THE "TURNING-OUT" OF BOYS IN A MAN'S PRISON: WHY AND HOW WE NEED TO AMEND THE PRISON RAPE ELIMINATION ACT

JAMES E. ROBERTSON*

Ian Manuel was sentenced to die in prison for a non-homicide that occurred when he was 13. When he arrived at prison processing in Central Florida, he was so small that no prison uniform fit him. "He was scared of everything and acting like a tough guy as a defensive mechanism," said Ron McAndrew, then the assistant warden. "He didn't stand a chance in an adult prison."[1]

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INTRODUCTION

As a boy entering a prison housing adults in 1978, T.J. Parsell faced long odds against living a dignified life behind bars. He came up way short; within

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* Distinguished Faculty Scholar and Professor of Corrections, Minnesota State University. Professor Robertson received law diplomas from Oxford University and, earlier, from Washington University in St. Louis. He earned his undergraduate degree, with election to Phi Beta Kappa, from the University of Washington in Seattle. He is editor-in-chief of the *Criminal Law Bulletin* and a contributing editor of the *Correctional Law Reporter* and the *Criminal Justice Review*.

1. EQUAL JUSTICE INITIATIVE, CRUEL AND UNUSUAL: SENTENCING 13- AND 14-YEAR-OLD CHILDREN TO DIE IN PRISON 12 (2007), *available at* http://www.eji.org/eji/files/20071017cruelandunusual.pdf.

twenty-four hours into his confinement in Michigan State Prison, four inmates repeatedly raped the once defiant boy prisoner. After they had their way with the seventeen-year-old, they flipped a pink token to determine who "owned" him.[2]

Earlier, a prison psychologist had told him the facts of life for boy prisoners:

> "A pretty boy like you," the psychologist added, "you'll need to get a man."
> "F . . . *that*!" I said, my eyes darted to the floor. I could feel my face burning.
> "If you don't get a man, you'll be open game."
> "They'll have to kill me first," I said, sitting up in my chair.
> "That can be arranged," he said, calmly.[3]

By the last count, some 8500 boys under age eighteen stand in the shoes of T.J. Parsell: they too were sentenced to serve "adult time" in county jails and state prisons.[4] Like Parsell, they entered a prison subculture that equates sexual aggression with masculinity, and weakness and passivity with femininity.[5] Unlike Parsell, however, they reside in a prison that Congress promised will exercise "zero tolerance" of sexual assault when it enacted the Prison Rape Elimination Act (PREA).[6]

Will the next generation of boys confined in a man's prison share Parsell's fate? This Article argues that as things stand now, many of them will serve out their sentences as neither boys nor men. Like Parsell, these unfortunates will have their gender socially reconstructed by being "turned out"—coerced into having sex, which supposedly can "[change] a person's sexual habits from heterosexual to homosexual."[7] As Parsell learned, a new inmate who cannot or

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2. T.J. PARSELL, FISH: A MEMOIR OF A BOY IN A MAN'S PRISON 86-94 (2006).

3. *Id.* at xi.

4. *See infra* notes 13-14 and accompanying text (delineating the number of boy prisoners). The term "boy prisoners" designates men under age eighteen at the commission of their offenses who were tried as adults and sentenced as adults to jails, state prisons, or federal prisons.

5. *See infra* notes 84-116 and accompanying text (discussing the social construction of boys as punks).

6. Prison Rape Elimination Act of 2003, 42 U.S.C. § 15602(1) (2006) (formerly the Prison Rape Reduction Act of 2002).

7. WILLIAM K. BENTLEY & JAMES M. CORBETT, PRISON SLANG: WORDS AND EXPRESSIONS DEPICTING LIFE BEHIND BARS 60 (1992); *see also* HUMAN RIGHTS WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISONS 17 (2001), *available at* http://www.hrw.org/legacy/reports/2001/prison/report.html ("Prisoners refer to the initial rape as 'turning out' the victim."). David, a victim of repeated prison rapes, described his sexual "reorientation" as follows:

> I am a very confused person now, sexually that is, because I am insecure about what is naturally combined with what I've been through and seen with my own eyes . . . . I am attracted to younger guys because of their innocent look and naïve personalities, more so because it's that very innocence that I was robbed of.

VICTOR HASSINE, LIFE WITHOUT PAROLE: LIVING IN PRISON TODAY 74 (Thomas J. Bernard & Richard McCleary eds., 1996).

will not protect his manhood becomes a "punk,"[8] a non-man of sorts and surely a humiliating, scorned gender assignment.[9]

Boys sentenced to a man's prison deserve better. Toward that end, this Article drafts an amendment to the PREA designed to offset the underprotection of boy prisoners that the Article attributes to the Eighth Amendment[10] and the extant provisions of the PREA. Part I of this Article explores why and how juvenile boys are transferred to adult court for trial and, upon conviction, sometimes incarcerated with adult males. After calculating the odds of a boy prisoner being sexually assaulted, Part II describes the process of "turning" boy prisoners into punks. Part III contends that the United States Supreme Court has left boy prisoners underprotected. After critiquing the PREA and the standards proposed by the United States Department of Justice for implementing its goal of "zero tolerance" of prison rape, Part IV concludes that the Act will also leave boy prisoners underprotected from the subcultural forces that "turn" inmates. Part V advances a remedy for these underprotected boys, a "turn-out" amendment to the PREA. The proposed amendment (1) creates a new federal cause of action providing for strict liability when boys experience sexual abuse and sexual harassment in a man's prison; (2) exempts boys bringing this cause of action from two key provisions of the Prison Litigation Reform Act;[11] and (3) mandates the appointment of a guardian ad litem for every boy prisoner who would monitor his welfare and have standing to initiate and represent his interests in litigation.

