

Journal of Law, Medicine and Ethics  
Winter, 2003  
**Symposium: Emerging Issue in Population Health: National and Global Perspective**  
**A Tribute to Gene W. Matthews**  
**Part III: National Challenge in Population Health**  
**\*602 NEW HOPE FOR VICTIMS OF PRISON SEXUAL ASSAULT**  
Julie Samia Mair  
Shannon Frattaroli  
Stephen P. Teret

Copyright © 2003 by American Society of Law, Medicine & Ethics; Julie Samia

Mair, Shannon Frattaroli, Stephen P. Teret

Senate Bill 1435, the "Prison Rape Elimination Act of 2003," [\[FN1\]](#) was introduced into the Senate on July 21, 2003, and in less than a week passed both the Senate and House by unanimous consent. The Bill was presented to President Bush on September 2, 2003, and he signed it two days later on September 4, 2003. The stated purposes of the Act are far-reaching and ambitious:

- (1) establish a zero-tolerance standard for the incidence of prison rape in prisons in the United States;
- (2) make the prevention of prison rape a top priority in each prison system;
- (3) develop and implement national standards for the detection, prevention, reduction, and punishment of prison rape;
- (4) increase the available data and information on the incidence of prison rape, consequently improving the management and administration of correctional facilities;
- (5) standardize the definitions used for collecting data on the incidence of prison rape;
- (6) increase the accountability of prison officials who fail to detect, prevent, reduce, and punish prison rape;
- (7) protect the Eighth Amendment rights of Federal, State, and local prisoners;
- (8) increase the efficiency and effectiveness of Federal expenditures through grant programs such as those dealing with health care; mental health care; disease prevention; crime prevention, investigation, and prosecution; prison construction, maintenance, and operation; race relations; poverty; unemployment; and homelessness; and
- (9) reduce the costs that prison rape imposes on interstate commerce." [\[FN2\]](#)

The speed by which Congress passed the Prison Rape Elimination Act is surprising. Since the 1970s, the tenor of U.S. criminal justice policies has become increasingly punitive as evidenced by the growth of supermax facilities, the enactment of "three-strikes, you're out" laws, the "Zimmer Amendment" banning federal funding for certain "amenities" in federal prisons [\[FN3\]](#) and other "no frills" prison initiatives, [\[FN4\]](#) trying young teenagers as adults and housing them in the general population of adult prisons, and the imposition of juvenile death sentences. Even more surprising is that Congress acted absent popular demand; the Congressional findings specifically state that: "Members of the public and government officials are largely unaware of the epidemic character of prison rape and the day-to-day horror experienced by victimized inmates."

Receiving bi-partisan support in both the House (e.g., Representatives Frank Wolfe [R-VA] and Robert C. "Bobby" Scott [D-VA]) and Senate (sponsored by Senator Jeff Sessions [R-AL] and among the co-sponsors, Senator Ted Kennedy [D-MA]), S. 1435 appears to be a wish-list for prison reform advocates. Its success has been attributed in large part to efforts of Michael Horowitz, senior fellow at the Hudson Institute, [\[FN5\]](#) who led a broad coalition of supporters including Stop

Prisoner Rape, Christian Coalition, Justice Policy Institute, Prison Fellowship Ministries, and Focus on the Family. [\[FN6\]](#) The Act offers new hope to individuals incarcerated in U.S. institutions, their families, correctional staff, and society, all of whom are affected by prison sexual assault and its aftermath.

### **\*603 WHAT IS KNOWN ABOUT PRISON SEXUAL ASSAULT**

#### **Epidemiology**

The prevalence of sexual violence in prisons and other places of incarceration or detention (hereafter "prison") is not well understood. [\[FN7\]](#) According to the Congressional findings, the number of inmates sexually assaulted over the past twenty years likely exceeds one million. [\[FN8\]](#) Sexual assault occurs in both male and female prisons and is committed by other inmates as well as correctional staff. For many victims, the assaults are repeated throughout their period of confinement and involve numerous assailants.

Research efforts to document the problem rely on official reports of victimization, inmate interviews, and written surveys. Official reports are widely recognized as an underutilized reporting mechanism and therefore of little value. While inmate interviews offer detailed insight into the prisoner experience, there is a concern that the results may suffer from under-reporting of this sensitive topic, thereby questioning the value of resulting prevalence estimates. Prisoner surveys, usually anonymous, provide the best available evidence to date of the scope of sexual assault in U.S. prisons.

