

THE PASSAGE AND IMPLEMENTATION OF THE PRISON RAPE ELIMINATION ACT: LEGAL ENDOGENEITY AND THE UNCERTAIN ROAD FROM SYMBOLIC LAW TO INSTRUMENTAL EFFECTS

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INTRODUCTION

The scourge of prison sexual assault was recognized early in the history of U.S. corrections when the Reverend Louis Dwight of the Boston Prison Discipline Society condemned this “dreadful degradation” in 1826.¹ Fast forward to the modern era. Shortly after the turn of the twentieth century, in 2003, President Bush affirmed bipartisan Congressional efforts to define prison rape as a national social problem worthy of immediate legislative action and sizeable federal funding when he signed into law the Prison Rape Elimination Act (PREA).² In accordance with this law, in 2009 the National Prison Rape

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1. Louis Dwight, *Printed Broadside* (1826), reprinted in *GAY AMERICAN HISTORY: LESBIANS AND GAY MEN IN THE U.S.A.* 27, 28 (1976).

2. Prison Rape Elimination Act of 2003, 42 U.S.C. §§ 15601-15609 (2006).

Elimination Commission, a bipartisan group of lawmakers, advocates, and prison rape survivors, released its final report and proposed standards to prevent, detect, respond to, and monitor sexual abuse of incarcerated or detained individuals throughout the United States.³ To the disappointment of many anti-prison rape advocates and survivors, in the summer of 2010, U.S. Attorney General Holder missed the statutory deadline to adopt the Commission's standards, ensuring they remain—at least for the time being—recommendations rather than legally binding public policy that shapes the management of prisons and other detention facilities in the modern era.⁴ These are historic moments in criminal justice policy development and reform. As we demonstrate in this Article, they illustrate the failure of symbolic law to generate instrumental effects.⁵

During the almost two centuries that separate Reverend Dwight's proclamation and the statutory deadline to adopt national standards endorsed by the Commission, prison rape has become increasingly visible as a pressing issue for corrections officials and lawmakers; redefined as a civil rights violation for inmates and wards; taken up by the courts as a form of "cruel and unusual punishment"; and politicized as an issue inextricably intertwined with faith-based initiatives, human rights, public health, and public safety. In the process, there has been ample opportunity for symbolic law and policy to be transformed into law and policy with instrumental effects.⁶ However, this transformation has, to date, not been forthcoming in the form of legally binding national standards for the prevention and management of sexual assault in prison. Why?

Our point of departure for this study of lawmaking and policy formation in the criminal justice realm is the passage of the PREA. Signed into law by President George W. Bush on September 4, 2003, the PREA has many objectives. Its overall purpose is "to provide for the analysis of the incidence and effects of prison rape in Federal, State, and local institutions and to provide information, resources, recommendations, and funding to protect individuals

3. NATIONAL PRISON RAPE ELIMINATION COMMISSION, REPORT [hereinafter NPREC REPORT], available at <http://www.cybercemetery.unt.edu/archive/nprec/20090820154841/http://nprec.us/publication/report/>.

4. Letter from Eric Holder, U.S. Att'y Gen., to Frank R. Wolf and Bobby Scott, Members, U.S. House of Representatives (June 22, 2010), available at <http://big.assets.huffingtonpost.com/PREAletter.pdf>.

5. For a recent discussion of the distinction between symbolic law and instrumental effects, see Ryken Grattet & Valerie Jenness, *Transforming Symbolic Law into Organizational Action: Hate Crime Policy and Law Enforcement Practice*, 87 SOC. FORCES 501 (2008); Valerie Jenness, *Explaining Criminalization: From Demography and Status Politics to Globalization and Modernization*, 30 ANN. REV. SOC. 147 (2004).

6. See Grattet & Jenness, *supra* note 5, at 5-8 (positing that the transformation of symbolic law into enforcement patterns is dependent upon "agency and community processes").

from prison rape.”⁷ In only two months, the PREA passed through both the House of Representatives and the Senate unanimously, with surprisingly little discussion and no contestation. Senator Edward Kennedy, one of the primary architects of the legislation, acknowledged the uncharacteristic bipartisan support that enabled its swift passage.⁸

The swift and virtually uncontested passage of the PREA was surprising for a number of reasons. First, it is a rare event when the U.S. Congress passes legislation swiftly. Second, this piece of legislation required Congress to appropriate over sixty million dollars at a time when “the war effort” and “tax breaks” were already straining the federal budget.⁹ Third, the PREA does not criminalize behavior anew nor does it provide a new cause of action for inmates if and when prison rape occurs. Almost a decade before the passage of the PREA, the Supreme Court found in *Farmer v. Brennan* that “deliberate indifference” to prison rape by prison officials constituted “cruel and unusual punishment.”¹⁰ Fourth, the PREA came into being at a moment in history when the popular mood was/is, at best, indifferent and, at worst, unreservedly punitive toward the over two million people incarcerated in U.S. prisons and other detention facilities.¹¹

7. Prison Rape Elimination Act of 2003, Pub. L. No. 108-79, 117 Stat. 978.

8. 149 CONG. REC. 18,912 (2003) (statement of Sen. Edward Kennedy).

9. See 42 U.S.C. §§ 15603(e), 1504(c), 1505(g), 15606(l); see also Deborah M. Golden, *Looking Behind the Locked Door: Prison Law Reform Proposals for the New Administration*, 3 HARV. L. & POL'Y REV. ONLINE 1, 6 (2008), http://www.hlpronline.com/Golden_HLPR_111308.pdf.

10. *Farmer v. Brennan*, 511 U.S. 825, 834, 837-38, 843 (1994).

11. From a socio-cultural perspective, suffering is considered by many to be an expected element of prison life, a sentiment perhaps best captured by the adages “if you can’t do the time, don’t do the crime” and “this is jail, not Yale.” In these terms, historically, prison rape can be considered a form of unexamined “permissible prejudice” whereby the general public, including lawmakers and politicians, silently condones this form of assault. Jodi O’Brien, *Writing in the Body: Gender (Re)production in Online Interaction*, in COMMUNITIES IN CYBERSPACE 76, 99 (1999). See also Jodi O’Brien, *Introduction: Differences and Inequality*, in EVERYDAY INEQUALITIES: CRITICAL INQUIRIES 1, 22 (1998) (discussing the persistence of discriminatory practice and prejudice). The U.S. public holds an indifferent or retributive attitude toward victims of prison sexual assault. According to a *Boston Globe* survey, fifty percent of those polled agreed with the statement, “society accepts prison rape as ‘part of the price criminals pay for wrongdoing.’” Charles M. Sennott, *Poll Finds Widespread Concern About Prison Rape; Most Favor Condoms for Inmates*, BOS. GLOBE, May 17, 1994, at 22. As Robert Weisberg, Professor of Law at Stanford Law School, observed less than a month after the PREA became law: “The truth is that the United States has essentially accepted violence—and particularly brutal sexual violence—as an inevitable consequence of incarcerating criminals.” Robert Weisberg & David Mills, *Violence Silence: Why No One Really Cares About Prison Rape*, SLATE (Oct. 1, 2003), <http://www.slate.com/id/2089095/>. Accordingly, prison rape is often fodder for humor by law enforcement officials and celebrities alike. For example, in 2001, California Attorney General Bill Lockyer implicitly referenced prison rape as an appropriate punishment for convicted felons. He did so when he remarked that if he were allowed to prosecute former Enron CEO Kenneth Lay, “I would love to personally escort Lay to an 8-by-10 cell that he could share with a tattooed dude who says ‘Hi, my name is Spike, honey.’” Jennifer Warren,

Combined, these observations—the swift passage of legislation, a public attitude that is indifferent toward prison rape, and the development of national standards for the management of prison rape that to date have failed to get adopted by the states—raise both empirical and theoretical questions. Empirically, which stakeholders constitute the driving force behind this historic legislation? How have those most strategically positioned to define the constitutive features of sexual assault behind bars and the responsibility of correctional institutions to keep prisoners safe from harm envisioned, discussed, and politicized prison rape, the federal law (PREA), and the recently proposed and rejected national standards designed to eliminate prison rape? More theoretically, how can we explain the passage and the content of the PREA as symbolic law coupled with the creation and failure to implement national standards released by the Commission? In this Article, we treat the former as symbolic reform and the latter as a failed effort to ensure instrumental effects are attached to the reforms associated with the PREA.

In addressing these questions about prison reform, this Article has multiple objectives. First, we provide the first and only sustained empirical “genealogy of law”¹² related to lawmaking around prison rape in the modern era. We do so by mapping key players, moments, and discourses in the development of the PREA and the Commission’s national standards. Our empirical focus is on how prison rape is variably constructed as it traverses diverse contexts inside and outside the criminal justice system. Second, in accordance with Ismaili’s call to understand criminal justice policy by “contextualizing the criminal justice

Lockyer Fires Earthy Attack at Energy Exec., L.A. TIMES, May 23, 2001, § 2, at 7, available at <http://articles.latimes.com/2001/may/23/local/me-1510>. These are telling words from the highest-ranking law enforcement official in the state with the largest prison system in the western world. See Joan Petersilia, *California’s Correctional Paradox of Excess and Deprivation*, in 37 CRIME AND JUSTICE: A REVIEW OF RESEARCH 207, 209, 213-15 (2008) (discussing the dramatic increase in California’s prison population and associated problems and offering policy recommendations). Taking a lighter tone, but nonetheless making the point that prison rape is acceptable, if not laughable, Jay Leno was not the first to offer jokes about prison rape and get a stand-up comedian’s most valued reward—laughter from a live audience—for doing so. In his monologue on *The Tonight Show* in 2005, Leno observed that Karl Rove, senior advisor to President Bush, was facing tough criticism from Democrats about his role in leaking to the press the identity of former CIA agent Valerie Plame; he then commented: “I think Karl Rove is getting a little worried. Like today he said the biggest problem facing Americans is prison rape.” Karl Rove Jokes, ABOUT.COM, http://politicalhumor.about.com/od/karlrove/Karl_Rove_Jokes.htm (last visited Dec. 15, 2010). Clearly, the laughter that ensued derived from the imagery of Rove going to prison for his wrongdoing and, while there, being raped by another male prisoner. More recently, *Let’s Go to Prison*, a film released in 2006 that purports to provide a “penetrating look” at the American penal system, featured a bar of soap lying on a shower room floor—the quintessential symbol for prison rape—as the central image in its publicity campaign. LET’S GO TO PRISON (NBC/Universal 2006), available at <http://www.commercialcloset.org/common/adlibrary/adlibrarydetails.cfm?QID=3125&clientID=11064> (trailer).

12. Ryken Grattet & Valerie Jenness, *The Reconstitution of Law in Local Settings: Agency Discretion, Ambiguity, and a Surplus of Law in the Policing of Hate Crime*, 39 LAW & SOC’Y REV. 893, 893 (2005).

policy-making process,”¹³ our theoretical focus is on how state and non-state actors that comprise a policy community shaped the development of law and policy around prison rape. This newly politicized corrections problem—prison rape—has, in turn, inspired symbolic legislation but very little in the way of legally binding mandates for state action designed to address the problem.

We explain this historical legal development and attendant prison policy by (1) drawing a classic distinction between symbolic law and law with discernable instrumental effects¹⁴ and (2) directing analytic attention to an increasingly well-known concept and attendant process in sociolegal studies—the “endogeneity of law.” Legislation is seen as “merely” or “purely” symbolic when it communicates positions on ideological battles and affirms or changes values, but goes largely unenforced; as a result, instrumental effects of such legislation are not forthcoming.¹⁵ As for the other core concept, our focus on the endogeneity of law directs analytic attention to the process whereby law is “generated within the social realm that it seeks to regulate.”¹⁶ In other words, the very domain to be regulated plays a significant, if not decisive role in setting the terms of its own regulation (or lack thereof). Originally identified and interrogated in the realm of civil rights law in the workplace and more recently in the realm of consumer rights law,¹⁷ the workings of legal endogeneity have been heretofore unexamined in the realm of criminal justice policy. More specifically, they have not been interrogated in the realm of corrections in general and correctional reform in particular. As we demonstrate in this Article, it is fruitful to integrate the study of symbolic and instrumental law and the version of endogeneity of law advanced below in the realm of criminal justice reform. Doing so can further our understanding of the conditions under which criminal justice reform emerges at the symbolic level (i.e., the passage of symbolic law), but fails to take shape in ways that result in real, material, enforcement-related effects monitored by the state (i.e., the failure of instrumental effects to accompany symbolic law).

13. Karim Ismaili, *Contextualizing the Criminal Justice Policy-Making Process*, 17 CRIM. JUST. POL'Y REV. 255, 255 (2006).