I. BOYS DOING ADULT TIME

> Since being incarcerated in an adult prison, this boy ["Brown Sugar," who was age fifteen when he entered the adult criminal justice system] has been repeatedly raped. He was forced to prostitute himself in exchange for protection from physical beatings and sexual assault by

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8. *See* PARSELL, *supra* note 2, at 57; Terry A. Kupers, *Rape and the Prison Code*, *in* PRISON MASCULINITIES 111, 115 (Don Sabo et al. eds., 2001) ("A prisoner is either a 'real man' who subdues and rapes an adversary, or he is a 'punk.'"); Christopher D. Man & John P. Cronan, *Forecasting Sexual Abuse in Prison: The Prison Subculture of Masculinity as a Backdrop for "Deliberate Indifference,"* 92 J. CRIM. LAW & CRIMINOLOGY 127, 156 (2001) ("The 'punk' is usually a heterosexual male who submits to sexual acts, after initial resistance and eventual force. These inmates are turned into 'punks' after rape (often gang rape), convincing threat of rape, or intimidation. Once a prospective 'punk' is raped, other inmates promptly brand him a continual target for future sexual attack." (internal citations omitted)).

9. *See infra* note 110 and accompanying text (describing "punks" as persons at the bottom of the prison gender order). Punks can be categorized among the prison's "non-men." *See* HANS TOCH, LIVING IN PRISON: THE ECOLOGY OF SURVIVAL 224 (rev. ed. 1992) (describing "weak" men in prison as "nonmen").

10. The Eighth Amendment, in relevant part, prohibits "cruel and unusual punishment[]." U.S. CONST. amend. VIII.

11. Prison Litigation Reform Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (codified in scattered sections of 11, 18, 28, and 42 U.S.C.).

> other inmates. His "protectors" forced him to have their names tattooed on his body to signify their ownership of him. Prison guards target him for beatings and harassment because of the sexual relationships into which he has been forced. His nickname, "Brown Sugar," is one of the prison tattoos that brand him as a victim of repeated and ongoing sexual abuse.[12]

In mid-year 2009, Brown Sugar was one of 2778 state prisoners under age eighteen, of whom 2644 were boys.[13] His counterparts in county jails numbered 5847.[14] Kids like Brown Sugar give new meaning to American exceptionalism; "researchers at the LBJ School in Austin were unable to find any instance anywhere in the modern world where a child as young as twelve or thirteen received a multi-decade sentence in adult prison."[15]

Between 1985 and 2004, 175,000 children under age eighteen,[16] of whom 703 were under age twelve and 961 were age thirteen,[17] came under the criminal jurisdiction of courts reserved for adults. These courts acquired jurisdiction through so-called transfer statutes. Every state, as well as the District of Columbia, has this type of statute.[18] The least common transfer statute, present in fifteen states, grants prosecutors the discretion to try kids as if they are adults for certain offenses.[19] By contrast, in twenty-eight states, legislation mandates that certain charges be transferred to adult court.[20] Lastly, forty-six states vest juvenile courts with the power to transfer certain categories of cases into adult courts.[21] The Supreme Court in *Kent v. United States*[22] set forth eight "determinative factors"—such as "seriousness of the alleged offense", "prosecutive merit of the complaint", "sophistication and maturity of the

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12. EQUAL JUSTICE INITIATIVE, *supra* note 1, at 15.

13. HEATHER C. WEST, U.S. DEP'T OF JUSTICE, PRISON INMATES AT MIDYEAR 2009—STATISTICAL TABLES 24 tbl.21 (2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/pim09st.pdf.

14. TODD D. MINTON, U.S. DEP'T OF JUSTICE, JAIL INMATES AT MIDYEAR 2009—STATISTICAL TABLES 16 tbl.12 (2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/jim09st.pdf.

15. Michael E. Tigar, *What Are We Doing to the Children?: An Essay on Juvenile (In)justice*, 7 OHIO ST. J. CRIM. L. 849, 851 (2010).

16. MICHELE DEITCH ET AL., UNIV. OF TEX. AT AUSTIN, FROM TIME OUT TO HARD TIME: YOUNG CHILDREN IN THE ADULT CRIMINAL JUSTICE SYSTEM 29 (2009), *available at* http://www.utexas.edu/lbj/archive/news/images/file/From%20Time%20Out%20to%20Hard%20Time-revised%20final.pdf.

17. *Id.* at xiii.

18. DANIELLE MOLE & DODD WHITE, CHILD WELFARE LEAGUE OF AM., TRANSFER AND WAIVER IN THE JUVENILE JUSTICE SYSTEM 5 (2005), *available at* http://www.cwla.org/programs/juvenilejustice/jjtransfer.pdf.

19. *See id.* at 8-9.

20. *See id.* at 9.

21. *See id.* at 6.

22. 383 U.S. 541 (1966).

juvenile", and "[t]he record and previous history of the juvenile"—in a juvenile court's decision whether to waive jurisdiction.[23]

Regardless of how youngsters enter the adult criminal justice system, they overwhelmingly share one critical characteristic—their sex. Referenced in a recent literature review,[24] a 2005 study found that males comprised all but 5% of transferees.[25] Several other studies have demonstrated that the more extensive a prior record, the more likely a boy was to be transferred.[26] Yet in sorting out who will serve adult time, race matters; a 2008 national study determined that African-Americans made up 62% of all transferees.[27] Moreover, another study concluded that this racial disparity persisted after controlling for the severity of the offense.[28]

The odds favor transferred boys "doing time," and lots of it. Most studies showed high conviction rates—approximately 80% in some jurisdictions.[29] A study encompassing nineteen states found that 43% of transferees received prison sentences, and another 20% got jail time.[30] Furthermore, long sentences awaited the transferees. A national study published in 2008 reported an average sentence of ninety months behind bars.[31] Some 40% of the transferees received more than seventy-two months.[32] Whether there is a disparity between the sentence and the time served awaits a conclusive answer.[33]

Whereas federal law mandates sight and sound separation of children locked up under state juvenile court jurisdiction or federal court jurisdiction,[34] only seventeen states and the District of Columbia provide separate housing for offenders classified as "juveniles," an expansive category that includes youthful adults.[35] According to a recent study, "many states no longer take . . . [a transferee's] age into consideration when deciding where the child is to be housed

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23. *Id.* at 566-67.

