses to intimidation;" and that staff encourage targets to fight their tormentors); Silberman, supra note 41, at 19 (recounting that "correctional officers frequently lend support to such aggressive responses"); Carl Weiss & David James Friar, Terror in the Prisons: Homosexual Rape and Why Society Condones It 25 (1974) (stating that a correctional officer told an inmate, "to get a knife and cut up the prisoners responsible for his rape"); Wooden & Parker, supra note 56, at 203 (quoting a correctional officer, who stated that "[t]he guy has to be willing to get a pipe or shank and defend himself"); Helen M. Eigenberg, Rape in Male Prisons: Examining the Relationship Between Correctional Officers' Attitudes Toward Rape and Their Willingness to Respond to Acts of Rape, in Prison Violence in America 145, 159 (Michael C. Braswell et al. eds., 2d ed. 1994) (observing that correctional officers "seem to offer little assistance to inmates except the age-old advice of 'fight or fuck'").

[FN88]. See Lockwood, supra note 56, at 53 (observing that staff sometimes make "private arrangements to overlook a fight provided it is in the service of survival").

[FN89]. See Human Rights Watch, No Escape: Male Rape in U.S. Prisons, at Part VIII (2001), available at http://www.hrw.org/reports/2001/prison/report.html (last visited on Jan. 27, 2003) [hereinafter No Escape].
Defendant J.M, a security officer with the rank of sergeant, came to investigate the series of latest allegations. Defendant J.M. refused to interview the inmate witnesses and told plaintiff that he was lying about being sexually abused. After plaintiff vehemently protested that he was being truthful, defendant J.M. made comments that plaintiff "must be gay" for "letting them make you suck dick."
Id. (footnote omitted).

[FN90]. See, e.g., LaMarca v. Turner, 995 F.2d 1526, 1532 (11th Cir. 1993) ("When alerted to specific dangers, prison staff often looked the other way rather than protect inmates. Rather than offer to help, the staff suggested that the inmates deal with their problems 'like men,' that is, use physical force against the aggressive inmate."); Young v. Quinlan, 960 F.2d 351, 354 (3d Cir. 1992) (stating that a correctional officer allegedly told the plaintiff that "protection was not one of his duties, that plaintiff had better learn to get along because officials as Lewisburg do not like crybabies").

[FN91]. See, e.g., Susan Bandes, The Negative Constitution: A Critique, 88 Mich. L. Rev. 2271, 2273 (1990) ("Traditionally, the protections of the Constitution have been viewed largely as prohibitory constraints on the power of government, rather than affirmative duties with which government must comply."); Archibald Cox, The Supreme Court, 1965 Term - Foreword: Constitutional Adjudication and the Promotion of Human Rights, 80 Harv. L. Rev. 91, 93 (1966) (observing that the "original Bill of Rights was essentially negative" and that "the citizen had no claim upon government except to be left alone").

[FN92]. Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983); see also Isaiah Berlin, Two Concepts of Liberty, in Four Essays on Liberty 118, 123-24 (1969) (examining how "the classical English political philosophers" defined liberty); cf. John Kekes, Against Liberalism 7-8 (1997) (defining negative and positive rights).

[FN93]. See, e.g., David Abraham, Are Rights the Right Thing?, 25 Conn. L. Rev. 947, 948 (1993) ("These rights are meant to guarantee a zone of autonomy for self-fulfillment.") (reviewing Mary Ann Glendon, Rights Talk: The Impoverishment of Political Discourse (1991)); but see Ronald R. Garet, Communality and Existence: The Rights of Groups, 56 S. Cal. L. Rev. 1001, 1008 (1983) (contending that many textual provisions of the Constitution embrace "groupness," such as freedom of assembly in the First Amendment).

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[FN94]. See Michel Rosenfeld, Contract and Justice: The Relation Between Classical Contract Law and Social Contract Theory, 70 Iowa L. Rev. 769, 788 (1985) ("In the Lockean version of the libertarian paradigm the equilibrium between individual rights and individual welfare is maintained by the enforcement of the natural right to property. Such a natural right guarantees a broad measure of individual autonomy ... ."); see also Andrew B. Lustig, Natural Law, Property, and Justice: The General Justification of Property in John Locke, 19 J. Religious Ethics 1 (1991) (discussing the central role of property in Locke's concept of law).

[FN95]. See Jeffrey Reiman, The Rich Get Richer and the Poor Get Prison: Ideology, Class, and Criminal Justice 101-36 (5th ed. 2000) (discussing the socio-economic backgrounds of inmates).

[FN96]. See id. at 9 (discussing the employment backgrounds of inmates).

[FN97]. See John Matosky, Note, Illiterate Inmates and the Right of Meaningful Access to the Courts, 7 B.U. Pub. Int. L.J. 295, 302 (1998) (reporting that "the typical twenty-five-year-old inmate functioned at two to three grade levels below the level actually completed in school").

