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Criminal Law Bulletin

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The Prison Rape Elimination Act of 2003: A Primer

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"Within U.S. prisons, inmate sexual assault is a devastating and overwhelming scourge that remains largely unabated, under-reported, and ignored." [\[FN1\]](#)

A male prisoner's darkest fear is that he will be raped by another man. [\[FN2\]](#) For many prisoners, this fear comes true. Moreover, once a victim, many times a victim, with one study finding that on average a victim of rape is sexually assaulted eight more times. [\[FN3\]](#) Will men doing time feel any safer now that Congress has passed the Prison Rape Elimination Act (PREA)? [\[FN4\]](#)

What's the Big Deal?

Once "shrouded in dead silence," [\[FN5\]](#) prison rape has been assimilated into the cultural mainstream as the subject of dark humor [\[FN6\]](#) and, according to one poll, as a socially acceptable price offenders' pay for crimes. [\[FN7\]](#) The horrific has become banal.

There are no nation-wide statistics on the prevalence on prison rape. Many states fail to keep a running count. [\[FN8\]](#) Besides, few victims notify authorities because of fear of reprisal, [\[FN9\]](#) shame, [\[FN10\]](#) and adherence to the inmate code's prohibition against "snitching." [\[FN11\]](#)

Interviews and anonymous surveys of select inmate populations yield sexual assault rates that are all over the map. The much cited and highly regarded study by Struckman-Johnson and Struckman-Johnson of Midwestern prisons concluded that 7% of male inmates experienced coerced anal or oral rape and about 21% had experienced some form of coerced sexual contact. [\[FN12\]](#) On the other hand, several other studies of varying quality reported that a mere 1% of surveyed inmates acknowledged being raped. [\[FN13\]](#) As Cindy and David Struckman-Johnson concluded, "[A]fter decades of research, social scientists have yet to agree on what percentage of incarcerated men experience coercive sexual contact." [\[FN14\]](#)

Some PREA proponents fault prison administrators. Take, for instance, Mark Earley, the former Republican attorney general of Virginia and current head of Prison Fellowship. He charged that prison administrators "turn their back on unspeakable acts in order to maintain 'peace'-allowing aggressive predators to have their way." [\[FN15\]](#)

Nonetheless, blaming correctional employees tells only half the story. After all, the perpetrators are inmates. Most experts believe that men rape other men in prison for the same reasons that men rape women: the assailant equates power with masculinity and believes that raping fellow inmates demonstrates his power. [\[FN16\]](#) Not surprisingly, the assailant is more often than not heterosexual. [\[FN17\]](#)

Ironically, imprisonment enhances inmates' need to establish their masculinity. Confinement strips inmates of the various badges of manhood, such as autonomy, self-sufficiency, and access to heterosexual relationships. [\[FN18\]](#) More than ever, an inmate has something to prove-his competency as an adult male. He will find no shortage of exploitable inmates, whose sexual domination will affirm his manhood.

The Origins of the PREA

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Evangelicals rallying behind a Jewish, Yale-educated lawyer might seem improbable, unless you are familiar with the origins of the PREA. The lawyer, Michael J. Horowitz, a senior fellow at the Hudson Institute, had earlier won the admiration of evangelicals by championing legislation to protect third world Christians from persecution. [\[FN19\]](#) By 2001, Horowitz had taken up a new cause-prison rape.

An evangelical website trumpeted that "the feisty Mr. Horowitz is gathering together old allies ... to begin fighting anew on behalf of prison rape." [\[FN20\]](#) Robert Colson, the founder of Prison Fellowship and one-time winner of the Templeton Prize for Progress in Religion, lent his influence among evangelicals. Carried by a legion of radio stations, his syndicated commentary included denunciation of prison rape and support of Horowitz's proposed legislation.

