

THE IMPACT OF PRISONER SEXUAL VIOLENCE: CHALLENGES OF IMPLEMENTING PUBLIC LAW 108-79 THE PRISON RAPE ELIMINATION ACT OF 2003

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At the dawn of the twenty-first century, a wound that had been festering in American corrections finally received examination and treatment. For decades, there had been reports of the “[c]ruel and [u]sual”¹ punishment of prisoner rape which had broken forth in the national media and in scholarly journals, raising the alarm about what some called “America’s most ignored crime problem.”² In 1996, Struckman-Johnson, Struckman-Johnson, Rucker, Bumby and Donaldson reported that twenty-two percent of Nebraska’s male prisoners were the victims of sexual pressuring, attempted sexual assault or completed rapes³ and that one in ten prisoners were victims of a completed rape.⁴ Human Rights Watch decried the sexual abuse of women in state prisons in the United States.⁵ The National Institute of Corrections also initiated a training program to address staff sexual misconduct that same year.⁶ Ironically,

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1. Editorial, *Cruel and Usual*, WASH. POST, Apr. 23, 2001, at A14.

2. Eli Lehrer, *Hell Behind Bars: The Crime that Dares Not Speak its Name*, NAT’L REV., Feb. 5, 2001, available at http://www.findarticles.com/cf_dls/ml282/2_53/69388675/p1/article.jhtml.

3. Cindy Struckman-Johnson et al., *Sexual Coercion Reported by Men and Women in Prison*, 33 J. SEX RES. 67, 71 (1996) [hereinafter *Sexual Coercion Reported*].

4. *Id.* at 77.

5. See generally HUMAN RIGHTS WATCH, ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS (1996), <http://hrw.org/reports/1996/Us1.htm>.

6. See generally Anadora Moss & Ashbel T. Wall II, *Addressing the Challenge of Inmate Rape*, 67 CORRECTIONS TODAY 74 (2005) (discussing training program).

however, until 1999 “sexual abuse of prisoners by correctional officials was not even a criminal offense in 14 states.”⁷

By 2001, the problem was thrust into the national consciousness, spurred by a national study of male rape in U.S. prisons,⁸ an additional study of Midwestern prisons which re-confirmed earlier findings⁹ and a flood of media, who argued that prisoner rape was “accepted as [a] fact of prison life.”¹⁰ The Supreme Court of Canada had even chided a Pennsylvania prosecutor for violating the Canadian Charter of Rights by threatening sexual violence.¹¹ In April 2001, the Canadian high court unanimously ruled to block the extradition of four men accused of a multimillion-dollar telemarketing scam in the United States because Pennsylvania prosecutor Gordon Zubrod had threatened “[y]ou’re going to be the boyfriend of a very bad man if you wait out the extradition.”¹²

In response, a unique, bi-partisan coalition of national legislators, social scientists, religious, professional and human rights organizations joined forces behind legislation, The Prison Rape Elimination Act of 2003,¹³ to alleviate the crisis.¹⁴ Notably, the Act was passed unanimously by both houses of Congress¹⁵ and was signed by President Bush on September 4, 2003,¹⁶ sending a clear signal that such behavior was unacceptable and would not be tolerated.

I. PASSAGE OF THE PRISON RAPE ELIMINATION ACT HAS SPURRED SUBSTANTIVE CHANGE

Though some have argued that progress on the Act has been slow,¹⁷ the problem of prisoner sexual assault is receiving considerable scrutiny and an enormous commitment of public resources and support. State and federal departments of corrections have risen to the challenge. The American Correctional Association has created several new standards and revised a number of other standards to respond to prisoner sexual

7. Curt Goering, Deputy Executive Director, Amnesty International U.S.A., Letter to the Editor, *An Ugly Portrait of Rape in Prison*, N.Y. TIMES, Apr. 17, 2001, at A18.

8. HUMAN RIGHTS WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISONS (2001), <http://files.findlaw.com/news.findlaw.com/cnn/docs/hrw/hrwmalerape0401.pdf>.

9. Cindy Struckman-Johnson & David Struckman-Johnson, *Sexual Coercion Rates in Seven Midwestern Prison Facilities for Men*, 80 PRISON J. 379 (2000), available at <http://www.spr.org/pdf/struckman.pdf> [hereinafter Struckman-Johnson, *Sexual Coercion Rates*].

10. Tamar Lewin, *Little Sympathy or Remedy For Inmates Who Are Raped*, N.Y. TIMES, Apr. 15, 2001, at 11.

11. *United States v. Cobb*, [2001] S.C.R. 587 (Can.).

12. *See id.*

13. 42 U.S.C.A. §§ 15601–15609 (West 2005).

14. Robert W. Dumond, *Confronting America's Most Ignored Crime Problem: The Prison Rape Elimination Act of 2003*, 31 J. AM. ACAD. PSYCHIATRY & L. 354 (2003), available at <http://www.jaapl.org/cgi/reprint/31/3/354> [hereinafter Dumond, *Confronting America*].

15. Press Release, Stop Prisoner Rape, House and Senate Pass Legislation to Curb Prisoner Rape (July 25, 2003), <http://www.spr.org/en/pressreleases/2003/0725.html> (discussing unanimous Congressional vote to pass the Act).

16. Press Release, Stop Prisoner Rape, Prison Rape Elimination Act Becomes Federal Law (September 4, 2003), <http://www.spr.org/en/pressreleases/2003/0904.html>.

17. *See, e.g.*, STOP PRISONER RAPE, PREA UPDATE: STOP PRISONER RAPE'S REPORT ON THE PRISON RAPE ELIMINATION ACT 2 (2005), <http://www.spr.org/pdf/PREAUpdate0505.pdf>.

violence.¹⁸ The National Institute of Corrections has begun a major initiative to establish a clearinghouse of information on prisoner sexual violence, providing national training through teleconferences and, along with the Moss Group, providing a full range of resources to correctional agencies nationwide.¹⁹ The Bureau of Justice Statistics (BJS) has initiated comprehensive data collection efforts, with more to come, including an innovative inmate survey using an audio computer-assisted process.²⁰ BJS and the National Institute of Justice have funded comprehensive research studies and a number of innovative strategies.²¹ The National Prison Rape Elimination Commission has begun its comprehensive study of the problem, convening several public hearings, with more hearings to come.²²

A. Defining Prison Rape

Prisoner sexual violence is a complex continuum which includes a whole host of sexually coercive (non-consensual) behaviors, including sexual harassment, sexual extortion and sexual assault, which can involve inmates and/or staff as perpetrators.²³ Called "the most serious and devastating of non-lethal offenses which occur in corrections,"²⁴ prisoner sexual violence has devastating personal, social, and emotional consequences to both the victim/survivor and society at large.

18. See Minutes from American Correctional Association Standards Committee Meeting (Jan. 10, 2003), http://www.aca.org/standards/revisions/pdf/sc_minutes_jan03.pdf.

19. See PREA: NIC Assistance, http://nicic.org/WebPage_391.htm (last visited Apr. 5, 2006) (collecting electronically available resources on the Prison Rape Elimination Act).

20. ALLEN J. BECK & TIMOTHY A. HUGHES, BUREAU OF JUSTICE STATISTICS, DEP'T OF JUSTICE, PRISON RAPE ELIMINATION ACT OF 2003: SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES, 2004, at 2 (2005), <http://www.ojp.usdoj.gov/bjs/pub/pdf/svrca04.pdf>; DATA COLLECTIONS FOR THE PRISON RAPE ELIMINATION ACT OF 2003 (2004), <http://www.nicic.org/Library/serial883> [hereinafter DATA COLLECTIONS].

21. See National Institute of Corrections, PREA Grants Through BJA, http://nicic.org/WebPage_56.htm (last visited July 6, 2006); Dep't of Justice, Project Summaries: PREA Grant Awards, FY 2004, <http://www.nicic.org/downloads/pdf/misc/PREA04ProjectSummaries.pdf>.

22. See Nat'l Prison Rape Elimination Comm'n, *Public Proceedings*, <http://www.nprec.us/proceedings.htm> (last visited Apr. 10, 2006) (identifying public hearings in San Francisco, CA, Washington, D. C., Miami, FL, and a public meeting at the University of Notre Dame).