[FN98]. See Howard B. Eisenberg, Rethinking Prisoner Civil Rights Cases and the Provision of Counsel, 17 S. Ill. U. L. Rev. 417, 442 (1993) (discussing the barriers facing inmates who file actions pro se).

[FN99]. See James R. P. Ogloff et al., Mental Health Services in Jails and Prisons: Legal, Clinical, and Policy Issues, 18 Law & Pyschol. Rev. 109, 109 (1994) (discussing inmates' mental health).

[FN100]. See Charles Blanchard, Drugs, Crime, Prison, and Treatment, 72 Spectrum 26 (1999) (discussing substance abuse among inmates).

[FN101]. DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989).

[FN102]. Id. at 200.

[FN103]. 452 U.S. 337 (1981).

[FN104]. Id. at 348.

[FN105]. 501 U.S. 294 (1991).

[FN106]. 511 U.S. 825 (1994).

[FN107]. See generally U.S. Const. amend. VIII (prohibiting in relevant part cruel and unusual punishment).

[FN108]. See Farmer, 511 U.S. at 842-43; Wilson, 501 U.S. at 300.

[FN109]. For a discussion of the key role played by the lower federal courts, see Fred Cohen, The Discovery of Prison Reform, 21 Buff. L. Rev. 855 (1972); Daryl R. Fair, The Lower Federal Courts as Constitution-Makers: The Case of Prison Conditions, 7 Am. J. Crim. L. 119 (1979); Malcolm M. Feeley & Roger A. Hanson, The Impact of Intervention on Prisons and Jails: A Framework for Analysis and Review of the Literature, in Courts, Corrections, and the Constitution 12 (John D. DiIulio, Jr. ed., 1990); Harvard Center for Criminal Justice, Judicial Intervention in Prison Discipline, 63 J. Crim. L. Criminology & Police Sci. 200 (1972); Michael S. Fieldberg, Comment, Confronting Conditions of Confinement: An Expanded

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Role for Courts in Prison Reform, 12 Harv. C.R.-C.L. L. Rev. 367 (1977); Note, Decency and Fairness: An Emerging Judicial Role in Prison Reform, 57 Va. L. Rev. 841 (1971).

[FN110]. See, e.g., Laaman v. Helgemoe, 437 F. Supp. 269, 323 (D.N.H. 1977) (ruling that conditions making degeneration likely violate the Eighth Amendment); Pugh v. Locke, 406 F. Supp. 318, 330 (M.D. Ala. 1976) (holding that prison conditions that dehabilitate inflict cruel and unusual punishment), aff'd as modified sub nom. Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), rev'd on other grounds sub nom. Alabama v. Pugh, 438 U.S. 781 (1978); Holt v. Sarver, 309 F. Supp. 362, 379 (E.D. Ark. 1970) (holding that conditions "which militate against reform and rehabilitation" inflict cruel and unusual punishment).

[FN111]. 437 F. Supp. 269.

[FN112]. Id. at 316. See Gregg v. Georgia, 428 U.S. 153, 183 (1976) (holding that "the sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering.").

[FN113]. Bounds v. Smith, 430 U.S. 817 (1977). The Court in Wolff v. McDonnell, 418 U.S. 539 (1974), extended inmates right to assist one another to the filing of civil rights actions.

[FN114]. Bounds, 430 U.S. at 822.

[FN115]. Id. at 820-21.

[FN116]. 393 U.S. 483 (1969).

[FN117]. See id. at 487.

[FN118]. 518 U.S. 343 (1996).

[FN119]. Id. at 343, 354.

[FN120]. See id. at 351.

[FN121]. See Bentley & Corbett, supra note 7, at 11 (defining "lockdown" as confining inmates in their cells or housing units).

[FN122]. See Lewis, 518 U.S. at 354.

[FN123]. See MacPherson, supra note 81 (examining the attributes of the atomistic liberal man).

[FN124]. See Robert A. Holland, Comment, A Theory of Establishment Clause Adjudication: Individualism, Social Contract, and the Significance of Coercion in Identifying Threats to Religious Liberty, 80 Cal. L. Rev. 1595, 1632 (1992) (observing that liberal individualism constructs human kind as rational and autonomous).

[FN125]. See George Mousourakis, Character, Choice, and Criminal Responsibility, in 1998 Universite Laval Les Cahiers De Droit, 39 C. de D. 51, 57 (1998) ("The concept of voluntariness may be interpreted to denote either the actor's ability to control her external conduct --i.e. to act in a strict sense--or the actor's capacity to determine freely the course of her action --i.e. to give effect to her choice of action.").