24. *See* UCLA SCH. OF LAW JUVENILE JUSTICE PROJECT, THE IMPACT OF PROSECUTING YOUTH IN THE ADULT CRIMINAL JUSTICE SYSTEM: A REVIEW OF THE LITERATURE (2010), *available at* http://www.campaignforyouthjustice.org/documents/UCLA-Literature-Review.pdf [hereinafter UCLA JUVENILE JUSTICE PROJECT].

25. *See id.* at 7.

26. *See id.* at 8.

27. *See id.* at 9.

28. *See id.* at 11.

29. *See id.* at 13.

30. *See id.* at 16.

31. *See id.* at 21. In *Graham v. Florida*, 130 S. Ct. 2011 (2010), the Supreme Court held that a sentence of life "without possibility of parole" for a juvenile sentenced as an adult for the non-capital crime of robbery committed at age sixteen constituted cruel and unusual punishment as proscribed by the Eighth Amendment. *See id.* at 2030. The ruling indicated that child felons could serve out a life sentence as long as there existed "some realistic *opportunity* to obtain release." *Id.* at 2034 (emphasis added).

32. *See* UCLA JUVENILE JUSTICE PROJECT, *supra* note 24, at 21.

33. *See id.* at 23.

34. *See* Juvenile Justice and Delinquency Prevention Act, 42 U.S.C. § 5601 (2006).

35. DEITCH ET AL., *supra* note 16, at 58.

before trial and after sentencing."[36]

The "adultification" of the criminal justice system hit full stride by the mid-1980s, when a steep increase in youth homicides occurred.[37] A supposed onslaught of youthful "super-predators," a phrase that Feld characterized as "a code word for harsher treatment of young black males,"[38] led to legislation resulting in the transfer of more boys and girls into adult criminal courts.[39] Consequently, the number of kids under age eighteen serving state prison time mushroomed from just over 2000 in 1985 to 5400 in 1997.[40] Largely because of plunging juvenile crime rates,[41] their ranks thinned by some 50% by mid-year 2009.[42] Nonetheless, Benekos and Merlo have concluded that "[d]espite declining juvenile crime rates, the adultification of youth continues to include punitive and exclusionary sanctions."[43]

The certification of thousands of juveniles has done little to deter criminality. Regarding specific deterrence,[44] a review of six large-scale studies concluded that kids sentenced in adult courts for violent crimes experienced higher recidivism rates than similar offenders sentenced in juvenile courts.[45] Their greater offending rates suggested a hardened criminal identity born partly from exposure to the prison subculture.[46] Regarding general deterrence,[47] the studies reported either a modest deterrent effect or none at all.[48]

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36. *Id.* at 53.

37. *See* Barry C. Feld, *A Century of Juvenile Justice: A Work in Progress or a Revolution That Failed?*, 34 N. KY. L. REV. 189, 231 (2007).

38. *Id.* at 253-54.

39. *See id.* at 216-17.

40. *See* KEVIN J. STROM, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, PROFILE OF PRISONERS UNDER AGE 18, 1985-1997, at 1 (2000).

41. *See* Alida V. Merlo & Peter J. Benekos, *Is Punitive Juvenile Justice Policy Declining in the United States? A Critique of Emergent Initiatives*, 10 YOUTH JUST. 3, 3 (2010).

42. *Compare* STROM, *supra* note 40, at 1 (tallying 5400 state prisoners under age eighteen in 1997), *with* SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, at tbl.6.39.2009, *available at* http://www.albany.edu/sourcebook/pdf/t6392009.pdf (tallying 2778 state prisoners under age eighteen in 2009).

43. *See* Peter J. Benekos & Alida V. Merlo, *Juvenile Justice: The Legacy of Punitive Policy*, 6 YOUTH VIOLENCE & JUV. JUST. 28, 28 (2008).

44. Specific deterrence addresses the deterrence of a particular person. *See generally* RICHARD HAWKINS & GEOFFREY P. ALPERT, AMERICAN PRISON SYSTEMS: PUNISHMENT AND JUSTICE 141-62 (1989).

45. *See* Richard E. Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?*, JUV. JUST. BULL., June 2010, at 1, 2, *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/220595.pdf.

46. *See id.* at 7.

47. General deterrence refers to the impact of potential penalties on the public at large. *See generally* HAWKINS & ALPERT, *supra* note 44.

48. *See* Redding, *supra* note 45, at 2.