23. See generally LEE H. BOWKER, PRISON VICTIMIZATION (1980); Donald J. Cotton & A. Nicholas Groth, *Sexual Assault in Correctional Institutions: Prevention and Intervention*, in VICTIMS OF SEXUAL AGGRESSION: TREATMENT OF CHILDREN, WOMEN, AND MEN (Irving R. Stuart & Joanne G. Greer eds., 1984) [hereinafter Cotton, *Sexual Assault*]; Robert W. Dumond & Doris A. Dumond, *Training Staff on Inmate Sexual Assault*, in PRISON SEX: PRACTICE AND POLICY 89 (Christopher Hensley ed., 2002) [hereinafter Dumond, *Training Staff*]; DANIEL LOCKWOOD, PRISON SEXUAL VIOLENCE (Michael Gnat ed., 1980); CARL WEISS & DAVID JAMES FRIAR, TERROR IN THE PRISONS: HOMOSEXUAL RAPE AND WHY SOCIETY CONDONES IT (1974); WAYNE S. WOODEN & JAY PARKER, MEN BEHIND BARS: SEXUAL EXPLOITATION IN PRISON (1982); Donald J. Cotton & A. Nicholas Groth, *Inmate Rape: Prevention and Intervention*, 2 J. PRISON & JAIL HEALTH 47 (1982) [hereinafter Cotton, *Inmate Rape*]; Alan J. Davis, *Sexual Assaults in the Philadelphia Prison System and Sheriff's Vans*, 6 TRANS-ACTION 8 (1968); Dumond, *Confronting America*, *supra* note 14; Robert W. Dumond, *The Sexual Assault of Male Inmates in Incarcerated Settings*, 20 INT'L J. SOC. L. 135 (1992) [hereinafter Dumond, *Male Inmates*]; Robert W. Dumond & Doris A. Dumond, *The Treatment of Sexual Assault Victims*, in PRISON SEX: PRACTICE AND POLICY 67 (Christopher Hensley ed., 2002) [hereinafter Dumond, *Treatment of Victims*]; HUMAN RIGHTS WATCH, *supra* note 8; Struckman-Johnson, *Sexual Coercion Rates*, *supra* note 9; *Sexual Coercion Reported*, *supra* note 3; Cindy Struckman-Johnson & David Struckman-Johnson, *Sexual Coercion Reported by Women in Three Midwestern Prisons*, 39 J. SEX RES. 217 (2002) [hereinafter Struckman-Johnson, *Three Midwestern Prisons*].

24. Cotton & Groth, *Inmate Rape*, *supra* note 23, at 47.

B. Prisoner Sexual Violence Compromises the Underpinnings of American Justice.

The United States was established on the fundamental principles of freedom and equal justice under the rule of law. The founding fathers enshrined in the *Bill of Rights* specific guarantees for all citizens, which have become the cornerstone of our constitutional system of justice.²⁵ The Enlightenment notion that the punishment should be proportional to the crime, first heralded by Cesare Beccaria,²⁶ set the stage for penal and legislative reforms that were a radical departure from the prevailing practice of capital punishment for a broad spectrum of crimes and substituted the penitentiary movement in its place.²⁷ In particular, the Eighth Amendment prohibited the infliction of "cruel and unusual punishment" upon prisoners.²⁸ As the problem of prisoner sexual violence reached public awareness at the dawn of the twenty-first century, many argued that prisoner rape had become "an accepted . . . part of prison life"²⁹ in direct opposition to the Eighth Amendment guarantee.

C. Prisoner Sexual Violence Has Been Known Since the Rise of the Penitentiary Movement

The American correctional system has been plagued by prisoner sexual violence since its inception. Rev. Louis Dwight, Director of the Prison Discipline Society of Boston from 1825 to 1854, is considered the best source of information about American prisons of that era.³⁰ After investigating state prison conditions from Massachusetts to Georgia between 1824 and 1826, Rev. Dwight stated:

I have found melancholy testimony to establish one general fact, viz. that boys are prostituted to the lust of old convicts. . . . the sin of sodomy is the vice of prisoners, and boys are the favorite prostitutes . . . "Sodomy" . . . "is said to be constantly practiced among them. . . ." "[W]hen a boy was sent to Prison, who was of a fair countenance, there many times seemed to be quite a strife . . . I will only add to this testimony, the following conversation which I had with a boy in the Penitentiary . . . : "Was the crime ever committed upon you? Yes, Sir! . . . Why did you submit? He choked me! He was stronger than I! Why did you not complain? I did, in the room! but [sic] they said if I told of it, they would punish me! Who said so? They all said, I must not tell any thing out of the room!" [N]ature and humanity cry aloud for redemption from this dreadful degradation.³¹

One hundred years later, Joseph F. Fishman, who visited 1500 jails and prisons in

25. See generally Frank B. Cross, *Institutions and Enforcement of the Bill of Rights*, 85 CORNELL L. REV. 1529, 1530–32 (2000).

26. See CESARE BECCARIA, OF CRIMES AND PUNISHMENTS 18 (Henry Paolucci trans., 1963) (1767).

27. LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 63, 77 (1993).

28. U.S. CONST. amend. VIII.

29. Editorial, *Cruel and Usual*, WASH. POST, Apr. 23, 2001, at A14.

30. HARRY E. ALLEN & CLIFFORD E. SIMONSEN, CORRECTIONS IN AMERICA: AN INTRODUCTION 35 (9th ed., 2001).

31. JONATHAN KATZ, GAY AMERICAN HISTORY 27–28 (1976).

the United States before 1920,³² confirmed the continuation of this practice. The author of two now classic correctional texts,³³ he denounced the large number of boys and young men “made homosexuals, either temporarily or permanently.”³⁴ He also reported that prison officials turned a blind eye to sexual abuses and that the inmate predators responsible were often ignored by correctional officers.³⁵ As an inspector of federal prisons, Fishman cited a number of conditions which contributed to such behavior: lack of women, enforced idleness, close proximity of other men, breakdown of social relations, and the presence of homosexual ‘wolves.’³⁶ He also was one of the first to identify that the inmate code prevents victims from reporting.³⁷

D. The Precise Number of Prisoners Affected By Prisoner Sexual Violence Is Unknown

In the last thirty-five years, there have been less than twenty empirically based studies to accurately assess the incidence of prisoner sexual violence,³⁸ only three of which have included data about women prisoners.³⁹ Gerald Gaes and Andrew Goldberg note that, in total, these studies examined less than fifty prisons, only one jail setting and one national probability study.⁴⁰ The majority of these studies focused on male facilities and used inconsistent definitions, making comparisons and conclusions difficult.⁴¹ In each of these studies, there has been a wide range of reported incidents, from extremely low incident rates⁴² to the suggestion that prison rape is widespread and

32. FRIEDMAN, *supra* note 27, at 310.

33. JOSEPH F. FISHMAN, *SEX IN PRISON: REVEALING SEX CONDITIONS IN AMERICAN PRISONS* (1934) [hereinafter FISHMAN, *SEX IN PRISON*]; JOSEPH F. FISHMAN, *CRUCIBLES OF CRIME: THE SHOCKING STORY OF THE AMERICAN JAIL* (1923).

34. FISHMAN, *SEX IN PRISON*, *supra* note 33, at 83.

35. *Id.* at 117.

36. *Id.* at 19, 24, 26, 59, 84.

37. Christopher Hensley et al., *Introduction: The History of Prison Sex Research*, 80 PRISON J. 360, 362 (2000).

38. Struckman-Johnson, *Sexual Coercion Rates*, *supra* note 9; Clemens Bartollas & Christopher M. Sieverdes, *The Sexual Victim in a Co-educational Juvenile Correctional Institution*, 58 PRISON J. 80 (1983); Davis, *supra* note 23; LOCKWOOD, *supra* note 23; WOODEN & PARKER, *supra* note 23; Leo Carroll, *Humanitarian Reform and Biracial Sexual Assault in a Maximum Security Prison*, 5 URBAN LIFE 417 (Jan. 1977); D.A. Fuller & T. Orsagh, *Violence and Victimization within a State Prison System*, 2 CRIM. JUST. REV. 35 (1977); Christopher Hensley, *Consensual Homosexual Activity in Male Prisons*, 26 CORRECTIONS COMPENDIUM 1 (2001); DAVID A. JONES, *THE HEALTH RISKS OF IMPRISONMENT* (1976); C. Scott Moss et al., *Sexual Assault in Prison*, 44 PSYCHOL. REP. 823 (1979); Peter L. Nacci & Thomas R. Kane, *Sex and Sexual Aggression in Federal Prisons: Inmate Involvement and Employee Impact*, 48 FED. PROBATION 46 (1984) [hereinafter Nacci, *Federal Prisons*]; Peter L. Nacci & Thomas R. Kane, *The Incidence of Sex and Sexual Aggression in Federal Prisons*, 47 FED. PROBATION 31 (1983) [hereinafter Nacci, *Incidence of Sex and Sexual Aggression*]; Peter L. Nacci, *A Federal Study: Sexual Assault in Prisons*, 40 AM. J. CORRECTIONS 30 (1978) [hereinafter Nacci, *A Federal Study*]; Christine Saum et al., *Sex in Prison: Exploring the Myths and Realities*, 75 PRISON J. 413 (1995); *Sexual Coercion Reported*, *supra* note 3; Richard Tewksbury, *Measures of Sexual Behavior in an Ohio Prison*, 74 SOC. RES. 34 (1989).

39. Leanne Fifal Alarid, *Sexual Assault and Coercion Among Incarcerated Women Prisoners: Excerpts from Prison Letters*, 80 PRISON J. 391, 392–93 (2000); Stephen Donaldson, *Rape of Incarcerated Americans: A Preliminary Statistical Look* (1995), http://www.spr.org/en/stephendonaldson/doc_01_stats.html; *Sexual Coercion Reported*, *supra* note 3.

40. Gerald G. Gaes & Andrew L. Goldberg, *Prison Rape: A Critical Review of the Literature* 1–2 (2004), available at <http://nicic.org/pubs/2004/019813.pdf>.

41. *Id.* at 2.

