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Symposium: Sentencing and Punishment
***561 JUST DESERTS, PRISON RAPE, AND THE PLEASING FICTION OF GUIDELINE
SENTENCING**
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[B]y choosing a shorter period of incarceration, and thereby diminishing the likelihood that Gonzalez would be assaulted in prison, the court sensibly balanced Gonzalez's need for safety against the Government's interest in incarcerating wrongdoers.

Chief Judge Oakes, *United States v. Gonzalez* [\[FN1\]](#)

The reduced sentence . . . seems to have no logical basis. If Gonzalez is assaulted on numerous occasions during his 33-month sentence, then his sentence will have been inhumanely long.

Judge Winter, *United States v. Gonzalez* (dissenting) [\[FN2\]](#)

Today I will be talking about the problem of prison rape from the perspective of criminal sentencing. I will be focusing particularly on guideline sentencing and raising what I hope will be troubling questions about our sentencing practices. To be sure, the viability of the Federal Sentencing Guidelines in the wake of Booker [\[FN3\]](#) and Blakely [\[FN4\]](#) is uncertain, and I will not be weighing in on that debate. For my purposes, the fate of the Guidelines is less important than what our experience with the Guidelines suggests about the possibility of taking inmate vulnerability into account in criminal sentencing. In particular, it raises questions about what it means for punishment to be deserved, what it means to treat like cases alike, and, in view of these considerations, whether it is possible or desirable to take inmate vulnerability into account in criminal sentencing.

Let me begin by outlining my approach. First, I will spend just a few minutes talking about the institution of punishment in American criminal law, including the prevailing justifications and their implications for prison *562 rape. Not surprisingly, none of the traditional justifications supports a case for rape as a form of punishment. In addition to the traditional justifications, which have found their way into the Guidelines in one form or another, I will also highlight a couple "explanations" that may account for some of our practices, but that I would hesitate to label "justifications" because I think they are largely indefensible in terms of the rule of law. Next, I will briefly describe prison life, focusing on the circumstances confronting the most vulnerable inmates. Although reliable data are hard to come by in this area, it seems clear that rape is a significant problem in prison, especially among male inmates; and some inmates are more vulnerable than others.

Then I will turn to the Federal Sentencing Guidelines, which are instructive as an attempt to grapple with the tension between uniformity and proportionality in criminal sentencing. In particular, the Guidelines have been interpreted to allow for consideration of extreme vulnerability in prison as a factor in determining an appropriate sentence. [\[FN5\]](#) While I applaud the motivation that lies behind this, I find myself troubled by some of the implications of this approach. In fact, I will argue that the doctrine of downward departures on the basis of extreme vulnerability is problematic in political, moral, and practical terms. Moreover, because the doctrine is premised on a false conception of punishment and incarceration, it is logically incoherent as well. Finally, just when you might expect to find me offering my own upbeat prescription for reform, you will find instead more occasion for despair. In my concluding remarks, I will suggest what I think is the real source of the problem of

prison rape, which points toward a solution, or a set of solutions, that, I fear, lies beyond our grasp.

I. Punishment and Its Justifications

In its most neutral formulation, criminal punishment is the "authorized imposition of deprivations"--liberty, property, or other goods to which one otherwise has a right--or the "imposition of special burdens" because one has been found guilty of a criminal violation. [\[FN6\]](#) In the absence of criminal wrongdoing, the sort of treatment that we call punishment--taking life, liberty, or property--would itself represent a grave injustice. For this ***563** reason, we must be able to provide a justification, or some combination of justifications, that makes such otherwise prohibited treatment permissible or even obligatory.

The traditional justifications for punishment in American criminal law fall into two broad categories: consequentialist and retributive. [\[FN7\]](#) The principal consequentialist justifications--incapacitation, deterrence, and rehabilitation--are defended in terms of the positive consequences they are believed to bring about. [\[FN8\]](#) For our purposes, we can think of these as utilitarian justifications to the extent that they aim at increasing net social welfare or the balance of human happiness. [\[FN9\]](#) So although locking people up against their will is something we generally regard as evil, we can justify it from the utilitarian perspective if on balance it yields a net social gain-- such as crime reduction. [\[FN10\]](#) Retributivism, by contrast, is centrally concerned with the imposition of suffering in proportion to an offender's moral desert. [\[FN11\]](#) On this view, punishment of the deserving is intrinsically good; its justification does not depend on any further positive consequences that punishment might be expected to produce. Although a retributivist will welcome the positive consequences that punishment may incidentally yield--for example, crime prevention or character reformation--they are not part of the justification for punishment. [\[FN12\]](#) Thus, a "retributivist punishes because, and only because, the offender deserves it." [\[FN13\]](#)

So from both the retributive and utilitarian perspectives, punishment must be proportional. For the utilitarian, proportionality is measured in terms of the relevant social goal, so that the amount of suffering to be inflicted is the amount necessary to achieve, say, crime control; any suffering above that amount is excessive and unjustifiable. [\[FN14\]](#) In principle this means that rape might be a fitting punishment for rapists--or for any other offenders (possibly even non-offenders)--if it advanced the goal of crime prevention.

***564** In practice, however, rape as a form of punishment is likely to be disutilitarian. The positive consequence of crime prevention would have to be weighed against the staggering disutility of imposing this form of treatment. Any such calculation must include not only the unhappy consequences associated with the offender's experience of the sanction, but also the negative consequences for those assigned to authorize, inflict, and oversee it. Among other considerations, the imposition of punitive rape could be expected to brutalize and corrupt our own humanity and that of the offenders, and also to foster sadism and cruelty among those who administer criminal punishment and society more generally. [\[FN15\]](#)

From the retributive perspective, proportionality is more complicated, though fairly intuitive: Offenders should get what they morally deserve. [\[FN16\]](#) For some retributivists, most notably Kant, this translates into the principle of *lex talionis*--the notion that "the act of punishment [should] be the same as the act that constituted the offense." [\[FN17\]](#) For Kant at least, and for many others, this means that death, for example, is the fitting retributive punishment for murder. [\[FN18\]](#) Yet Kant and, again, most retributivists, reject rape for the rapist or torture for the torturer because such treatment is inconsistent with the principle of respect for humanity that the retributive account of punishment presupposes. [\[FN19\]](#)

In addition to these traditional justifications for punishment, which are the ones that courts and legislatures point to when they do their work, there are at least two further possibilities. The first is simple revenge. That is, beyond the retributive ideal--that offenders should suffer in proportion to their moral desert--lies the impulse for revenge. On this view, the moral foundation of the criminal law is the collection of vengeful emotions that are triggered by injury or harm, manifesting them-

selves in a desire to "get even." [FN20] In the context of prison rape, this was nicely--that is, horribly-- illustrated by a California case in which a group of guards who were angry *565 with an inmate for defying an order locked him in a cell with a notorious prison rapist. [FN21] And the inevitable happened. [FN22]

A second possible explanation for our punitive practices is a kind of blind-eye deterrence. That is, despite our unwillingness to endorse the use of certain tactics openly, perhaps we welcome what we perceive to be the deterrent effects of the threat of unofficial punishment. On this account, "the tougher, colder, and more cruel and inhuman a place is, the less chance a person will return." [FN23] So, while officially committed to the humane treatment of prisoners, we still reap the crime control benefits of exceptionally harsh treatment. In this way, we are not forced to confront the tension between our principles and practices.