14. See Grattet & Jenness, *supra* note 5, at 2. See also Jenness, *supra* note 5, at 147.

15. Grattet & Jenness, *supra* note 5, at 2.

16. Lauren B. Edelman, *Law at Work: The Endogenous Construction of Civil Rights*, in HANDBOOK OF EMPLOYMENT DISCRIMINATION RESEARCH 337, 339 (2005) [hereinafter Edelman, *Law at Work*]. See also Lauren B. Edelman, *Legality and the Endogeneity of Law*, in LEGALITY AND COMMUNITY: ON THE INTELLECTUAL LEGACY OF PHILIP SELZNICK 187, 202 (2002) (arguing that endogeneity “slows the achievement” of legality as an ideal) [hereinafter Edelman, *Legality and the Endogeneity of Law*]; Lauren B. Edelman, Christopher Uggen & Howard S. Erlanger, *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 AM. J. SOC. 406, 406 (1999) (presenting a “model of endogeneity among organizations, the professions, and legal institutions”); Shaubin A. Talesh, *The Privatization of Public Legal Rights: How Manufacturers Construct the Meaning of Consumer Law*, 43 LAW & SOC'Y REV. 527, 531 (2009) (extending a theory of the endogeneity of law into the field of consumer protection law).

17. Talesh, *supra* note 16, at 531.

The remainder of this Article is organized into three parts. Part I sets the stage for an analysis of prison rape reform efforts by describing a contextual approach to understanding the formation of criminal justice policy and by presenting the specific formulation of the endogeneity of law being introduced and utilized in this Article. Thereafter, we present an empirical analysis of how prison rape has been constructed by multiple stakeholders existing in diverse institutional environments that comprise the prison rape policy domain.¹⁸ Our genealogy of the politics of prison rape reveals three general categories of discursive politicking relevant to reform around prison rape: first-person testimonials about prison rape, academic assessments of prison rape, and calls for reform put forth by stakeholders in this particular criminal justice reform movement. Finally, we conclude with a discussion that relates our findings to the process of lawmaking in general, the endogeneity of law in particular, and the relationship between the two in terms of symbolic and instrumental law. Specifically, we empirically demonstrate that the corrections industry has, by and large, determined the final parameters of the PREA, the current content of national standards devised to regulate its implementation, and the failure of those standards to be embraced by the state as binding in any authoritative way. Drawing on these findings, we argue that the endogeneity of law, as presented in the analysis that follows, is a consequential force in lawmaking and enforcement. It effectively prevents instrumental effects from accompanying the passage of symbolic law designed to reform corrections.

I. ANALYTIC AND THEORETICAL CONSIDERATIONS

In what is arguably the most influential academic book on crime control policy in the last decade, *The Culture of Control*, David Garland offers a historical account of the emergence of the contemporary field of crime control in the United States and the United Kingdom.¹⁹ He does so by focusing on central discourses, strategies, and policies of crime control in a way that enables structural patterns at the level of the field rather than at the level of a particular institution or agency to be discerned.²⁰ In the process, Garland directs attention to a wider field that encompasses the practices of non-state as well as state actors.²¹ Taking Garland's lead, the analysis presented in this Article also

18. A complete inventory of the multiple types of archival data used to create a genealogy of the politics of prison rape analyzed for the purposes of this Article can be obtained from the lead author of this Article.

19. DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 75 (2001).

20. *See id.* at 167.

21. As Garland explained in a subsequent publication, "the concept of a broad social field—as opposed to a narrower complex of state institutions—was adopted in *The Culture of Control* because the aim of the research was to address the ways in which crime now figures in the thought and action of lay people as well as legal actors, and to investigate how and why this came to be true." Davis Garland, *Beyond Culture of Control*, 7 *CRITICAL REV.*

broadens the view of the field at play to include state and non-state actors.

A criticism of Garland's work that is especially important for the analysis presented in this Article is that Garland almost exclusively focused on new policies and practices that *did* become established in the newly transformed field, while at the same time ignoring policies and practices that did not become established in the field. Garland acknowledged this limitation when he explained that a "consequence of this style of inquiry is that it tends to understate the importance of the actors whose preferences and policies lost out in the current conjecture but who continue to be a presence in the field and to exert a pressure for change."²² Clearly, deposed or displaced forces may continue to be operative and play an ongoing role in the constitution (or reconstitution) of the field as they compete, resist, and otherwise press for change.

We take advantage of this critique of Garland's work, and, as a welcome corrective, we focus analytic attention on the policy community and the plethora of discourse produced by the diverse stakeholders who comprise it. Quite apart from whether any given stakeholder, by some measure, "wins" or "loses" in the politics of policymaking, our genealogy of law orients to their participation in the policy domain as at least potentially important. This approach is informed by Ismaili's conceptualization of a "policy community"²³ as it applies to the development and implementation of prison rape policy as criminal justice policy.

A. A Contextual Approach to Criminal Justice Policy

In an article published in *Criminal Justice Policy Review*, Ismaili delineates a contextual approach to understanding criminal justice policy by orienting to policy discourse and formation as a process that can only be understood by focusing on both the contextual (i.e., environmental) features amid which it unfolds, and the structure and workings of the policy community with an expressed stake in the issue.²⁴ This approach is commensurate with a constructionist approach to social problems insofar as both are concerned with contextual features of the environment in which policy is envisioned, formulated, proposed, and accepted or rejected; the politicization of crime, including the symbolic dimensions of crime and criminal justice; and the definition and construction of policy "problems," campaigns and elections, public opinion, and policy networks.²⁵ The focus is on *all* actors or potential actors with a direct interest in the particular policy field, including those who

INT'L SOC. & POL. PHIL. 160, 166 (2004).

22. *Id.* at 167.

23. Ismaili, *supra* note 13, at 263.

24. *Id.* at 260.

25. *See* Jenness, *supra* note 5, at 154.

attempt to influence it, such as government agencies, pressure groups, media people, and individuals including academics, consultants, and other experts.²⁶

Formulated in this way, the prison rape policy community obviously includes the state as a particular type of actor in the policy community. Distinguishing it from other participants, the state is responsible for the organizations—prisons and other detention facilities comprising corrections—implicated in the problem of prisoner rape. Corrections and the state are mutually constitutive. In addition, the state is implicated as the sovereign body most proximate to lawmaking and policymaking related to the criminal justice system, including the passage of the PREA and the development of national standards designed to address prison rape. Relatedly, the state is a key player in the process captured by the term endogeneity of law as conceptualized in the literature and as revised and elaborated for the purposes of the analysis presented in this Article.

B. The Endogeneity of Law

Recognizing the unique way in which the state and corrections are inextricably intertwined requires consideration of the endogeneity of law as a consequential force in lawmaking. As originally formulated by Edelman and her colleagues, a theory of law as endogenous disavows the notion that law is autonomous from organizations targeted for regulation. This conceptualization negates the idea that law is somehow “above” or “outside” the organizations subject to its control.²⁷ To quote Edelman: “As organizations respond to legal ideals by themselves becoming legalized, they shape social understandings of law and of the meaning of compliance [A]s law becomes progressively institutionalized in organizational fields, it is simultaneously transformed by the very organizational institutions that it is designed to control.”²⁸ In simpler terms, the endogeneity of law is a process whereby law is “generated within the social realm that it seeks to regulate.”²⁹ The target of regulation through law is often the central player in delineating the conditions of regulation (or lack of regulation).

This conceptualization of law as endogenous can be utilized to understand how and why laws regulating organizations, including correctional organizations like prisons, often take unanticipated forms or forms that are at

26. See David S. Meyer, *Introduction: Social Movements and Public Policy: Eggs, Chicken, and Theory*, in ROUTING THE OPPOSITION: SOCIAL MOVEMENTS, PUBLIC POLICY, AND DEMOCRACY 1 (2005) (delineating the “first premises” of a consideration of social movements and discussing the importance of considering the actors involved).

27. See Edelman, *Legality and the Endogeneity of Law*, *supra* note 16, at 187-202; Edelman, *Law at Work*, *supra* note 16, at 337-52; Edelman, Uggem & Erlanger, *supra* note 16, at 46.

28. Edelman, *Law at Work*, *supra* note 16, at 339-40.

29. *Id.* at 339.

odds with the ideological commitments of others who are seemingly influential in the policy community. To quote Edelman again:

The policy implications of legal endogeneity, moreover, are critical. To the extent that law is endogenous, or shaped within the organizational fields that it seeks to regulate, the social control *of* organizations is in a very real sense social control *by* organizations—not overtly, but rather through the influence of institutionalized models of governance.³⁰

This notion has routinely been utilized to make sense of a plethora of types of lawmaking, most notably in the realm of civil rights law.

Surprisingly, the idea of the endogeneity of law has yet to gain a foothold in the realm of criminal justice-related law and policy. Taken into this arena, the analysis presented in this Article offers a new formulation of law's endogeneity. The focus is on how an organizational field that lies relatively dormant during the incipient stages of lawmaking can nonetheless emerge to define the parameters of its own regulation—or lack thereof. In the case of prison rape reform efforts, the endogeneity of law is not played out via the relationship between the dynamics that underlay law on the books and the administrative implementation of those laws. Rather, the development and installation of implementation structures and processes are effectively denied at the moment of formulation by the very organizations the implementation would otherwise target for control. The law as a form of administrative regulation is not “co-opted” (in the classic formulation); rather, it is denied *in toto*.

The result is the same, however: the social control *of* organizations is, in a very real sense, social control *by* organizations; in the case of prison reform, the correctional industry looms large in setting the parameters of the regulation of prisons. In the analysis that follows, we reveal how this has occurred with reform related to prison rape. In so doing, this Article ultimately sheds light on the challenges associated with achieving real, meaningful, institutional, and consequential criminal justice policy reform.

II. THE POLITICS OF PRISON RAPE

The genealogy of the politics of prison rape reveals three general categories of discursive political talk³¹ relevant to lawmaking around prison rape: first-person testimonials about the experience of prison rape, academic assessments of the prevalence of prison rape, and moral entrepreneurs' promulgation of the problem and calls for reform. This amalgamation of discourse is analyzed below for what it can tell us about the social construction of prison rape and the endogeneity of law in criminal justice policymaking.

30. *Id.* at 352.

31. See Mary Fainsod Katzenstein, *Faithful and Fearless: Moving Feminist Protest Inside the Church and Military* (1998).

A. First-Person Testimonials: Naming and Describing Prison Rape as a Lived Experience

First-person testimonials have put the issue of prison rape on the public agenda by providing dramatic examples of real life experiences that describe, often in painful detail, the experience of prison rape. These first-person accounts narrate the bodily experiences of prison rape as well as the fear, humiliation, and desperation that precede, define, and follow the lived experience. In addition, they often note the failure of correctional officials to respond to prisoner rape in any meaningful or consequential way, and they speak to the intersection between rape, sexuality, and gender.

As just one example, consider the *first* testimonial presented in *No Escape*, an alarming report of how prison rape occurs, is experienced, and is reacted to (or not):

I've been sentenced for a D.U.I. offense. My 3rd one. When I first came to prison, I had no idea what to expect. Certainly none of this. I'm a tall white male, who unfortunately has a small amount of feminine characteristics. And very shy. These characteristics got me raped so many times that I have no more feelings physically. I have been raped by up to 5 black men and two white men at a time. I've had knives at my head and throat. I had fought and been beat so hard that I didn't ever think I'd see straight again. One time when I refused to enter a cell, I was brutally attacked by staff and taken to segregation though I had only wanted to prevent the same and worse by not locking up with my cellmate. There is no supervision after lockdown. I was given a conduct report. I explained to the officer what the issue was. He told me that off the record, He suggests I find a man I would/could willingly have sex with to prevent these things from happening. I've requested protective custody only to be denied. It is not available here. He also said there was no where to run to, and it would be best for me to accept things I probably have AIDS now. I have great difficulty raising food to my mouth from shaking after nightmares or thinking to [sic] hard on all this I've laid down without physical fight to be sodomized. To prevent so much damage in struggles, ripping and tearing. Though in not fighting, it caused my heart and spirit to be raped as well. Something I don't know if I'll ever forgive myself for.³²

In addition to first-person accounts provided by currently incarcerated men (largely through letters), there are testimonials from formerly incarcerated individuals for the purposes of public hearings.³³ On August 19, 2005, for example, five panelists, all of whom were incarcerated years ago, opened the

32. Letter from A.H. to Human Rights Watch (Aug. 30, 1996), *reprinted in* HUMAN RIGHTS WATCH, *NO ESCAPE: MALE RAPE IN U.S. PRISONS*, at xv, xv (2001). As with other excerpts presented in *No Escape*, here the text of the inmate's letter is reproduced without correcting spelling and grammar.