42. See, e.g., Tewksbury, *supra* note 38, at 38; LOCKWOOD, *supra* note 23, at 87.

pervasive.⁴³ Despite these limitations, credible evidence over nearly a forty year period from reliable observers has established two unequivocal facts: prison sexual violence does occur in correctional settings, and it has a devastating and profound effect upon its victims and society. The lack of substantive national data about the problem of prisoner sexual assault, however, has stymied a coordinated effective response to managing the problem. The Prison Rape Elimination Act provides a vehicle to examine prisoner sexual violence; to accurately assess the problem; and, to appropriately respond.

II. A RECENT BJS REPORT PROVIDES A MAJOR INNOVATION IN UNDERSTANDING PRISONER SEXUAL VIOLENCE

The data collection process that Dr. Allen Beck and his colleagues at BJS heralded represents a quantum leap in methodology and our knowledge about the problem. Whereas previous studies focused on a very small sample, BJS, in its 2004 *Survey of Sexual Violence* surveyed 2730 correctional facilities nationwide, holding seventy-nine percent of all adults and juveniles in custody.⁴⁴ By including prisons, local jails, juvenile, Immigration and Naturalization Services, military, public and private correctional facilities, BJS created a broad, well-constructed national sample.

A. Rape and Sexual Violence Are the Most Underreported of Crimes

To fully understand the implications of the BJS study, one must recognize that of all categories of crime, rape and sexual violence are known to be one of the most underreported, making an accurate assessment of its occurrence difficult. There are three major methods to report crime: administrative records of crimes reported to law enforcement agencies (e.g., Uniform Crime Reports), victimization surveys (e.g., National Crime Victimization Surveys), and self-report studies.⁴⁵ The BJS survey belongs to the first method. Accordingly, one must acknowledge that the BJS results will report the lowest rate of victimization. This is an issue of great importance, and it will be useful when comparing reporting of sexual violence in the community.

In the 1992 National Women's Study, only about 12% of the women who alleged being victims of rape reported to the police.⁴⁶ In the National Crime Victimization Survey in 1994, 41% of sexual assault victims reported to authorities.⁴⁷ In the 1998 survey, only 32% of sexual assaults of persons twelve years or older reported to law enforcement.⁴⁸ In the 2000 National College Women Sexual Victimization Survey, fewer than 5% of the completed or attempted rapes were reported

43. See, e.g., WOODEN & PARKER, *supra* note 23, at 134.

44. BECK & HUGHES, *supra* note 20.

45. ANNE BARTOL & CURT BARTOL, INTRODUCTION FOR FORENSIC PSYCHOLOGY 104 (2004).

46. DEAN G. KILPATRICK ET AL., NAT'L VICTIM CENTER, RAPE IN AMERICA: A REPORT TO THE NATION (1992).

47. BUREAU OF JUSTICE STATISTICS, DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 1994, vii-viii (1997), <http://www.ojp.usdoj.gov/bjs/pub/pdf/cvius94.pdf>.

48. CALLIE M. RENNINGSON, BUREAU OF JUSTICE STATISTICS, DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION 1998: CHANGES 1997-1998 WITH TRENDS 1993-1998, at 9-10 (1999), <http://www.ojp.usdoj.gov/bjs/pub/pdf/cv03.pdf>.

to law enforcement.⁴⁹ In the most recent National Crime Victimization Survey (2003), 39% of the victims of rape and sexual assault reported their victimization to the police.⁵⁰ We know far less about male sexual assault victims; only very recently did the Uniform Crime Reports even consider the fact that males could be sexually victimized.⁵¹ Three percent of American men reported having been the victim of an attempted or completed rape in their lifetime, according to the findings from the National Violence Against Women 1998 report,⁵² and one in ten rape victims were male according to the 2003 National Crime Victimization Surveys.⁵³

B. Innovations in BJS Survey of Sexual Violence

Additionally, the use of four standardized, behaviorally specific definitions is a major improvement which will advance our knowledge of prisoner sexual violence substantially. Until this point, there had been little consensus on which acts of sexual violence were being described. By being able to compare “apples to apples,” we will be able to discuss the issue of prisoner sexual violence with precision and confidence.

The results from the 2004 BJS Survey⁵⁴ are compelling. Nationwide, there were 8210 allegations of sexual violence reported to correctional authorities in 2004 (3.15 allegations of sexual violence per 1000 inmates held).⁵⁵ Of these, correctional authorities substantiated nearly 2100 incidents of sexual violence, 30% of completed investigations.⁵⁶ Not surprisingly, males comprised 90% of both victims and perpetrators of inmate-on-inmate nonconsensual acts, consistent with the large percentage of male prisoners nationwide.⁵⁷

With staff sexual misconduct, however, surprising differences emerged between prisons and jails. In state prisons, 69% of victims of staff sexual misconduct were male, while 67% of perpetrators were female.⁵⁸ In local jails, the dynamics were reversed, 70% of victims of staff sexual misconduct were female, while 65% of perpetrators were male.⁵⁹ These findings challenge correctional authorities to develop procedures to more carefully screen, train, monitor, and support correctional staff in their duties of prisoner care, custody and control.

The BJS Survey also makes an important point: as this is the first attempt at a national understanding of the problem, the data presented cannot be used to “rank order” states, since additional methods (i.e. victimization surveys) must be utilized to

49. BONNIE S. FISHER ET AL., BUREAU OF JUSTICE STATISTICS, DEP'T OF JUSTICE, THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN 23 (2000), <http://www.ncjrs.gov/pdffiles1/nij/182369.pdf>.

50. SHANNAN M. CATALANO, BUREAU OF JUSTICE STATISTICS, DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION, 2003, at 10 (2004), <http://www.ojp.usdoj.gov/bjs/pub/pdf/cv03.pdf>.

51. Dumond, *Treatment of Victims*, *supra* note 23, at 72.

52. PATRICIA TJADEN & NANCY THOENNES, DEP'T OF JUSTICE, FULL REPORT ON THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN 13 (2000), <http://www.ncjrs.gov/pdffiles1/nij/183781.pdf>.

53. CATALANO, *supra* note 50.

54. BECK & HUGHES, *supra* note 20.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

make reliable comparisons. What is sure, however, is that there is likely to be an increase in the reporting of prisoner sexual violence in the future. In fact, there *should* be an increase in reporting if we, as correctional agencies, are doing what is necessary to encourage reporting and to take this problem seriously. By scrutinizing and tracing prisoner sexual violence in a uniform and scientific manner, correctional agencies will be better positioned to identify vulnerable victims, potential perpetrators, and times and locations where violence has occurred or is likely to occur. They can use this data to drive necessary policy and procedural changes.

III. CRUCIAL INFORMATION ABOUT PRISONER SEXUAL VIOLENCE WHICH IS KNOWN FROM PRIOR RESEARCH

The previous forty years of research has revealed crucial information about the methods of victimization, the increased vulnerability of certain prisoners, and the devastating impact upon victims.

A. Methods of Victimization

Aggressors employ several methods to control their victims, including entrapment (blackmail), pressure tactics and physical force, accompanied by psychological manipulation.⁶⁰

A common form of entrapment is to give a new prisoner a number of goods which are “on-loan,” since new inmates often have few resources available to them. In the correctional economy, loaned goods must be repaid at exorbitantly high rates (e.g., two packages of canteen goods for every one loaned, which increases by the week).⁶¹ When an inmate cannot repay the loan, he or she is forced to pay with sex.⁶² Pressure tactics include persuasion, bribes, threats to withdraw love and use of alcohol or drugs.⁶³ Force tactics include threats of harm; intimidation by the perpetrator’s size and strength; being physically held down; having a weapon present; and, a variety of physical assaults.⁶⁴

Perpetrators also utilize five major psychological components to engage victims: conquest and control, revenge and retaliation, sadism and denigration, conflict and counteraction, and status and affiliation,⁶⁵ aimed primarily at exercising control and aggression. The process is seductive and manipulative, has a significant impact upon the psyche of the victim, and often contributes to feelings of guilt, shame and humiliation.⁶⁶ Researchers have shown that these crimes destabilize the safety and security of America’s jails and prisons, and are a contributing factor in homicides,

60. *Sexual Coercion Reported*, *supra* note 3, at 69.

61. See Julie Kunselman et al., *Nonconsensual Sexual Behavior*, in PRISON SEX: PRACTICE AND POLICY 29 (C. Hensley ed., 2002) (stating that the repayment amount may be double or triple the amount borrowed).

62. See Cotton, *Sexual Assault*, *supra* note 23, at 129 (detailing one inmate’s story in which he could not repay a debt and was forced to perform oral sex).

63. *Sexual Coercion Reported*, *supra* note 3, at 69.

64. *Id.*

65. A. Nicholas Groth et al., *Rape: Power, Rage and Sexuality*, 134 AM. J. PSYCHIATRY 1239 (1977) [hereinafter Groth, *Rape*].