Regardless of whether vengeance or blind-eye deterrence provides an accurate psychological description of public attitudes toward punishment, neither constitutes a justification for punishment. Vengeance, whether meted out by guards or other inmates, is by definition lawless. Similarly, blind-eye deterrence requires the willful violation of official rules and norms, and collective self-deception about the dissonance between our principles and practices. Whatever our psychological inclinations, such a disingenuous subterfuge cannot be reconciled with our commitment to the rule of law. Thus, at least as a formal matter, the justification for punishment in American criminal law reflects a combination of utilitarian and retributive considerations. [FN24]

II. Prison Life

In the case of incarceration as a form of punishment, the deprivation of liberty is the most obvious hardship. In addition, we can point to the lack of creature comforts and basic privacy, as well as the indignity of being almost completely under the control of others: told when to eat, sleep, bathe, and whether, when, and how to communicate with loved ones. Most of us would recognize these as features of an impoverished form of human existence, *566 but also the necessary concomitants of incarceration. As the Supreme Court has observed, "the Constitution does not mandate comfortable prisons." [FN25] Thus "[t]o the extent that . . . conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society." [FN26]

But beyond the discomforts and ordinary indignities of incarceration, many inmates are subject to much harsher treatment and more extraordinary indignities, including rape and other forms of violence. For the time being, I will focus on rape, as distinct from other forms of violence, and victimization by other inmates. [FN27] I will also refer mostly to male victims and perpetrators because, at least in the context of inmate-on-inmate rape, this is where the problem occurs. [FN28] I focus on rape because I think it is a singularly devastating form of non-fatal violence. Indeed, the criminal law treats rape as second only to murder, though the physical consequences of a brutal beating may be just as severe. [FN29] A more practical consideration is the spread of AIDS, which is rampant in prison; AIDS is the second leading cause of death for inmates after natural causes. [FN30] Finally, I focus on inmate-on-inmate violence not because it is more worrisome than victimization by guards--quite the contrary. My concern about inmate-on-inmate rape is that it is so much easier to distance ourselves from it. Unlike official misconduct, it is not committed in our name, and we are less obviously implicated by it. [FN31] Indeed, it is only grudgingly recognized as an Eighth *567 Amendment violation, since the perpetrators cannot actually be said to be inflicting "punishment" at all. [FN32]

In any case, as I've already indicated, it is difficult to know exactly how pervasive this problem is, but we can get a sense of it from recent congressional findings in connection with the Prison Rape Elimination Act of 2003. [FN33] Congress "conservatively estimated that at least 13 percent of the inmates in the United States have been sexually assaulted in prison." [FN34] This means that "nearly 200,000 inmates now incarcerated have been or will be the victims of prison rape. The total

number . . . assaulted in the past 20 years likely exceeds [one million]." [FN35] Congress also found that, not surprisingly, young, first-time offenders and inmates with mental illness are at the greatest risk for victimization. [FN36] Other attributes that correlate with victimization include small stature, feminine appearance, apparent homosexuality, and past victimization. [FN37] Certain categories of offenders are known to be more vulnerable, including sex offenders, especially those who have victimized children. [FN38] Finally, law enforcement officers face a heightened risk of victimization. [FN39]

Obviously rape is not a formal part of any criminal sentence in the United States. And indeed, the Supreme Court has made clear that officials have an affirmative duty to protect inmates from one another. [FN40] In the Court's words: "Having incarcerated 'persons [with] demonstrated proclivit[ies] for antisocial criminal, and often violent, conduct,' having stripped them of virtually every means of self-protection and foreclosed *568 their access to outside aid, the government and its officials are not free to let the state of nature take its course." [FN41] Thus, "gratuitously allowing the beating or rape of one prisoner by another serves no 'legitimate penological objective,' any more than it squares with the 'evolving standards of decency.'" [FN42]

Things are less clear in practice, of course. Because the Eighth Amendment protects individuals from mistreatment at the hands of government officials, it does not obviously apply to a case in which an inmate is victimized by another inmate, who is himself a private citizen. Although the Court has held that inmate-on-inmate rape may constitute an Eighth Amendment violation, it has adopted a demanding burden of proof that precludes relief in all but the most egregious cases. [FN43] An inmate must prove that officials consciously disregarded a known and substantial risk of serious harm to the inmate and failed to take reasonable steps to abate the risk. [FN44] It is not enough for an inmate to show that the risk was obvious, that officials should have known, or that a reasonable official would have known. [FN45] Nor is it necessary that the steps taken to protect the inmate actually be successful; they need only be reasonable. [FN46]

In addition to these legal obstacles, public attitudes seem to reflect a measure of ambivalence about prison rape that further complicates matters. This is evident in the ubiquity and social acceptability of prison rape jokes in our culture. For example, in 2001, Bill Lockyer, the attorney general of California, held a press conference in which he joked about punishing Enron Chairman Ken Lay with prison rape. [FN47] Around the same time, 7-Up ran a television commercial set in a prison. [FN48] It featured jokes about the dangers of bending over in prison and showed a large inmate hugging and *569 leering at the 7-Up spokesman inside a cell. [FN49] I honestly do not know why these make us laugh (assuming they do). Sometimes I think it is a form of nervous laughter; we cope by engaging in black humor. [FN50] But in my more cynical moments, which I think are most of my moments, I detect something more sinister--a kind of callousness that has taken root in the American character. [FN51] Perhaps we think prison rape is funny because it is something that happens to other people--people who are themselves not very sympathetic figures, certainly people not like us. [FN52] Or perhaps we think it's what they deserve. As I suggested before, it may be possible to explain certain aspects of the institution of punishment in terms of vengeance, a bare desire to get even with criminals, or blind-eye deterrence, encouraging officials to do whatever it takes to reduce crime, without sharing the sordid details with us. In either case--in any case--it is deeply shameful.