Horowitz also picked up support among unlikely champions of inmates, political conservatives. An article appearing in the conservative standard bearer, the National Review, described the PREA as the "sensible middle-ground solution" to the prison rape "epidemic," which it juxtaposed to the "left-wing" answer of more prison litigation. [\[FN21\]](#) The article's author, Eli Lehrer, pulled no punches in blaming "unaccountable" prison administrators. [\[FN22\]](#)

Horowitz's campaign gained more momentum in the spring of 2001 with the release a Human Rights Watch report, No Escape: Male Rape in U.S. Prisons. [\[FN23\]](#) It asserted that prison rape was "much more pervasive than correctional authorities acknowledge." [\[FN24\]](#)

Prompted by No Escape's publication, the mainstream media brought the terror of prison rape to a national audience. In particular, ABC World News Tonight featured prison rape on three consecutive nights. [\[FN25\]](#) The series portrayed rape as commonplace in many prisons and spoke poorly of correctional staff's response to sexual victimization within the nation's bulging inmate population.

In 2002, the Speaker of the House of Representatives joined with a host of groups spanning the political and religious spectrum in support of the PREA. In the coming year, hearings were held in both the House [\[FN26\]](#) and the Senate. [\[FN27\]](#) In July of 2003, without a dissenting vote, Congress passed the PREA. [\[FN28\]](#)

The Nuts and Bolts

Defining the Problem

Many correctional officers tacitly define prison rape as nothing less than sex applied with force - the "fight and then fuck" scenario. [\[FN29\]](#) Inmates who fail to fight run the risk of being seen as "gay" or willing sex partners. [\[FN30\]](#)

The drafters of the PREA expanded the definition of rape by including two situations where no force is used: 1) "where the victim is incapable of giving consent because of his or her temporary or permanent mental or physical incapacity;" [\[FN31\]](#) and 2) "through the exploitation of the fear or threat of physical or bodily injury." [\[FN32\]](#) Most prison sex fits the latter category. Rather than facing repeated, brutalizing rapes, many victims "hook-up" with a "daddy" who protects them in exchange of sex. [\[FN33\]](#)

An Annual Prison Rape Survey

Social scientists have largely ignored prison rape. [\[FN34\]](#) Moreover, as discussed early, we are unsure of how many rapes occur in custody. [\[FN35\]](#)

The PREA requires the Bureau of Justice Statistics to conduct an annual survey of the prevalence and effects of prison

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rape. [\[FN36\]](#) The legislation calls for at least one prison in every state to participate in a survey that will include no fewer than 10 percent of all state and federal prisons. [\[FN37\]](#)

Public Hearings

Christopher Henley spoke for other researchers when he stated, "Aside from a few exceptional studies on prison sexuality, we still know very little about the subject." [\[FN38\]](#) The PREA addresses this matter by mandating public hearings, which will focus on prisons with the highest and lowest incidence of prison rape. [\[FN39\]](#) The hearings will be conducted by a panel appointed by the U.S. Attorney General. [\[FN40\]](#) The legislation gives the hearing panel subpoena power. [\[FN41\]](#)

Rape Prevention Programs

Few prisons provide specific training in preventing and responding to sexual assault. [\[FN42\]](#) Moreover, many prison staff have embraced certain "rape myths," e.g., a "real man" cannot be raped because he will fight to the death, [\[FN43\]](#) or inmates prostituting themselves must be doing so willingly. [\[FN44\]](#) These staff norms ignore a blunt reality behind prison sex: "By the time an inmate reaches his initial classification destination...," observed one federal district court, "it is difficult to discern non-consensual homosexual activity, because the resistance of most non-consensual victims has been broken by that time." [\[FN45\]](#)

The PREA provides staff with assistance in addressing prison rape. A clearing house will train and education staff. [\[FN46\]](#) For each of the fiscal years 2004-2010, up to \$40 million in matching grants will be dispensed to state initiatives, including efforts to prosecute rapists. [\[FN47\]](#)