33. The NPREC convened a series of nine public hearings between March 31, 2005, and December 6, 2007.

PREA Commission hearings in San Francisco, California, by telling their stories of being raped while incarcerated. These narratives include sexually graphic details about bodily harm, the identification of the consequences of rape for mental and physical health (including the contraction of AIDS), and commentary about sexuality, homosexuality, and “stolen . . . manhood.”³⁴ The testimonials presented in *No Escape* and the PREA Commission hearings, as well as elsewhere, serve to publicly “discover”—to use the terms of social problems theorists—and document prison rape.³⁵ This type of publicly disseminated testimony, which proliferated during the latter part of the twentieth century, renders heretofore largely invisible violence—prison rape—visible. It does so by publicizing both select cases of prison rape and, along the way, emphasizing the physical and psychological horror attached to prison rape, the gendered nature of prison rape, and the failure of correctional officials in particular and society in general to respond to this type of criminal behavior. It effectively captures the attention of academics and other stakeholders.

B. Academic Assessments: Quantifying the Problem of Prison Rape

With vivid first-person accounts of prison rape as a catalyst, academic assessments of prison rape shift attention to statistical claims about the prevalence of prison rape. Academic researchers committed to accurately determining the incidence and prevalence rates of prison rape and other forms of sexual assault in correctional facilities have produced and disseminated contradictory findings. The academic body of literature that speaks to the aggregate-level contours of the experience of prison rape provides a forum for moralistic claims about sexual assault behind bars.

Based on studies done prior to the passage of the PREA, Gaes and Goldberg’s landmark inventory of estimates of prison rape revealed prevalence estimates from zero to 40%.³⁶ Thereafter, studies based on methodological improvements began to converge around prevalence rates of less than 10%.³⁷

34. Carolyn Marshall, *Panel on Prison Rape Hears Victims’ Chilling Accounts*, N.Y. TIMES (Aug. 20, 2005), <http://www.nytimes.com/2005/08/20/politics/20rape.html>.

35. For a recent installment of first person accounts, see VALERIE JENNESS, CHERYL L. MAXSON, KRISTY N. MATSUDA & JENNIFER MACY SUMNER, CTR. FOR EVIDENCE-BASED CORR., VIOLENCE IN CALIFORNIA CORRECTIONAL FACILITIES: AN EMPIRICAL EXAMINATION OF SEXUAL ASSAULT (2007).

36. Gerald G. Gaes & Andrew L. Goldberg, *Prison Rape: A Critical Review of the Literature 2* (Nat’l Inst. of Corr., Working Paper, 2004).

37. For example, in 2007 the largest and arguably most defensible prison rape study, ALLEN J. BECK & PAIGE M. HARRISON, U.S. DEP’T OF JUSTICE, SEXUAL VICTIMIZATION REPORTED BY STATE AND FEDERAL INMATES (2007), was released by the Bureau of Justice Statistics (BJS). Likewise, studies by Wolff, Shi, Blitz, and Siegel and Jenness, Maxson, Matsuda, and Sumner were released after the passage of the PREA and are arguably based on methodological improvements on the studies reported in Gaes and Goldberg, *supra* note 36. Nancy Wolff, Jing Shi, Cynthia L. Blitz & Jane Siegel, *Understanding Sexual Victimization Inside Prisons: Factors That Predict Risk*, 6 CRIM. & PUB. POL’Y 535, 546

Offering a “conservative estimate” of prison rape, the PREA reports that 13% of inmates experience sexual assault in correctional facilities in the United States, rightly or wrongly transforming debatable statistical estimates into a singular fact.³⁸

As academics continue to produce statistics, appointed and elected officials continue to debate the severity of the problem. For example, Roderick Q. Hickman, former Secretary of the California Department of Corrections and Rehabilitation (CDCR), acknowledged in public hearings on August 19, 2005, almost two years after the passage of the PREA, that the CDCR is beginning to try to quantify the problem, but outdated prison designs, inadequate electronic surveillance systems, and an antiquated computer system have stalled progress.³⁹ Nonetheless, in the same hearing, Senator Gloria Romero testified early in her remarks: “I believe that we have underestimated the problem.”⁴⁰ She did so without referencing data to support this assessment.

Contradictory and convergent statistical profiles aside, leading experts on the criminal justice system have affirmed the gravity of the problem of prisoner rape in U.S. prisons. For example, when the U.S. Department of Justice’s Bureau of Justice Statistics (BJS) released the first national study of reported rape and sexual assault in U.S. prisons in July 2005,⁴¹ Judge Reggie Walton, the Chair of the National PREA Commission, declared: “Even these low figures reveal that sexual abuse behind bars is a national scandal.”⁴² Shortly thereafter, Malcolm Feeley, Professor of Law at the University of California, Berkeley, declared: “It’s a real and serious problem. It may be the single largest shame of the American criminal justice system, and that’s saying a lot.”⁴³ Comments like these effectively link varying and questionable statistical claims with moralistic claims about sexual assault in carceral settings.

(2007); JENNESS ET AL., *supra* note 35. See also Valerie Jenness, Cheryl L. Maxson, Jennifer Macy Sumner & Kristy N. Matsuda, *Accomplishing the Difficult But Not Impossible: Collecting Self-Report Data on Inmate-on-Inmate Sexual Assault in Prison*, 21 CRIM. JUST. POL’Y REV. 1, 24 (2010).

38. NPREC REPORT, *supra* note 3.

39. Roderick Q. Hickman, Sec’y., Cal. Dep’t of Corr. & Rehab., Address at Public Hearing (Aug. 19, 2005) (transcript available at http://www.nprec.us/docs/sf_sechickman_statement.pdf).

40. Senator Gloria Romero, Address at Public Hearing 1 (Aug. 19, 2005) (transcript available at http://www.nprec.us/docs/sf_senromero_statement.pdf).

41. Press Release, U.S. Dep’t of Justice, Almost 2,100 Sexual Violence Incidents Took Place in the Nation’s Correctional Facilities During 2004 (July 31, 2005), available at <http://www.ojp.usdoj.gov/archives/pressreleases/2005/svrca04pr.htm>.

42. *National Prison Rape Elimination Commission Applauds Bureau of Justice Statistics Report, Says More Research Needed*, PR NEWSWIRE PUBLIC INTEREST SERVICES, July 31, 2005.

43. Leslie Miller, *Study: Sex Crimes in Prisons Underreported*, WASH. POST, July 30, 2006, at 1.

C. Moral Entrepreneurs: Mediating the Lived Experience and the Statistics to Construct the Social Problem of Prison Rape

Rendering prison rape visible through first-person testimony and the scientization of facts is crucial to the incipient stages of policymaking and implementation, but it is not the end point of either.⁴⁴ Institutional actors inevitably appropriate the “raw data” provided by these types of claims-makers to formulate new configurations of discourse, emphasizing some conceptualizations of the problems and proposals for reform—and not others—along the way. To address how this has unfolded with regard to prison rape requires turning away from testimonials and empirical studies and toward the work of professional moral entrepreneurs who draw on first-person accounts and findings from research to advance more overtly moralistic claims. The key players in the policy domain are: Prison Fellowship Ministries, Stop Prisoner Rape (now Just Detention International), and the correctional profession as represented by the National Institute of Corrections and the American Correctional Association. These stakeholders routinely and publicly interpret the causes, manifestations, and consequences of prison rape. In the process, the discursive politics generated by these groups reconstitutes prison rape by promoting certain interpretations of the problem and eclipsing others. Regardless of the available data, they individually and collectively construct the social problem of prison rape and delineate the range of acceptable options for policy responses.

1. Prison Fellowship Ministries

Although over thirty-five non-profit organizations endorsed the PREA,⁴⁵ the support of Prison Fellowship Ministries (PFM) was arguably the most significant catalyst for the formulation and passage of the PREA. PFM put prison rape on the public agenda by drawing on evangelical fervor and emphasizing that the fight against prison rape is, in the first instance, a moral battle. As described in this Subpart, from the point of view of PFM, criminal justice reform should be informed by a Christian worldview and be advanced through religiously infused fellowship and restorative justice.

According to their website, PFM is the largest prison ministry in the world, partnering with thousands of churches and tens of thousands of volunteers

44. See, e.g., VALERIE JENNESS & RYKEN GRATTET, MAKING HATE A CRIME: FROM SOCIAL MOVEMENT TO LAW ENFORCEMENT (2001); Paul Burstein, *Policy Domains: Organization, Culture, and Policy Outcomes*, 17 ANN. REV. SOC. 327 (1991).

45. A diverse array of organizations endorsed the PREA, including Amnesty International, the Salvation Army, the Christian Coalition, Physicians for Human Rights, the American Probation and Parole Association, and the Soros Foundation.

across the country to minister to inmates, recognizing that society in general “often scorns and neglects prisoners, ex-prisoners, and their families.”⁴⁶ Founded in 1976 by Chuck Colson, who served as special counsel to President Nixon, went to prison in 1975 for Watergate-related crimes, and was later deemed one of the twelve “Christian heavyweights” by *Newsweek*,⁴⁷ PFM “reaches out to prisoners, ex-prisoners, and their families both as an act of service to Jesus Christ and as a contribution to restoring peace to our cities and communities endangered by crime.”⁴⁸ This work is based in the belief that restorative change through a relationship with Jesus is the ideal way to transform our communities.⁴⁹

PFM sponsors numerous programs and activities designed to encourage fellowship with Jesus and to welcome the children of prisoners to embrace the gospel. Specific programs are designed to equip Christians to develop and defend a clear Christian worldview and to integrate biblically based, restorative reforms into the criminal justice system.⁵⁰ To do so, those involved in PFM visit inmates, sponsor a pen pal program, and produce and disseminate the *Inside Journal*.⁵¹ Combined, these activities are designed to draw current and former prisoners and their families into a “relationship with God through Jesus Christ” such that every prisoner and his/her family in the United States is exposed to the gospel.⁵²

With this larger set of objectives in mind, PFM has relied on Colson’s *BreakPoint* radio commentaries, newsletters, Congressional testimony, and prison ministries at the grassroots level to persuade its followers and the public more generally that the elimination of prison rape is a “moral imperative.”⁵³ PFM has done so in stark terms, making comparisons to other forms of immorality, sin, and evil along the way. For example, Colson explained why prison rape is best seen as a moral issue in his essay, *The Horrors of Prison Rape*:

They were, Iraqis say, places of evil. As the recent war came to an end,⁵⁴ U.S. soldiers uncovered Saddam’s torture chambers, outfitted

46. *Who We Are*, PRISONFELLOWSHIP.ORG, <http://www.prisonfellowship.org/who-we-are-drm-at> (last visited May 20, 2007).

47. Lisa Miller, *An Evangelical Identity Crisis*, NEWSWEEK, Nov. 13, 2006, at 30, 30.

48. PRISONFELLOWSHIP.ORG, <http://www.prisonfellowship.org/prison-fellowship-home> (last visited Oct. 3, 2009).

49. *Id.*

50. *Mission, Vision, and Values Statements*, PRISONFELLOWSHIP.ORG, <http://www.prisonfellowship.org/why-pf/299> (last visited Dec. 12, 2010).

51. *Inside Journal*, PRISONFELLOWSHIP.ORG, <http://www.prisonfellowship.org/inside-journal> (last visited Dec. 12, 2010).

52. *What is Prison Fellowship?*, PRISONFELLOWSHIP.ORG, <http://www.prisonfellowship.org/why-pf> (last visited May 20, 2007).

53. *About Breakpoint*, BREAKPOINT, <http://www.breakpoint.org/about-bp> (last visited Dec. 12, 2010).