III. U.S. Sentencing Guidelines

Ultimately I will suggest that the causes of prison rape may not be capable of legal remedy. But first I would like to take a closer look at one way courts have tried to address the problem, at least in certain circumstances.

Rather than discuss the Sentencing Guidelines and their purposes in detail, let me just emphasize a couple of the most salient features. In general terms, the statutory mandate was to mitigate disparities in sentencing while at the same time assigning appropriate punishments based on relevant *570 differences. [FN53] The Guidelines in turn are animated by a commitment to uniformity--to ending wide disparities in sentences for comparable offenses and offenders across jurisdictions; and to

proportionality--to ensuring that more serious offenses will carry commensurately more severe sentences. [FN54] When it came time to settle on the justifications for punishment, the Commission sought to accommodate competing philosophical perspectives, but opted for an empirical approach based on the collective experience, and perhaps wisdom, of judges and legislators, which was taken to reflect both the moral sensibilities and practical crime-control realities of the communities from which they were drawn. [FN55] In this way, the Guidelines reflect a commitment to both utilitarian and retributive considerations, though they would certainly disappoint a true believer in either camp.

In view of these considerations, departures from the Guidelines, whether upward or downward, tend to undermine the uniformity at which the Guidelines aim and the goals of deterrence and retribution that animate them. But if the departure is warranted by a morally relevant factor, the slight deviation can be readily justified in terms of desert or proportionality. So, for example, the Commission deemed "victim provocation" a relevant basis for downward departure, but one that could not be taken fully into account in formulating the Guidelines. [FN56] At the same time, the Commission noted that taking account of distinctions that are too fine-grained would produce a system that was "unworkable and [would] seriously compromise the certainty of punishment and its deterrent effect[]." [FN57]

In addition to the numerous variables for which accommodation is explicitly made, the Guidelines (following the statute) include a kind of catch-all. Section 3553(b) of the Sentencing Reform Act provides that a court may deviate from a prescribed sentencing range where "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in *571 formulating the guidelines." [FN58] It is on the basis of this provision, and its analog in the Guidelines, [FN59] that some federal courts have adjusted a sentence downward based on a defendant's vulnerability to abuse in prison. [FN60]

Without examining all of the cases where vulnerability of this kind was at issue, I will just try to give a sense of the case law and the kinds of rationales that operate in this context. What I think this reveals is how woefully inadequate the doctrine is in this area, but also how difficult the job of the sentencing judge is, certainly in these kinds of cases. In one of the earliest cases, a defendant convicted of cocaine possession with intent to distribute sought a downward departure on the basis of "extreme vulnerability" to abuse in prison. [FN61] His attorney noted that he was "a 'delicate [] young man . . . [with] a certain sweetness about him,' who had [already] been victimized [because] of his diminutive size, immature appearance and bisexual orientation." [FN62] The trial judge granted the departure, noting the defendant's bisexuality and the fact that although he was twenty-two years old, he looked only sixteen. [FN63] As a result, the judge concluded that the Guidelines' range would produce an unduly severe sentence relative to most other defendants convicted of a similar offense. [FN64] The Second Circuit upheld the departure, noting that the only possible way to protect this defendant in prison was to place him in solitary confinement. [FN65] And, given the special deprivations of protective housing, the defendant's term would be harsher than that contemplated by the Guidelines. In effect, the court found that a shorter period of time in protective custody is equivalent to a lengthier sentence in the general population. Thus, although the age of a defendant and his sexual orientation are not by themselves appropriate grounds for departure, the trial judge's assessment of the defendant's overall vulnerability as extraordinary fell within the statute's provision for departures based on factors "of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission" [FN66]

In subsequent cases, appellate courts have upheld downward departures based on a trial judge's finding that a defendant had a "feminine cast to his face and a softness of features"; though nineteen, he looked fourteen or *572 fifteen; he was 5'2" and weighed 110 pounds. [FN67] In another case, the trial judge identified a series of characteristics of the defendant--his status as a gay and effeminate man of smallish stature with a history of being sexually abused in prison--none of which by itself justified a downward departure; [FN68] indeed, age and physical stature are expressly discouraged as grounds for departure under the Guidelines. [FN69] But the judge granted the departure based on "the cumulative effect of [the defendant's]

mental and physical characteristics," which would "substantially increase his risk for sexual assault in prison" [FN70] He noted that exposing individuals to this heightened risk would violate the Commission's mandate for uniformity in sentencing and may, as already noted, constitute an Eighth Amendment violation as well. [FN71] In a more recent decision, the Ninth Circuit upheld a downward departure of eight levels for a defendant convicted of possessing child pornography, based on his stature, demeanor, naivete, and the nature of his offense, which, taken together, rendered him highly susceptible to abuse in prison. [FN72] Finally, in *Koon v. United States*, [FN73] the Supreme Court affirmed the trial court's reliance on susceptibility to abuse in prison as a basis for downward departure. [FN74] You may not recognize the name right away, but this case involved one of the police supervisors of the officers involved in the Rodney King beating; he had been convicted of violating King's rights under color of state law. [FN75] The Court emphasized that the downward departure was warranted not because Koon was a police officer, but because of the notoriety of the case--remember the notorious videotape, the acquittals in state court, and the subsequent riots-- which enhanced the potential for abuse in prison. [FN76]

*573 Now let us see what, if anything, justifies these outcomes. The first thing to notice is that in many cases, a downward departure does not mean no prison time; the defendant will still go to prison, usually to the same facility where he would have gone anyway. This means that instead of serving, say, five years (during which time, by hypothesis, he will be periodically raped), he may serve three years "at rape." And although three years at rape is plainly preferable to five years, this hardly seems an acceptable resolution of the problem. As one judge put it, dissenting from the grant of a downward departure: "The reduced sentence . . . seems to have no logical basis. If [Defendant] is assaulted on numerous occasions during his 33-month sentence, then his sentence will have been inhumanely long." [FN77] Still, no one would prefer five years under these conditions to three.