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[FN126]. Michael A. Sandel, Liberalism and the Limits of Justice 11 (2d ed. 1989); see also Adeno Addis, Individualism, Communitarianism, and the Rights of Ethnic Minorities, 67 Notre Dame L. Rev. 615, 633 (1992) (observing that individualism "embraces the Enlightenment's assumption of a universal, stable, and to a large extent, pre-social, individual identity"). "Individualism," wrote Alexis de Tocqueville, "[exists in the American character as] mature and calm feeling which disposes each citizen to sever himself from the mass of his fellows ... .; he willing leaves society at large to itself." Alexis de Tocqueville, Democracy in America 104 (Henry Reeve text, rev. by Francis Bowen Vantage Books 1945) (1835). Tocqueville attributed American individualism not to innate qualities but a democratic and equalitarian society that "intoxicated [people] with their new power." Instead of acknowledging their debt to this society, "they acquire[d] the habit of always considering themselves as standing alone ... ." Id. at 98-100

[FN127]. Stephen L. Carter, When Victims Happen To Be Black, 97 Yale L.J. 420, 421 (1988) (footnote omitted); see also Joel Feinberg, Harm to Others 118- 25 (1984) (discussing causation in the liberal concept of harming).

[FN128]. Carter, supra note 127, at 421.

[FN129]. See supra notes 87-90 and accompanying text (discussing staff attitudes toward inmates' use of force in dealing with their tormentors).

[FN130]. See supra notes 89-90 and accompanying text (discussing staff attitudes toward inmates who fail to fight their tormentors).

[FN131]. 511 U.S. 825 (1994).

[FN132]. Id. at 832-40 (quoting Wilson v. Seiter, 501 U.S. 294, 298 (1991)).

[FN133]. Hale v. Tallapoosa County, 50 F.3d 1579, 1583 (11th Cir. 1995) (emphasis added).

[FN134]. Langston v. Peters, 100 F.3d 1235, 1236 (7th Cir. 1996).

[FN135]. See id. at 1236. See Charles B. Fields, Protective Custody, in Encyclopedia of American Prisons 373 (Marilyn D. McShane & Frank D. Williams III eds., 1996):
The use of protective custody (PC) is one of the ways prison administrators attempt to isolate and protect those inmates most likely to be victimized. Protective custody is a restricted housing area that usually is made up of maximum security cells located within the larger prison setting. In most cases, there are only a limited number of cells available. PC is often referred to as a "prison within a prison."
Id.

[FN136]. Langston, 100 F.3d at 1236.

[FN137]. See id. at 1238.

[FN138]. Id. at 1239.

[FN139]. Id. at 1239 n.2.

[FN140]. See, e.g., Ruiz v. Estelle, 503 F. Supp. 1265, (S.D. Tex. 1980) (ordering system-wide relief in Texas), modified, 650 F.2d 555 (5th Cir. 1981), aff'd in part and rev'd in part, 666 F.2d 854 (5th Cir. 1982), aff'd in part, rev'd in part, modified

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in part, 679 F.2d 1115 (5th Cir. 1982); Newman v. Alabama, 559 F.2d 283, 289-90 (5th Cir. 1977) (ordering system-wide relief in Alabama), rev'd in part sub nom. Alabama v. Pugh, 438 U.S. 781 (1978); Palmigiano v. Garrahy, 443 F. Supp. 956, 986-89 (D.R.I. 1977) (upheld system-wide relief in Rhode Island), remanded, 599 F.2d 17 (1st Cir. 1979), aff'd, 887 F.2d 258 (1st Cir. 1989); Holt v. Sarver, 309 F. Supp. 362, 382-85 (E.D. Ark. 1970) (ordering system-wide relief in Arkansas), aff'd, 442 F.2d 304 (8th Cir. 1971).

[FN141]. See, e.g., Battle v. Anderson, 564 F.2d 388, 401 (10th Cir. 1977) (ruling that overcrowding and other shortcomings justified the trial court's verdict for the plaintiff); Williams v. Edwards, 547 F.2d 1206, 1211 (5th Cir. 1977) (ruling that the prison environment, as a whole, inflicted a constitutional violation); Gates v. Collier, 501 F.2d 1291, 1309 (5th Cir. 1974) (ruling that the totality of the circumstances inflicted cruel and unusual punishment).

[FN142]. See Judith Resnik, Managerial Judges, 96 Harv. L. Rev. 374, 376- 77 (1982).
Many federal judges have departed from their earlier attitudes; they have dropped the relatively disinterested pose to adopt a more active, "managerial stance." In growing numbers, judges are not only adjudicating the merits of issues ..., but also are meeting with parties in chambers to encourage settlement of disputes and to supervise case preparation.
Id.; see also Abram Chayes, The Role of the Judge in Public Law Adjudication, 89 Harv. L. Rev. 1281, 1284 (1976) (describing the trial judge as "the creator and manager of complex forms of ongoing relief ... ."); Owen M. Fiss, The Supreme Court, 1978 Term - Foreword: The Forms of Justice, 93 Harv. L. Rev. 1 (1978) (describing "structural reforms" of prisons and other institutions).

[FN143]. Malcolm M. Feeley & Roger A. Hanson, The Impact of Intervention on Prisons and Jails: A Framework for Analysis and Review of the Literature, in Courts, Corrections, and the Constitution 12-13 (John D. DiIulio, Jr. ed., 1990).