Model Standards

Since the birth of the penitentiary, prison reformers have looked to guidelines, model rules, and other standards to ensure humane imprisonment. [\[FN48\]](#) In 1968 the American Correctional Association (ACA) began accrediting facilities. [\[FN49\]](#) In turn, courts have consulted the ACA standards in adjudicating conditions of confinement and formulating remedies. [\[FN50\]](#) Their influence on courts has been mixed. In their seminal study of prisoner litigation, Feeley and Rubin described the early editions of the ACA standards as a "leading resource for the federal courts" [\[FN51\]](#) On the other hand, one commentator found their influence much diminished by 1992. "Courts," he wrote, "have not adopted ACA standards as their primary yardstick for evaluating practices and conditions. In fact, they often establish standards significantly different from [the ACA's]." [\[FN52\]](#)

Prior to 2003, the ACA standards barely addressed prison rape. [\[FN53\]](#) The drafters of the PREA sought to remedy this omission through the creation of the National Prison Rape Reduction Commission. [\[FN54\]](#) It will mount a thorough study of prison rape, including prison practices and conditions that contribute to the sexual exploitation of inmates. [\[FN55\]](#) Thereafter, the commission will draft national standards for preventing and detecting prison rape as well as punishing its perpetrators and aiding its victims. [\[FN56\]](#) However, the U.S. Attorney General will be statutorily prohibited from establishing any standard "that would impose substantial additional costs" on prison authorities. [\[FN57\]](#) This fiscal constraint may lead to standards that reflect the status quo.

Concluding Observations

From 1970 to the mid-1990s, the courts employed prospective relief to reform prison conditions on a national scale. [\[FN58\]](#) Implementing these reforms led judges to become active managers [\[FN59\]](#) who broke with "the received tradition" of

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judicial passivity and neutrality. [\[FN60\]](#)

As I have argued elsewhere, the judge's new role resulted in "a Faustian bargain: prospective relief made adjudication a potent engine of correctional reform, but it portrayed judges as intrusive policy makers." [\[FN61\]](#) By 1996, a legislature backlash against this new model of adjudication, coupled with a seeming torrent of frivolous filings by pro se inmates, led Congress to enact the Prison Litigation Reform Act. [\[FN62\]](#) Its provisions have weakened the judiciary's remedial powers and led to 43% reduction in inmate filings under section 1983. [\[FN63\]](#)

Enactment of prison rape legislation provides additional evidence that Congress, not the courts, will dominate the making of penal policy for some time to come. As to the content of that policy, the PREA suggests that elected officials are not indifferent to the fate of some inmates. Throughout the PREA, a subtext defines raped inmates as victims of imprisonment.

Ironically, the dominant theme in penal policy for the past several decades-"getting tough" on crime [\[FN64\]](#)-has nurtured prison rape. This policy has ballooned prison populations [\[FN65\]](#) and thereby led to two outcomes linked to high rates of prison rape: overcrowding, which diminishes the monitoring of offenders; [\[FN66\]](#) and mixing predators and prey in barracks-like housing used to cope with overcrowding. [\[FN67\]](#) A punitive penal policy has also led to a "you got nothing coming" attitude toward inmates, which encourages staff to view prison rape as just another part of the penalty offenders pay. [\[FN68\]](#) The PREA does not expressly repudiate this "get tough" policy. Consequently, members of Congress could favor its passage without appearing mollicoddling.

If Congress is to become a voice of humane corrections, it should pursue the "normalization" of prison life so as to incarcerate individuals under conditions and normative arrangements that mirror the free world as much as custodial security permits. Regarding prison sex, normalization directs that vulnerable male inmates cannot be accepted as female surrogate by inmates or staff. [\[FN69\]](#) The PREA represents an important step toward normalization.

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[\[FN71\]](#). Robert W. Dummond & Doris A. Dummond, *The Treatment of Sexual Assault Victims*, in *Prison Sex: Practice and Policy* 67, 67 (Christopher Hensley ed., 2002).

[\[FN72\]](#). See Carl Weiss & David James Friar, *Terror in the Prisons* 4 (1974) (observing that "prison rape is the first thing you fear" as an inmate); Richard S. Jones & Thomas J. Schmid, *Inmates' Conceptions of Prison Sexual Assault*, 69 *Prison J.* 53, 55 (1990) (writing that "perhaps, more than anything else an inmate fears sexual assault"); see also Lee H. Bowker, *Prison Victimization* 1 (1980) ("Even in institutions where the rape rate is relatively low-perhaps averaging no more than a few incidents per year-there is widespread fear of being raped, and this fear motivates prisoners to defend themselves carefully against this possibility.").