Another way to think about a shorter term of years is to assume that because of an inmate's vulnerability he will most likely serve his time in protective custody. Although protective custody probably sounds pretty good to most of us, especially if it means the difference between being raped or not, bear in mind that in most facilities it is a "prison within a prison," [FN78] comparable to disciplinary segregation, which affords even less freedom of movement and none of the resources or amenities--such as jobs or training--otherwise available to inmates. [FN79] As a result, it might make sense to think of three years in protective custody as the equivalent of five years in the general population. And in fact, the Second Circuit reasoned in just this way, noting that "[t]he severity of [Defendant's] prison term is exacerbated by his placement in solitary confinement as the only means of segregating him from other inmates." [FN80]

So these are both possible justifications for downward departures for vulnerable inmates. Of course, these rough and ready calculations about equivalencies leave something to be desired. This is probably tolerable because we recognize that desert calculations are always problematic. Although we can readily agree that a murderer deserves a more severe sentence than a non-violent thief, or that capital punishment is undeserved for shoplifting, it is very difficult to establish much else in this area with *574 certainty. [FN81] Some punishments will strike us as too lenient, others too severe; and we are unlikely to agree among ourselves where those lines should be drawn. Still, although we may not always know desert when we see it, we are much better at recognizing what is plainly undeserved. [FN82] And rape as a form of punishment, we have already stipulated, is always undeserved.

Finally, in our catalog of justifications for downward departures based on vulnerability, I think we cannot discount the moral consideration. A judge rarely has the power to overhaul the prison system when sentencing an individual. But a judge sentencing an offender whom he has every reason to believe will be brutalized in prison may feel a moral duty to take whatever steps he can to mitigate the likelihood of that injustice. I do not want to push this analogy too far, but guideline sentencing in these circumstances puts me in mind of nineteenth-century judges confronted with fugitive slave cases. As a matter of constitutional and statutory law, runaway slaves were to be returned to their masters. [FN83] The commonality, it seems to

me, is that in both kinds of cases, the duly enacted law unambiguously required something of judges that they could not in conscience bring themselves to do. As one nineteenth century jurist put it: "How is it expected or desired that a Judge shall substitute his own notions for positive law?" [FN84] For if judges "disregard what they conscientiously believe to be the written law in any case, they act corruptly and are traitors to their country." [FN85]

Which brings us to the problems that vulnerability departures raise. In the fugitive slave context, an unjust law--system of laws, really--regarded slaves as property. [FN86] In retrospect, the heroes are the judges who recognized this injustice and found ways to mitigate it when they could. Similarly here, *575 a judge who departs in an "ordinary" case--that is, to protect an inmate who is not officially "vulnerable"--acts contrary to the positive law to achieve results we might welcome. But we generally do not look favorably upon judges who act in this way; it is at odds with the judicial role, and it is undemocratic (or at least countermajoritarian). [FN87] Legislatures, not judges, decide in the first instance what punishment is deserved and the factors relevant to assigning punishments in particular cases. [FN88] Indeed, it was a too-ready willingness on the part of judges to institute their own sense of justice that brought about the need for sentencing guidelines in the first place. [FN89]

Worries of this sort are reflected in the dissenting opinions in some of the departure cases I have already cited. In fact, these dissenters offer some surprisingly good arguments against downward departures, and they invoke a number of principles that are central to our legal and political system. The first problem, as we have seen, is that departures, by definition, reintroduce disparity into sentencing, which the Guidelines were designed to mitigate. This would be fine if it were reserved for truly extraordinary cases. But as one dissenter observed: "Persons who look young and whose mannerisms may indicate homosexuality are not unusual persons. Physical attack in prison is not an unusual situation. The incarceration of such a person does not create an unusual case." [FN90]

*576 Therefore, too many departures create disparity. At this point, it might be worth reviewing why disparity is a problem in this context. The first problem is that it tends to undermine the goals of punishment that lie behind sentencing determinations. If the legislature--acting through the Commission-- determines that a particular range of punishment is best calculated to achieve crime control, then a sentence below that range fails to serve that goal or serves it less well. Likewise, where the Commission has determined that a particular range of punishment is the amount that is deserved in some sense, then a sentence less than that amount represents a retributive failure. As before, we might reasonably question the precision of these calculations, but they're all we have; and either they're meaningful or they're not. If not, then disparity may be the least of our problems.

Another problem with imposing disparate sentences on similarly situated offenders is that this fails to treat like cases alike. [FN91] Admittedly, determining which cases are truly alike is an almost impossible task. And we might wish to say of a vulnerable offender that he is not situated similarly to more able-bodied offenders, so sentencing him to the same term of years will not result in punishments that are alike. But this creates problems of its own. No two people are ever truly similarly situated; some offenders have dependent children while others do not; some will suffer an irredeemable loss of reputation, while others will not (perhaps their reputation will even be enhanced in certain communities). How do we decide which of these considerations is a relevant difference? The answer under current doctrine, of course, is that none of this is relevant. [FN92] I do not want to beg the question here. The fact that we do not take account of these considerations under current law is not an argument for why the law should not take account of *577 them. But hyper-individuation of this kind was rejected for a host of reasons--most notably that it is unworkable in practice. [FN93]

So what we can expect to have in cases where a vulnerability departure is granted is two inmates convicted of the same offense--say possession with intent of identical amounts of cocaine--but receiving different sentences. [FN94] Inmate A is a first-time offender, physically imposing with numerous tattoos; based on the Guidelines he gets ten years. In the adjacent cell

is Inmate B, also a first-time offender, but of small stature and effeminate appearance, so he gets five. But if ten years is what some combination of utilitarian and retributive considerations prescribe for this offense, how can we justify a sentence of five? How can we justify it to Inmate A?

A different kind of oddity arises in the case of offenders granted departures based in part on the nature of their offense--child pornography, for example. As one judge, dissenting from a vulnerability departure of this kind observed: "The majority's message is that if society so roundly condemns a particular crime that even other criminals are especially appalled by it, the 'average Joe' who perpetrates the crime should spend less than the average time in prison for that crime." [\[FN95\]](#)

In other words, the offenses that society regards as the most despicable are very often the same offenses that inmates find most despicable. It seems a perverse result that those who commit such offenses--the most offensive offenses, such as child molestation--should get a reduced sentence on that basis. Moreover, as one judge noted, "[i]f we permitted defendants convicted of [child molestation, for example] to use the crime as a reason to justify a departure from the range recommended by the Guidelines, then we would eviscerate the recommended range for [these offenses] and undermine the goals of the Sentencing Reform Act" [\[FN96\]](#)

Finally, before turning to my gloomy concluding remarks, let me suggest one more problem with the doctrine of vulnerability departures. In the *578 course of invalidating a downward departure for a defendant with a naïve disposition convicted of child pornography, the Eighth Circuit noted that the defendant's "average size and good health" militated against a downward departure. [\[FN97\]](#) Now in the context of the "extreme vulnerability" criterion, this seems like a sound decision. But pair it with the realization, reflected in the case law, that physical attack in prison is commonplace, [\[FN98\]](#) especially for those who victimize children. [\[FN99\]](#) In effect what the court is saying is: "Oh, you'll be a target alright, but with your average size and good health, we think you'll fare just fine."