66. Kunselman et al., *supra* note 61, at 43–44.

violence against inmates and staff, insurrections and riots.⁶⁷

B. Increased Vulnerability of Certain Prisoners

The same operating principles which affect crime in the community operate in jails and prisons. Predators look for means, opportunity and vulnerability. They select targets who are least able to defend themselves; less believed by prison staff; are disliked by inmates and staff; and, easily ostracized.⁶⁸ Research has demonstrated that certain prisoners appear to be at increased risk: young and inexperienced; first time offenders; inmates with mental illness or developmental disabilities; physically small or weak; known to be homosexual, transgendered; appear overtly effeminate; not “tough” or “street-wise”; not gang affiliated; and, those previously sexually assaulted.⁶⁹ This is particularly important to note, because the impact of victimization is mediated by a number of factors, including availability of positive support.⁷⁰ When victims are from a “suspect class” displaying characteristics that make them loathsome or unsympathetic, they may be unable to garner or secure the necessary support. Researchers have found that some officers were less likely to respond to incidents involving homosexual victims, or involving apparently consensual acts.⁷¹ Some officers even believed that certain inmates deserved to be raped.⁷²

IV. CONSEQUENCES OF PRISON SEXUAL VIOLENCE

A. Devastating Impact Upon Victims

The effects of sexual violence are well-known and extremely deleterious. Victims of sexual violence undergo a destructive, catastrophic, life-changing event.⁷³ They are likely to experience “physical, emotional, cognitive, psychological, social and sexual” problems as a result.⁷⁴ Even one event may precipitate a lifetime of pain and

67. See, e.g., Nacci, *Federal Prisons*, *supra* note 38, at 30.

68. See Donaldson, *supra* note 39.

69. See *id.* (“The more of these factors apply, the more likely the victimization. If most apply, rape becomes a probability.”).

70. Trevor Markesteyn, *The Psychological of Nonsexual Criminal Offenses on Victims*, at iii (1992), available at http://ww2.psepc-sppcc.gc.ca/publications/corrections/pdf/199221_e.pdf (“[A]n established social support network can buffer negative consequences.”).

71. See, e.g., Helen M. Eigenberg, *Male Rape: An Empirical Examination of Correctional Officers' Attitudes Toward Male Rap in Prison*, 68 PRISON J. 39, 48–49 (1989) [hereinafter Eigenberg, *Male Rape*] (“Slightly over one-fourth (27.1 percent) of the officers reported that they would have difficulty believing homosexual rape victims.”).

72. See, e.g., Struckman-Johnson et al., Address at the Midwestern Psychological Association Annual Meeting (May, 1995) (noting that “incarcerated inmates who are sexually assaulted may be viewed as somewhat deserving or responsible for their fate”); Helen M. Eigenberg, *Prison Staff and Male Rape*, in PRISON SEX: PRACTICE AND POLICY 49, 58–59 (Christopher Hensley ed., 2002); Eigenberg, *Male Rape*, *supra* note 71, at 48–49 (“Most respondents . . . believe that inmates who have consented to participate in prior sexual acts get what they deserve if they are subsequently raped by other inmates . . .”).

73. See generally Libby O. Ruch et al., *Life Change and Rape Impact*, 21 J. HEALTH & SOC. BEHAV. 248 (1980) (studying the life-changing effects on rape victims).

74. Cotton & Groth, *Inmate Rape*, *supra* note 24, at 51.

suffering.⁷⁵ One study noted that even seventeen years after the assault, 16.5% of rape victims manifested symptoms of posttraumatic stress disorder (PTSD).⁷⁶

The sexual victimization experience precipitates immediate, short-term and long-term effects, which can be severe. Immediate effects might include the victim experiencing a lack of control accompanied by physical pain, suffering, and threats of further harm or death concomitant with the assault.⁷⁷ Victims often articulate shock, disbelief, panic, and fright, and they are focused upon survival.⁷⁸ Victims may employ a host of coping strategies (i.e., fighting back, bargaining, focusing on the rapist, mental escaping, and compliance) with variable outcomes.⁷⁹

Short-term (and long-term) effects on male and female sexual violence victims might include a wide range of psychiatric problems such as PTSD, rape trauma syndrome, anxiety, depression, exacerbation of preexisting psychiatric disorders, and suicidal feelings.⁸⁰ The degree and severity of these problems will vary, but certain conditions (i.e., previous physical/sexual victimization prior to incarceration, preexisting mental disorders, and long-term, on-going abuse and torture) will certainly exacerbate the problems.⁸¹ Trevor Markestein postulates that reactions to victimization may be mediated by three classes of variables: victims' pre-victimization characteristics; victims' post-victimization abilities to cope; and, factors related to the criminal event.⁸²

Victims may also contract HIV/AIDS, tuberculosis, hepatitis B and C, and other sexually transmitted diseases, all of which are common in U.S. correctional institutions.⁸³ The intimate and complex nature of coercive sexuality itself may also

75. JULIE A. ALLISON & LAWRENCE S. WRIGHTSMAN, *RAPE: THE MISUNDERSTOOD CRIME* 148 (1993) ("[T]he victim is forced to be a different person for the rest of a lifetime.").

76. Dean G. Kilpatrick et al., *Criminal Victimization: Lifetime Prevalence, Reporting to Police and Psychological Impact*, 33 *CRIME & DELINQ.* 479, 487 (1987).

77. See ALLISON & WRIGHTSMAN, *supra* note 75, at 152–55; LOCKWOOD, *supra* note 23, at 93–96.

78. See ALLISON & WRIGHTSMAN, *supra* note 75, at 152–55; LOCKWOOD, *supra* note 23, at 93–96.

79. See Cotton & Groth, *Sexual Assault*, *supra* note 23, at 129–30 (describing the consequences of fighting back, submission, and other types of coping strategies); see generally HANS TOCH, *MOSAIC OF DESPAIR: HUMAN BREAKDOWNS IN PRISONS* 379–397 (rev. ed., 1992) (discussing different types of inmate coping strategies).

80. See Dumond, *Treatment of Victims*, *supra* note 23, at 69, 81–83 (discussing PTSD, rape trauma syndrome, and suicidal feelings); LOCKWOOD, *supra* note 23, at 60–70 (detailing specific accounts of anxiety, suicidal feelings, and self-mutilation); TERRY A. KUPERS, *PRISON MADNESS: THE MENTAL HEALTH CRISIS BEHIND BARS AND WHAT WE MUST DO ABOUT IT* 147–51 (1999) (describing the symptoms of PTSD in rape victims).

81. See Stuart Turner, *Surviving Sexual Assault and Sexual Torture*, in *MALE VICTIMS OF SEXUAL ASSAULT* 75, 79–81 (Gillian C. Mezey & Hiller B. Zobel eds., 1992) (discussing the long-term effects of sexual abuse and torture); see generally Judith Lewis Herman, *Complex PTSD: A Syndrome in Survivors of Prolonged and Repeated Trauma*, 5 *J. TRAUMATIC STRESS* 377 (1992) (describing the effects of previous long-term sexual trauma).

82. Markestein, *supra* note 70, at ii

83. See *High AIDS rates, other infectious diseases reported in U.S. prisons*, *AIDS WEEKLY PLUS*, Sept. 13, 1999 ("Prison inmates are five to 10 times more likely than non-inmates to have HIV or AIDS . . ."); KUPERS, *supra* note 80, at 152 ("The incidence of AIDS in prison in 1994 was 518 cases per 100,000, compared to a comparable annual incidence in the total population of 31 cases per 100,000."); R.W. Reindollar, *Hepatitis C and the Correctional Population*, 107 *AM. J. MED.* 100S (1999) ("Epidemiologic data estimate that 30% to 40% of the 1.8 million inmates in the United States are infected with the hepatitis C virus . . ."); C.R. MacIntyre et al., *Unrecognized Transmission of Tuberculosis in Prisons*, 15 *EUR. J. EPIDEMIOLOGY* 705 (1999).

contribute to personal feelings of guilt, shame, humiliation, confusion, and despair within victims.⁸⁴

In the long term, victims might negatively cope with their victimization by dulling their senses with alcohol and narcotics, or engaging in sexually promiscuous behavior.⁸⁵ Some victims might rape other inmates, or become more violent in general.⁸⁶

B. Suicide is the Most Lethal Consequence of Prison Sexual Violence

Some prisoners, especially those who face unrelenting, repeated physical and sexual victimization, may view suicide as the only viable option out of the intolerable circumstance. Contemplating or attempting suicide is far more likely among victims of sexual violence.⁸⁷ Suicide is a significant cause of death in America's correctional institutions;⁸⁸ however, currently we do not know how many prisoners have attempted or completed suicide as a result of sexual violence.

Kilpatrick, Whalley and Edmunds have noted that "rape victims were 4.1 times more likely than noncrime victims to have contemplated suicide. . . . [and] 13 times more likely than noncrime victims to have actually made a suicide attempt (13% vs. 1%)." ⁸⁹ In the past, suicide has been one of the leading causes of death in America's correctional institutions.⁹⁰

According to the most recent BJS survey, the suicide rate in local jails was over three times the rate in state prisons (14 per 100,000 inmates).⁹¹ Important to note, however, is that the suicide rate rose steadily as jail size decreased.⁹²

State prisoners had a higher rate of suicide (14 per 100,000) than the overall resident population (11 per 100,000).⁹³ However, once standardized to match the state prisoner population, the U.S. resident rate of suicide (18 per 100,000) exceeded that of

84. See LOCKWOOD, *supra* note 23, at 97–101 (describing inmates who felt confused about their sexuality); Turner, *supra* note 81, at 81–83 (discussing feelings of shame, guilt and humiliation).