[\[FN73\]](#). See Cindy Struckman-Johnson et. al, *Sexual Coercion Reported by Men and Women in Prison*, 33 *J. Sex Research* 67, 75 (1996); see also, e.g., [LaMarca v. Turner](#), 662 F. Supp. 647, 686 (S.D. Fla. 1987) (observing that "[o]nce an inmate is raped, he is marked as a victim for repeated sexual assaults for the remainder of his imprisonment"), *aff'd in part and vacated in part on other grounds*, 995 F.2d 1526 (11th Cir. 1993).

[\[FN74\]](#). See *The Prison Rape Elimination Act of 2003* (formerly the *Prison Rape Reduction Act of 2003*), H.R. 1707, S. 1435, 108th Cong. (2003) (enacted).

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[FN5]. Joseph F. Fishman, *Sex in Prison: Revealing Sex Conditions in America's Prison* 81-82 (National Library Press, 1934).

[FN6]. See, e.g., 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.").

[FN7]. Robert Dummond, *The Impact and Recovery of Prison Rape*. Available at http://www.spr.org/en/doc/01_rts.html (last visited February 11, 2003) (recounting a survey by the Boston Globe, May 17, 1994, which found that 50% of 400 registered voters in Massachusetts agree that "[s]ociety accepts prison rape as part of the price criminals pay for wrongdoing").

[FN8]. See Human Rights Watch, *No Escape: Male Rape in U.S. Prisons*, at VIII. *Deliberate Indifference* (2001), available at <http://www.hrw.org/reports/2001/prison/report.html> (last visited on Jan. 27, 2003) (hereafter *No Escape*) (reporting that nearly half of the fifty states fail to collect data on rapes occurring in their jails and prisons).

[FN9]. See [Smith v. Norris](#), 877 F. Supp. 1296, 1304 (E.D. Ark. 1995), aff'd in part, rev'd in part, [103 F.3d 637](#) (8th Cir. 1996) (quoting an unpublished report by the Civil Rights Division of the United States Department of Justice (July, 1991)):

In reviewing reports of violent incidents for the past year, a number of rapes occurred in these dorms that went totally undetected by staff until the victim subsequently reported the attack. Since rapes are almost always accompanied by threats of retaliation, if the victim tells staff, one wonders how many rapes occurred that were not reported-the victim preferring to find safety via some other mechanism within the inmate culture.

[FN10]. See *No Escape*, supra note 8, at VII. *Anomaly or Epidemic* (describing "the terrible stigma" attached to prison rape).

[FN11]. See, e.g., [Shrader v. White](#), 761 F.2d 975, 989 (4th Cir. 1985) ("In addition to violence officially observed but unreported, the evidence makes clear that if violence is not officially observed, the inmates' fear of being retaliated against for "snitching" severely limits any possibility that inmate witnesses will make any report."); [Jensen v. Gunter](#), 807 F. Supp. 1463, 1472 (D. Neb. 1992) ("First, there is a reluctance among inmates to inform prison officials of the misconduct of another inmate. This is termed "snitching," and is frowned upon severely by other inmates. I do not credit the testimony of defendants' witnesses which attempted to assert that most inmates actually act in their own best interest by snitching and therefore are motivated to do so, and do so routinely.") (citation omitted).

[FN12]. See Cindy Struckman-Johnson & David Struckman-Johnson, *Sexual Coercion Rates in Seven Midwestern Prison Facilities for Men*, 80 *Prison J.* 379, 381 (2000).