What I'm suggesting is that the vulnerability departure is both too much and too little. It is an occasion for judges to overstep the boundaries of their institutional role, too quick to find "extreme vulnerability" according to a standard that is not, and cannot be, applied consistently or fairly across cases or jurisdictions. At the same time, it is not nearly enough to provide meaningful protection to the range of inmates actually vulnerable to sexual abuse at the hands of other inmates. Three years of rape instead of five--and only for those few inmates who can plausibly be classified as "extremely vulnerable."

IV. Conclusion

By now, and perhaps even before I began, the right answer may seem obvious. Inmates should be segregated more carefully--in particular facilities, units, and cells where they are least likely to be victimized. We need larger staffs, better oversight, fewer inmates per cell, and improved staff training. Finally, inmate offenders--rapists in this case--should be prosecuted; after all, it is a crime to attack a person--even if it is just another inmate. But all of these measures are expensive, and resources are scarce.

Rapists will rape unless we deprive them of the opportunity and incentives to do so. Judges cannot do this even if they were to take over prison management; they would need appropriate budgets and public support. The callousness I spoke of earlier--our seeming indifference to the *579 fate of prison inmates-- suggests that we lack the political will to address this problem--or even really to see it. Survey data indicates that a majority of citizens believe that prison rape is part of the punishment that offenders deserve. [\[FN100\]](#) In such an environment, prosecutors, who are usually elected officials, will use their discretion not to prosecute; [\[FN101\]](#) and legislators will use their power to toughen criminal penalties without allocating the resources to operate safe facilities. [\[FN102\]](#) Congress recently found, what common sense would have told us anyway, that brutalized inmates are not less but more likely to re-offend. [\[FN103\]](#) For what this brutal treatment teaches them is that hu-

man life lacks intrinsic value; that the strong can have their way by preying on the weak; and that the concern of the human community extends only to those who never transgress its laws.

At this point, I feel pretty confident that I have delivered on my promise--I have tried to make you uncomfortable about our punishment practices, but I have offered nothing particularly constructive about how we might fix them. In fact I have suggested that we probably cannot. Let me close with something slightly more hopeful.

I recently encountered an analysis of jokes and humor. The author, Lee Siegel, is a television critic. [\[FN104\]](#) His analysis begins with Nietzsche's claim that "jokes [are] the epigrams on the death of feelings"--that "comedy comes at the expense of sympathy." [\[FN105\]](#) On this view, humor "depends on a diminishment of feeling, on a hardness toward something or someone where there should be softness. Laughter briefly snaps the human bond . . ." [\[FN106\]](#) Now, although I have been harping about prison rape jokes, it's not really *580 the jokes that concern me, but the indifference to victimized inmates-- the hardness where there should be softness--that the pervasiveness of prison rape humor seems to signal.

But Siegel ultimately rejects Nietzsche's account of humor. He notes that the "funniest people are usually nursing the deepest wounds;" that "[s]ome subterranean part of [them] is more alive than life can bear." [\[FN107\]](#) I hope he's right--that was the hopeful part--because if we really think prison rape is funny, then we may have permanently severed the human bond--and no set of guidelines can possibly save us from that.

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[\[FN1\]](#). [United States v. Gonzalez](#), 945 F.2d 525, 527 (2d Cir. 1991).

[\[FN2\]](#). [Id.](#) at 529 (Winter, J., dissenting).

[\[FN3\]](#). [United States v. Booker](#), 543 U.S. 220 (2005).

[\[FN4\]](#). [Blakely v. Washington](#), 542 U.S. 296 (2004).

[\[FN5\]](#). See, e.g., [Koon v. United States](#), 518 U.S. 81, 111-12 (1996) (upholding downward departure for police officers in high-profile case based in part on their susceptibility to abuse in prison); [United States v. Lara](#), 905 F.2d 599, 605 (2d Cir. 1990) ("Extreme vulnerability of criminal defendants is a factor that was not adequately considered by the Commission and a proper ground for departure under § 3553(b).").

[\[FN6\]](#). See Hugo Adam Bedau, Punishment, in Stanford Encyclopedia of Philosophy, at <http://plato.stanford.edu/archives/fall2005/entries/punishment> (last visited Mar. 28, 2006).

[\[FN7\]](#). See *id.*

[\[FN8\]](#). See *id.*

[\[FN9\]](#). See, e.g., Jeremy Bentham, An Introduction to the Principles of Morals and Legislation 11-12 (J.H. Burns & H.L.A. Hart eds., Methuen 1982) (1970).

[\[FN10\]](#). See Bedau, *supra* note 6.

[\[FN11\]](#). See *id.*

[\[FN12\]](#). See Robert Nozick, *Philosophical Explanations* 374 (1996) ("These further consequences are not to be dismissed simply; but we shall see them as an especially desirable and valuable bonus, not as part of a necessary condition for justly imposed punishment.").

[\[FN13\]](#). Michael S. Moore, *The Moral Worth of Retribution*, in *Punishment and Rehabilitation* 94 (Jeffrie G. Murphy ed., 1995).

[\[FN14\]](#). See Bentham, *supra* note 9, at 158 ("[A]ll punishment is mischief: all punishment in itself is evil. Upon the principle of utility, if it ought to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil.").

[\[FN15\]](#). See, e.g., Immanuel Kant, *The Metaphysical Elements of Justice* 132- 33 (John Ladd trans., The Bobbs--Merril Co., Inc. 1965) (1797); Jeremy Waldron, [Lex Talionis](#), 34 *Ariz. L. Rev.* 25, 38 (1992).

[\[FN16\]](#). See, e.g., Kant, *supra* note 15, at 132-33.

[\[FN17\]](#). Waldron, *supra* note 15, at 32 (interpreting Kant); see also Kant, *supra* note 15, at 101 (invoking the "principle of equality (illustrated by the pointer on the scales of justice), that is, the principle of not treating one side more favorably than the other").