II. It Wasn't a Real Rape!

A. The Odds Favoring Rape

"[R]esearch concerning prison sexual victimization," observed Tonisha Jones and Travis Pratt, "has been both sparse and fraught with methodological inconsistencies. As a result, debate continues to rage concerning the prevalence of prison sexual victimization."[49] The rate of officially reported cases—2.91 per 1000 adult inmates in 2006[50]—provides fodder for that debate because many sexually abused inmates do not report their victimization.[51] Indeed, a study of Nebraska inmates found that some 50% did not confide in anyone, with a mere one in ten telling medical staff.[52] Some inmates fail to report their victimization because doing so would transgress the subcultural norm against "ratting,"[53] a

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49. Tonisha R. Jones & Travis C. Pratt, *The Prevalence of Sexual Violence in Prison: The State of the Knowledge Base and Implications for Evidence-Based Correctional Policy Making*, 52 Int'l J. Offender Therapy & Comp. Criminology 280, 281 (2008); *see also* Cindy Struckman-Johnson & David Struckman-Johnson, *Sexual Coercion Rates in Seven Midwestern Prison Facilities for Men*, 80 Prison J. 379, 379 (2000) (observing that "after decades of research, social scientists have yet to agree on what percentage of incarcerated men experience coercive sexual contact").

50. *See* Allen J. Beck et al., U.S. Dep't of Justice, Sexual Violence Reported by Correctional Authorities, 2006, at 3 (2007), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/svrca06.pdf [hereinafter Beck et al., Sexual Violence Reported]. In juvenile facilities, the sexual victimization rate was 16.8 per 1000 children. *See* Allen J. Beck et al., U.S. Dep't of Justice, Sexual Violence Reported by Juvenile Correctional Authorities, 2005-06, at 2 tbl.1 (2008), *available at* http://bjs.ojp.usdoj.gov/ content/pub/pdf/svrjca0506.pdf.

51. Helen M. Eigenberg, *Male Rape: An Empirical Examination of Correctional Officers' Attitudes Toward Rape in Prison*, 69 Prison J. 39, 47 (1989) (finding that 72.9% of correctional officers believed that raped inmates will not report their victimization); *see also* Smith v. Norris, 877 F. Supp. 1296, 1304 (E.D. Ark. 1995) (quoting an unpublished July 1991 report by the Civil Rights Division of the United States Department of Justice, which stated that "[s]ince rapes are almost always accompanied by threats of retaliation, if the victim tells staff, one wonders how many rapes occurred that were *not* reported—the victim preferring to find safety *via* some other mechanism within the inmate culture").

52. *See* Cindy Struckman-Johnson et al., *Sexual Coercion Reported by Men and Women in Prison*, 33 J. Sex Res. 67, 74 (1996).

53. United States v. Montes-Diaz, 208 F. App'x 565, 566 (9th Cir. 2006) (holding that "the district court did not abuse its discretion in admitting the challenged inmate code of silence evidence"); Skinner v. Lampert, 457 F. Supp. 2d 1269, 1282 (D. Wyo. 2006) (referencing "a culture of silence—sometimes referred to as a 'code of silence'—that prevented administrators from ostensibly knowing much of what was happening at the [p]enitentiary"); Alberti v. Heard, 600 F. Supp. 443, 450 (S.D. Tex. 1984) (writing that "it is apparent that the inmates have an unwritten code of silence which results in most of the acts of violence going undetected"); Grubbs v. Bradley, 552 F. Supp. 1052, 1078 (M.D. Tenn. 1982) (finding that "the evidence is absolutely clear that the inmate code exists and that it prevents the reporting of a great many episodes of actual or threatened violence").

despised breach of the inmate code.[54] Others remain quiet out of shame because, according to Human Rights Watch, there is a "terrible stigma" attached to prison rape.[55] And to make matters worse, as one court explained, victims perceive the reporting process as "degrading and humiliating."[56]

Anecdotal evidence about the prevalence of prison rape is chilling and has been for many years. For instance, a federal district judge in 1996 charged that "[i]n general, inmate rape and assault is pervasive in this country's prison system."[57] "What we cannot blink away," commented Charles Fried a year later, "is the astonishing prevalence [of prison rape] . . . ."[58] In 1999, Victor Hassine, a prisoner himself, observed that "[s]exual assaults . . . have become unspoken, *de facto* parts of court-imposed punishments."[59] As we entered the twenty-first century, Human Rights Watch's *No Escape: Male Rape in U.S. Prisons* portrayed prison rape as a predicable feature of male incarceration.[60] Similarly, I wrote, "While the [men's] prison has missed the mark in rehabilitating inmates and reducing crime rates through deterrence or incapacitation, *it has come of age in one endeavor—promoting sexual terrorism.*"[61]

What is a sound, empirically-based estimate of prison sexual abuse rates? Jones and Pratt examined a host of studies and concluded that the "good studies," which used an "inclusive definition of sexual violence," reported victimization

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54. United States v. Bailey, 444 U.S. 394, 426 n.6 (1980) (Blackmun, J., dissenting) (remarking that an inmate's life "isn't worth a nickel" if he reports his rape) (quoting R. GOLDFARB, JAILS: THE ULTIMATE GHETTO 325-26 (1975)); Withers v. Levine, 615 F.2d 158, 160 (4th Cir. 1980) (stating that "[t]here was evidence, however, that many more such [prison sexual] assaults go unreported because the victim is usually threatened with violence or death should the incident be reported"); Smith v. Ullman, 874 F. Supp. 979, 985 (D. Neb. 1994) (noting that naming one's assailant is an act of snitching, a practice "often brutally discouraged in the general [prison] population"); Raymond G. Kessler & Julian B. Roebuck, *Snitch*, *in* ENCYC. OF AMERICAN PRISONS 449, 449 (Marilyn D. McShane & Frank P. Williams III eds., 1996) (explaining that snitches are "hated and despised . . . and may be the object of violent reprisal[s]").