[FN13]. See, e.g., Peter L. Nacci & Thomas R. Kane, *Sex and Sexual Aggression in Federal Prisons* 8-9 tbl. 1 (1982) (finding that 11% of inmates housed in one federal prison experienced sexual aggression, less than 1% stated that they performed a nonconsensual sex act, but 29% responded affirmatively when asked if they had been propositioned); Christine A. Saum et al., *Sex in Prison: Exploring Myths and Realities*, 75 *Prison J.* 413, 427 (1995) (finding that less than 1% of inmates questioned in a Delaware prison reported being raped); Richard Tewksbury, *Measures of Sexual Behavior in a Ohio Prison*, 74 *Sociology & Soc. Res.* 34, 36 (1989) (concluding that less than 1% of inmates in an Ohio prison reported being raped).

[FN14]. Struckman-Johnson & Struckman-Johnson, supra note 12, at 383.

[FN15]. See *Prison Rape Reduction Act of 2002: Hearing on H.R. 4643 and S.R. 2619 Before the Senate Committee on the Judiciary*, 107th Cong. (2002) (statement of Mark Earley, President and Chief Financial Officer, Prison Fellowship Minis-

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tries).

[FN16]. Compare A. Nicholas Groth, *Men Who Rape* 13 (1979) ("In every act of rape, both aggression and sexuality are involved, but it is clear that sexuality becomes the means of expressing the aggressive needs and feelings that operate in the offender and underlie his assault."), with Wayne S. Wooden & Jay Parker, *Men Behind Bars* 14 (1982) (explaining that in the inmate subculture "eroticism has come to be associated with aggression"); see also Susan Brownmiller, *Against Our Will* 102 (1975) (stating that "[h]omosexual rape in the Philadelphia prisons turned out to be a microcosm of the female experience with heterosexual rape manhood by acting as the dominant sexual party, that is, by being the "inserter").

[FN17]. Daniel Lockwood, *Lockwood, Prison Sexual Violence* 124 (1980).

[FN18]. See Gresham M. Sykes, *The Society of Captives* 71-72 (1958) (contending that prison rules "involve a profound threat to the prisoner's self image because they reduce the prisoner to the weak, helpless, dependent status of childhood ..."); Michael Welch, *Corrections* 341 (1996) ("[T]he prisoner's masculinity is in fact besieged from every side..."); see also Walter Rideau & Billy Sinclair, *Prison: The Sexual Jungle*, in *Male Rape: A Casebook of Sexual Aggressions* 3,4 (Anthony M. Scacco, Jr., ed., 1982) (discussing the emasculating disempowering prison environment).

[FN19]. Michael Cromartie, *The Jew Who Is Saving Christians*, *Christianity Today*, March 1, 1999, available at http://www.pals.msus.edu/cgi-bin/pals-cgi?SETWEB 20NSUGEN_/su%.../tx (last visited March 17, 2003).

[FN20]. See, e.g., Anne Morse, *Brutality Behind Bars*, *World on the Web*, Feb. 16, 2001, available at http://www.worldmag.com/world/issue/02-03-01/nationa_3.asp (last visited June 7, 2003).

[FN21]. Eli Lehrer, *No Joke*, *National Review Online*, June 20, 2002, available at <http://www.nationalreview.com/comment/comment-lehrer062002.asp> (last visited June 5, 2003).

[FN22]. Lehrer, *supra* note 21.

[FN23]. See *No Escape*, *supra* note 8, at VIII. Deliberate Indifference.

[FN24]. *No Escape*, *supra* note 8, at VIII. Deliberate Indifference.

[FN25]. See Dan Harris, *Nowhere to Hide*, *ABCNews.com*, April 16, 2001, available at http://abcnews.go.com/sections/wnt/WorldNewsTonight/wnt010416_prisonrape1_feature.html1/12/2003 (last visited Jan. 12, 2003); Dan Harris, *'Time Bombs'*, *ABCNews.com*, April 17, 2001, available at http://abcnews.go.com/sections/wn/WorldNewsTonight/wnt010417_prisonrape2_feature.html1/12/2003 (last visited Jan. 12, 2003); Judy Muller, *Preventing Inmate Rape*, *ABCNews.com*, April 18, 2001, available at http://abcnews.go.com/sections/wnt/WorldNewsTonight/wnt010418prisonrape3_feature.html1/12/2003 (last visited Jan. 12, 2003).