54. This statement was made shortly after President George W. Bush declared,

with cattle prods, wooden stocks, manacles, and meat hooks. One victim remembers, "They would beat us as we hung there. They did unthinkable things—electrocution, immersion in a bath of chemicals, and ripping off people's finger and toenails. Many were forced to listen to tape recordings of their wives screaming as they were brutally raped. Americans were horrified to hear these grisly tales—and relieved to know that Saddam Hussein would never again persecute his people. But, ironically, the same compassionate Americans who abhor torture and rape in Iraq tolerate it on a grand scale here. I'm talking about America's prisons, where hundreds of thousands of inmates—mostly men—are sexually assaulted every year. And yet, few people really seem to care. After all, these men are the "dregs" of society, we reason. If they get raped—well, so what? [A]s Christians we need to take the lead in fighting prison rape—and supporting this legislation [PREA]. Jesus called us to care for the "least of these," and He specifically included people in prison. It is the mark of a Christian—and of a Christian country—that we act to halt the terrible exploitation of human beings inside our own institutions, buildings that all too often become homegrown torture chambers. We must wage an assault on prison rape—not because we may one day be victimized by released inmates, but because getting rid of our own "places of evil" is the human and Christian thing to do."⁵⁵

It is both predictable and surprising that the evangelical sector has taken up the cause of prison rape. It is predictable because the history of prison is replete with religious ideas infusing the structure and functioning of prisons;⁵⁶ the modern evangelical sector has long been committed to controlling sexual behavior and sexuality—especially when it involves same-sex participants, is shrouded in exploitation and violence, and relates to the AIDS epidemic; and the presidential administration under which the PREA emerged and found support invited and supported "faith-based initiatives" to address contemporary social problems.⁵⁷ Going beyond these specifics, Michael Horowitz, Senior Fellow at the Hudson Institute, surmised: "Combating prisoner rape is the third frontier where American evangelical commitment will make its mark on the human rights area . . . just as with religious persecution and sexual trafficking."⁵⁸

"Mission Accomplished." George W. Bush, Address on the USS Abraham Lincoln (May 1, 2003).

55. Chuck Colson, Prison Fellowship, *The Horror of Prison Rape*, JUBILEE EXTRA, June 2003, at 2.

56. MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977); MICHAEL IGNATIEFF, A JUST MEASURE OF PAIN: THE PENITENTIARY IN THE INDUSTRIAL REVOLUTION, 1750-1850 (1978); MICHAEL MERANZE, LABORATORIES OF VIRTUE: PUNISHMENT, REVOLUTION, AND AUTHORITY IN PHILADELPHIA 1760-1835 (1996).

57. *President Bush's Faith-Based and Community Initiative: Good Idea?*, LUTHERAN CHURCH MISSOURI SYNOD, <http://www.lcms.org/pages/internal.asp?NavID=14514> (last visited Dec. 12, 2010).

58. Ted Olson, *Prison Rape Is No Joke*, CHRISTIANITY TODAY MAG. (Aug. 8, 2002),

On the other hand, it is surprising that the evangelical sector has taken up this cause in the latter part of the twentieth century. By all accounts, this is an era in which policymakers on both the right and the left have promoted crime control legislation that allows them to cultivate a “tough on crime” image. Conversely, appearing “soft on crime”—in this case by passing legislation designed to protect inmates from harm—has become a major liability for both right and left-leaning policymakers, many of whom have adopted sterner stances on crime issues.⁵⁹

It is surprising that the evangelical sector would treat the elimination of prison rape as a political cause when some of the most successful social movements of the twentieth century have been silent on the topic, despite the fact that it implicates people of color, homosexuality and same-sex behavior, and girls and women. As Morse claimed in *Brutality Behind Bars*, an article that addresses how the nascent movement against prison rape is sustained by Christian soldiers:

These political soldiers may fight largely alone. Despite the magnitude of the problem, many other groups—even those committed to human rights—are reluctant to touch this issue. The reasons are disturbing. Civil rights activists keep mum because prison rape is often a black-on-white phenomenon; they're afraid of feeding incipient racism. Gay rights groups also shy away from the problem because they fear that publicity about male-to-male rape will advance the idea that homosexuals as a group are predators. . . . And human rights organizations? They are often dominated by feminists who appear to care far more about “politically correct” prison assaults: those involving male guards raping female prisoners, even though male victims vastly outnumber female victims.⁶⁰

That said, there *are* human rights groups involved in the movement to eliminate prison rape, most notably Stop Prisoner Rape.

2. Stop Prisoner Rape⁶¹

Stop Prisoner Rape (SPR), a Los Angeles-based 501(c)(3) human rights

<http://www.christianitytoday.com/ct/2002/july8/34.10.html>.

59. See, e.g., KATHERINE BECKETT, *MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS* (1997); William J. Chambliss, *On Lawmaking, in MAKING LAW: THE STATE, THE LAW, AND STRUCTURAL CONTRADICTIONS* 3-35 (1993); ELLIOTT CURRIE, *CRIME AND PUNISHMENT IN AMERICA* (1998); DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (2001); Katherine Beckett, *Crime and Control in the Culture of Late Modernity*, 35 *LAW & SOC. REV.* 899 (2001).

60. Anne Morse, *Brutality Behind Bars*, 16 *WORLD MAG.*, Feb. 3, 2001, available at <https://www.justicefellowship.org/key-issues/issues-in-criminal-justice-reform/issue-1/pf-commentary-prison-rape/12778-brutality-behind-bars>.

61. Stop Prisoner Rape was renamed Just Detention International on September 4, 2008. For the purposes of this analysis, however, it will be called Stop Prisoner Rape because that is the name it had while advocating for the passage of the PREA.

organization, takes a decidedly secular approach to prison rape reform. Generally avoiding religious overtones, this group treats prisoner rape as a violation of human rights. Framed in this way, prisoner rape becomes easily recognizable as a civil rights issue to be addressed through government intervention in general and enhanced regulation in particular.

SPR is the only human rights group exclusively devoted to ending sexual violence against men, women, and youth in all forms of detention.⁶² Founded in 1980 by Russell D. Smith, People Organized to Stop Rape of Imprisoned Persons (POSRIP) preceded SPR.⁶³ The original mission of POSRIP was described in the first newsletter as dealing “with problems of rape, sexual assault, un-consensual sexual slavery, and forced prostitution in the prison context.”⁶⁴

Shifts in SPR leadership are telling. SPR was incorporated in 1994 by Stephen Donaldson, who, like Smith, was a survivor of prison rape.⁶⁵ As the second leader of SPR, Donaldson wrote articles and editorials on prison sexual assault, was featured in high profile media outlets (e.g., *New York Times*, *USA Today*, *Los Angeles Times*, *Boston Globe*, *60 Minutes*),⁶⁶ coordinated SPR’s amicus brief for the landmark legal case on prisoner rape, *Farmer v. Brennan* (1994), and launched SPR’s website.⁶⁷ Two survivors of sexual assault, Don Collins and Tom Cahill, followed Donaldson as the leader of SPR until 2001 when the group opened its first permanent office and hired Lara Stemple as the Executive Director.⁶⁸ This marked the first time the leader of SPR was not a survivor of prison sexual assault and, more importantly, it put a lawyer and legal scholar with a background in human rights at the helm of SPR.

SPR currently has an Executive Director, Lovisa Stannow, with a background in international human rights and a Deputy Executive Director, Linda McFarlane, with a background in counseling and crisis intervention; a professional staff that includes a program associate, program development director, senior communications associate, executive assistant, survivor outreach associate, and policy advisors; a Board of Directors and a Board of Advisors; and a Survivors’ Speakers Bureau.⁶⁹ It is committed to pursuing three goals: to advocate policies designed to ensure institutional accountability, to change society’s attitudes toward prisoner rape, and to promote access to

62. JUST DETENTION INT’L, <http://www.justdetention.org>, (last visited Aug. 10, 2010).

63. A *Brief History*, JUST DETENTION INT’L, http://justdetention.org/en/spr_history.aspx (last visited Aug. 10, 2010).

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Staff and Board*, JUST DETENTION INT’L, <http://justdetention.org/en/staff.aspx> (last visited Dec. 12, 2010).

resources for survivors of sexual assault behind bars.⁷⁰ SPR's work to end sexual violence against men, women, and youth now includes all forms of custody, including immigration detention centers.

SPR is most publicly visible when promoting laws and policies designed to reduce prison rape, increase responsiveness to victims when rape occurs, and ensure survivors are afforded health and legal services thereafter. Specifically, at local, state, and federal levels, SPR has promoted laws and policies that mandate correctional administrators to develop and institutionalize policies designed to ensure that sexual assault in detention facilities is detected, reported, and prosecuted and that victims are treated both legally and humanely.⁷¹ Most notably, SPR was a prime sponsor of the PREA at the federal level and of similar state-level legislation.⁷² For example, in a six-plus page "statement for the record" provided to the U.S. Senate Committee on the Judiciary, then-Executive Director Lara Stemple addressed a slew of concerns, including the "need for legislation":

Although prisoner rape violates international, U.S., and state laws, the response to prisoner rape thus far has been indifferent and irresponsible. Current institutional policies regarding sexual violence are in need of reform and greater enforcement. The Prison Rape Reduction Act [later named the Prison Rape Elimination Act] creates important incentives and standards, encouraging states to respond more responsibly.⁷³

She went on to argue that "nationwide data on prisoner rape is sorely needed"; "reporting procedures, where they exist, are often ineffectual and complaints by prisoners about sexual assault are routinely ignored by prison staff and government officials"; "simple prevention measures, such as pairing cellmates according to risk, are uncommon, and basic supervision is often lacking"; "punishment for prison rape is rare"; "prison rape has been used in some cases as a tool to punish inmates for misbehavior"; and "overcrowding and insufficient staffing are among the chief reasons for prison rape."⁷⁴

Pursuing reform at the state level, SPR played a key role in the development and passage of the Sexual Abuse in Detention Elimination Act (Chapter 303, Statutes of 2005) in California, which Governor Schwarzenegger

70. JUST DETENTION INT'L, *supra* note 62.

71. Press Release, Just Detention Int'l, Stop Prisoner Rape Hails Passage of Historic Law in California (June 12, 2002), *available at* http://www.justdetention.org/en/pressreleases/2002/06_12_02.aspx.

72. Press Release, Just Detention Int'l, Stop Prisoner Rape Hails Passage of Historic Law in California (Sept. 8, 2005), *available at* http://www.justdetention.org/en/pressreleases/2005/09_08_05.aspx.

73. *Prison Rape Reduction Act of 2002: Hearing on S. 2619 Before the S. Comm. on the Judiciary*, 107th Cong. 46-52 (2002) (statement of Lara Stemple, Executive Director, Stop Prisoner Rape).

74. *Id.*

signed into law on September 22, 2005.⁷⁵ Similar to the PREA, this Act was designed to prevent, reduce, and effectively respond to the sexual abuse of inmates and wards held in detention facilities operated by the CDCR.⁷⁶ According to SPR, this law “lays the foundation for California, which runs the largest prison system in the country, to be a national leader in the fight to end prisoner rape.”⁷⁷ As Katherine Hall-Martinez, then a spokesperson for SPR, explained in a press release, “The passage of this law is a significant milestone for California, finally giving this all-too-common human rights violation the attention it deserves in our state.”⁷⁸

In addition to promoting anti-prison rape law and policies, SPR devotes organizational resources to educating correctional administrators about prison rape, changing public opinion about prison rape, and providing prisoners and ex-prisoners with resources related to preventing and responding to prison rape. One way it does so is by making public “stories of survival,” either by sponsoring events at which prison rape survivors tell their stories of rape or by publishing stories of prison rape on their webpage or in other outlets. With regard to public testimonials, for example, on June 24, 2003—less than three months before President Bush signed the PREA into law—SPR sponsored a Capitol Hill event called “Stories of Survival: Recognizing Prison Rape Behind Bars” in Washington, D.C.⁷⁹ The objective of this event was to marshal support for the PREA by “showing America the human face of prisoner rape.”⁸⁰ Thereafter, SPR was responsible for ensuring survivors of prison rape appeared and were prepared to provide testimony about their experience of rape while in custody.⁸¹ In addition to these “live” testimonials, SPR routinely publishes survivors’ stories on its webpage, both as first person accounts and as poetry.⁸² Another way in which SPR pursues the goal of educating prisoners and ex-prisoners, correctional administrators, and the public at large about prison rape is by writing, publishing, and circulating short articles on a diverse array of topics related to prison rape.

As SPR pursues its goals—ensuring institutional accountability, changing

75. Press Release, Just Detention Int’l, Stop Prisoner Rape Hails Governor’s signing of Historic Law in California (Sept. 22, 2005), *available at* http://www.justdetention.org/en/pressreleases/2005/09_22_05.aspx.

76. *Id.*

77. *Id.*

78. *Id.*

79. Seven survivors of prison rape were scheduled to speak at this event, along with three legislators (Rep. Robert C. Scott (D-VA), Rep. Roscoe G. Bartlett (R-MD), and Rep. Frank R. Wolf (R-VA)), the Executive Director of SPR, and the President of Justice Fellowship.

80. Press Release, Just Detention Int’l, Survivors of Prisoner Rape Speak at Capitol for First Time (Jun. 24, 2003), *available at* http://www.justdetention.org/en/pressreleases/2003/06_24_03.aspx.