[\[FN18\]](#). See Kant, *supra* note 15, at 102 ("There is no sameness of kind between death and remaining alive even under the most miserable conditions, and consequently there is also no equality between the crime and the retribution unless the criminal is judicially condemned and put to death.").

[\[FN19\]](#). See *id.* at 102 (noting that offenders "must be kept entirely free of any maltreatment that would make an abomination of the humanity residing in the person suffering it").

[\[FN20\]](#). Jeffrie G. Murphy, *Getting Even* 3 (2003).

[\[FN21\]](#). See Mark Arax, *Five Charged in Corcoran Prison Rape*, *Contra Costa Times* (Walnut Creek, CA), Oct. 9, 1998 (reporting that a former guard "described how fellow officers had transferred [the victim] into [the] cell [of] ['the Booty Bandit'], knowing that the 6-foot-3, 230-pound prison enforcer would probably rape the small, slender Dillard").

[\[FN22\]](#). *Id.*

[\[FN23\]](#). James E. Robertson, [A Clean Heart and an Empty Head: The Supreme Court and Sexual Terrorism in Prison](#), 81 *N.C. L. Rev.* 433, 446 (2003) (quoting an inmate).

[\[FN24\]](#). See, e.g., [18 U.S.C. § 3553\(a\)\(2\) \(2003\)](#) (listing purposes of punishment); U.S. Sentencing Guidelines Manual, § 1A1.1, cmt. n.2 (2005) [hereinafter *Sentencing Guidelines*] (identifying deterrence, incapacitation, just punishment, and rehabilitation as the "basic purposes of criminal punishment").

[\[FN25\]](#). [Rhodes v. Chapman](#), 452 U.S. 337, 349 (1981).

[\[FN26\]](#). *Id.* at 347.

[\[FN27\]](#). For a full discussion justifying the focus on these aspects of the problem, see Mary Sigler, *By the Light of Virtue*:

[Prison Rape and the Corruption of Character, 91 Iowa L. Rev. 561 \(2006\).](#)

[FN28]. See, e.g., Cindy Struckman-Johnson et al., Sexual Coercion Reported by Men and Women in Prison, 33 J. Sex Res. 67, 67 (1996) [hereinafter Sexual Coercion Reported by Men] (finding rates of victimization for male inmates of 22% and 7% for female inmates in a Midwestern state prison system); Human Rights Watch, Preface to No Escape: Male Rape in U.S. Prisons, n.3 (2001), <http://www.hrw.org/reports/2001/prison/report.html> (last visited Mar. 28, 2006) [hereinafter No Escape] (noting that data suggest inmate-on-inmate rape occurs far more frequently among male populations).

[FN29]. See Michael Davis, Setting Penalties: What Does Rape Deserve?, 3 Law & Philosophy 61, 66 (1984).

[FN30]. See No Escape, supra note 28, at ch. VI. ("AIDS is currently the second leading cause of death among prison inmates.").

[FN31]. Cf. Thomas W. Pogge, How Should Human Rights Be Conceived? (1995), reprinted in The Philosophy of Human Rights 187, 194 (Patrick Hayden ed., Paragon House 2001) (arguing that human rights violations, unlike ordinary crimes, are more likely to be regarded as "everyone's concern" because people will generally "feel implicated in, and experience shame on account of, what their government and its officials do in their name").

[FN32]. See, e.g., [Wilson v. Seiter, 501 U.S. 294, 300 \(1991\)](#) (invoking "the Eighth Amendment itself, which bans only cruel and unusual punishment. If the pain inflicted is not formally meted out as punishment by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify"); [Farmer v. Brennan, 511 U.S. 825, 859 \(1994\)](#) (Thomas, J., concurring) ("Because the unfortunate attack that befell petitioner was not part of his sentence, it did not constitute 'punishment' under the Eighth Amendment.").

[FN33]. [42 U.S.C. §§15601-09 \(2003\)](#).

[FN34]. Id. [§ 15601\(2\)](#).

[FN35]. Id.

[FN36]. Id. [§ 15601\(3\)-\(4\)](#).

[FN37]. See, e.g., [United States v. Gonzalez, 945 F.2d 525, 526 \(2d Cir. 1991\)](#) (small stature and feminine appearance); [United States v. Lara, 905 F.2d 599, 603 \(2d Cir. 1990\)](#) (homosexuality); [United States v. Ruff, 998 F. Supp. 1351, 1356 \(M.D. Ala. 1998\)](#) (homosexuality and past victimization); see also Robertson, supra note 23, at 461 (noting the heightened risk for small, youthful inmates and gay or transsexual inmates).

[FN38]. See, e.g., [United States v. Parish, 308 F.3d 1025, 1027 \(9th Cir. 2002\)](#) (possession of child pornography); see also Robertson, supra note 23, at 462 ("Sex offenders, especially those convicted of victimizing children, also represent an anathema in the inmate subculture.").

[FN39]. See, e.g., [Koon v. United States, 518 U.S. 81, 111-12 \(1996\)](#) (noting greater susceptibility to abuse of police officers, at least in high-profile cases).

[FN40]. See [Farmer v. Brennan, 511 U.S. 825, 833 \(1994\)](#).

[FN41]. Id. (quoting [Hudson v. Palmer, 468 U.S. 517, 526 \(1984\)](#)).

[FN42]. *Id.* (citing [Hudson v. Palmer](#), 468 U.S. at 548, [Estelle v. Gamble](#), 429 U.S. 97, 102 (1976)).

[FN43]. See, e.g., *id.* at 837.

[FN44]. *Id.*

[FN45]. *Id.* at 837-38.

[FN46]. *Id.* at 844.

[FN47]. Investigating Enron, *Wall St. J.*, Nov. 30, 2001, at A14. Lockyer said he "would love to personally escort Lay to an 8-by-10 cell that he could share with a tattooed dude who says 'Hi, my name is Spike, honey.'" Although Lockyer was criticized by prisoners' rights advocates, he was overwhelmingly reelected in 2002. See Greg Lucas, Names for 2006 Gubernatorial Election Include Actor Arnold's, *San Diego Union Trib.*, Nov. 10, 2002, at A14 (Lockyer "was the biggest vote getter on the Democratic ticket, the only one to crest 50 percent and capture 150,000 more votes than Gov. Gray Davis").