[FN144]. Pound described the traditional approach to judicial decision making as a process of "deciding" the dispute and "declaring" what the law would be in the future. Roscoe Pound, The Theory of Judicial Decision, 36 Harv. L. Rev. 940, 941 (1923).

[FN145]. Alexander Bickel, The Least Dangerous Branch 16 (1978).

[FN146]. Id. at 18. But see, e.g., Robert H. Dahl, democracy and its critics 190 (1989) (concluding that "a majority of the justices of the Supreme Court are never out of line for very long with the views ... among the lawmaking majorities"); Barry Friedman, Dialogue and Judicial Review, 91 Mich. L. Rev. 577, 577-616 (1993) (questioning "just how 'countermajoritarian' courts are").

[FN147]. See Prison Litigation Reform Act of 1995, Pub. L. No. 104-34, 110 Stat. 1321 (1996).

[FN148]. Benjamin v. Jacobson, 935 F. Supp. 332, 340 (S.D.N.Y. 1996) ("The thrust of the criticism which promoted the legislation was that the federal courts had overstepped their authority and were mollycoddling the prisons ... .").

[FN149]. See, e.g., 141 Cong. Rec. S14419 (daily ed. Sept. 27, 1995) (statement of Sen. Abraham) ("[N]o longer will prison administration be turned over to Federal judges for the indefinite future for the slightest reason."), reprinted in 1 Legislative History of the Prison Litigation Reform Act of 1996, Pub. L. No. 104-134, at doc. 15 (1997) (Bernard D. Reems, Jr. & William H. Manz eds., 1997) [hereinafter Legislative History of the Prison Litigation Reform Act of 1996].

[FN150]. See generally Johnson v. Avery, 393 U.S. 483, 490 (1969) (holding that writ writers, that is, inmates who file suits pro se, enjoy constitutional protection in absence of other means of access to courts).

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[FN151]. See, e.g., 141 Cong. Rec. S14418 (daily ed. Sept. 27, 1995) (statement of Sen. Hatch) (urging legislation to "bring relief to a civil justice system overburdened by frivolous prisoner lawsuits"), reprinted in Legislative History of the Prison Litigation Reform Act of 1996, supra note 149, at doc. 15; Kincade v. Sparkman 117 F.3d 949, 951 (6th Cir. 1997) ("The text of the Prison Litigation Reform Act itself reflects that the drafters' primary objective was to curb prison conditions litigation.").

[FN152]. See Legislative History of the Prison Litigation Reform Act of 1996, supra note 149, at vii (stating that the House of Representatives and the Senate approved the conference report containing the Act 399 to 25 and 89 to 11, respectively).

[FN153]. The statute, according to Schlanger, has made even constitutionally meritorious cases [harder] "both to bring and to win." Margo Schlanger, Inmate Litigation, 116 Harv. L. Rev. 1555, 1563 (2003).

[FN154]. See 42 U.S.C. § 1997e(a) (2002). In Porter v. Nussle, 534 U.S. 516 (2002), the Court held that the exhaustion requirement applies whether plaintiff complains of systemic wrongs or an isolated instance of wrongdoing.

[FN155]. A status degradation ceremony is "[a]ny communicative work between persons, whereby the public identity of an actor is transformed into something looked on as lower in the local scheme of social types ... ." Harold Garfinkel, Conditions of Successful Degradation Ceremonies, in Symbolic Interaction 205 (Jerome G. Manis & Bernard N. Meltzer eds., 1967).

[FN156]. See No Escape, supra note 89, at Part II.
[I]in general they (grievance systems] tend to be plagued by a lack of confidentiality, which may expose the complaining prisoner to retaliation by others, a bias against prisoner testimony, and a failure to seriously investigate prisoners' allegations. Grievances are frequently denied with rote responses that show little individualized attention to the underlying problem.
Id.
A "snitch" or "rat" is an informant. See Bentley & Corbett, supra note 7, at 36 (defining "snitch").

[FN157]. See, e.g., Comstrock v. McCrary, 273 F.3d 693, 699 n.2 (6th Cir. 2001) ("Being labeled a 'snitch' was dreaded, because it could make the inmate a target for other prisoners' attacks."); see also Alberti v. Heard, 600 F. Supp. 443, 450 (S.D. Tex. 1984) ("[I]t is apparent that the inmates have an unwritten code of silence which results in most of the acts of violence going undetected."); Grubbs v. Bradley, 552 F. Supp. 1052, 1078 (M.D. Tenn. 1982) ("[T]he evidence is absolutely clear that the inmate code exists and that it prevents the reporting of a great many episodes of actual or threatened violence."); Pugh v. Locke, 406 F. Supp. 318, 325 (M.D. Ala. 1976) ("A cardinal precept of the convict [sub]culture is that no inmate should report another inmate to officials.").