81. *Id.*

82. *Id.*

attitudes toward prisoner rape, and promoting access to resources for survivors—it puts forth a decidedly secular, “human rights” version of prison rape as a social problem. As the homepage of the SPR website proclaimed:

Prisoner rape—and the failure of the government to address it—represent one of the most egregious human rights violations in the U.S. today. With little institutional protection or recourse, victims have been left beaten and bloodied, they have suffered long-term psychological harm, they have been impregnated against their will, and they have contracted HIV.⁸³

In a more forcefully worded statement, SPR presented the following in an article *Prison Rape Is Torture Under International Law*:

Sexual assault of prisoners, whether it is perpetrated by corrections officers or by other inmates is not only a crime—in many cases, it is also a form of torture under international law. Torture has long been prohibited under international human rights law—a standard that has been characterized as “one of the most basic principles of human rights,” comparable to the right to life or the prohibition of slavery. More than 65 countries expressly provide for the right to be free from torture or cruel and unusual punishment, and international customary law also bars the use of torture. Torture is behavior that the United States has denounced in other nations. But the torture of American prisoners through sexual assault has long been allowed to flourish. This inattention to a widespread form of institutionalized brutality is a violation of the United States’ duty to uphold basic standards of international human rights.⁸⁴

Commensurate with this statement, SPR posted on its webpage legalistic understandings of prison rape, along with case law relevant to battling it. For example, a document reports on *Farmer v. Brennan*, the landmark Supreme Court case involving a pre-operative male-to-female transsexual who was raped while serving a twenty-year sentence for credit card fraud in a men’s maximum security federal prison in Terre Haute, Indiana.⁸⁵

More recently, SPR endorsed the national standards produced by the Commission and took a leading role in instigating and sustaining a campaign to pressure the U.S. Attorney General to adopt the standards. As SPR explained in a letter sent to friends and colleagues in March 2010:

As you know, the Department of Justice is currently soliciting public comments on the national standards addressing prisoner rape. These standards represent a hard-won compromise that is the best tool we currently have to end rape in prisons, jails, and juvenile facilities. They are in danger of being watered down. JDI [SPR] is mobilizing our supporters and allies to submit comments urging the Attorney General

83. *Fact Sheet: Prisoner Rape is Torture Under Int’l Law*, JUST DETENTION INT’L, (Feb. 2009), http://www.justdetention.org/en/factsheets/Prisoner_Rape_is_Torture.pdf.

84. *Id.*

85. *Farmer v. Brennan*, JUST DETENTION INT’L, http://www.justdetention.org/en/docs/doc_01_laws.aspx (last visited Feb. 3, 2011).

to enact these standards fully. The opposition from some in corrections leadership is strong, but we're hoping to outweigh that resistance with thousands of comments in favor of the standards. It is critical that the DOJ and Attorney General receive a flood of comments. JDI [SPR] has created a petition through Change.org that is simple to fill out and qualifies as public comments.⁸⁶

Whether promoting law and national standards or providing resources and services, the human rights discourse disseminated by SPR is similar to that which is produced and disseminated by PFM. In at least one important way, however, it is distinct: namely, SPR discourse calls on a decidedly secular understanding of human rights, while PFM relies upon a biblical one. In short, what is wrong for PFM on religious grounds is wrong for SPR on legal grounds, even as they join forces to eliminate the "wrong" behavior: torture in the form of sexual assault.

3. Correctional Professionals and Associations

Not surprisingly, the industry most proximate to prison rape—corrections—has played a key role in the politics of prison rape, especially the passage and implementation of law. Surprisingly, however, this group of stakeholders came to the political table fairly late in the reform effort. Nonetheless, correctional officials proved decisive. Compared to academics, PFM, and SPR, for example, the professional associations representing corrections were comparatively silent in early hearings on the PREA. However, the impending passage of the PREA became a catalyst for sustained and consequential involvement in lawmaking by correctional associations. Once fully involved in the politics of prison rape and the process of lawmaking, correctional representatives put forth a managerial view of the problem, persuasively arguing that cost-effective and efficient management is the answer to the problem of prison rape. The most compelling way to reveal the contributions to reform made by corrections is to examine the actions taken by the National Institute of Corrections (NIC) and the American Correctional Association (ACA) as well as leading spokespeople, especially administrators, in corrections.

Founded in 1977, the NIC was formed shortly after the riots in New York's Attica prison in 1971 and focused national attention on corrections, including the policies and practices that determine the conditions of imprisonment in the United States. In response to heightened public concern generated by riots in Attica, John N. Mitchell, then the U.S. Attorney General, convened a National Conference of Corrections devoted to addressing problems in the U.S. correctional systems at the federal, state, and local levels. In his keynote address to conference attendees, Chief Justice Berger called for the creation of

86. E-mail from Linda McFarlane, MSW, LCSW, Deputy Exec. Dir., Just Detention Int'l, to "Friends and Colleagues" of JDI (Mar. 24, 2010) (on file with authors).

a national training academy of corrections, the goals of which would be to “encourage the development of a body of corrections knowledge, coordinate research, and formulate policy recommendations; provide training of the highest quality for corrections employees and executives; provide a forum for the exchange of advanced ideas in corrections; and bring about long-delayed improvements in professionalism in the corrections field.”⁸⁷ In response, the NIC was formed in 1974 and received its first funding from the Federal Bureau of Prisons in 1977.

By the 1990s, sexual misconduct on the part of correctional staff emerged as a topic of considerable concern for correctional officials; accordingly, it was taken up by the NIC. In 1996, LIS, Inc. and the NIC Information Center in cooperation with the Prisons Division of the U.S. Department of Justice released a special report, *Sexual Misconduct in Prisons: Law, Agency Response, and Prevention* that provided correctional officials with an “overview” of what it termed a “serious, if seldom acknowledged problem.”⁸⁸ It also outlined a three-pronged approach to addressing sexual misconduct in corrections.⁸⁹ Later, in 2001, the NIC produced and broadcast “Addressing Staff Sexual Misconduct with Prisoners,” a three-hour satellite video conference that, among other things, promoted the development of professional standards for institutional response to what had become identified as a pervasive problem within the industry.⁹⁰

Importantly, the 1996 NIC special report began by identifying two specific “external pressures”—legislation and litigation—that abruptly elevated staff sexual misconduct to an issue of critical importance requiring immediate action by correctional agencies.⁹¹ Although staff-on-inmate sexual misconduct was neither illegal nor criminal in most jurisdictions until the latter decades of the twentieth century, by 1996 when the NIC special report was released, the U.S. Congress and more than half of U.S. state legislatures had passed laws defining sexual misconduct by correctional staff as a criminal offense.⁹² Heightening the sense of urgency around this trend toward criminalization was the fact that a majority of this legislative activity had taken place over the four to five-year period immediately preceding the release of the NIC’s report.⁹³

Perhaps even more troubling to correctional officials than the criminalization of staff-on-inmate sexual misconduct was the apparently

87. *History*, NAT’L INST. CORRECTIONS, <http://www.nicic.org/History> (last visited Aug. 10, 2010).

88. NAT’L INST. CORR., *SEXUAL MISCONDUCT IN PRISONS: LAW, AGENCY RESPONSE, AND PREVENTION 1* (1996), available at <http://nicic.gov/pubs/1996/013508.pdf>.

89. *Id.*

90. *Addressing Staff Sexual Misconduct with Offenders*, NAT’L INST. CORRECTIONS INFO. CENTER (Dec. 12, 2001), <http://nicic.gov/Library/017503> (video conference).

91. NAT’L INST. CORRECTIONS, *supra* note 87.

92. *Id.*

93. *Id.*

marked increase in individual and class-action suits based on allegations of sexual misconduct filed against various departments of corrections since 1990.⁹⁴ According to the NIC, in the early 1990s approximately half of all departments of corrections (DOCs) in the United States had been party to litigation stemming from staff-on-inmate sexual misconduct allegations.⁹⁵ At the time the NIC's special report was released, nineteen of the fifty-three reporting correctional jurisdictions were embroiled in litigation related to sexual misconduct and, of those nineteen, five had been involved in other similar litigation during the preceding five-year period while an additional five DOCs that were not actively responding to such litigation in 1996 had been involved in such suits at some point during that same period.⁹⁶ Judgments in a number of class action suits favored the plaintiffs⁹⁷ and were resolved through consent decrees designed to remedy institutional deficiencies that, the courts opined, amounted to unconstitutional conditions of confinement at a number of prisons.⁹⁸

The issue of sexual assault in prisons emerged as a significant domestic policy issue in the latter part of the twentieth century—the last decade of the twentieth century to be more precise.⁹⁹ Representatives of the NIC attribute the organization's focus on developing strong agency responses to staff sexual misconduct to a recent “decade of scrutiny” of corrections by legislatures, courts, and other outside organizations.¹⁰⁰ During the 1990s the central focus was on sexual engagement between correctional officers and inmates; within that focus, the dominant imagery was one of male officers having sexual

94. *Id.*

95. *Id.*

96. *Id.*

97. NAT'L INST. CORR., *SEXUAL MISCONDUCT IN PRISONS: LAW, REMEDIES, AND INCIDENCE* (2000), available at <http://nicic.gov/pubs/2000/016112.pdf>.

98. *Id.*

99. Sexual assault of persons detained or incarcerated by the state was first politicized in the international arena. Concern with rape and other forms of sexual assault perpetrated by troops involved in armed conflicts, as well as the sexual abuse of refugees and prisoners of war, ultimately led a number of organizations to take up the issue of custodial rape. In particular, various bodies working under the auspices of the United Nations High Commissioner for Human Rights were instrumental in promoting international attention on this issue (e.g., The Committee Against Torture (the body of independent experts monitoring implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by its State parties), the UN Special Rapporteur on torture, and the UN Special Rapporteur on violence against women). In 1992, the Special Rapporteur on Torture declared: “it was clear that rape or other forms of sexual assault . . . in detention were a particularly ignominious violation of the inherent dignity and right to physical integrity of the human being, they accordingly constituted an act of torture.” *Summary Record of 21st Meeting*, [1992] Comm'n Hum. Rts., 48th Sess., para 35, U.N. Doc. E/CN.4/1992/SR.21. It is notable that, in the international arena, “prison rape” was constructed almost exclusively as custodial rape and in that context, was understood in gendered terms, with perpetrators understood to be male and victims female.

100. NAT'L INST. CORR., *supra* note 88, at 1.

relations with female inmates. Inmate-on-inmate sexual assault was, for the most part, eclipsed in this early formulation. As the discussion below suggests, another professional body, the American Correctional Association (ACA), was also delayed in directing administrative, policy, and operational attention to the issue of inmate-on-inmate sexual assault.

The ACA is arguably the leading professional association for corrections in the United States and abroad. As the ACA webpage explains under the banner “Celebrating More than 135 Years of Global Excellence”:

The American Correctional Association is the oldest, and largest international correctional association in the world. ACA serves all disciplines within the corrections profession and is dedicated to excellence in every aspect of the field. From professional development to certification to standards and accreditation, from networking to consulting to research and publications, and from conferences and exhibits to technology and testing, ACA is your resource and the world-wide authority on corrections.¹⁰¹

Surprisingly, the ACA was late coming to the politics that informed and surrounded the passage of the PREA. Compared to academics, PFM, and SPR, the ACA was comparatively silent on the matter in early hearings.¹⁰² When, on July 21, 2002, Senator Kennedy held hearings on the Prison Rape Reduction Act of 2002, he opened the hearings by recognizing: “An extraordinary coalition of churches, civil rights groups, and concerned citizens have joined together to act on this issue. It is not a liberal issue or a conservative issue. It is an issue of basic decency and human rights. I commend this coalition for its impressive moral leadership.”¹⁰³ The ACA was notably absent from this “moral leadership” as the primary witnesses at the hearings included: Linda Bruntmyer, the mother of a young man who committed suicide after being raped in a correctional facility; Robert Dumand, Clinical Mental Health Director and Counselor and Member of the Board of Advisors for SPR; Mark Earley, PFM; Rabbi Saperstein, Director of the Religious Action Center of Reform Judaism; and the Honorable Frank R. Wolf.

Correctional officials have acknowledged their lack of participation in the coalition most responsible for envisioning, promoting, and ensuring the passage of the PREA. As A.T. Wall, the Director of Corrections for the State of Rhode Island, explained in *Facing Prison Rape*, a 2004 video on the 2003 Prison Rape Act:

Prison rape is an uncomfortable subject. But it does occur and it tarnishes the reputation of the corrections profession. [T]he Prison

101. AM. CORRECTIONAL ASS'N (ACA), <http://www.aca.org/> (last visited Aug. 10, 2010).

102. *Hearing on H.R. 1707 Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the Comm. on the Judiciary*, 107th Cong. (2002), available at <http://www.access.gpo.gov/congress/senate/pdf/107hrg/87677.pdf>.