85. WOODEN & PARKER, *supra* note 23, at 116 ("Research shows that [victims] . . . report engaging in compulsive heterosexual activity and/or excessive drinking.").

86. See LOCKWOOD, *supra* note 23, at 100 ("[T]he experience of being a victim trains men to raise the level of violence they have been accustomed to employing."); WOODEN & PARKER, *supra* note 23, at 116 ("[I]t is not uncommon for a kid who has been turned out as a punk in one prison to, in turn, become a jockey once transferred to another prison.").

87. LOCKWOOD, *supra* note 23, at 68 ("Targets, however, are more than twice as likely than aggressors [sic] and more than 17 times as likely as nontargets to have made attempts on their own lives . . .").

88. CRISTOPHER J. MUMOLA, BUREAU OF JUSTICE STATISTICS, DEP'T OF JUSTICE, SUICIDE AND HOMICIDE IN STATE PRISONS AND LOCAL JAILS 2 (2005), <http://www.ojp.usdoj.gov/bjs/pub/pdf/shsplj.pdf> (reporting that, in 2002, suicide was the second highest cause of death in local jails and the third highest cause in state prisons).

89. D.G. Kilpatrick et al., *Sexual Assault*, in NATIONAL VICTIM ASSISTANCE ACADEMY TEXTBOOK ch. 10 (A. Seymour et al. eds., 2002), available at <http://www.ojp.usdoj.gov/ovc/assist/nvaa2002/chapter10.html>.

90. See MUMOLA, *supra* note 88, at 2 ("Suicide was the leading cause of death among jail inmates in 1983 . . .").

91. See *id.* (reporting that, in 2002, the suicide rate in local jails was 47 per 100,000 inmates, while the suicide rate in state prisons was 14 per 100,000).

92. *Id.* at 5. The suicide rate was over five times higher (177 per 100,000 inmates) in jails holding fewer than fifty inmates. *Id.* Although most U.S. jails are small, their populations account for fourteen percent of all jail suicides. *Id.*

93. *Id.* at 11.

state prisoners in 2002.⁹⁴

Linda Bruntmeyer, the mother of seventeen year-old Rodney Hulin, testified before the US Senate Committee on the Judiciary in 2002.⁹⁵ Her testimony provides a sobering and heart-wrenching commentary about a situation that never should have occurred:

When Rodney was 16 . . . they sentenced him to 8 years in an adult prison.

. . . .

Then our worst nightmares came true. Rodney wrote us a letter telling us he had been raped. A medical examiner had confirmed the rape. The doctor found tears in his rectum and ordered an HIV test, because, he told us, one-third of the prisoners there are HIV positive.

. . . [Rodney] wrote to the authorities, requesting to be moved to a safer place. . . . but he was denied.

After the first rape, he returned to the general population. There, he was repeatedly beaten and forced to perform oral sex and raped. He wrote for help again. . . . "I have been sexually and physically assaulted several times, by several inmates. I am afraid to go to sleep, to shower, and just about anything else. I am afraid that when I am doing these things, I would die at any minute. Please, sir, help me."

Still, officials told him that he did not meet the emergency criteria. . . . I called the warden, trying to figure out what was going on. He said, "Rodney needs to grow up." He said, "This happens every day. Learn to deal with it. It is no big deal."

. . . .

. . . On the night of January 26, 1996, my son hung himself in his cell. He was 17 and afraid and ashamed and hopeless. He laid in a coma for the next 4 months before he died.⁹⁶

Such testimony vividly documents the horror and hopelessness which leads some to end

94. *Id.*

95. See *The Prison Rape Reduction Act of 2002: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 8–9 (2002), available at <http://www.access.gpo.gov/congress/senate/pdf/107hr/87677.pdf> (testimony of Linda Bruntmeyer).

96. *Id.*

their lives.

C. Sexual Victimization in Incarcerated Settings May Be More Debilitating

In jails and prisons, however, the unique structure of incarceration may result in even more debilitating effects on victims. Research has demonstrated that incarcerated victims are more often physically assaulted during attacks, and they may experience repeated assaults by multiple assailants over time.⁹⁷ As a result, victims may experience on-going psychological trauma, terror, helplessness, and fear as the physical/sexual abuse continues. Judith Herman has postulated that victims of prolonged and repeated trauma experience a more debilitating, complex version of PTSD.⁹⁸ In addition, victims experience enormous social consequences; victims routinely experience a loss of social status, and they might be more vulnerable for future attacks within the jail or prison.⁹⁹

When prison staff perpetrate the assault, victims often experience enhanced feelings of betrayal, alienation and suffering, because those with the duty and responsibility to ensure the victims' safety are attacking them.¹⁰⁰ Most prison sexual assault victims do not report the incidents to correctional authorities, because they fear reprisals, fear no one will believe them, or think it will only cause more problems.¹⁰¹ As a result, victims do not receive much needed therapeutic prophylaxis and treatment.

D. Victim Action May Only Compromise His/Her Wellbeing and Safety

After an attack, a victim of prisoner sexual violence faces difficult decisions which increase the feelings of confusion and despair.¹⁰² The victim's response will profoundly affect his future life in prison. In some ways the victim is in a no-win situation.¹⁰³ If the victim chooses protective custody, he risks further labeling, increased stigmatization, reduced programs and services, and the potential trauma of

97. See, e.g., *Sexual Coercion Reported*, *supra* note 3, at 71–72 (reporting that, on average, targets had experienced nine episodes of pressured or forced sex, and more than one fourth of the male targets were forced to have intercourse with two or more perpetrators).

98. See generally Herman, *supra* note 81.

99. See LOCKWOOD, *supra* note 23, at 98 (“Other inmates (and staff) may . . . assume the victim of a sexual assault ‘gives it up’ willingly.”).

100. See A.L. Baro, *Spheres of Consent: An Analysis of the Sexual Abuse and Sexual Exploitation of Women Incarcerated in the State of Hawaii*, 8 WOMEN AND CRIM. JUST. 61, 69–70 (1997) (discussing the vulnerability of female prisoners to sexual misconduct by prison staff); HUMAN RIGHTS WATCH, *supra* note 5 (describing the terror experienced by some women in U.S. prisons).

101. See WOODEN & PARKER, *supra* note 23, at 107–08 (stating that once an inmate complains to authorities he is unable to live among the general prison population for fear of reprisals); Moss et al., *supra* note 38, at 823 (“Accurate incidence reports are extremely difficult to obtain due to the victims’ reluctance to inform on other inmates . . .”); Struckman-Johnson, *Sexual Coercion Rates*, *supra* note 9, at 380 (“[S]exual assault is likely to be underreported by male inmates because of fears of reprisals, unwillingness to be a ‘snitch,’ and fear of being labeled a homosexual or weak . . .”); Struckman-Johnson, *Three Midwestern Prisons*, *supra* note 23, at 226 (“[T]argeted women anticipated that no one would believe them.”).

102. See KUPERS, *supra* note 80, at 137–38 (“The prisoner is confronted with complicated questions involving his safety and survival at precisely the moment when, just after experiencing a massive trauma, he is totally incapable of processing the event and rationally planning his next move.”).

103. Cotton & Groth, *Sexual Assault*, *supra* note 23, at 129.

isolation itself.¹⁰⁴ If he fights back to defend himself, he risks being labeled a troublemaker, being disciplined by staff, or being denied parole.¹⁰⁵ If he chooses to “hook-up” with a “protector,” he might avoid some future attacks, but he will likely become a long-term sexual slave forced to perform sexually with the “protector.”¹⁰⁶ If he remains in the general population, he may be further confronted by his attacker or others aware of the victimization.¹⁰⁷

T.J. Parsell, a young man who became a sexual slave during his incarceration, described his traumatic experience at the National Prison Rape Elimination Commission Hearing in San Francisco, California in August 2005.¹⁰⁸ T.J. was seventeen years old when he was sentenced to four years in an adult prison in Michigan for robbing a Photomat with a toy gun.¹⁰⁹ He was gang-raped by other inmates, and after the initial assault, inmates flipped a coin to determine who would “own” him.¹¹⁰

I didn't last 24 hours before an inmate spiked my drink with Thorazine and then ordered me down to his dorm. Even with the drug's heavy effect, it was the most agony I had ever experienced. They knocked me out of the bed and nearly suffocated me as they shoved my head into a pillow to muffle my screams.

... One of them grabbed my hair and smacked me and pulled my head down while the others took turns sodomizing me. When I choked on my own vomit and gasped for air, it only made them laugh.

... My rectum bled for several days, but I was too afraid to come forward, even to see a doctor. ... I just wanted to do my time and get out alive. Everyone knew that snitches were killed.

104. See Cotton & Groth, *Sexual Assault*, *supra* note 23, at 129 (“He will not be able to attend school, job training, or mental health programs.”); see generally Stuart Grassian, *Psychopathological Effects of Solitary Confinement*, 140 AM. J. PSYCHIATRY 1450 (discussing potential negative effects on isolated inmates); Sheilagh Hodgins & Gilles Côté, *The Mental Health of Penitentiary Inmates in Isolation*, 33 CAN. J. CRIMINOLOGY 175, 178 (1991) (finding that some inmates who did not have mental problems when they entered prison developed such disorders while incarcerated).