[FN158]. See Booth v. Churner, 532 U.S 731 (2001) (ruling that the exhaustion requirement applied "regardless of the relief offered through Administrative proceedings.").

[FN159]. See 28 U.S.C. § 1915(b) (2000).

[FN160]. See 18 U.S.C. § 3624(b) (2000) (permitting the court to order revocation of unvested good time for filers confined in federal prisons when the plaintiff filed for a malicious purpose, solely to harass, or testifies falsely).

[FN161]. See 42 U.S.C. § 1997e(d) (2004).

[FN162]. Most courts have ruled that sexual harassment does not state a cause of action in the absence of a physical injury. See, e.g., McFadden v. Lucas, 713 F.2d 143, 146 (5th Cir. 1983) (ruling that the absence of physical abuse precludes an

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Eighth Amendment violation); see also Wilson v. Horn, 971 F. Supp. 943, 948 (E.D. Pa. 1997) (ruling that verbal abuse and verbal harassment falls short of a constitutional violation). Nor will fear of sexual assault state a cognizable claim in some courts. See, e.g., Wilson v. Yaklich, 148 F.3d 596, 600-602 (6th Cir. 1998) ("However legitimate [the plaintiff's] fears may have been, we nevertheless believe that it is the reasonably preventable assault itself, rather than any fear of assault, that gives rise to a compensable claim under the Eighth Amendment.") (citing Babcock v. White, 102 F.3d 267, 272 (7th Cir. 1996)); see also Babcock v. White, 102 F.3d 267, 272 (7th Cir. 1996) ("Simply put, Babcock alleges, not a 'failure to prevent harm,' ... but a failure to prevent exposure to risk of harm. This does not entitle Babcock to monetary compensation."); but see LaMarca v. Turner, 995 F.2d 1526, 1535 (11th Cir. 1993) (concluding that "unnecessary pain and suffering" inflicts an Eighth Amendment violation when inmates experience "unjustified constant and unreasonable exposure to violence"); Mooreman v. Sargent, 991 F.2d 472, 474 (8th Cir. 1993) (indicting that an Eighth Amendment violation can result when sexual assaults occur with sufficient frequency to place inmates in reasonable fear for their safety).

[FN163]. See Anderson v. Redman, 429 F. Supp. 1105, 1117 (D. Del. 1977) ("By the time an inmate reaches his initial classification destination, be it maximum, medium, or minimum, it is difficult to discern non-consensual homosexual activity, because the resistance of most non-consensual victims has been broken by that time."); James E. Robertson, A Clean Heart and an Empty Head: The Supreme Court and Sexual Terrorism in Prison, 81 N.C. L. Rev. 433, 444 (2003) ("Coercive techniques--such as extorting sex for overdue debts or protection from fellow inmates--lead most victims to surrender their bodies silently and, in their eyes, shamefully.")

[FN164]. See Farmer v. Brennan, 511 U.S. 825, 832-40 (1994).

[FN165]. Schlanger, supra note 153, at 1606.

[FN166]. See Fed. R. Civ. P. 54(d)(1) ("[C]osts other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs ... .").

[FN167]. See The Prison Rape Elimination Act of 2003, Pub. L. No. 108-79, 117 Stat. 972 (2003).

[FN168]. See Sabrina Qutb & Lara Stemple, Selling a Soft Drink, Surviving Hard Time: Just What Part Of Prison Rape do you Find Amusing?, S.F. Chron., June 9, 2002, at D2, available at http://www.sfgate.com/cgi-bin/article-cgi?file=HRonicle/archive/2002/06/09/IN181350.dtl (last visited Oct. 27, 2003).

[FN169]. Robert W. Dumond, The Impact and Recovery of Prison Rape, available at http://www.spr.org/pdf/Dumond.pdf (last visited Apr. 25, 2003). Culminating in the 7-UP advertising campaign described above, the media has often portrayed male prison rape as an expected and deserved punishment. See, e.g., Christopher D. Mann & John P. Cronan, Forecasting Sexual Abuse in Prison: The Prison Subculture of Masculinity as a Backdrop for Deliberate Indifference, 92 J. Crim. L. & Criminology 127, 185 n.383 (2001-02) (citing media portrayals of prison rape); Joanne Mariner, Body and Soul: The Trauma of Prison Rape, in Building Violence 125, 126 (John P. May ed., 2000) ("Judging by the popular media, rape is accepted as almost a commonplace of imprisonment, so much so that when the topic of prison arises, a joking reference to rape seems almost obligatory."); Tamar Lewin, Little Sympathy or Remedy for Inmates Who Are Raped, N.Y. Times, Apr. 15, 2001, at A1 ("Inmate rape has such an established place in the mythology of prison that references to confinement often call forth jokes about sexual assault.").

[FN170]. Joseph A. Amato, Victims and Values: A History and a Theory of Suffering 159 (1990).

[FN171]. See Qutb & Stemple, supra note 168.

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[FN172]. See id.