103. *The Prison Rape Reduction Act of 2002: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. (2002).

Rape Elimination Act was passed with broad support across the political spectrum. When the bill first surfaced it was something that caught the corrections profession unaware. We had not been involved in crafting the bill. However, Congress was interested in knowing how corrections directors felt about the legislation. Fortunately, our core concerns were heard and addressed and this legislation is far more useful to corrections departments now than when it was originally proposed.¹⁰⁴

Understood this way, it is useful to ask: when did corrections officials get involved in the political discourse surrounding the passage of the PREA? What did they contribute to the growing repertoire of meaning related to prison rape? And, how did they influence policy formulation and implementation?

In 2001, the U.S. Department of Justice initiated a Prison Rape Working Group to work with supporters of the legislation and with organizations such as the ACA.¹⁰⁵ At this time, the Justice Department drafted a framework for new standards and worked with the ACA to have them adopted. The new standards are now in effect and representatives from the Department of Justice have reported confidence that they will assist in the prevention of prison rape and the effective handling of prison rape and sexual assault that occurs in prisons and jails.¹⁰⁶

Thereafter, in the final Congressional hearings on the PREA, a correctional official gave testimony before the Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary for the U.S. House of Representatives. Specifically, A.T. Wall spoke on behalf of the Association of State Correctional Administrators, a professional association for the fifty Directors of Corrections and the Administrators of the nation's largest jail systems, and on behalf of the Council of State Governments, which represents all elected and appointed state officials.¹⁰⁷ He said:

We appreciate very much the bipartisan concern regarding sexual assault in correctional facilities. After all, protecting inmates and staff, as well as the public safety, are the core of our correctional mission, a mission I have upheld since I began in this profession some 29 years ago. We in corrections know that sexual assault occurs. We support the objectives of this bill. We want to prevent prison rape, assess the extent to which it occurs, respond swiftly and effectively, and we recognize this bill represents a moderate approach to dealing with the issue. We also recognize that, as corrections officials, we are accountable for the operations of our systems, including the

104. Videotape: Facing Prison Rape, Part 1: The 2003 Prison Rape Act—An Introduction for Correctional Administrators (The Moss Group 2004) (on file with authors).

105. *Id.*

106. *The Prison Rape Reduction Act of 2003: Hearing on H.R. 36 Before the Subcomm. on Crime, Terrorism & Homeland Sec. of the Comm. on the Judiciary*, 108th Cong., 12 (2003), available at http://commdocs.house.gov/committees/judiciary/hju86706.000/hju86706_0f.htm.

107. *Id.*

implementation of the initiatives that come about as a result of this legislation. There is [sic] some provisions that we, as directors of corrections, believe would impede as opposed to assist the efforts to reduce prisoner rape. We are also concerned that the bill does not allocate significant resources to combat prison rape while overlooking another major issue in corrections that has widespread implications for the public safety.¹⁰⁸

In the same hearing, Wall went on to cite concerns about how data collection would unfold, how the review panel would hold public hearings and with what consequence, how national standards would be developed, and how states would be encouraged to comply with mandates of the PREA. He concluded his comments by thanking the committee for allowing him to “present specific, practical changes that will help correctional administrators combat rape.”¹⁰⁹

This testimony exemplifies discourse developed and disseminated by the correctional industry more generally. It reveals a commitment to thinking about rape as an operational issue. Framed as an operational issue, the priority becomes “safety and security” for both staff and inmates alike and concerns about (other) moral imperatives fall to the background, if not disappear completely, when administrators talk about “safe prisons” and how best to create and manage them. More analytically, the political discourse emanating from the field of corrections reflects what others have called “new managerialism.”¹¹⁰ New managerialism rests on the belief that social, economic, and political problems can be solved through effective and efficient management; relatedly, it promotes explicit standards and measures of performance in quantitative terms that set specific targets for the accountability of personnel. In short, new managerialism is a form of disciplinary knowledge that leans heavily on rationality and actuarial thinking.

In this case, actuarial thinking prioritizes the efficient management of personnel and populations based on a statistically grounded risk assessment of the problem at hand. As Simon argues, “the institutional fabric of society is colonized by actuarial practice.”¹¹¹ Thus, trends in policing—and here we argue corrections is a type of policing—reflect a broader growth in actuarialism in the criminal justice system and society at large.¹¹² Just as the rise of actuarial

108. *Id.* at 17-18.

109. *Id.* at 18.

110. CHRISTOPHER POLLITT, *MANAGERIALISM AND THE PUBLIC SERVICES: THE ANGLO-AMERICAN EXPERIENCE* (1990).

111. Jonathan Simon, *The Ideological Effects of Actuarial Practices*, 22 *LAW & SOC'Y REV.* 771, 797 (1988).

112. Feeley and Simon delineate three distinct elements of new penology inextricably tied to new managerialism and actuarialism: (1) it is characterized by a new discourse that emphasizes risk and probability rather than diagnosis and moralistic judgments to make sense of problem populations facing the criminal justice system; (2) there is a discernable move away from an ideology of punishing or normalizing wrongdoers and toward identifying and managing classes of criminals; and (3) the shift in discourse and ideology

practices in law enforcement has led to the displacement of other disciplinary practices related to the allocation and operation of power in society and the organizations that comprise it,¹¹³ here it displaces claims related to human suffering as well as more overtly moralistic claims about Christian duty and human rights.

III. LAWMAKERS, THE LAW, AND THE FEDERAL COMMISSION: DELINEATING THE PROBLEM AND SPECIFYING INSTITUTIONAL RESPONSES

As key extralegal players in the policy community under study, prison rape survivors, academics, PFM, SPR, and the correctional industry (i.e., the NIC and the ACA) have, each in their own way, contributed to the development of a political discourse and policy context. Individually and collectively, they have shaped the passage and the content of the PREA as well as the content and fate of the Commission's national standards. This reveals the utility of Garland's observation about the lawmaking process as it relates to criminal justice: "our tendency to focus upon legislators, politicians and policy makers as the prime movers in bringing about penal change may appear to be a realistic focus on power holders and on the arena in which power is exercised, but it is somewhat un-sociological nevertheless."¹¹⁴ Our analysis thus far is sociological and it extends to lawmakers themselves.

Often lawmakers are easily seen as the final levers of social change. This is the case with the politics of prison rape and attendant lawmaking. They are best seen as political actors operating within a structured field of forces and attendant frames to which they have responded and upon which they have left their imprint. But what, empirically speaking, is their imprint? And, relatedly, what has their imprint meant for the actual implementation of proposed reforms around prison rape?

A. Lawmakers and the Content of the PREA

An examination of the PREA *as legislation* reveals the central discourse and strategies of lawmakers. The primary way in which lawmakers have

identified above has led to the development of a new set of practices that sustain the criminal justice system, including the intensification of commitments to measuring and assessing risk via the use of statistical/actuarial methods. Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449 (1992); see also Jonathan Simon & Malcolm Feeley, *True Crime: The New Penology and Public Discourse on Crime*, in PUNISHMENT AND SOCIAL CONTROL: ESSAYS IN HONOR OF SHELDON MESSINGER (1995). For a succinct review of these distinctions, see Mona Lynch, *Waste Managers? New Penology, Crime Fighting, and Parole Agent Identity*, 32 LAW & SOC'Y REV. 839 (1998).

113. Cf. Mona Lynch, *supra* note 112.

114. David Garland, *Beyond Culture of Control*, 7 CRITICAL REV. INT'L SOC. & POL. PHIL. 16, 181 (2004).

responded to the criminal justice policy context in which they find themselves, as described in previous sections of this analysis, is by delineating an analysis of incidents and effects of prison rape in federal, state, and local institutions; defining prison rape as a public health and public safety issue; and providing a cost-effectiveness argument for the unprecedented federal expenditure on prison rape. These legal articulations, in and of themselves, configure prison rape in now-familiar ways as well as in ways that have not been heretofore promoted by a stakeholder in any systematic or consequential way.

Taking up where academics have yet to reach agreement, Section 2 of the PREA acknowledges that “insufficient research has been conducted and reported on prison rape,” but nonetheless confirms the “epidemic character of prison rape.”¹¹⁵ Embracing a “conservative” estimate, the PREA claims “at least 13% of the inmates in the United States have been sexually assaulted in prison.”¹¹⁶ According to the PREA, “nearly 200,000 inmates now incarcerated have been or will be the victim of prison rape. The total number of inmates who have been sexually assaulted in the past 20 years likely exceeds 1,000,000.”¹¹⁷ In short, the PREA establishes the magnitude of harm for the nation; indeed, the “13%” is often quoted by the press, activists, and other policymakers as “the number” granting empirical credibility to the problem of prison rape.¹¹⁸

Also without reference to any particular research, the PREA identifies a subpopulation of individuals who are thought to be most at-risk for sexual victimization: inmates with mental illness, young first-time offenders, and juveniles incarcerated in adult facilities.¹¹⁹ In other words, those who might be considered the most vulnerable in prison in general are identified as the most vulnerable to sexual assault in prison in particular. However, no claim is made about the racial or gendered nature of sexual assault in detention facilities.

For federal lawmakers, and later state legislators, the “associated impacts” connected to the alarming rates of prison rape provide the basic rationale for

115. Prison Rape Elimination Act of 2003, Pub. L. No. 108-79, Stat. 972 (codified as amended at 42 U.S.C. 15601 § 2).

116. *Id.*

117. *Id.*

118. See, e.g., Lovisa Stannow & Melissa Cortez Goemann, *Virginia Should Stand for Children's Safety*, RICHMOND TIMES-DISPATCH (Jan. 11, 2010), http://www2.timesdispatch.com/news/2010/jan/11/ed-juvabuse11_20100110-165405-ar-20187/; Cathy Wilson, *Joke's Over: Prison Rape Is a Serious Problem, Needs Answers*, OPENSALON.COM (May 12, 2010, 2:47 PM), http://open.salon.com/blog/isandwich/2010/05/12/jokes_over_prison_rape_is_a_serious_problem_needs_answers_1; Jacqueline Sullivan, *The Risks Juveniles Face When They Are Incarcerated with Adults*, PRISON TALK.COM (Oct. 10, 2004, 3:00 PM), <http://www.prisontalk.com/forums/showthread.php?t=83090>; Janet Anderson, Letter from the Editor, *Prison Rape and Sexual Coercion Behind Bars*, 7 RES. & ADVOC. DIGEST (May 2005), <http://www.wcsap.org/advocacy/PDF/PrisonRape052005.pdf>, at 1; *New Government Report on Sexual Abuse of Inmates*, TALKLEFT.COM (Aug. 26, 2010, 1:56 PM), <http://www.talkleft.com/story/2010/8/26/145750/181>.

119. Garland, *supra* note 114.

legislation like the PREA. The associated impacts are twofold: public health and public safety. With regard to the former, recognizing that the incidence of diseases known to be transmitted through sexual contact are especially high among those in detention facilities, the PREA defines prisoner rape as a threat to public health in general. As Section 2 states:

HIV and AIDS are major public health problems within America's correctional facilities. In 2000, 25,088 inmates in Federal and State prisons were known to be infected with HIV/AIDS. In 2000, HIV/AIDS accounted for more than 6 percent of all deaths in Federal and State prisons. Infection rates for other sexually transmitted diseases, tuberculosis, and hepatitis B and C are also far greater for prisoners than for the American population as a whole. Prison rape undermines the public health by contributing to the spread of diseases, and often giving potential death sentences to its victims.¹²⁰

Prison rape, therefore, is understood to "undermine the public health" by contributing to the spread of sexually transmitted diseases.