105. See Cotton & Groth, *Sexual Assault*, *supra* note 23, at 129 (“This may increase the risk of more serious physical injury being done him by his attacker(s) and/or he risks disciplinary action (loss of good time, punitive segregation, etc.) . . .”).

106. See Cotton & Groth, *Sexual Assault*, *supra* note 23, at 129–30 (“He may be forced to ‘hook up’ (provide sexual services) to one inmate (his ‘jock’ or ‘dad’) in exchange for protection from sexual victimization by other prisoners.”); see also KUPERS, *supra* note 80, at 140 (“Typically, a tougher prisoner forces a new arrival to become his ‘woman,’ and announces to the other prisoners that this new inmate is henceforth known as a punk and shall be available as a sexual object.”).

107. See Cotton & Groth, *Sexual Assault*, *supra* note 23, at 129–30 (“He may have to continually exchange sex with everyone and anyone for survival.”).

108. *At Risk: Sexual Abuse and Vulnerable Groups Behind Bars: Hearing Before the National Prison Rape Elimination Comm.* (2005), available at http://www.nprec.us/docs/sf_tjparsell_statement.pdf (testimony of Timothy J. Parsell) (providing a personal account as a survivor of prison sexual assaults).

109. *Id.*

110. *Id.*

What they took from me went beyond sex. They had stolen my manhood, my identity and part of my soul. They laughed about it afterward and openly bragged. . . . The inmate who won [me] . . . had set it up to make me more vulnerable. It's one of the oldest games in prison . . . I was forced into protective pairing.

It takes only one or two violent rapes before you start compromising.

. . . .

Being gang raped in prison has scarred me in ways that can't be seen or imagined. . . . I'm a successful businessman, a functioning member of society. But that success has come at a great cost. I've undergone years of therapy to get where I am, but I still don't sleep well at night. I start up at the slightest noise. And as a gay man, I blamed myself for many years. You're degraded so much in there that after a while you start to believe it.¹¹¹

The horror and scars of Mr. Parsell's victimization plague him to this day; however, he has channeled his trauma into constructive action for other victims of prisoner sexual violence. He is a prison rape advocate, author of *FISH: Memoir of a Boy in a Man's Prison*, and President of Stop Prisoner Rape, an international human rights group dedicated to eradicating prisoner sexual violence.¹¹²

E. Gender and Age Differences in the Impact of Prisoner Sexual Violence

Impact on Women: Compared to men, incarcerated women have a much higher rate of physical and sexual abuse during childhood, adolescence and prior to incarceration.¹¹³ This exacerbates the assault's impact during incarceration, and compromises women's ability to cope with and recover from the assault.¹¹⁴ Female victims may have had long histories of abuse and submission which reinforces their feelings of inadequacy, despair and unworthiness.¹¹⁵ Importantly, female rape victims may also become pregnant as a result of the assault.

Impact on Men: Sexual assault devalues two primary areas of male identity: sexuality and aggression. Most male victims experience concern about their

111. *Id.*

112. See Stop Prisoner Rape, Staff Biographies (2006), http://www.spr.org/en/about_bios.html.

113. CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, DEP'T OF JUSTICE, PRIOR ABUSE REPORTED BY INMATES AND PROBATIONERS (1999), <http://www.ojp.usdoj.gov/bjs/abstract/parip.htm> ("Just under half of the women in correctional populations and a tenth of the men indicated past abuse.").

114. See HUMAN RIGHTS WATCH, *supra* note 5, at § II (discussing the findings of Christine Kampfner, who reported that 85% of incarcerated women who kill their batterer had been sexually abused at some point prior to their incarceration).

115. See generally Robbin S. Ogle, *Battered Women and Self-Defense*, in *ENCYCLOPEDIA OF WOMEN AND CRIME* (Nicole H. Rafter ed., 2000); LENORE E. WALKER, *TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS* (1989); LENORE E. WALKER, *THE BATTERED WOMAN* (1979); LENORE E. WALKER, *THE BATTERED WOMAN SYNDROME* (1984).

masculinity, competence and security, increasing their humiliation and suffering.¹¹⁶ Men often might manifest a more “controlled” response to an assault, which may lead authorities to conclude that the event did not occur or that its impact was minimal.¹¹⁷

Impact on Juveniles: The crisis of adolescence is one of identity—knowing where one “fits in” in society and adopting an identity of whom one is physically, emotionally, socially and sexually.¹¹⁸ Sexuality is a powerful force in the lives of developing teens.¹¹⁹ With younger male victims, there may also be considerable confusion regarding their sexual identity following sexual victimization.¹²⁰

One of the strategies which predators often use is to attempt to get the victim to ejaculate.¹²¹ A common myth about male rape is that men cannot become excited or ejaculate under coercion; however, Nicholas Groth and Ann Burgess have demonstrated that perpetrators can force male victims to become sexually aroused.¹²² When this occurs, there may be considerable confusion and questioning particularly about gender identity, and juveniles may feel intense guilt, shame and are likely to blame themselves for their victimization.¹²³

F. Sexual Victimization of Inmates by Staff: An Often Overlooked Cancer

The issue of sexual misconduct, abuse, and assault by staff on male and female inmates continues to be important. Most correctional officers do not participate in such abusive behavior; yet a small minority of staff have inflicted serious harm on inmates.¹²⁴ The boundaries between correctional staff and inmates can get confused in the alienating and negative environment of the prison milieu. Even if the exchange between staff and inmate was consensual, there exists a barrier which cannot be breached.¹²⁵ This type of staff involvement is not confined to one type of correctional

116. See A. Nicholas Groth & Ann W. Burgess, *Male Rape: Offenders and Victims*, 137 AM. J. PSYCHIATRY 806, 808 (1980) [hereinafter Groth, *Male Rape*] (“The male victims felt pressured into not reporting the rape for several reasons: 1) societal beliefs that a man is expected to be able to defend himself . . . 2) the victim’s sexuality may become suspect . . . and 3) telling is distressing . . .”).

117. See Arthur Kaufman et al., *Male Rape Victims: Noninstitutionalized Assault*, 137 AM. J. PSYCHIATRY 221, 223 (1980) (finding that 79% of male victims showed a “controlled” emotional reaction).

118. See ERIK H. ERIKSON, *CHILDHOOD AND SOCIETY* 265–66 (1950) (discussing physiological maturation during adolescence and the subsequent effects on identity); ERIK H. ERIKSON, *LIFE HISTORY AND THE HISTORICAL MOVEMENT* 19 (1975) (commenting on adolescence, youth, and the accompanying identity crisis); Alan S. Waterman, *Identity in the Context of Adolescent Psychology*, in *IDENTITY IN ADOLESCENCE: PROCESSES AND CONTENTS* 5–6 (A.S. Waterman ed., 1985) (discussing the importance of an adolescent’s “inner sense of identity”); see generally ERIK H. ERIKSON, *IDENTITY: YOUTH AND CRISIS* 128–35 (1968) (describing the different stages of adolescent experience and the search for identity).

119. See ERIKSON, *CHILDHOOD AND SOCIETY*, *supra* note 117, at 265–66.

120. See LOCKWOOD, *supra* note 23, at 98 (“Being labeled a homosexual is a dismaying condition for most young working-class men.”).

121. Groth & Burgess, *Male Rape*, *supra* note 116, at 809.

122. See *id.*

123. See *id.*

124. See Struckman-Johnson, *Sexual Coercion Rates*, *supra* note 9, at 386 (“[A]bout 20% of the inmates from the larger facilities indicated that a male or female staff member(s) participated in their worst-case sexual coercion incident.”); HUMAN RIGHTS WATCH, *supra* note 5 (“[M]ale officers have used mandatory pat-frisks or room searches to grope women’s breasts, buttocks, and vaginal areas . . .”).

125. DEP’T OF JUSTICE OFFICE OF THE INSPECTOR GENERAL, *DETERRING STAFF SEXUAL ABUSE OF FEDERAL INMATES* 4 (2005), <http://www.usdoj.gov/oig/special/0504/final.pdf> (“Even if a sexual act would have been considered consensual if it occurred outside of a prison, by statute it is criminal sexual abuse when

worker. Correctional officers, administrators, mental health staff, support staff, teachers have all been identified as violating inmates sexually.

In the last ten years in particular, it has become increasingly apparent that women in confinement face a substantial risk of sexual assault, most often by a small number of ruthless male correctional staff who use terror, retaliation, and repeated victimization to coerce and intimidate confined women.¹²⁶ Concerns about this issue led the National Institute of Corrections to solicit submissions for development of a training curriculum for investigating allegations of staff sexual misconduct with inmates.¹²⁷ While several states did not even recognize that sexual congress between correctional staff and prisoners was fundamentally unequal and can never be allowed,¹²⁸ it is now a crime in nearly every state.¹²⁹ There is also much food for thought in the new data regarding staff sexual misconduct reported by BJS, particularly as to the large number of female prison staff responsible for staff sexual misconduct against male inmates.¹³⁰ Such abuses are intolerable. They are fundamental violations of incarceration; they defile the guiding principles of correctional environments and tarnish the corrections profession.