55. HUMAN RIGHTS WATCH, *supra* note 7, at 131.

56. LaMarca v. Turner, 662 F. Supp. 647, 686 (S.D. Fla. 1987), *aff'd in part*, 995 F.2d 1526 (11th Cir. 1993).

57. Webb v. Lawrence Cnty., 950 F. Supp. 960, 965 (D.S.D. 1996) (citing Martin v. White, 742 F.2d 469, 472 (8th Cir. 1984)); *cf.* Young v. Quinlan, 960 F.2d 351, 362 (3d Cir. 1992) (describing repeated assaults by "a succession of cellmates . . . most likely because of . . . [the inmate's] youthful appearance and slight stature").

58. Charles Fried, *Reflections on Crime and Punishment*, 30 SUFFOLK U. L. REV. 681, 682-83 (1997).

59. VICTOR HASSINE, LIFE WITHOUT PAROLE: LIVING IN PRISON TODAY 134 (Thomas J. Bernard & Richard McCleary eds., 2d ed. 1999).

60. HUMAN RIGHTS WATCH, *supra* note 7, at 4-5.

61. James E. Robertson, *A Clean Heart and an Empty Head: The Supreme Court and Sexual Terrorism in Prison*, 81 N.C. L. REV. 433, 439-40 (2003) (internal citations omitted) (emphasis added).

rates of around 20%.[62] This finding is not inconsistent with the legislative findings of the PREA,[63] which posited that "experts have conservatively estimated that at least 13% of the inmates in the United States have been sexually assaulted in prison."[64]

On a twelve month basis, the most recent National Inmate Survey of Sexual Victimizations in Prisons and Jails for 2008-09 found that 4.4% of prison inmates and 3.1% of jail inmates of both sexes reported one or more instances of sexual victimizations involving staff and inmates.[65] For males, the inmate-on-inmate victimization rates stood at 1.9% and 1.3% for prisons and jails, respectively; and the staff-on-inmate victimization rates were 2.9% and 2.1% for prisons and jails, respectively.[66]

What are the odds for boy prisoners? Anecdotal accounts almost universally portray juveniles doing adult time as easy and frequent sexual prey. In the 1830s, after visiting many early prisons, one observer discerned "one general fact . . . boys are prostituted to the behest of old convicts."[67] Some 140 years later, in their groundbreaking book *Terror in the Prisons*, Carl Weiss and David Friar observed that "youth is hit the hardest" among the victims of prison sexual abuse.[68] Later, Justice Blackmun issued his frequently quoted assessment that "[a] youthful inmate can expect to be subjected to homosexual gang rape his first night in jail."[69] Equally telling, surveyed correctional officers strongly agreed that "it is a very common occurrence for young straight boys to be turned out, or forced into being punks"[70] and that among all inmates, "forced or pressured sexual encounters are very common."[71] Similarly, the court in *Schwenk v. Hartford* concluded, "It is well-documented . . . that young, slight, physically weak male inmates, particularly those with 'feminine' physical characteristics, are routinely raped, often by groups of men."[72]

Nonetheless, a 1997 report lamented the "dearth of [empirical] data" on the

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62. Jones & Pratt, *supra* note 49, at 289; *cf.* Eigenberg, *supra* note 51, at 47 tbl.3 (finding that 50.6% disagreed that rape is rare and another 35.5% of the officers strongly disagreed).

63. Prison Rape Elimination Act of 2003, Pub. L. No. 108-79, 117 Stat. 972 (codified as amended at 42 U.S.C. §§ 15601-09).

64. 42 U.S.C. § 15601(2) (2006).

65. *See* ALLEN J. BECK ET AL., U.S. DEP'T OF JUSTICE, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2008-09, at 5 (2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/svpjri0809.pdf.

66. *See id.*

67. DAVID M. HEILPERN, FEAR OR FAVOUR: SEXUAL ASSAULT OF YOUNG PRISONERS 63 (1998) (quoting Rev. Louis Dwight).

68. CARL WEISS & DAVID JAMES FRIAR, TERROR IN THE PRISONS: HOMOSEXUAL RAPE AND WHY SOCIETY CONDONES IT 74 (1974).

69. United States v. Bailey, 444 U.S. 394, 421 (1980) (Blackmun, J., dissenting).

70. *See* WAYNE S. WOODEN & JAY PARKER, MEN BEHIND BARS: SEXUAL EXPLOITATION IN PRISON 203 (1982).

71. *Id.* at 202.

72. Schwenk v. Hartford, 204 F.3d 1187, 1203 n.14 (9th Cir. 2000) (citing sources).

sexual abuse of boys behind bars.[73] The same could be said today, given that the National Inmate Survey of Sexual Victimizations in Prisons and Jails for 2008-09 did not include prisoners under age eighteen.[74] An earlier Bureau of Justice Statistics study found that persons under age eighteen accounted for 4% of all substantiated instances of inmate-on-inmate sexual violence (1% in prison and 13% in jail).[75] However, just as inmates as a group underreport sexual assault, one would anticipate the same from boy prisoners.

The congressional findings in support of the PREA posited that "[j]uveniles are 5 times more likely to be sexually assaulted in adult rather than juvenile facilities—often within the first 48 hours of incarceration."[76] It appears that legislators took that prevalence rate from a 1989 study.[77] The multiple of five was derived from responses to the following question: "Has anyone attempted to sexually attack or rape you?"[78] The 1989 study found that nearly 10% of juveniles incarcerated in adult prisons, as compared to some 2% in juvenile facilities, reported a sexual attack or rape.[79]

If we embrace the assumption of the PREA's drafters that boy prisoners are at far greater risk of sexual victimization than those in juvenile facilities, then what is the current rate of sexual victimization in juvenile facilities? The most recent (2008-09) survey by the Bureau of Justice Statistics found that 12% of surveyed youth (91% being male) reported sexual victimization by other juveniles or staff in the last twelve months, or since their incarceration if less than twelve months.[80] Most involved staff (10.3%), 95% of whom were female, rather than fellow children (2.6%).[81]

In the absence of current and "spot-on" empirical data, we should assume that boy prisoners can readily walk in the shoes of the kids described by Victor Hassine, a well-regarded observer of imprisonment. As Hassine described it, "My current cellmate has been serving a life sentence in an adult facility since he

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73. JUSTICE POLICY INST., THE RISKS JUVENILES FACE WHEN THEY ARE INCARCERATED WITH ADULTS 1 (1997), *available at* http://www.justicepolicy.org/images/upload/97-02_REP_RiskJuvenilesFace_JJ.pdf.