Another associated impact is the endangerment of public safety. According to the PREA, prison rape is a threat to public safety in at least three ways. First, "prison rape endangers the public safety by making brutalized inmates more likely to commit crimes when they are released—as 600,000 inmates are each year."¹²¹ Second, "the frequently interracial character of prison sexual assaults significantly exacerbates interracial tensions, both within prisons and, upon release of perpetrators and victims from prison, in the community at large."¹²² Third, "prison rape increases the level of homicides and other violence against inmates and staff, and the risk of insurrections and riots."¹²³

Finally, the PREA puts forth an analysis of prison rape that is anchored in a concern with "cost effective" and efficient state policy, which will also characterize the state's concern about the content and implementation of the Commission's national standards. For example, the PREA warns: "victims of prison rape suffer severe physical and psychological effects that hinder their ability to integrate into the community and maintain stable employment upon release from prison. They are thus more likely to become homeless and/or require government assistance."¹²⁴ More broadly, it explains:

States that do not take basic steps to abate prison rape by adopting standards that do not generate significant additional expenditures demonstrate such indifference [i.e., the "deliberate indifference" found in *Farmer v. Brennan*, 511 U.S. 825 (1994)]. Therefore, states are not entitled to the same level of federal benefits as other states.¹²⁵

Furthermore: "The high incidence of prison rape undermines the effectiveness

120. *Id.* at 973.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

and efficiency of United States government expenditures through grant programs such as those dealing with health care; mental health care; disease prevention; crime prevention; investigation; prison construction, maintenance, and operation; race relations; unemployment and homelessness.”¹²⁶

As English and Heil conclude, the PREA contains a rationale for addressing prison rape that details some of the suspected and documented societal consequences.¹²⁷ From the legislators’/law’s point of view, the consequences of prison rape include: increasing a victim’s likelihood of committing a crime when released, decreasing a victim’s likelihood of stable employment and positive integration into the community when released, increasing violence and homicides against staff and inmates, and increasing interracial tension both in prisons and in the broader community. Consistent with this focus on how prison rape affects not just the inmate, but also the entire community within which the inmate is embedded, the PREA contains a provision to provide funding to “safeguard communities.”¹²⁸ This is a significant departure from the discourse put forth by other stakeholders in the policy domain. In simple terms, a human rights issue is transformed into a community safety issue.

B. The PREA Commission and the Development of National Standards

As others have made clear, lawmaking includes both the passage of a law and its implementation.¹²⁹ If the passage and content of the PREA constituted a watershed moment in the politics of prisoner rape and policy about rape in prison, then the PREA Commission’s national standards spoke to the implementation of extant legislation. As Just Detention International described it:

Almost six years after the passage of the Prison Rape Elimination Act (PREA), the binding national standards mandated by the law were released on June 23, 2009. These new measures seek to prevent sexual abuse behind bars, and ensure that—when preventative efforts have failed—appropriate action is taken in the aftermath of the assault. As such, they are a milestone in the effort to end prisoner rape. These standards, however, together with the detailed report accompanying them represent something else as well: a dramatic shift in the way government officials speak about sexual abuse in U.S. correctional facilities.¹³⁰

126. *Id.*

127. Kim English & Petty Heil, *Prison Rape: What We Know Today*, in 30 CORRECTIONS COMPENDIUM 1, 1-5, 42-44 (2005).

128. 42 U.S.C. § 15605(b)(2) (2006).

129. JENNESS & GRATTET, *supra* note 44; Grattet & Jenness, *supra* note 12; Grattet & Jenness, *supra* note 5.

130. *A Dramatic Shift in the Debate: Prisoner Rape Is Not Inevitable*, JUST DETENTION INT’L (July 2009), http://www.justdetention.org/en/actionupdates/AU0709_web.pdf, at 1.

This “dramatic shift” was meted out by a nine-member bipartisan commission established by the passage of the PREA in 2003.¹³¹ The commission was charged with the twofold task of “carry[ing] out a comprehensive legal and factual study of the penological, physical, mental, medical, social, and economic impacts of prison rape in the United States,” and—informed by the results of that study—with crafting a set of “recommended national standards for enhancing the prevention, reduction, and punishment of prison rape.”¹³² In June 2004, President Bush appointed Federal District Judge Reggie B. Walton, a former Associate Director of the Office of National Drug Control Policy in the Executive Office of the President, former Senior White House Advisor for Crime under George H.W. Bush, and Chair of the National Prison Rape Elimination Commission (NPREC).¹³³

As mandated by Congress,¹³⁴ the NPREC undertook an investigation into the causes, costs, and correlates of prison rape. Toward that end, the Commission’s activities included: reviewing and identifying deficits in the existing literature on sexual violence in carceral settings; commissioning studies aimed at generating new knowledge on the subject; holding public hearings generating testimony for over one hundred witnesses; convening “expert committees comprising stakeholders with broad correctional expertise” to inform the content of standards; and consulting with a broad variety of individuals and interested groups of criminal justice professionals, prisoners and their advocates, and various others.¹³⁵ “Throughout the process,” noted

131. The Commission was called the National Prison Rape Reduction Commission in the law, but came to be referred to as the National Prison Rape Elimination Commission (NPREC).

132. Prison Rape Elimination Act of 2003, Pub. L. No. 108-79, § 2, 117 Stat. 972, 972 (codified as amended at 42 U.S.C. § 15601 (2006)).

133. Others appointed to the Commission included: James Aiken, an expert on prison conditions with more than thirty-three years of experience in correctional administration, facility operations and management, inspection and assessment of facility performance, and technical-assistance consulting; Gus Puryear, Executive Vice President, General Counsel, and Secretary of Corrections Corporation of America; Jamie Fellner, Senior Counsel of the U.S. Program of Human Rights Watch; Pat Nolan, President of Justice Fellowship, the public-policy arm of Chuck Colson’s Prison Fellowship Ministries; Brenda V. Smith, a Professor at the American University, Washington College of Law, whose research interests focus on women in conflict with the law and the sexual abuse of individuals in custody; Cindy Struckman-Johnson, a Professor of Psychology at the University of South Dakota who, along with David Struckman-Johnson, has researched sexual coercion in prisons since 1994; and John A. Kaneb, Chair of the Board of Directors of HP Hood LLC, President of The Catamount Companies, and a partner in the Boston Red Sox baseball franchise. *The Commissioners’ Biographies*, NAT’L PRISON RAPE ELIMINATION COMMISSION, http://nicic.gov/Downloads/General/prea_commission_members.pdf (last visited Dec. 14, 2010).

134. *Overview*, NAT’L PRISON RAPE ELIMINATION COMMISSION [hereinafter *NPREC Overview*], <http://www.cybercemetery.unt.edu/archive/nprec/20090820154816/> <http://nprec.us/publication/> (last visited Dec. 14, 2010).

135. NPREC REPORT, *supra* note 3.

Commission Chair Walton, “corrections leaders, survivors of sexual abuse, health care providers, researchers, legal experts, advocates, and academics shared their knowledge, experiences, and insights about why sexual abuse occurs, under what circumstances, and how to protect people.”¹³⁶

The lengthy, multi-pronged NPREC study led to the distillation of nine core findings that informed the Commission’s development of model standards for identifying and combating the problem of sexual abuse in carceral settings. These notable findings, presented as fact in the Report’s Executive Summary, include: (1) protecting prisoners from sexual violence remains a challenging task; (2) carceral sexual violence is not inevitable and correctional leadership can create a culture that promotes safety rather than abuse; (3) some prisoners are more vulnerable to victimization than others and, relatedly, corrections could—and must—do more to identify and protect vulnerable populations; (4) understanding why sexual abuse in carceral settings occurs requires a considerable degree of internal monitoring and external oversight that is largely nonexistent in corrections today; (5) reporting procedures must be improved; (6) currently, correctional facilities fail to ensure access to medical and mental health care for victims that would minimize the trauma of sexual abuse; (7) juveniles in confinement are much more likely than incarcerated adults to be sexually abused, particularly when confined with adults; (8) individuals under correctional supervision in the community, who outnumber prisoners by more than two to one, are at risk of sexual abuse; and (9) a large and growing number of detained immigrants are at risk of sexual abuse, thus their heightened vulnerability and unusual circumstances require special interventions.¹³⁷ Importantly, other considerations that significantly shaped the initial set of recommended standards included a Congressional directive to “seriously consider restrictions of cost, differences among systems and facilities, and existing political structures”¹³⁸ and the overarching notion that “agency and facility heads should retain the flexibility, responsibility, and authority to establish systems, practices, and protocols that will eliminate sexual abuse in their confinement facilities.”¹³⁹

Formulated with these findings and considerations in mind, initial drafts of the NPREC standards were modified in accordance with “extensive feedback” solicited by the Commission from a cross-section of correctional officers and officials at eleven facilities across the nation.¹⁴⁰ To provide for even more feedback and input, drafts of the NPREC standards were released for a sixty-two day public comment period. According to the Commission, during this time period the Commission received and “reviewed feedback from

136. *Id.*

137. *See id.* (providing a complete listing of the Commission’s core findings).

138. *Id.*

139. *Id.*

140. *NPREC Overview*, *supra* note 134.

more than 225 organizations and individuals and, in response, made significant substantive changes to the content and format of the standards.”¹⁴¹ The Commission explained the impact of the public comment period on the ultimate shape of the recommended standards published in the final report, the NPREC Standards and Report Development:

All public comments . . . have been systematically reviewed by staff and by each individual Commissioner. In response to the significant additional input received during the public comment period, the standards that accompany the Commission’s final report have been significantly and substantively changed from the draft version of the standards released during public comment.¹⁴²

In particular, the Commission noted:

One outstanding area of concern was the anticipated cost of some changes required by the standards as originally drafted. Although concerns about the cost are understandable, Congress, state legislatures, and county and city officials must provide adequate resources to ensure safe correctional and detention facilities. The Commission acknowledges that this is a formidable task, especially in the current economic climate. From the outset we have been mindful of the statutory prohibition against recommending standards that would impose substantial additional costs compared to the current expenditures. With the assistance of information provided during the public comment period, the Commission attempted to further limit potential new costs and to shape realistic standards that represent what is minimally required to meet Congress’ mandate to eliminate sexual abuse in confinement.¹⁴³

Tellingly, what was or was not “realistic” was, in the main, shaped by correctional officials with native knowledge of what can and cannot be done when running a prison. Chair Walton specifically noted the Commission’s indebtedness to “early reformers—corrections professionals who have been working to prevent sexual abuse in their facilities since long before the passage of the Prison Rape Elimination Act and who continue to do so.”¹⁴⁴

Also in the public comment period, concerns expressed by various stakeholders led to a number of changes in the standards initially identified by the NPREC. For example, initial drafts of the NPREC standards required “continuous direct sight and sound supervision of inmates necessary to prevent sexual abuse.”¹⁴⁵ As Shay observed: “Corrections officials objected to this rule

141. *About NPREC*, NAT’L PRISON RAPE ELIMINATION COMMISSION, <http://www.cybercemetery.unt.edu/archive/nprec/20090820154820/http://nprec.us/home/about/> (last visited Aug. 10, 2010).

142. *Standards*, NAT’L PRISON RAPE ELIMINATION COMMISSION [hereinafter *NPREC Standards*], <http://www.cybercemetery.unt.edu/archive/nprec/20090820154845/http://nprec.us/publication/standards/> (last visited Aug. 10, 2010).

143. NPREC REPORT, *supra* note 3.

144. *NPREC Standards*, *supra* note 142.

145. Giovanna Shay, *Ad Law Incarcerated*, 14 BERKELEY J. CRIM. L. 329, 364 (2009) (citing NATIONAL PRISON RAPE ELIMINATION COMMISSION, [PROPOSED] STANDARDS FOR THE

as overly burdensome, and prisoners' rights advocates commented that the supervision need not literally be continuous. Accordingly, the standard was changed to require supervision 'necessary to protect inmates from sexual abuse.'"¹⁴⁶

In contrast to this type of accommodation, other concerns that were addressed more clearly reflected outside interests. For example, concerns expressed by Lesbian, Gay, Bisexual, and Transgender (LGBT) advocates during the periods of public commentary on proposed NPREC standards shaped the final set of standards published in the Commission's report.¹⁴⁷ Shay notes:

[T]he finalized standards prohibit the automatic segregation of LGBT prisoners, as well as the isolation of vulnerable prisoners, an issue that the original draft standards had addressed in the discussion section [T]he final proposed standard on screening lists specific pieces of information that are to be elicited at intake (*e.g.*, the inmate's sexual orientation and perception of vulnerability), a suggestion made by advocates for LGBT prisoners. Also in response to comments from LGBT advocates, the final proposed standards use the term "gender non-conforming" to refer to persons who may not identify as LGBT but whose gender expression does not match gender stereotypes. Indeed, the terms "gender identity," "gender non-conforming," and "transgender," which had been absent from the original draft standards, were included in the definition section of the final proposed standards. In a gain for the transgender community, the discussion accompanying the final proposed standards suggests that corrections officials refrain from automatically assigning inmates housing based on their birth gender or genital status, language likely prompted by suggestions.¹⁴⁸

Clearly, in some ways—like with regard to the treatment of LGBT prisoners—outside interests prevailed.