In 1997, a corrections officer in a Washington, D.C. hospital ward raped Hope Hernandez in a jail shower while she was heavily medicated for drug withdrawal symptoms.¹³¹ Hope's account offers a powerful description of prison staff sexual abuse and its effects:

After being incarcerated for three months, you learned to do what the guards tell you to do. . . . If they said go into that stall, you go into that stall. If they said eat now, I ate. I was very compliant. I had no desire to cause trouble and every reason to believe that I was being directed by trained professionals. That's the psychology of the incarceration. . . .

So when the guard who took me to the shower came in the middle of the night, I had no reason to suspect foul play. . . .

it occurs inside a prison.”); *The Cost of Victimization: Why Our Nation Must Confront Prison Rape: Hearing Before the National Prison Rape Elimination Comm.* (June 14, 2005), available at http://www.nprec.us/docs/InspectorGeneralGlennFine_Vol_1.pdf (testimony of Glenn Fine, Inspector General, Dep't of Justice) (“It is important to note that consent is never a legal defense for prison staff to engage in sexual acts with inmates.”).

126. HUMAN RIGHTS WATCH, *supra* note 5 (stating that male correctional officers coerce female inmates by actual or threatened physical force, bribery and withholding of goods or services).

127. SUSAN W. MCCAMPBELL & ELIZABETH P. LAYMAN, TRAINING CURRICULUM FOR INVESTIGATING ALLEGATIONS OF STAFF SEXUAL MISCONDUCT WITH INMATES (2000), <http://www.cipp.org/pdf/ssm1.PDF>.

128. See Goering, *supra* note 7 (“[U]ntil [1999], sexual abuse of prisoners by correctional officials was not even a criminal offense in 14 states.”).

129. See BRENDA V. SMITH, FIFTY-STATE SURVEY OF CRIMINAL LAWS PROHIBITING SEXUAL ABUSE OF PRISONERS (2005), available at <http://www.nicic.org/Library/021387> (reporting that only Vermont lacks criminal laws prohibiting sexual abuse of prisoners).

130. BECK & HUGHES, *supra* note 20.

131. *At Risk: Sexual Abuse and Vulnerable Groups Behind Bars: Hearing Before the National Prison Rape Elimination Comm.* (2005) (statement of Hope Hernandez), available at http://www.nprec.us/docs/sf_hhernandez_statement.pdf.

He came in while I was in the shower. Before I knew it, he was standing in the shower stall having intercourse with me. I wasn't in a position to say no. In addition to being heavily medicated, it was 2:30 or 3 o'clock in the morning . . .

. . . .

Later I told a nurse what had happened, and they took me to the hospital to do a rape kit. But the officer had used a condom. The rape kit came back . . . inconclusive.

Although it's been eight years, I'm still suffering from the effects of that rape. . . . I kept seeing the guard's face over me. . . .

I would get so sick thinking about it that I would throw up.

And my husband has tried to be intimate with me. All I could see was this guard's face flashing back in my mind, and I would become ill.¹³²

V. APPROPRIATE MANAGEMENT REQUIRES A COMPREHENSIVE STRATEGY.

The management of prisoner sexual violence cannot be effectively undertaken without the active and positive involvement of all correctional staff, including: administrators, security, classification and other members of the correctional team, and appropriate medical and mental health providers. Everyone plays an integral role in the process, and all members are vital to ensuring a just and efficient response to inmate victims. Comprehensive services must be initiated as soon as possible after the event, and must address immediate, short-term, and long-term effects. Services must be sustained throughout the prisoner's incarceration with appropriate community referrals upon release.

A. Correctional Mental Health Care is Inconsistent and Often Inadequate

Providing appropriate care to prisoners who have experienced sexual violence and its effects requires the utilization of current and sound mental health technologies. Unfortunately, the state of mental health care in America's jails and prisons has been found to be inconsistent, deficient, and inadequate to meet the needs of those prisoners requiring such services.¹³³ In addition, the increasing number of inmates entering U.S.

132. *Id.*

133. See generally HUMAN RIGHTS WATCH, ILL EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS (2003), available at <http://www.hrw.org/reports/2003/usa1003/usa/1003.pdf>.

jails and prisons with pre-existing psychiatric illnesses will continue to tax already overburdened resources.

In the United States, jails and prisons have become the de facto psychiatric facilities of the twenty-first century. With more mentally ill individuals housed in correctional facilities than in public psychiatric facilities,¹³⁴ jails and prisons are essentially serving as “the country’s front-line mental health providers,”¹³⁵ though they are ill-equipped to do so. Even more disturbing is the realization that American jails, which often have fewer facilities and resources to offer, have become “the largest inpatient mental health institutions in the United States.”¹³⁶

The quality of mental health services and the ability of staff to meet the great demand might differ depending on the type of institution (jail or prison) and other factors such as size, staff and location. While larger state departments of corrections might employ full-time staff to provide mental health services (either as state employees or contracted agents), smaller prison facilities and local jails might rely on contracted services from local mental health agencies.¹³⁷ As a result, it is imperative that mental health be delivered consistent with community standards, using the current accepted benchmarks of professional practice. An appropriate number of mental health professionals must be available, and must employ the same (if not greater) care in meeting the complex needs of some of our most challenging citizens.¹³⁸

1. American Correctional System is Facing Historically Unprecedented Problems

Jails and prisons throughout the country struggle with the realities of overcrowding, underfunding, understaffing, and inadequate resources (i.e., lack of adequate educational, vocational, medical, and mental health programs and services).¹³⁹ Michael

134. See PAULA M. DITTON, BUREAU OF JUSTICE STATISTICS, DEP’T OF JUSTICE, MENTAL HEALTH AND TREATMENT OF INMATES AND PROBATIONERS 1 (2005) <http://www.ojp.usdoj.gov/bjs/pub/pdf/mhtip.pdf> (reporting that 283,800 mentally ill inmates were incarcerated in U.S. prisons and jails in 1998); Cesar Chelala, *More Mentally Ill People Reported in U.S. Prisons*, 319(7204) British Med. J. 210 (1999), available at http://www.findarticles.com/p/articles/mi_m0999/is_7204_319/ai_55449754 (stating that while 283,800 prison inmates had some form of mental illness, only 72,000 people were housed in state psychiatric hospitals).

135. HUMAN RIGHTS WATCH, *supra* note 133, at 16.

136. MARTIN DRAPKIN, MANAGEMENT AND SUPERVISION OF JAIL INMATES WITH MENTAL DISORDERS 1 (2003).

137. See DEP’T OF JUSTICE, NATIONAL INSTITUTE OF CORRECTIONS, SURVEY OF MENTAL HEALTH SERVICES IN LARGE JAILS AND JAIL SYSTEMS (1995) <http://www.nicic.org/pubs/1995/012268.pdf> (identifying which correctional systems use jail staff to provide mental health services and which systems use contracted services).

138. See generally Council of State Governments, *Criminal Justice/Mental Health Consensus Project*, <http://consensusproject.org> (last visited Apr. 15, 2006) (explaining how to better support inmates with mental illnesses once they are released from jail).

139. See generally B. JAYE ANNO, DEP’T OF JUSTICE, NATIONAL INSTITUTE OF CORRECTIONS, CORRECTIONAL HEALTH CARE: GUIDELINES FOR THE MANAGEMENT OF AN ADEQUATE DELIVERY SYSTEM 14 (2001) <http://nicic.org/Library/017521> (“[S]ome have claimed that suicide, violence, or stress in prisons increases in overcrowded conditions”); PAIGE M. HARRISON & JENNIFER C. KARBERG, BUREAU OF JUSTICE STATISTICS, DEP’T OF JUSTICE, BULLETIN: PRISON AND JAIL INMATES AT MIDYEAR 2002 (2003), <http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim02.pdf> (discussing the problems associated with prison overcrowding); *Hearing on The Prison Rape Reduction Act of 2002 Before the S. Comm. on the Judiciary*, 107th Cong. 73–75 (2002), available at <http://www.access.gpo.gov/congress/senate/pdf/107hr/87677.pdf> [hereinafter Testimony of Edward Harrison] (testimony of Edward Harrison, President, National Commission

Tonry and Joan Petersilia contend that there have been profound changes in prisons since the 1970s, especially regarding inmate and staff subcultures and changes in inmate-staff interactions, brought about by a wide range of causes.¹⁴⁰

The population of American correctional institutions is exploding beyond its capacity; the United States currently ranks first worldwide in the number of incarcerated inmates.¹⁴¹ There is an enormous annual turnover of inmates in America's jails and prisons. There are an estimated twelve million people released from correctional facilities annually;¹⁴² state and federal prisons admitted 625,964 sentenced prisoners while they released 606,225 in 2000.¹⁴³

Despite a decade of correctional construction in the 1990s, prison facilities have failed to keep pace with the burgeoning national prison population.¹⁴⁴ Prisoners are incarcerated for longer periods of time as a result of the legislative and judicial policy changes of the last twenty-five years.¹⁴⁵ Prisoners in American correctional institutions are getting older and are experiencing significant physical and medical disorders.¹⁴⁶

An ever-increasing number of prisoners experience profound mental health and psychiatric disabilities. The combination of the above factors (increased population, aging, longer sentences, and medical and psychiatric disorders) are taxing the often inadequate medical, mental health, and programmatic resources within the nation's prisons and jails.