Estimates of the extent of inmate sexual assault produced from survey data vary widely, and there is debate among researchers about the extent of the problem. [\[FN9\]](#) Criminal justice researchers attribute this variation to study design issues such as differing definitions of sexual assault and differing methodologies, as well as to real variation among prisons (reflecting such effects as crowding, administrative approaches to the problem, and single vs. multi-cell occupancy) and inmate characteristics (such as age and criminal history). [\[FN10\]](#) Despite the challenges associated with measurement, the current literature generally estimates sexual coercion (less serious violations involving aggressive behaviors, propositions, and touching) as more common than completed rapes. For example, in a recent study of seven Midwestern prisons, 16 percent of inmates reported experiencing sexual coercion in their current facility. By contrast, rape victims constituted 7 percent of the sample. [\[FN11\]](#) Of note, reported offenses varied widely among the seven participating prisons: reported sexual coercion ranged from 4 to 21 percent, and reported rape included one facility with no reported rapes, and one facility where 11 percent of the sample reported having been raped.

#### **The Sequelae of Prison Sexual Assault**

In addition to the trauma from the actual assault, the available research suggests that victims of prison sexual assault have a high risk of suicide, contracting HIV and other communicable sexual diseases, and experiencing lifelong psychological and emotional trauma. [\[FN12\]](#) A significant amount of the other violence in prison may be related to sexual assault or the threat of such assault, placing all inmates and correctional staff in those institutions at risk of violent attack. [\[FN13\]](#)

Prison sexual assault also affects society-at-large. Anecdotal evidence suggests that many victims of sexual assault become violent aggressors both while incarcerated and after their release; some preemptively raping in prison to avoid rape themselves. Many victims unable to adjust to mainstream society become homeless or return to prison. [\[FN14\]](#) The Congressional findings note that prison sexual assault has other impacts on society such as increasing the costs incurred by federal, state and local governments to administer prison systems and increasing health care expenditures to treat and stop the spread of HIV and other communicable diseases both in and out of prison. The Act also cites treatment costs associated with mental health illnesses as an additional burden to society. [\[FN15\]](#)

The true impact on individuals, their families and society is unknown because relatively few studies have been conducted on this issue. Clearly there is a need to better understand the problem of prison sexual violence. The Prison Rape Elimination Act represents a step towards understanding and preventing this long-ignored problem.

### THE PRISON RAPE ELIMINATION ACT OF 2003

The Prison Rape Elimination Act is a comprehensive and ambitious piece of legislation, intended to foster an understanding of prison rape and its impact on individuals, families, and society with the ultimate goal of prevention. The terms "prison" and "rape" are defined broadly in the Act. "Prison" means any federal, state, or local confinement facility, including local jails, police lockups, juvenile facilities, and state and federal prisons. [\[FN16\]](#) "Rape" includes: (a) carnal knowledge; oral sodomy; sexual assault with an object; and sexual fondling of a person, forcibly or against that person's will; (b) carnal knowledge; oral sodomy; sexual assault with an object; and sexual fondling of a person, without force or against that person's will, but where the victim cannot give consent because of age, or mental or physical incapacity; and (c) carnal knowledge; oral sodomy; sexual assault with an object; and sexual fondling of a person where such acts have been achieved by exploiting fear or threat of physical violence or bodily injury. [\[FN17\]](#) It is important that the Act define the word "rape" broadly as surveys of correctional officers show that some may label coercive or exploitative acts of sexual assault as consensual. [\[FN18\]](#)

The Act has five main components to accomplish its stated purposes. First, the Act requires the Bureau of Justice Statistics ("Bureau") to conduct an annual comprehensive statistical review and analysis of the incidence and impact of prison rape. [\[FN19\]](#) This review and analysis must include, but is not limited to, identifying common characteristics of both victims and perpetrators of prison rape and prisons and prison systems that have a \*604 high incidence of rape. This review and analysis is to be based on annual surveys of at least 10 percent of all federal, state, and county prisons, as well as a representative sample of municipal prisons. Part of this review and analysis must involve surveys or other research of current and former inmates from a sample of federal, state, county and municipal prisons. Officials and administrators of the selected prisons are required to participate in these studies and to allow access to any inmates in their custody.