[FN48]. See Rhonda Bodfield Bloom, *Invisible Assault*, *Ariz. Daily Star*, Jan. 25, 2004, at E1.

[FN49]. *Id.* The commercial ran for two months before the parent company of 7-Up, Cadbury-Schweppes, canceled the ad in response to protests from prisoners' rights organizations. See *id.* A spokeswoman for the company noted that the commercial had been well received by test audiences, which raised no objections to the content of the ad. See Doug Young, *Blasted for Jail Rape Jokes*, May 30, at <http://www.curenational.org/new/> (follow "issues" hyperlink; then follow "Prison Rape" hyperlink) (last visited Mar. 28, 2006).

[FN50]. See, e.g., Ted Cohen, *Jokes* 40 (1999) ("Humor in general and jokes in particular are among the most typical and reliable resources we have for meeting [] devastating and incomprehensible matters.").

[FN51]. For a defense of this claim, see Sigler, *supra* note 27, at 566.

[FN52]. This is the central insight of Judge Richard Posner's critique of American attitudes toward prison inmates:

[W]e should have a realistic conception of the composition of the prison and jail population before deciding that they are scum entitled to nothing better than what a vengeful populace and resource-starved penal system choose to give them. We must not exaggerate the distance between 'us,' the lawful ones, the respectable ones, and the prison and jail population; for such exaggeration will make it too easy for us to deny that population the rudiments of humane consideration.

[Johnson v. Phelan](#), 69 F.3d 144, 152 (7th Cir. 1995) (Posner, C.J., dissenting).

[FN53]. See [28 U.S.C. § 991\(b\)\(1\)\(B\) \(2000\)](#) (identifying as one of the purposes of the Sentencing Reform Act "avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices").

[FN54]. See Sentencing Guidelines, *supra* note 24, at § 1A1.1 cmt. n.3.

[FN55]. See *id.*

[FN56]. See *id.* § 5K2.10 ("If the victim's wrongful conduct contributed significantly to provoking the offense behavior, the

court may reduce the sentence below the guideline range to reflect the nature and circumstances of the offense."). See generally *id.* § 5K2.0 (a)(2) (encouraging departure for factors "not adequately taken into consideration by the Sentencing Commission in formulating the guidelines").

[FN57]. See *id.* § 1A1.1 cmt. n.3.

[FN58]. [18 U.S.C.A. § 3553\(b\)\(1\)](#).

[FN59]. See Sentencing Guidelines, *supra* note 24, § 5K2.0(a)(2).

[FN60]. See [United States v. Lara, 905 F.2d 599 \(2d Cir. 1990\)](#).

[FN61]. [Id. at 601-02](#).

[FN62]. [Id. at 601](#).

[FN63]. *Id.*

[FN64]. *Id.*

[FN65]. *Id.* at 602.

[FN66]. *Id.* (quoting [18 U.S.C. § 3553\(b\) \(1988\)](#)).

[FN67]. [United States v. Gonzalez, 945 F.2d 525, 525-26, 528 n.1 \(2d Cir. 1991\)](#) (internal quotation marks omitted).

[FN68]. [United States v. Ruff, 998 F. Supp. 1351, 1359 \(M.D. Ala. 1998\)](#).

[FN69]. Sentencing Guidelines, *supra* note 24, §5H1.1 (noting that age "is not ordinarily relevant in determining whether a departure is warranted"); *id.* § 5H1.4 ("Physical condition or appearance, including physique, is not ordinarily relevant in determining whether a departure may be warranted."). In at least one case, the government challenged a downward departure on the grounds that homosexuality is a mental or emotional condition and thus a discouraged ground for departure under the Guidelines. See [Lara, 905 F.2d at 603](#); see also Sentencing Guidelines, *supra* note 24, § 5H1.3 ("Mental and emotional conditions are not ordinarily relevant in determining whether a departure is warranted").

[FN70]. [Ruff, 998 F. Supp. at 1359](#).

[FN71]. *Id.*

[FN72]. See [United States v. Parish, 308 F.3d 1025, 1031-32 \(9th Cir. 2002\)](#).

[FN73]. [518 U.S. 81 \(1996\)](#).

[FN74]. [Id. at 111-12](#).

[FN75]. [Id. at 88](#).

[FN76]. [Id. at 111-12](#).

[FN77]. [United States v. Gonzalez, 945 F.2d 525, 529 \(2d Cir. 1991\)](#) (Winter, J., dissenting).

[FN78]. Robertson, *supra* note 23, at 459-60.

[FN79]. See, e.g., Christopher Hensley et al., Characteristics of Prison Sexual Assault Targets in Male Oklahoma Correctional Facilities, 18 J. Interpersonal Violence 595, 604 (2003) ("Protective custody, in many institutions, consists of several hours of lockdown, loss of privileges, and removal from prison activities (i.e., church, educational programs, movies, work, classes."); Robertson, *supra* note 23, at 459-60; No Escape, *supra* note 28, at VIII (likening conditions of protective custody to those of disciplinary segregation).

[FN80]. [United States v. Lara, 905 F.2d 599, 603 \(2d Cir. 1990\)](#).

[FN81]. See, e.g., Joshua Dressler, The [Wisdom and Morality of Present-Day Criminal Sentencing](#), 38 Akron L. Rev. 853, 855 (2005) (noting that retributivism does not specify precise amounts of deserved punishment, but only provides parameters).

[FN82]. Moore, *supra* note 13, at 112 (noting that skepticism about our ability to identify those deserving punishment generally does not prevent us from objecting to the punishment of the undeserving).

[FN83]. See [U.S. Const. art. IV, § 2, cl. 3](#) ("No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such service or Labour may be due."); Fugitive Slave Act, ch. 7, 1 Stat. 302 (1793) (repealed 1864); Fugitive Slave Act, ch. 60, 9 Stat. 462 (1850) (repealed 1864).

[FN84]. Letter from Justice John McLean to Mr. Matthews (1847), in 2 Charles Warren, *The Supreme Court in United States History* 157 (Little, Brown, & Co. 2d ed. 1935).

[FN85]. *Id.* But see generally Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* (Yale Univ. Press 1975) (criticizing judges who enforced fugitive slave laws for hiding behind legal formalism).

[FN86]. See [Scott v. Sandford, 60 U.S. 393 \(1856\)](#) (holding that slaves are property).

[FN87]. See, e.g., Alexander M. Bickel, *The Least Dangerous Branch* 19 (Bobbs-Merill Co. 1962) ("[N]othing can finally depreciate the central function that is assigned in democratic theory and practice to the electoral process; nor can it be denied that the policy-making power of representative institutions, born of the electoral process, is the distinguishing characteristic of the system.").