74. BECK ET AL., *supra* note 65, at 6.

75. BECK ET AL., SEXUAL VIOLENCE REPORTED, *supra* note 50, at 35 tbl.5.

76. 42 U.S.C. § 15601(4) (2006); *see also* NAT'L CRIM. JUSTICE REFERENCE SERV., NATIONAL PRISON RAPE ELIMINATION COMMISSION REPORT 16 (2009), *available at* http://www.ncjrs.gov/pdffiles1/226680.pdf (concluding that "[j]uveniles in confinement are much more likely than incarcerated adults to be sexually abused, and they are particularly at risk when confined with adults").

77. Martin Forst et al., *Youth in Prisons and Training Schools: Perceptions and Consequences of the Treatment-Custody Dichotomy*, 40 JUV. & FAM. CT. J. 1, 9 (1989).

78. *Id.* at 10 tbl.5.

79. *Id.*

80. ALLEN J. BECK ET AL., U.S. DEP'T OF JUSTICE, SEXUAL VICTIMIZATION IN JUVENILE FACILITIES REPORTED BY YOUTH, 2008-09, at 1 (2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/svjfry09.pdf.

81. *See id.* at 1.

was 14, and I personally know a dozen or more men who were 16 when they first came to prison . . . . [M]ost teenage inmates do in fact become victims, and that victimization usually begins or ends with rape."[82]

B. "Turning-Out" Boy Prisoners

> The kids I know of here are kept in the hospital part of the prison until they turn 16. Then they are placed in general population. At age 16, they are just thrown to the wolves, so to speak, in population. I have not heard of one making it more than a week in population without being "laid."[83]

Being "laid" is a telling term. It suggests a sexual act but not a rape—at least not a "real rape." In the prison subculture, it is hard to find a victim of a real rape. Based upon interviews with 564 randomly selected inmates in thirty prisons, Mark Fleisher and Jessie Krienert concluded that inmates perceive prison rape as "rare" and that none of the 564 inmates acknowledged being a victim of sexual violence.[84] Real rapes are rare because, according to Fleisher and Krienert, the "sexual worldview" prevalent among prisoners "allows a wide berth of sexual freedom" with "rape . . . on the margin of what otherwise would be culturally permissible sexual behavior."[85] Thus, "[n]o matter how an institution assesses a sexual assault, inmate culture has its own cultural criteria to determine if a sexual assault was rape."[86] These subcultural criteria place boy prisoners in great peril. It is not by chance that the punk, the inmate type whose victimization falls outside the definition of a "real" rape,[87] possesses characteristics that coincide with the expected characteristics of the boy prisoner[88]—that is, "the youngest prisoners, small in size, [and] inexperienced in personal combat."[89]

Three types of sexual assailants await the boy prisoner. The "rapist" uses violence to achieve his sexual desires but will retreat if resisted.[90] By contrast, the "turn-out artist['s]" stock-in-trade is coercion rather than brute force[91]—the

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82. HASSINE, *supra* note 7, at 114.

83. Joanne Mariner, *The Latest Trend in Child Sexual Exploitation: Rape in Adult Prisons*, FINDLAW (Jan. 25, 2001), http://writ.news.findlaw.com/mariner/20010125.html (quoting an unnamed inmate).

84. Kim Curtis, *A Disputed Study Claims Rape Is Rare in Prison*, USA TODAY, Jan. 17, 2006, http://www.usatoday.com/news/nation/2006-01-17-prison-rape_x.htm.

85. MARK S. FLEISHER & JESSIE L. KRIENERT, THE CULTURE OF PRISON SEXUAL VIOLENCE 139 (2006), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/216515.pdf.

86. *Id.* at 169.

87. *See infra* notes 111-16 and accompanying text (discussing why punks are denied victim status).

88. There are no empirical data on the physical characteristics of boy prisoners.

89. Stephen "Donny" Donaldson, *A Million Jockers, Punks, and Queens*, *in* PRISON MASCULINITIES 118, 119, *supra* note 8.

90. FLEISHER & KRIENERT, *supra* note 85, at 142-43.

91. *See id.* at 140.

latter being a prerequisite for "real" rape in prison.[92] Fleisher and Krienert described the "turn-out artist['s]" technique as follows: "A turn-out artist has smooth social and talking skills and coaxes, often in a matter of days, his prey into a sexually compromising situation; a new inmate[] who accepts a chocolate bar or stamps or joins a friendly card game has enjoined a debt that must be repaid."[93] Finally, the "bootie bandit" displays characteristics of both the rapist and the turn-out artist; his preference is sexual violence, and he has the will to use it.[94] On the other hand, he possesses social skills that make him particularly adept at hustling boy prisoners.[95]

The inmate subculture dictates that men of all ages must preserve their manhood in the face of aggression. The boy prisoner should heed the following advice of an inmate indoctrinated into this subculture:

> Well, the first time . . . [a potential sexual aggressor] says something to you or looks wrong at you, have a piece of pipe or a good heavy piece of two-by-four. Don't say a damn thing to him, just get that heavy wasting material and walk right up to him and bash his face in and keep bashing him till he's down and out, and yell loud and clear for all the other cons to hear you, "Motherf . . . er, I'm a man, I came in here a motherf . . . ing man and I'm going out a motherf . . . ing man. Next time I'll kill you.[96]

Jack Henry Abbott likely heard advice of this sort before he entered an adult prison.[97] In *In the Belly of the Beast*, he described how he avoided becoming a punk:

> The first prisoner—a middle-aged convict—who tried to f . . . me, I drew my knife on. I forced him to his knees, and with my knife at his throat, made him perform fellatio on my flaccid penis . . . .
>
> . . .
>
> It was inevitable then that a youth in an adult penitentiary at some point will have to attack and *kill*, or else he most certainly will become a punk . . . . If he cannot protect himself, someone else will.[98]

Unlike Abbott, many boy prisoners are ill-prepared for what awaits them. The National Prison Rape Commission knew this fact of prison life all too well when explaining, "Juveniles are not yet fully developed physically, cognitively, socially . . . [or] emotionally and are ill-equipped to respond to sexual advances

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92. *See id.* at 83-104 (reporting study findings).

93. *Id.* at 140.

94. *See id.* at 143.

95. *See id.* at 143-44.

96. PIRI THOMAS, DOWN THESE MEAN STREETS 267 (1967).

97. *See* JACK HENRY ABBOTT, IN THE BELLY OF THE BEAST: LETTERS FROM PRISON 7 (1981) (describing his "long stints" in juvenile detention, followed by confinement from age twelve to age eighteen at the Utah State Industrial School for Boys and, shortly after his release, his imprisonment in the Utah State penitentiary).

98. *Id.* at 79.

and protect themselves. Younger teenagers and preteens, in particular, are unprepared to cope with sexualized coercion or aggression from older, more experienced youth or adult corrections staff . . . ."[99]

Facing sexual harassment—which is often a precursor to sexual assault[100]—or threats of sexual aggression from rapists and bootie bandits, boy prisoners may unwittingly welcome turn-out artists eager to extend them protection,[101] loans,[102] or some other form of assistance—and who will later demand repayment through sexual submission.[103] Their predicament could mirror that of Tico, whom inmate-author Piri Thomas portrayed as the embodiment of a new, youthful, and naïve inmate who had become acquainted with turn-out artist Rube:

> He kept on looking at the concrete walk and his face grew red and the corners of his mouth got a little too white. "Piri, I've been hit on already," he said . . . .
> "Well, I got friendly with this guy named Rube."
> Rube was a muscle bound degenerate whose sole ambition in life was to cop young kids' behinds. "Yeah," I said, "and so . . . ."
> "Well, this cat has come through with smokes and food and candy and, well, he's a spic like me and he talked about the street outside and about guys we know outside and he helped me out with favors . . . ."
> *My God*, I thought, *what can I tell him?* . . . . Rube would use that first time to hold him by threatening to tell everybody that he screwed him. And if anybody found out, every wolf in the joint would want to cop . . . and he'd be a jailhouse punk.[104]

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99. NAT'L CRIM. JUSTICE REFERENCE SERV., *supra* note 76, at 142-43.

100. *See* James E. Robertson, *Cruel and Unusual Punishment in United States Prisons: Sexual Harassment Among Male Inmates*, 36 AM. CRIM. L. REV. 1, 14-15 (1999) (discussing patterns of sexual harassment, which include feminizing a targeted inmate and communicating aggressive intentions); *see also* Notice of Proposed Rulemaking, National Standards to Prevent, Detect, and Respond to Prison Rape, 76 Fed. Reg. 6248, 6251 (proposed Feb. 3, 2011) (to be codified at 28 C.F.R. pt. 115), *available at* http://www.ojp.usdoj.gov/programs/pdfs/prea_nprm.pdf (characterizing sexual harassment as a "precursor" of sexual abuse) [hereinafter PREA Notice of Proposed Rulemaking].

101. *See, e.g.*, Payne v. Collins, 986 F. Supp 1036, 1048 n.18 (E.D. Tex. 1997) (finding the existence of inmate violence by virtue of fact that inmates pay "protection money," which "usually assumes the form of either goods . . . or participation in homosexual acts"); Helen M. Eigenberg, *Correctional Officers and Their Perceptions of Homosexuality, Rape, and Prostitution in Male Prisons*, 80 PRISON J. 415, 420-21 (2000) (describing how inmates find "protectors," who later threaten them unless sexual payments are given).

102. *See* Helen M. Eigenberg, *Homosexuality in Male Prisons: Demonstrating the Need for a Social Constructionist Approach*, 17 CRIM. JUST. REV. 219 *passim* (1992) (describing how aggressive inmates provide "gifts" to new naïve inmates and then demand "payment or else").

103. *See, e.g.*, HASSINE, *supra* note 7, at 72 ("I was playing chess for money and lost several times, and it became like a 20- or 30-dollar debt. I couldn't immediately cover it. I was given a choice, either borrow it or have sex with him.").

104. THOMAS, *supra* note 96, at 265-66.

The boy prisoner in Tico's situation has three options. First, he can follow Abbott's example by assaulting his tormentor, preemptively if need be.[105] Second, he can request transfer to protective custody, which is sometimes derisively called "punk city" because its population includes non-men.[106] Finally, he can compromise his body, and by doing so, he will have been turned out.