[FN26]. See 148 Cong. Rec. H3561 (June 13, 2002).

[FN27]. See 148 Cong. Rec. S5535 (June 13, 2002).

[FN28]. The Senate and the House enacted the PREA on July 21, 2003, and July 25, 2003, respectively.

[FN29]. See 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.

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Braswell et al. eds. 2d ed. 1994) (observing that prison staff "in the prison vernacular, ... seem to offer little assistance to inmates except the age-old advice of 'fight or fuck' ").

[FN30]. See Helen M. Eigenberg, Correctional Officers' Definitions of Rape in Male Prisons, 28 J. Crim. Just. 435, 437-38 (2000).

[FN31]. See The Prison Rape Elimination Act of 2003 (formerly the Prison Rape Reduction Act of 2003), H.R. 1707, S. 1435, 108th Cong., § 10(9)(B) (2003) (enacted).

[FN32]. See The Prison Rape Elimination Act of 2003 (formerly the Prison Rape Reduction Act of 2003), H.R. 1707, S. 1435, 108th Cong., § 10(9)(C) (2003) (enacted).

[FN33]. See Helen M. Eigenberg, Correctional Officers and Their Perceptions of Homosexuality, Rape, and Prostitution in Male Prisons, 80 Prison J. 415, 420-21 (2000) (describing the process of how vulnerable inmates find "protectors").

[FN34]. Christopher Hensley, Introduction: Life and Sex in Prison, in Prison Sex: Practice and Policy 1, 1 (Christopher Hensley ed., 2002) (observing that social scientists have largely ignored prison sex).

[FN35]. See Helen M. Eigenberg, Prison Staff and Male Rape, in Prison Sex: Practice and Policy 49, 62 (Christopher Hensley ed., 2002).

[FN36]. See The Prison Rape Elimination Act of 2003 (formerly the Prison Rape Reduction Act of 2003), H.R. 1707, S. 1435, 108th Cong., § 4 (2003) (enacted).

[FN37]. See The Prison Rape Elimination Act of 2003 (formerly the Prison Rape Reduction Act of 2003), H.R. 1707, S. 1435, 108th Cong., § 4(A)(4)(2003) (enacted).

[FN38]. Hensley, supra note 34, at 11.

[FN39]. See The Prison Rape Elimination Act of 2003 (formerly the Prison Rape Reduction Act of 2003), H.R. 1707, S. 1435, 108th Cong., § 4(b)(3) (2003) (enacted).

[FN40]. See The Prison Rape Elimination Act of 2003 (formerly the Prison Rape Reduction Act of 2003), H.R. 1707, S. 1435, 108th Cong., § 4(b)(2)(A)(2003) (enacted).

[FN41]. See The Prison Rape Elimination Act of 2003 (formerly the Prison Rape Reduction Act of 2003), H.R. 1707, S. 1435, 108th Cong., § 4(b)(3)(C)(2003) (enacted).

[FN42]. No Escape, supra note 8, at VIII. Deliberate Indifference: State Authorities' Response to Prisoner-on Prisoner Sexual Abuse (stating that, based on a survey of departments of corrections, "few departments take specific affirmative steps" such as specialized training and specific protocols).

[FN43]. Eigenberg, supra note 35, at 60.

[FN44]. Eigenberg, supra note 33, at 427 tbl. 2.

[FN45]. [Anderson v. Redman](#), 429 F. Supp. 1105, 1117 (D. Del. 1977).

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[FN46]. See The Prison Rape Elimination Act of 2003 (formerly the Prison Rape Reduction Act of 2003), H.R. 1707, S. 1435, 108th Cong., § 6(c) 2003) (enacted),.

[FN47]. See The Prison Rape Elimination Act of 2003 (formerly the Prison Rape Reduction Act of 2003), H.R. 1707, S. 1435, 108th Cong., § 6(c)(2003) (enacted).

[FN48]. See Dale K. Sechrest, Accreditation, in *Encyclopedia of American Prisons* 1, 1 (Marilyn D. McShane & Frank D. Williams III eds., 1996).