2. Most Prisoners Return to Community Life

Responding to prisoner sexual violence is an ethical imperative, and in the best interest of society. Most of America's prisoners will, in fact, return to community life after a period of time while incarcerated. Our failure to effectively manage their difficulties will ultimately be borne by society itself, as poignantly articulated by Joseph Fishman in 1923:

[T]he man in jail today is the man who will be out tomorrow. . . . If the treatment

on Correctional Health Care describing the problems with health care in overcrowded prisons).

140. MICHAEL TONRY & JOAN PETERSILIA, DEP'T OF JUSTICE, PRISONS RESEARCH AT THE BEGINNING OF THE 21ST CENTURY 6 (2000), <http://www.ncjrs.gov/pdffiles1/nij/184478.pdf>.

141. ROY WALMSLEY, U.K. HOME OFFICE RESEARCH, DEVELOPMENT AND STATISTICS DIRECTORATE, FINDINGS 234: WORLD PRISON POPULATION LIST 1 (5th ed. 2003), *available at* <http://www.homeoffice.gov.uk/rds/pdfs2/r234.pdf> (finding that the U.S. had the highest prison population rate (701 per 100,000), and the highest prison population (2,030,000) in 2003).

142. Testimony of Edward Harrison, *supra* note 139, at 73.

143. ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, DEP'T OF JUSTICE, PRISON AND JAIL INMATES AT MIDYEAR 2001, at 7 (2002).

144. *See generally* David Masci, *Prison Building Boom: Should More Money Be Spent on Rehabilitation?*, 9 CONG. Q. 802, 805 (1999) (stating that from 1990 to 1995, state governments spent \$15 billion on prison construction, while the federal government built forty-five new prisons).

145. TONRY & PETERSILIA, *supra* note 140, at 6 ("The sentencing policy changes of the past quarter century and especially the past few years have produced larger fractions of prisoners serving very long sentences . . .").

146. *Id.*; *see generally* B. JAYE ANNO ET AL., CORRECTIONAL HEALTH CARE: ADDRESSING THE NEEDS OF ELDERLY, CHRONICALLY ILL, AND TERMINALLY ILL INMATES (2004), *available at* <http://www.nicic.org/Library/018735>; Centers for Disease Control and Prevention, *Prevention and Control of Infections with Hepatitis Viruses in Correctional Settings*, 52 MORBIDITY & MORTALITY WKLY. REV. 1 (2003) [hereinafter CDC, *Prevention and Control*].

which they receive in jail, and the surroundings forced upon them are such as to turn them out with criminal tendencies which were lacking or dormant when they went in, you, Mr. Average Citizen, may be the one to suffer.¹⁴⁷

Furthermore, if one accepts Fyodor Dostoyevsky's premise that "[t]he degree of civilization in a society can be judged by entering its prisons,"¹⁴⁸ the United States has a duty to eradicate the cancer of prisoner sexual violence. "[I]mprisonment itself, entailing loss of liberty, loss of citizenship, separation from family and loved ones, is punishment enough . . ." argued Mary Harris, U.S. prison administrator at the Federal Industrial Institution for Women.¹⁴⁹ In the Supreme Court's only case involving prisoner sexual violence, Justice Souter agreed that "[b]eing violently assaulted in prison is simply not 'part of the penalty . . .'"¹⁵⁰ In a concurring opinion, Justice Blackmun stated that prison officials have an "affirmative duty under the Constitution to provide for the safety of inmates."¹⁵¹

B. The Commitment to Change by State and Federal Correctional Agencies Has Been Noteworthy

In 2001, Human Rights Watch reported that most correctional authorities denied the existence of the problem.¹⁵² Of the forty-seven corrections departments that responded, twenty-three reported that they maintained distinct statistical data on inmate sexual assault.¹⁵³ Only six states provided correctional staff training in recognizing, preventing, and responding to prisoner sexual assault.¹⁵⁴ At the most recent National Institute of Justice conference in July 2005, Urban Institute researchers Janine Zweig and Megan Schaffer reported a sea-change by correctional departments nationwide in less than five years.¹⁵⁵ The majority of states had adopted methods to document incidents of prisoner sexual violence: 78% of states had prevention efforts underway, 80% provided staff training, 82% had investigation and response efforts, and 89% provided services to victims.¹⁵⁶

C. Several Challenges Exist and Must Be Addressed

Gaps in Our Knowledge: While the changes since passage of the Prison Rape Elimination Act have been noteworthy, there are still many challenges which must be

147. JOSEPH F. FISHMAN, *CRUCIBLES OF CRIME* 24 (1923).

148. FYODOR DOSTOYEVSKY, *THE HOUSE OF THE DEAD* 76 (Constance Garnett trans., 1923).

149. MARY B. HARRIS, *I KNEW THEM IN PRISON* 385-86 (1942).

150. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)).

151. *Id.* at 852 (Blackmun, J., concurring).

152. HUMAN RIGHTS WATCH, *supra* note 8, at 99 ("When questioned on the topic, state prison officials report that rape is an infinitely rare occurrence.").

153. *Id.*

154. *Id.* at 109 (identifying Arkansas, Illinois, Massachusetts, North Carolina, New Hampshire, and Virginia).

155. Megan Schaffer & Janine M. Zweig, Urban Institute, Presentation at National Institute of Justice Research & Evaluation Conference: Addressing Sexual Violence in Prisons (July 20, 2005).

156. *Id.*

overcome, not the least of which is the gap in our knowledge. Anadora Moss and Ashbel Wall outline a number of gaps that exist in our understanding of inmate-on-inmate sexual abuse, including the role of gangs and race, effective strategies to manage victims and perpetrators, consent versus coercion, managing special populations, and administrative versus criminal sanctions.¹⁵⁷ Some of these issues will be addressed by research being conducted by both the National Institute of Justice and the Bureau of Justice Statistics. Moss and Wall adroitly note that “the course is not a sprint, but a marathon.”¹⁵⁸

Myth of Permissible Consensual Inmate-on-Inmate Sexual Behavior in Correctional Settings: While some would argue that there may be instances of “consensual” sexual behavior between inmates in correctional settings, it is never permissible and is a violation of institutional discipline in most correctional settings. Prison changes the context of sexuality. Christopher Hensley notes that “[e]ven what people would assume was consensual sex, in prison it is coercive sex”¹⁵⁹ Helen Eigenburg further argues that wrestling with the vexing issue of consensual sex and the institutional response could re-victimize some victims.¹⁶⁰

Challenge of Managing the Range of U.S. Correctional Institutions: According to the BJS, there are 8663 correctional facilities in the United States that are covered under the Prison Rape Elimination Act of 2003, including 84 Federal prisons, 1320 state prisons, 264 private prisons, 3318 local public jails, 47 private local jails, 510 state juvenile facilities, 685 local juvenile facilities, 2275 private juvenile facilities, and 160 other facilities.¹⁶¹ Most challenging is the fact that at least half of the existing jail facilities have correctional populations of less than fifty prisoners.¹⁶² While there has been a strong response by state and federal correctional institutions (in part because of the efforts of the National Institute of Corrections, the American Correctional Association, and the Association of State Correctional Administrators), the awareness of the Prison Rape Elimination Act among jail administrators and staff varies, and the resources to respond, both internally and externally, differ considerably.

Limits of Confidentiality, Especially Among Institutional Medical and Mental Health Staff: In the community, victims of sexual violence can choose whether or not to report their victimization to law enforcement authorities, and they can elect to receive medical and mental health services without notifying these authorities. Unfortunately, because correctional facilities are responsible for the care, custody, and control of inmates in their care, all incidents of prisoner sexual violence require notification to the correctional administration in order to adequately respond to and intervene in such incidents. It would be legally untenable not to mandate this, since failure to respond affirmatively could compromise institutional safety and incur harm to inmate victims whom the institution is mandated to protect. This, too, is a dilemma whose solution has

157. Moss & Wall, *supra* note 6, at 78.

158. *Id.*

159. Scott Cannon, *Progress Lags Despite New Legislation to Stop Prison Rape*, KAN. CITY STAR, Mar. 22, 2004, available at <http://www.spr.org/en/sprnews/2004/0322.html>.

160. Helen Eigenberg, Statement at Journal of Legislation Symposium: Prison Reform and the Rape Elimination Act (Mar. 31, 2005).

161. BECK & HUGHES, *supra* note 20, at 3.

162. See MUMOLA, *supra* note 88, at 5.

yet to be crafted.

VI. CONCLUSION

American corrections is in a pivotal position to change the course of the future. After years of neglect, the corrections profession has begun to respond to the challenges of prisoner sexual violence by initiating substantive innovations in training, education, policies, procedures, and raising awareness. Prisoner sexual violence is a phenomenon with wide-ranging effects that can be deadly and catastrophic. While substantive progress has been made, and while corrections has risen to the challenge with vigor and commitment, there are vexing challenges which persist, and which must be examined and addressed. We can, and must, continue to display the leadership and vision which we have demonstrated in the past to adequately respond to prisoner sexual violence. For too long, many prisoners, often those who have been most vulnerable, have silently endured these crimes. We have the technology and means to address this issue, and now, with your help, we can implement substantive remedies. If America expects to continue to be the beacon of law and justice, we must take every step to end this cruel abuse.