[FN173]. See Stop Prisoner Rape, Stephen Donaldson: Classic Writing By and About the Former SPR President, at http:// www.spr.org/en/stephendonaldson/stephendonaldson.html (last visited June 6, 2003) (listing most of Donaldson's essays and editorials).

[FN174]. Most prominently, a three-part series on prison rape aired on the national news broadcast, World News Tonight. See Nowhere to Hide, (ABC News broadcast, Apr. 16, 2001), available at http:// abcnews.go.com/sections/wnt/WorldNewsTonight/wnt010416_prisonrape1_ feature.html1/12/2003 (last visited June 5, 2003); 'Time Bombs', (ABC News Broadcast, Apr. 16, 2001), available at http:// www.abcnews.go.com/sections/wn/WorldNewsTonight/wnt010417_prisonrape2_ feature.html1/12/2003 (last visited June 5, 2003); Preventing Inmate Rape, (ABC News Broadcast, Apr. 16, 2001), available at http:// abcnews.go.com/sections/wnt/WorldNewsTonight/wnt010418prisonrape3feature.html1/12/ 2003 (last visited June 5, 2003).

[FN175]. See No Escape, supra note 89.

[FN176]. Stop Prisoner Rape, Press Release: Survivors of Prison Rape Speak at Capitol for First Time, at http:// www.spr.org/en/pressreleases/2003/0624.html (last visited Oct. 15, 2003).

[FN177]. See generally Richard Posner, The Problematics of Moral and Legal Theory, 111 Harv. L. Rev. 1637, 1666-67 (1998) (observing that moral entrepreneurs provide critical rhetorical and organizational skills needed to convince otherwise self-interested persons to act dispassionately).

[FN178]. See Stop Prisoner Rape, Stop Prisoner Rape: A Brief History, at http://www.spr.org/en/history.html (last visited June 6, 2003).

[FN179]. See id.

[FN180]. See Press Release, Center for Reproductive Rights, Lara Stemple Joins the Center for Reproductive Rights (Nov. 8, 1999), available at http:// www.reproductiverights.org/pr_99_1108stemp.html.

[FN181]. See id.

[FN182]. See Michael J. Horowitz (online biography), at http:// pewforum.org/events/0509/horowitzbio.htm.

[FN183]. Anne Morse, Brutality Behind Bars, World on the Web, Feb. 16, 2001, at http://www.worldmag.com/world/issue/02-03-01/national_3.asp (last visited June 7, 2003); see also Michael Cromartie, The Jew Who Is Saving Christians, Christianity Today, Mar. 1, 1999, available at http:// www.ctlibrary.com/ct/1999/mar1/9t3050.html (last visited Apr. 25, 2004) (describing Horowitz's crusade for the International Freedom Religious Act of 1998).

[FN184]. See Becky Beane, Congress Passes Prison Rape Elimination Act, Prison Fellowship Ministries, at http:// www.pfm.org/Content/ContentGroups/Prison_ Fellowship/Publications/Jubilee1/Congress_Passes_Prison_Rape_Elimination_ Act.htm (last visited June 6, 2004).

[FN185]. Id.

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[FN186]. See Charles E. Colson, Born Again (1996).

[FN187]. Id.

[FN188]. Id.

[FN189]. Wendy Murray Zoba, The Legacy of Prisoner 23226, Christianity Today, July 9, 2001 (quoting Congressman Asa Hutchinson).

[FN190]. Colson, supra note 186.

[FN191]. Beane, supra note 184.

[FN192]. Press Release, Prison Fellowship Ministries, Will Our Society Support Human Dignity? Colson Statement on the 'Prison Rape Reduction Act of 2002' (June 12, 2002), at http://www.pfm.org/Content/ContentGroups/BreakPoint/Other_Content/Colsons_ Page/20028/Will_Our_Society_Support_Human_Dignity_.htm.

[FN193]. Id.

[FN194]. Beane, supra note 184.

[FN195]. Eli Lehrer, No Joke, Nat'l Rev. Online, June 20, 2002, available at http://www.nationalreview.com/comment/comment-lehrer062002.asp (last visited June 5, 2003) [hereinafter No Joke].

[FN196]. See supra note 85 (citing case law).

[FN197]. See Eli Lehrer, Hell Behind Bars: The Crime That Dare Not Speak Its Name, Nat'l Rev., Feb. 5. 2001, available at http://www.findarticles.com/cf_ dls/m1282/2_53/69388675/p1/article.jhtml (last visited Apr. 25, 2004) (describing rape as a "management tool").

[FN198]. No Joke, supra note 195.

[FN199]. See Beane, supra note 184.

[FN200]. The Prison Rape Elimination Act of 2003, Pub. L. No. 108-79, §4, 117 Stat. 972 (2003).

[FN201]. See id.

[FN202]. Id. § 5.

[FN203]. Id. § 6.