On June 23, 2009, six years after it first convened, the Commission released its final recommendations for a set of national standards to combat prison rape in a more than 250-page report presented to the President, Congress, the United States Attorney General, the Secretary of Health and Human Services, and other federal and state officials.¹⁴⁹ As described above,

PREVENTION, DETECTION, RESPONSE, AND MONITORING OF SEXUAL ABUSE IN ADULT PRISONS AND JAILS, Standard PP-1 at 18 (2008)).

146. *Id.*

147. *Id.*

148. *Id.* at 365-66.

149. According to stipulations included in the PREA, the U.S. Attorney General, within one year of receiving the Commission's recommendations, must adopt and promulgate standards for the detection, prevention, reduction, and punishment of prison rape. The set of standards adopted by the Attorney General will apply to the Federal Bureau of Prisons immediately upon issue, and compliance by facilities under its jurisdiction will be mandatory. States' officers, on the other hand, will not be bound by the national standards. However, the states that fail to adopt and comply with the standards adopted by the Attorney

the NPREC study generated input from a broad array of stakeholders and the representations of prison rape contained in the Commission's Report reflect the diversity of the voices that informed it. Echoing the way in which the stakeholders previously discussed in this Article frame prison rape, the introduction to the NPREC Report construes prison rape as a bricolage composed of issues related to human rights violations, constitutional rights violations, public safety concerns, risk management challenges, and threats to institutional security:

Sexual abuse of people in confinement violates their basic human rights, impedes the likelihood of their successful reentry into the community, and violates the Government's obligation to provide safe and humane conditions of confinement. No prison sentence, regardless of the crime, should ever include rape. A core priority of any confinement facility must be safety, which means protecting the safety of all—the public, the staff, and the inmate population. In recognition of this, Congress formed the National Prison Rape Elimination Commission . . . to develop national standards that will help eliminate prison rape and other forms of sexual abuse in confinement.

The Prison Rape Elimination Act (PREA) of 2003 requires agencies to comply with the national standards proposed by the Commission and approved and promulgated by the Attorney General to eliminate sexual abuse in confinement. Fundamental to an agency's success will be its commitment to zero tolerance of sexual abuse—a recognition that sexual abuse in confinement facilities is unacceptable under any circumstances and as dangerous a threat to institutional security as an escape or homicide.¹⁵⁰

As is the case with the entire report, the set of recommended standards reflects a plethora of interests such that, at the end of the day, it is impossible to argue that only one stakeholder dominated the race to influence the NPREC recommendations.

Nonetheless, three important considerations are empirically and analytically telling from the point of view of the operation of the endogeneity of law as it relates to prison reform. First, the Commission's recommendations, by and large, authorize correctional officials to assume responsibility for determining and monitoring the parameters of their own compliance with the NPREC standards. Each of the Commission's standards is supplemented with an "assessment checklist designed as a tool for agencies and facilities to self-assess and track their progress toward meeting the standards."¹⁵¹ Agency heads, facility heads, or PREA coordinators are expected to complete the self-assessment checklists; however, answering "Yes" to each checklist item is not

General risk losing 5% of federal grant funds provided for correctional purposes. Prison Rape Elimination Act of 2003, Pub. L. No. 108-79, § 2, 117 Stat. 972, 972 (codified as amended at 42 U.S.C. § 15601 (2006)).

150. NPREC REPORT, *supra* note 3.

151. *Id.*

mandatory.¹⁵² While meeting the requirement in each standard is mandatory, a correctional official who answers “No” to a checklist item may choose to explain how a particular facility meets the standard using a different process or procedure.¹⁵³

Second, while the standards call for periodic audits of correctional facilities by independent personnel, correctional agencies will employ PREA coordinators charged with facilitating compliance. These coordinators would do so by overseeing the agency’s efforts to comply with the standards; writing policy in accordance with the intent of the PREA; overseeing training, screening, investigation, and data collection procedures; and providing access and materials to auditors. Relatedly, the standard requiring independent audit is “designed to ensure that the audit process meets minimum audit standards while providing appropriate flexibility to the subject facility or agency regarding the identity of the auditor.”¹⁵⁴ By the time national standards enter the picture, corrections—as an industry and a set of actors and practices—largely “owns” the implementation of the law. Even while required to be responsive to external review, in many ways corrections is authorized to determine who will serve as reviewers and delineate the process whereby the review will unfold.

Third, in the summer of 2010 the U.S. Attorney General elected to forego approving the Commission’s standards prior to the statutory deadline for doing so.¹⁵⁵ The delay in approving the standards is attributed to two concerns: (1) a cost projection study, *The Prison Rape Elimination Act Cost Impact Analysis*, prepared for the Department of Justice’s Office of Justice Programs,¹⁵⁶ and (2) deference to concerns raised by correctional officials that implementing the reforms codified in the national standards would not only be cost prohibitive but would also interfere with meeting other operational goals closely aligned with safety and security. Clearly, administrative deference to correctional budgets and the judgment of correctional officials charged with implementing

152. *NPREC Standards*, *supra* note 142.

153. *Id.*

154. NPREC REPORT, *supra* note 3.

155. Letter from Eric Holder, *supra* note 4.

156. BOOZ, ALLEN & HAMILTON, DEP’T OF JUSTICE, PRISON RAPE ELIMINATION ACT (PREA): COST IMPACT ANALYSIS; FINAL REPORT 1 (2010). The report stated:

[T]his document is the final report of the Prison Rape Elimination Act (PREA) Cost Impact Analysis, an effort to assist the Bureau of Justice Assistance (BJA) in the review of national standards published by the National Prison Rape Elimination Commission (NPREC) on June 23, 2009. This document assesses the costs specific to each standard, assesses variations within cost estimates, and addresses a comprehensive view of implementation and compliance on a national level. It covers five sectors of correctional operations: state prison systems, state and local juvenile facilities, community corrections, and local/county jails, police lockups.

Id.

the proposed reforms was decisive.

The fact that the U.S. Attorney General elected to forego adopting the national standards put forth by the Commission in 2010 means the national standards endorsed by over sixty organizations, including progressive advocacy organizations (e.g., SPR) and faith-based organizations (e.g., PFM), remain—at least for the time being—recommendations rather than legally binding public policy that necessarily shapes the management of prisons. For example, the Bureau of Prisons and other federal agencies are not bound by the standards. Likewise, states do not have to establish compliance or risk losing five percent of their federal corrections-related funding. Without these enforcement mechanisms in place, potential instrumental effects of the PREA are effectively muted, if not retarded, at this point in time. Analytically speaking, just as judicial deference looms large in Edelman's conceptualization of the operation of the endogeneity of law,¹⁵⁷ here administrative deference to corrections proved decisive in prison reform. This is consistent with a long history of judicial deference to corrections.¹⁵⁸

CONCLUSION

The policy community, attendant discourse, law, and policies analyzed in this Article are historically significant because they have generated recognition of a new type of social problem: the problem of prison rape. As Ristoph explained in an article aptly titled *Prison and Punishment: Sexual Punishments*, "For much too long the general attitude toward prison rape was: 'That's just part of the penalty; those criminals deserve whatever they get in prison,' or, only slightly better, 'It's too bad such rapes occur, but there's nothing we can do about it.'"¹⁵⁹ In sharp contrast, this Article reveals that historically developed constructions of prison rape are under attack in the modern moment. Prisoners' rights advocates on the left and the right have labored to show that prison rape is a problem that can and should be remedied by state action. As a result, state action has been taken, most visibly in the form of the PREA and the development of national standards by the National Prison Rape Elimination Commission.

The multitude of claims and discursive themes put forth in survivors' testimonials, advanced by moral entrepreneurs, and codified in law have forced new ways of thinking about prison rape. In first-person testimony given by survivors, the lived experience of prison rape has been presented in a way that emphasizes the corporeality of rape, complete with accompanying physical and psychological horror, long-term mental and physical health consequences, "lost

157. Edelman, *Legality and the Endogeneity of Law*, *supra* note 16.

158. *Cf.* MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS* (1998).

159. Alice Ristoph, *Prison and Punishment: Sexual Punishments*, 15 *COLUM. J. GENDER & L.* 139, 140 (2006).

manhood,” and the predictable failure of correctional officials and the general public to respond. Showcasing the intersection of rape, sexuality, gender, and the conditions of confinement, first-person accounts have been instrumental in rendering prison rape visible to policymakers and the public alike.¹⁶⁰ This constitutes a crucial step in the initial identification of the problem of prisoner rape and in the long-term process of lawmaking and implementation.

Moving beyond the lived experience, moral entrepreneurs have configured prison rape in decidedly political terms (as well as corporeal, emotional, and psychological ones), even as there are disagreements over the nature of the problem, the motivation for redress, and appropriate remedies. Academics routinely treat prison rape as a problem in need of definition and quantification as they debate the severity of the problem and offer assessments of its epidemiological parameters. PFM presents prison rape as an affront to Christian morality and an occasion to engage in restorative change through a relationship with Jesus Christ. SPR constructs prison rape as torture that is best seen as a (secular) human rights issue. The correctional field addresses prison rape as a threat to the safe, secure, efficient, and constitutional operation of prisons, as well as public safety more generally. These claims coalesce around a call for the complete elimination of prison rape, albeit with very different justifications underlying the call. The elimination of prison rape, in turn, implicates corrections as the domain most proximate to the problem and thus most relevant to effective reform.

Not all claims have found equal footing in the marketplace of ideas about prison rape or federal law more particularly. Despite the development and dissemination of a plethora of claims put forth by non-state actors, in the legal arena prison rape is reconfigured in a way that most aligns with the language of corrections. Specifically, graphic discussion of the bodily experience of rape and attendant physical and psychological harm, academic debates about the prevalence of the problem, expressed commitments to crime management through biblically-based reform aimed at inmates and our communities, and the secular vision of legal torture and human rights violations fade as concerns about risk management, public health and public safety, and cost reduction become paramount. What is paramount is the language of corrections.

In some ways, it is not surprising that the PREA magnifies and codifies claims about public health, public safety, and cost-effectiveness. After all, the interest groups that have traditionally had the most influence on criminal justice policy are those that represent professionals and others involved in the operation of the criminal justice system—police associations, bar associations, judicial organizations, and correctional associations.¹⁶¹ In this case, claims related to correctional operations and their connection to community welfare

160. See, e.g., HUMAN RIGHTS WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISONS (2001).

161. Grattet & Jenness, *supra* note 12.

have trumped claims related to pain and suffering, human rights violations, and the importance of relying upon faith-based initiatives to solve social problems. In her analysis of the content of the PREA, Ristoph rightfully concluded, “recent efforts to address sexual assault in prisons have not centered on the Eighth Amendment, but on the development of better prison policies.”¹⁶²

The predominance of correctional language and attendant policy remedies in the legal codification of prison rape as a social problem reflects the endogeneity of law. The content and meaning of law and attendant social policy, most notably in the form of national standards for the way in which corrections should deal with prison rape, is (largely) determined within and by the social/organizational field it is designed to regulate.¹⁶³ In this case, the PREA was initiated, formulated, and promoted by non-state actors; however, it ultimately took legal shape at the hands of correctional officials who represent the very organizations—detention facilities, including prisons and jails—that the PREA seeks to expose, regulate, and target for systematic reform. Despite entering the political discourse late in the game, the organizational field in receipt of the regulation—the correctional industry—has, to date, imposed constructions of prison rape, remedies for reform, and the rules of compliance on the law and on the national standards developed by the NPREC. Even more, to date the standards have been effectively nullified as legally binding as a result of the U.S. Attorney General deferring to concerns raised by correctional officials, including the cost of implementing the national standards, when he failed to adopt them by the statutory deadline in the summer of 2010. To quote Edelman, “as the law becomes managerialized,¹⁶⁴ the logic of efficiency and rationality will often trump the logic of rights and justice . . . [t]he rhetorical reconstruction of legal ideals occurs as managerial rhetoric reframes the goals of law in ways that conform to managerial objectives.”¹⁶⁵ In this case, the law conforms to established correctional models of governance and discourse, which is informed by a highly institutionalized penology. Although this analysis does not present evidence of “judicial deference”¹⁶⁶ as a venue for the endogeneity of law, there is considerable evidence that “corrections deference”—a form of state deference and a mechanism of endogeneity—looms large and has proven consequential in criminal justice reform.

162. Alice Ristoph, *supra* note 159, at 175.

163. Edelman, Uggen & Erlanger, *supra* note 16.

164. Edelman, *Legality and the Endogeneity of Law*, *supra* note 16, at 199 (“The managerialism of law, then, is a process by which the implementation or conception of law is influenced by managerial values or goals.”).

165. Edelman, *Law at Work*, *supra* note 16.

166. Edelman, Uggen & Erlanger, *supra* note 16.