[FN88]. See [28 U.S.C. § 991\(a\)-\(b\)\(1\) \(2000\)](#) (establishing the United States Sentencing Commission and charging it with "establish[ing] sentencing policies and practices for the Federal criminal justice system ..."); see also [Koon v. United States, 518 U.S. 81, 106 \(1996\)](#) (noting that federal law "instructs a court that, in determining whether there exists an aggravating or mitigating circumstance of a kind or to a degree not adequately considered by the Commission, it should consider 'only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission'") (quoting [18 U.S.C. § 3553\(b\)](#)); [United States v. Gonzalez, 945 F.2d 525, 528 \(2d Cir. 1991\)](#) (Winter, J., dissenting) (noting the distinction between a discretionary sentencing regime and a guidelines regime).

[FN89]. See, e.g., [Koon, 518 U.S. at 92](#) ("The [pre-reform] discretion led to perceptions that 'federal judges mete out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar

circumstances.") (quoting [S. Rep. No. 98-225, at 38 \(1983\)](#)); U.S. Sentencing Comm'n, Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform 11 (2004), available at http://www.ussc.gov/15_year/15year.htm ("The legislative history of the [Sentencing Reform Act of 1984] clearly shows ... that different treatment by different judges was the chief problem the Act was designed to address").

[FN90]. [United States v. Lara, 905 F.2d 599, 608 \(2d. Cir. 1990\)](#) (Metzner, J., dissenting).

[FN91]. The maxim is usually attributed to Aristotle. See Aristotle, *Nicomachean Ethics*, Bk. V., at 162 (Christopher Rowe trans., Oxford Univ. Press 2002); see also John E. Coons, [Consistency, 75 Cal. L. Rev. 59, 59 \(1987\)](#) (citing Aristotle); Frederick Schauer, [The Generality of Law, 107 W. Va. L. Rev. 217, 230 \(2004\)](#) (same).

[FN92]. See, e.g., Sentencing Guidelines, *supra* note 27, § 5H1.6 ("[F]amily ties and responsibilities are not ordinarily relevant in determining whether a departure may be warranted."). Although decided before the enactment of the Sentencing Reform Act, the opinion of the court in *United States v. Bergman* makes an effective case for ignoring reputational harm:

[Rabbi Bergman's] notoriety should not in the last analysis serve to lighten ... his sentence. The fact that he has been pilloried by journalists is essentially a consequence of the prestige and privileges he enjoyed before he was exposed as a wrongdoer.... It is not possible to justify the notion that this mode of nonjudicial punishment should be an occasion for leniency not given to a defendant who never basked in such an admiring light

[United States v. Bergman, 416 F. Supp. 496, 502-03 \(S.D.N.Y. 1976\)](#).

[FN93]. See Sentencing Guidelines, *supra* note 24, § 1A1.1 cmt. n.3 ("[A] sentencing system tailored to fit every conceivable wrinkle of each case can become unworkable and seriously compromise the certainty of punishment and its deterrent effect."). Similarly, Justice Antonin Scalia provides a further reason for avoiding legal distinctions that are too fine-grained: "When a case is accorded a different disposition from an earlier one, it is important, if the system of justice is to be respected, not only that the later case be different, but that it be seen to be so." Antonin Scalia, [The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175, 1178 \(1989\)](#).

[FN94]. This scenario is adapted from a dissenting opinion in a downward departure case. See [Lara, 905 F.2d at 609-10](#) (Metzner, J., dissenting).

[FN95]. [United States v. Parish, 308 F.3d 1025, 1033 \(9th Cir. 2002\)](#) (Graber, J., dissenting) (emphasis in original).

[FN96]. [United States v. Wilke, 156 F.3d 749, 753-54 \(7th Cir. 1998\)](#).

[FN97]. See [United States v. Drew, 131 F.3d 1269, 1271 \(8th Cir. 1997\)](#).

[FN98]. See, e.g., [Lara, 905 F.2d at 608](#) (Metzner, J., dissenting) ("Physical attack in prison is not an unusual situation."); Robertson, *supra* note 23, at 458-59 (collecting cases in which courts found evidence of pervasive prison sexual violence).

[FN99]. See, e.g., [Parish, 308 F.3d at 1032](#) (crediting evidence that "individuals convicted of sex offenses involving minors, including possessors of child pornography, came to prison with a bad label and were in for a difficult time.") (internal quotation marks omitted); Robertson, *supra* note 23, at 462 ("Sex offenders, especially those convicted of victimizing children, also represent an anathema in the inmate subculture.").

[FN100]. Charles M. Sennott, Poll Finds Wide Concern About Prison Rape, Most Favor Condoms for Inmates, *Bost. Globe*,

May 17, 1994, at 22.

[FN101]. See, e.g., No Escape, *supra* note 28, at VIII ("Although local prosecutors are nominally responsible for prosecuting criminal acts that occur in prisons, they are unlikely to consider prisoners part of their real constituency.").

[FN102]. See, e.g., Fred Dickey, Rape, How Funny Is It?, *L.A. Times Mag.*, Nov. 3, 2002, available at <http://www.justicepolicy.org/article.php?id=83> ("Helping inmates is nuclear waste, politically.") (quoting Vincent Schiraldi, President of the Justice Policy Institute). The career of Cal Skinner, an eight-term state legislator in Illinois, is a cautionary tale. Skinner was defeated in a 2000 Republican primary election after campaigning for an end to prison rape in Illinois. He attributes his defeat at least partly to his efforts on behalf of prisoners. Eli Lehrer, Hell Behind Bars: The Crime That Dare Not Speak Its Name, *Nat'l Rev. Online*, Feb. 5, 2001, available at <http://www.heritage.org/Press/Commentary/ED020501.cfm>.

[FN103]. See [42 U.S.C. § 15601\(14\)\(E\) \(Supp. 2004\)](#) (finding that the high incidence of prison rape "increases the risk of recidivism, civil strife, and violent crime by individuals who have been brutalized by prison rape").

[FN104]. See Lee Siegel, Laugh Track: A New Direction for Laughter, *The New Republic Online*, Oct. 24, 2005, <http://www.tnr.com/doc.mhtml?i=w051024&s=siegel102405>.

[FN105]. *Id.*

[FN106]. *Id.*

[FN107]. *Id.*

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