[FN204]. Id. § 7. States are not required to embrace the commission's standards, but they will lose federal moneys they receive for the operation of their prisons.

[FN205]. Sabo et al., supra note 9, at 15.

[FN206]. See, e.g., No Escape, supra note 89, at Part IV (stating that correspondence and interviews with inmates indicates

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that whites are "disproportionately targeted;" and "black on white abuse appears to be more common"); Lockwood, supra note 56, at 104-05 (reporting that among New York inmates, young, lower class African-Americans comprised 80% of the sexually aggressive inmates); Leo Carroll, Humanitarian Reform and Biracial Sexual Assault in a Maximum Security Prison, in Male Rape: A Casebook of Sexual Aggressions 121, 122-23 (Anthony M. Scacco, Jr. ed., 1982) (reporting that interviews with inmate informants in an Eastern prison revealed that a minimum of 75% of sexual assaults pitted black aggressors against white victims); Cindy Struckman-Johnson & David Struckman-Johnson, Sexual Coercion Rates in Seven Midwestern Prison Facilities for Men, 80 Prison J. 379, 386 (2000) (finding that blacks comprised 74% of the perpetrators and whites made up 60% of the victims); but see Richard Tewksbury, Fear of Sexual Assault in Prison Inmates, 69 Prison J. 62, 68-69) (concluding that height and weight comprised the only significant factors in predicting fear of prison sexual assault).

[FN207]. See Dumond, supra note 169 and accompanying text (finding that 50% of poll respondents believed that society accepts prison rape as part of the penalty); Victor Hassine Life Without Parole 136 (Thomas J. Bernard et al. eds., Roxbury Publ'g Co. 2d ed. 1999) (observing that "[s]ome staff members ... view prison rape as part of the punishment-risk that lawbreakers take when they commit their crimes").

[FN208]. For instance, Eigenberg found that sixteen percent of surveyed guards in a Midwestern state believed that gay inmates deserved to be raped. Helen M. Eigenberg, Correctional Officers' Definitions of Rape in Male Prisons, 28 J. Crim. Just. 435, 437-38 (2000).

[FN209]. Allen et al., supra note 16, at 53 (describing the "get tough" laws of the 1990s).

[FN210]. See Mark Tushnet & Larry Yackle, Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act, 47 Duke L.J. 1, 4 (1997) (asserting that "the fundamental difficulty is that the expressive and symbolic dimensions of statutes typically interfere with whatever instrumental goals they serve").

[FN211]. The Prison Rape Elimination Act of 2003, Pub. L. No. 108-79, § 8(a)(3), 117 Stat. 972 (2003).

[FN212]. See Struckman-Johnson & Struckman-Johnson, supra note 206, at 389 (finding that five factors distinguished prisons with high rates of rape from those with low rates: (1) overcrowding and, concomitantly, understaffing; (2) lax, permissive attitude of staff toward prison rape; (3) barracks housing, which results in housing of violent offenders with the vulnerable; (4) racial conflict; and (5) high concentrations of offenders imprisoned for violent crimes).

[FN213]. Branham & Krantz, supra note 28, at 13.

[FN214]. Sherry, supra note 63, at 552.

[FN215]. Id. at 556. Sherry observes an internal contradiction in the Founders civic republicanism.

The notion of common good maintained by a virtuous citizenry was, however, beset by contradictions. Republicanism held that true liberty could only be maintained by the security of property. Yet property would beget wealth, which, when concentrated in the hands of the few, would be destructive of virtue and freedom.

Id.

[FN216]. Id. at 557-58.

[FN217]. Id. at 559-60.

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[FN218]. Adam J. Hirsch, The Rise of the Penitentiary 33 (1992); see also David J. Rothman, Discovery of the Asylum 50 (1971) (observing that punishments of the era "presumed a society in which reputation was an important element in social control ...").

[FN219]. See Lawrence M. Friedman, Crime and Punishment in American History 39 (1993) (examining punishment in colonial America); Hirsch, supra note 218, at 33 (same).

[FN220]. See Rothman, supra note 218, at 17 (examining colonialists' views on crime).

[FN221]. Samuel Walker, Popular Justice 57 (1980).

[FN222]. See Michael Sherman & Gordon Hawkins, Imprisonment in America 75 (1981) (observing that the Auburn and Pennsylvania prison systems of the 1820s "fused the notions of imprisonment and punishment").

[FN223]. Gustave de Beaumont & Alexis de Tocqueville, On the Penitentiary System in the United States and Its Application in France 80 (Herman R. Lantz ed., S. Ill. Univ. Press 1964) (1833).

[FN224]. Erving Goffman, Asylums 6 (1961). Goffman first used the concept of a total institution and described it as follows,

The central feature of total institutions can be described as a breakdown of the barriers separating three spheres of life. First, all aspects of life are conducted in the same place and under the same single authority. Second, each phase of the member's activity is carried on in the immediate company of a large batch of others, all of whom are treated alike and required to do the same thing together. Third, all phases of the day's activities are tightly scheduled. Finally, the various enforced activity are brought together into a single rational plan purportedly designed to fulfill the official objectives of the institution.