To facilitate this review and analysis, the Act also establishes a Review Panel on Prison Rape ("Review Panel") within the Department of Justice. [\[FN20\]](#) Each year, the Review Panel must hold public hearings on the operation of the three prisons with the highest incidence of prison rape and the two prisons with the lowest incidence in each of three categories of prison facilities surveyed (one category to include all federal and state prisons and the other two defined by the Attorney General). The purpose of the hearings is to collect evidence to help identify the common characteristics of: (1) both victims and perpetrators of prison rape; (2) prisons and prison systems with high incidence of rape; and (3) prisons and prison systems that appear to have successfully deterred rape. The Review Panel may subpoena the warden or director of a prison (as well as other witnesses) to testify at the hearings or produce documentation, and seek enforcement of subpoenas in federal court. Each year the Attorney General must submit a report to Congress and the Secretary of Health and Human Services on the Bureau's and Review Panel's activities under the Act. The Attorney General may provide research and other grants to assist it with its duties. The Act authorizes the appropriation of \$15,000,000 each year for fiscal years 2004 through 2010 for this section which includes the Bureau's statistical review and analysis, the Review Panel's hearings, and the Attorney General's report.

To provide information and assistance to federal, state and local authorities responsible for preventing, investigating, and prosecuting prison rape, the Act also establishes a national clearinghouse within the National Institute of Corrections. [\[FN21\]](#) The Institute must also provide periodic training and education programs to these authorities and submit a yearly report to Congress and the Secretary of Health and Human Services on their activities. To meet this objective, Congress is authorized to appropriate \$5,000,000 each year for fiscal years 2004 through 2010.

Third, the Attorney General must also provide funding to states for personnel, training, technical assistance, data collection, and equipment to prevent and prosecute prison rape. [FN22] This funding is to help ensure that budgetary circumstances do not undermine state efforts to protect inmates and to "safeguard communities" from inmates returning to the community. With respect to protecting inmates, the funding can only be used to prevent prison rape, investigate incidents of prison rape, and prosecute offenders. At least 50 percent of the grant must apply to these activities. The Act lists five activities that qualify for the safeguarding communities funding. [FN23] Each fiscal year from 2004 through 2010, Congress is authorized to appropriate \$40,000,000 for such state grants.

The Act also establishes a National Prison Rape Reduction Commission (Commission) consisting of nine members who have expertise in the issue of prison rape. [FN24] The Commission is to conduct "a comprehensive legal and factual study of the penological, physical, mental, medical, social, and economic impacts of prison rape in the United States on" [FN25]: (a) federal, state, and local governments; and (b) communities and social institutions as well as individuals, families and businesses within such communities and institutions. The Act lists fourteen matters that must be included in the study, which include assessments of "the extent to which the incidence of prison rape contributes to the spread of sexually transmitted diseases and to the transmission of HIV;" [FN26] "the safety and security of prison facilities and the relationship of prison facility construction and design to the incidence of prison rape;" [FN27] and "the general relationship between prison rape and prison violence." [FN28]

Within two years after the Commission's initial meeting, the Commission must submit a report to the President, Congress, Attorney General, Secretary of Health and Human Services, the Director of the Federal Bureau of Prisons, the chief executive of each State, and the head of the department of corrections of each state. In conjunction with the report, the Commission must recommended national standards for enhancing the detection, prevention, reduction, and punishment of prison rape to the Attorney General and Secretary of Health and Human Services. The Act provides twelve specific areas that the national standards must cover. The Commission, however, cannot recommend a standard "that would impose substantial additional costs" [FN29] to the federal, state and local prison authorities. Among its duties, the Commission is required to hold public hearings to assist in its study and may issue subpoenas and enforce those subpoenas in federal court. The Commission may also select nongovernmental researchers or experts to assist it, and the National Institute of Justice is required to fund those experts. No specific dollar amount is provided for this section. Instead it authorizes for appropriation "such sums as may be necessary" [FN30] to fulfill the provisions of this section.

The fifth major component of the Act requires the Attorney General to publish a final rule within one year after receiving the Commission's report establishing national standards for detecting, preventing, reducing, and punishing prison rape. [FN31] These standards cannot impose substantial additional costs on federal, state, and local prison authorities although they may provide a list of improvements for consideration. Upon adoption of the final rule, the Federal Bureau of Prisons must apply the national \*605 standards. Within 90 days of publishing the final rule, the Attorney General is required to provide the standards to the chief executive of each state, the head of the department of corrections of each state, and the appropriate local authorities. In order to receive federal funding, organizations that provide accreditation for prisons (defined broadly) must have accreditation standards for the detection, prevention, reduction, and punishment of prison rape 90 days after the Act is enacted and adopt accreditation standards consistent with the national standards one year after the final rule has been adopted. [FN32]