[FN49]. See John Woolredge, American Correctional Association, in *Encyclopedia of American Prisons* 27, 28 (Marilyn D. McShane & Frank D. Williams III eds., 1996).

[FN50]. See Woolredge, *supra* note 49, at 31.

[FN51]. Malcolm M. Feeley & Edward L. Rubin, *Judicial Policy Making and The Modern State* 163 (1998).

[FN52]. Rod Miller, Working Relationship-Examining Standards' Role in Court Decisions, *Corrections Today* 58, 60 (May 1992).

[FN53]. See Lehrer, *Hell Behind Bars*, *supra* note, at (quoting Horowitz, "There is not a single major private group that accredits prisons that set standards for preventing rape"); see also American Correctional Association Standards Committee Meeting Minutes, Standards Committee Action, Jan. 10, 2003, Proposal 03-04; 0-3-05; 03-05-A; 03-6, available at <http://aca.org/standards/revisons.htm> (last visited April 9, 2003) (approving proposals expanding policies, procedure, and practices addressing inmates with histories of sexually assault; those at high risk of sexual assault; and those who have been sexually assaulted).

[FN54]. See The Prison Rape Elimination Act of 2003 (formerly the Prison Rape Reduction Act of 2003), H.R. 1707, S. 1435, 108th Cong., § 7 (2003) (enacted).

[FN55]. See The Prison Rape Elimination Act of 2003 (formerly the Prison Rape Reduction Act of 2003), H.R. 1707, S. 1435, 108th Cong., § 4(d)(2003) (enacted).

[FN56]. See The Prison Rape Elimination Act of 2003 (formerly the Prison Rape Reduction Act of 2003), H.R. 1707, S. 1435, 108th Cong., § 4(e)(2003) (enacted).

[FN57]. See The Prison Rape Elimination Act of 2003 (formerly the Prison Rape Reduction Act of 2003), H.R. 1707, S. 1435, 108th Cong., § 8(a)(3)(2003) (enacted).

[FN58]. See 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* 13 (John D. DiIulio, Jr., ed., 1990) (contending that judicially mandated prison reform "is perhaps second in breadth and detail only to the courts' earlier role in dismantling segregation in the nation's public schools").

[FN59]. See [Abram Chayes, *The Role of the Judge in Public Law Adjudication*, 89 *Harv. L. Rev.* 1281, 1284 \(1976\)](#) (describing the judge's function as "the creator and manager of complex forms of ongoing relief"); Colin S. Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 *Va. L. Rev.* 43, 46 (1979) (describing the judge as a "powerbroker").

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[FN60]. See Roscoe Pound, *The Theory of Judicial Decision* (pt. 3), 36 *Harv. L. Rev.* 940, 943 (1923).

[FN61]. James E. Robertson, *Prison Reform, A Faustian Bargain: Commentary on Prospective Relief Before and After Miller v. French*, 37 *Crim. L. Bull.* 195 (2001).

[FN62]. [Pub. L. No. 104-134](#) (April 16, 1996), 110 *Stat.* 1321 (1996).

[FN63]. See Margo Schlanger, [Inmate Litigation, 116 *Harv. L. Rev.* 1555, 1613-14 \(2003\)](#) (discussing lack of availability of plaintiffs' lawyers).

[FN64]. See Todd R. Clear, *Harm in American Penology* 38-77 (1994) (describing "The Great Punishment Experiment").

[FN65]. See James E. Robertson, *Rape Among Incarcerated Men: Sex, Coercion and STDs*, 17 *AIDS Patient Care* 423, 428 (2003) (observing that the jail and prison population has increased five-fold since 1973).

[FN66]. See Struckman-Johnson & Struckman-Johnson, *supra* note 12, at 389.

[FN67]. Struckman-Johnson & Struckman-Johnson, *supra* note 12, at 389.

[FN68]. See Victor Hassine, *Life Without Parole* 136 (2d ed. 1999).

[FN69]. See Peter L. Nacci & Thomas R. Kane, *Sex and Sexual Aggression in Federal Prisons*, 48 *Fed. Probation* 46, 51 (March 1984).

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