Id.

[FN225]. Peter C. Buffum, Homosexuality in Prisons 6 (1972); see also William L. Selke, Prisons in Crisis 72 (1993) ("To a large extent, the convicts have always 'run the prison' and continue to do so today, especially given the levels of overcrowding and understaffing."); Donald R. Cressey, Foreword to John Irwin, Prisons in Turmoil, at vii (1980) ("[I]n [some] contemporary institutions they have withdrawn to the walls, leaving inmates to intimidate, rape, maim, and kill each other with alarming frequency.").

[FN226]. See Linda L. Zupan, Jails, Reforms, and the New Generation Philosophy 4-5 (1991) (discussing intermittent supervision, in which surveillance of inmates occurs on an occasional basis).

[FN227]. Edith Flynn, The Ecology of Prison Violence, in Prison Violence 115, 123 (Albert K. Cohen et al. eds., 1976).

[Prisons are not] particularly designed to facilitate effective staff intervention, whenever the life and safety of inmates or fellow staff are endangered ... . Violence and destructive behavior occurring in dormitories, bullpens, or at the end of long corridors can be observed but not stopped by staff, without unduly endangering the observing officer ... . The lack of visibility and long distances involved often make it impossible to identify those responsible for assault or other deviant behavior.

Id.

[FN228]. See Robert B. Bkaur & Peter C. Kratcoski, Correctional Officers: Career Opportunities, in Encyclopedia of American Prisons 122, 123 (Marilyn D. McShane & Frank D. Williams III eds., 1996) (stating that there are about 500,000 correctional employees and 1.5 million inmates).

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[FN229]. Fletcher, supra note at 24, at 2.

[FN230]. See supra notes 66-139 (describing the implications of social contract, negative rights, and bilateral harm).

[FN231]. Id.

[FN232]. 83 US. (16 Wall) 36, 109 (1872).

[FN233]. Fletcher, supra note 24, at 119-40 (recounting that the Court in the Slaughter-House Cases held that the Privileges and Immunities Clause of the Fourteenth Amendment did not make the Bill of Rights applicable to the states because its reference to "citizens" applied solely to the federal government's actions).

[FN234]. Fletcher, supra note 24, at 110.

[FN235]. See Robin West, Progressive Constitutionalism 267-70 (1994) (discussing liberty under what she labels as "progressive constitutionalism").

[FN236]. See Fletcher, supra note 24, at 91-111 (describing the "equalitarian message of Gettysburg" and positing that "[e]quality flourishes in an environment of mutual sympathy and reciprocal identification").

[FN237]. Linda McClain, Care as a Public Value: Linking Responsibility, Resources, and Republicanism, 76 Chi.-Kent. L. Rev. 1673 (1998) (examining the role of caring in public life).

[FN238]. Nicola Lacey, Unspeakable Subjects, Impossible Rights: Sexuality, Integrity and Criminal Law, 11 Can. J.L. & Juris. 47, 64 (1998) ("This inevitable relational interdependence renders the very idea of atomistic autonomy nonsensical. Without sustaining and respectful relationships, we cannot realise our personhood ... .").

[FN239]. See generally U.S. Const. amend. XIV (forbidding in relevant part denial of equal protection of the laws).

[FN240]. Reed Elizabeth Loder, Propter Honoris Respectum: Integrity and Epistemic Passion, 77 Notre Dame L. Rev. 841, 846 (2002).

[FN241]. See Michael Meranze, Laboratories of Virtue (1996).

[FN242]. Francis T. Cullen et al., The Virtuous Prison: Toward a Restorative Rehabilitation, in Contemporary Issues in Criminal Justice 265, 278 (Henry N. Pontell & David Shichor eds., 2001).

[FN243]. Id.

[FN244]. Id. at 280.

[FN245]. Id.

[FN246]. Id. (italics omitted).

[FN247]. Id.

[FN248]. Id. at 282.

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[FN249]. Id.; see also Michael Eisenberg & Brittani Trusty, Overview of the InnerChange Freedom Initiative: The Faith-Based Prison Program Within the Texas Department of Corrections (2002); Byron R. Johnson, The InnerChange Freedom Initiative (2003).

[FN250]. See Johnson, supra note 249, at 4 (describing the Interfaith environment). A University of Pennsylvania study found significantly lower arrest and reimprisonment rates among program graduates than their control group counterparts. See id. at 22 (finding an arrest rate of 17.3% for graduates and 35% for the control group and a reimprisonment rate of 8% of graduates as compared to 20.3% for the control group in a two-year period following release).

[FN251]. James B. Jacobs, Stateville (1977).

[FN252]. James B. Jacobs, New Perspectives on Prisons and Imprisonment 35 (1983).

[FN253]. Han Toch, Corrections: A Humanistic Approach 43 (1997).

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