## THE LEGAL ENVIRONMENT

The Prison Rape Elimination Act is a particularly important piece of legislation because litigation has failed to serve as a tool for protecting many inmates from sexual assault. The Eighth Amendment of the United States Constitution (applicable to the

states under the Fourteenth Amendment) prohibits cruel and unusual punishment. The seminal Supreme Court case on this issue, [Farmer v. Brennan, 511 U.S. 825 \(1994\)](#) held that a prison official's deliberate indifference to a substantial risk of serious harm--e.g., prison sexual assault--violates the Eighth Amendment. But "deliberate indifference" requires more than mere negligence, and according to the majority opinion, the fact that an official has failed to "alleviate a significant risk that he should have perceived but, did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment." [\[FN33\]](#) Deliberate indifference is a subjective standard akin to criminal recklessness, which requires a finding that a person was aware of a substantial risk of serious harm and disregarded it anyway. Requiring proof of a particular prison official's (or authority's) state of mind, rather than what an objectively reasonable official should perceive, has been widely criticized; many victims of prison rape cannot prove the requisite level of awareness. Congress appears to address this concern in the Act by specifically finding that: "States that do not take basic steps to abate prison rape by adopting standards that do not generate significant additional expenditures demonstrate such indifference." [\[FN34\]](#)

In his concurring opinion in *Farmer v. Brennan*, Justice Blackman states vividly what happens in some places of incarceration:

The horrors experienced by many young inmates, particularly those who, like petitioner, are convicted of nonviolent offenses, border on the unimaginable. Prison rape not only threatens the lives of those who fall prey to their aggressors, but is potentially devastating to the human spirit. Shame, depression, and a shattering loss of self-esteem accompany the perpetual terror the victim thereafter must endure ... Unable to fend for himself without the protection of prison officials, the victim finds himself at the mercy of larger, stronger, and ruthless inmates. Although formally sentenced to a term of incarceration, many inmates discover that their punishment, even for nonviolent offenses like credit card fraud or tax evasion, degenerates into a reign of terror unmitigated by the protection supposedly afforded by prison officials. [\[FN35\]](#)

The Prison Rape Elimination Act offers new hope that such atrocities in U.S. correctional institutions will end in the near future.

## CONCLUSION

There are over two million people currently incarcerated in the United States and the number continues to increase. [\[FN36\]](#) As a society, we have chosen incarceration as a primary tool to deal with antisocial behavior. Having made this choice, we are legally and morally responsible for protecting those who become wards of the state. And because 95 percent of inmates will be released back into society, preventing prison sexual assault has implications beyond prison walls. Fortunately, the research suggests that sexual assaults do not occur in all places of incarceration. The research also suggests that most of these assaults are predictable and therefore preventable. If implemented as intended, the Prison Rape Elimination Act of 2003 should make incarceration safer for inmates in all institutions. The Act demonstrates that law can be a powerful tool to protect the public's health, and the members of the coalition and Congress should be applauded for their efforts on this legislation.

[\[FN1\]](#). Prison Rape Elimination Act of [2003, Pub. Law. No. 108-79](#), 117 Stat. 972-989 (codified at [42 U.S.C.S. §§ 15601-15609](#)) (enacted September 4, 2003).

[\[FN2\]](#). [42 U.S.C.S. § 15602 \(2003\)](#).

[\[FN3\]](#). H.R. 247, 108th Congress, 1st Session, Title VI, § 611 (2003). The so-called "Zimmer Amendment" was initially enacted in the Omnibus Consolidated Appropriations Act, 1997, [Title VI, § 611, Pub. Law. No. 104-208](#), 110 Stat. 3009, and has been reenacted in each subsequent year. Similar language is included in the Federal No Frills Prisons Act of 2003, H.R. 2296, 108th Congress, 1st Session (2003).

[FN4]. P. Finn, "No Frills Prisons and Jails: A Movement in Flux," *Federal Probation*, 60, no. 3 (1996): 35-44.

[FN5]. 149 Cong. Rec. S9703 (daily ed. July 22, 2003) (statement of Sen. Kennedy); 149 Cong. Rec. H7764-H7765 (daily ed. July 25, 2003) (statement of Rep. Scott); and 149 Cong. Rec. H7766 (daily ed. July 25, 2003) (statement of Rep. Wolf).

[FN6]. Letter dated April 18, 2003, from Prison Fellowship Ministries and Justice Policy Institute to Senator Frist, Senator Daschle, Majority Leader DeLay, and Minority Leader Pelosi.

[FN7]. C. Struckman-Johnson and D. Struckman Johnson, "Sexual Coercion Rates in Seven Midwestern Prison Facilities for Men," *The Prison Journal*, 80, no. 4 (2000): 360-367.

[FN8]. [42 U.S.C.S. § 15601\(2\) \(2003\)](#).

[FN9]. D. Lockwood, "Issues in Prison Sexual Violence," in M.C. Braswell, R.H. Montgomery, Jr., and L.X. Lombardo, eds., *Prison Violence in America*, Second Edition (Cincinnati: Anderson Publishing Co., 1994):97-102.

[FN10]. Lockwood, *supra* note 9; A.S. Maitland and R.D. Sluder, "Victimization and Youthful Inmates: An Empirical Analysis," *The Prison Journal*, 78, no. 1 (1998): 55-73; C. Saum, H. Surratt, J. Inciardi and R. Bennett, "Sex in Prison: Exploring the Myths and Realities," *The Prison Journal*, 75, no. 4 (1995): 413-430; Struckman-Johnson, *supra* note 7; R. Wortley, "Situational Prison Control: Crime Prevention in Correctional Institutions" (Cambridge: Cambridge University Press, 2002): at 101-103.

[FN11]. Struckman-Johnson, *supra* note 7.

[FN12]. R.W. Dummond, *The Impact and Recovery of Prisoner Rape*, paper presented at the National Conference, "Not Part of the Penalty": Ending Prisoner Rape, Washington, D.C., October 19, 2001, available at <http://www.spr.org/en/Dumond.pdf> (Accessed August 25, 2003); and J. Mariner, *No Escape: Male Rape in U.S. Prisons* (New York: Human Rights Watch, 2001), available at <http://hrw.org/reports/2001/prison/report.html> (Accessed August 14, 2000).

[FN13]. D.J. Cotton and A.N. Groth, "Inmate Rape: Prevention and Intervention," *Journal of Prison & Jail Health*, 2, no. 1 (1982): 47-57; and R.C. McCorkle, "Personal Precautions to Violence in Prisons," *Criminal Justice and Behavior*, 19, no. 2 (1992): 160-173.

[FN14]. J. Mariner, *No Escape: Male Rape in U.S. Prisons* (New York: Human Rights Watch, 2001) Accessible at <http://hrw.org/reports/2001/prison/report.html> (Accessed August 14, 2000).

[FN15]. [42 U.S.C.S. § 15601\(14\) \(2003\)](#).

[FN16]. [42 U.S.C.S. § 15609\(7\) \(2003\)](#).

[FN17]. [42 U.S.C.S. § 15609 \(9\) \(2003\)](#).

[FN18]. H.M. Eigenberg, "Correctional officers' definitions of rape in male prisons," *Journal of Criminal Justice*, 28 (2000): 435-449.

[FN19]. [42 U.S.C.S. § 15603\(a\) \(2003\)](#).

[FN20]. [42 U.S.C.S. § 15603\(b\) \(2003\)](#).

[FN21]. [42 U.S.C.S. § 15604 \(2003\)](#).

[FN22]. [42 U.S.C.S. § 15605 \(2003\)](#).

[FN23]. [42 U.S.C.S. § 15605\(b\)\(2\) \(2003\)](#).

[FN24]. [42 U.S.C.S. § 15606 \(2003\)](#).

[FN25]. [42 U.S.C.S. § 15606\(d\)\(1\) \(2003\)](#).

[FN26]. [42 U.S.C.S. § 15606\(d\)\(2\)\(D\) \(2003\)](#).

[FN27]. [42 U.S.C.S. § 15606\(d\)\(2\)\(I\) \(2003\)](#).

[FN28]. [42 U.S.C.S. § 15606\(d\)\(2\)\(L\) \(2003\)](#).

[FN29]. [42 U.S.C.S. § 15606\(e\)\(3\) \(2003\)](#).

[FN30]. [42 U.S.C.S. § 15606\(l\) \(2003\)](#).

[FN31]. [42 U.S.C.S. § 15607 \(2003\)](#).

[FN32]. [42 U.S.C. S. § 15608 \(2003\)](#).

[FN33]. [Farmer v. Brennan, 511 U.S. 825, 838 \(1994\)](#).

[FN34]. [42 U.S.C.S. § 15601\(13\) \(2003\)](#).

[FN35]. [Farmer v. Brennan, 511 U.S. at 853](#).

[FN36]. P.M. Harrison and A.J. Beck, "Prisoners in 2002," U.S. Department of Justice, Bureau of Justice Statistics Bulletin, NCJ 198877 (April 2003) available through <http://www.ojp.usdoj.gov/bjs/pub/pdf/p02.pdf> (last visited August 25, 2003).

END OF DOCUMENT