Upon being turned out, the boy prisoner will acquire an overriding master status[107]—that of a punk. His socially constructed new identity will be a spoiled one because, as two long-time inmates of Louisiana's notorious Angola Prison explained, turning-out "strip[s] the male victim of his status as a 'man,'" leaving him feminized in an inmate social world that embraces hypermasculinity,[108] which in turn equates manhood with the capacity to dominate others.[109] No longer is he a boy among men; he has become a non-man residing at the bottom of the prison gender order.[110] Correspondingly, his fellow inmates will not see

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105. *See* James E. Robertson, *"Fight or F. . ." and Constitutional Liberty: An Inmate's Right to Self-Defense When Targeted by Aggressors*, 29 IND. L. REV. 339, 346 (1995).

> Correctional officers also view target-initiated violence as a legitimate form of self-defense. One inmate recounted:
>
> I asked Sergent [sic] Brown. And he told me to go ahead, "Pick up the nearest thing around you and hit him in the head with it. He won't bother you no more." I went over to another sergeant and I asked him and he said, "Pick up the nearest damn thing to you and just hit him with it, that is all." I looked at him and I said, "All right. If I do this I ain't going to get locked up for it, am I?" He looks at me and he says, "No." Because I am using self-defense.

Id. (internal citations omitted).

106. *See* James E. Robertson, *The Constitution in Protective Custody: An Analysis of the Rights of Protective Custody Inmates*, 56 U. CIN. L. REV. 91, 111 (1987) (explaining that "vulnerable inmates who resist transfer have concluded that the social stigma attached to being in protective custody as well as its more restrictive conditions of confinement outweigh the dangers awaiting them in the general prison population" (internal citations omitted)).

107. HOWARD S. BECKER, OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE 33 (1963) (defining "master status" as one that "will override most other status considerations").

108. *See* WILBERT RIDEAU & RON WIKBERG, LIFE SENTENCES: RAGE AND SURVIVAL BEHIND BARS 75 (1992). As the court in *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000), observed, "[t]he victims of these attacks are frequently called female names and terms indicative of gender animus like 'pussy' and 'bitch' during the assaults and thereafter." *Id.* at 1203 n.14.

109. *See* Robertson, *supra* note 61, at 440-41.

> Ironically, men rape other men in prison to validate their masculinity. The prison rapist lives in an environment that perversely encourages sexual assault by equating manhood with domination and femininity with subservience. Accordingly, most sexual aggressors define themselves as heterosexual, if not as "real men." Moreover, the structure of prison life constantly assaults one's manhood, denying respite to sexual aggressors and only further victimizing their prey.

Id. (internal citations omitted).

110. *See, e.g.*, Man & Cronan, *supra* note 8, at 156 (noting that "'[p]unks' are relegated to the lowest class of inmates"); Teresa A. Miller, *Sex & Surveillance: Gender, Privacy & the*

him as a legitimate victim. Within the prison subculture, a "blame the victim" mentality prevails.[111] Moreover, inmates will interpret his sexual behavior as a "fair exchange,"[112] with sex being traded for some commodity, be it protection or debts.

Nor will the persons duty-bound to protect boy prisoners necessarily regard him as a legitimate victim. About 25% of surveyed correctional officers did not consider sexual activity arising from subtle threats of force to constitute a real rape.[113] Even sexual activity in response to overt threats of harm failed to satisfy more than 25% of surveyed officers that a real rape had occurred.[114] Also, in finding that staff in the Texas prison system routinely failed to safeguard "youthful first offenders forcibly raped," the court in *Ruiz v. Johnson*[115] revealed that Texas officers' perceptions of punks mirrored those held by inmates:

> A TDCJ captain who testified for the defendants about protection matters stated that he disbelieved an inmate's threat of harm from sexual assault after the inmate told him that the inmate had been forced to perform sexual acts with two different inmates. The reason the captain refused to acknowledge the threat of harm to the inmate was because the inmate had not physically fought against his attackers after they threatened him with physical harm.[116]

III. THE BAD MEN OF *FARMER V. BRENNAN*

Following the demise of the hands-off doctrine during the 1960s,[117] federal

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Sexualization of Power in Prison, 10 GEO. MASON U. C.R. L.J. 291, 303 (2000) ("At the bottom of the hierarchy are 'punks' . . . .").

111. FLEISHER & KRIENERT, *supra* note 85, at 144 ("Prison culture's worldview assumptions are predicated on physical and mental weakness, a 'blame the victim' sexual victimization philosophy, and antipathy toward victims' pain and suffering.").

112. *See id.* at 142.

113. *See* Helen M. Eigenberg, *Correctional Officers' Definitions of Rape in Male Prisons*, 28 J. CRIM. JUST. 435, 442 (2000) ("About three-fourths (74 percent) of the officers believed it was rape when an inmate threatened to identify another inmate as a snitch in order to secure sexual acts.").

114. *See id.* ("Likewise, most officers . . . defined the situation as rape when an inmate was forced to choose between paying off a debt with sexual acts or receiving a beating.").

115. 37 F. Supp. 2d 855, 860 (S.D. Tex. 1999), *rev'd*, 243 F.3d 941 (5th Cir. 2001). As recently as the 1970s, some commentators characterized what is regarded today as coerced sex as "seduction." *Cf.* Eigenberg, *supra* note 113, at 437-38 (citing commentators writing between 1951 and 1975).

116. *Ruiz*, 37 F. Supp. at 926 (internal citations omitted).

117. Lower federal courts have offered a host of justifications for the hands-off doctrine. *See, e.g.*, Bethea v. Crouse, 417 F.2d 504, 505 (10th Cir. 1969) ("We have consistently adhered to the so-called 'hands off' policy . . . ."); Douglas v. Sigler, 386 F.2d 684, 688 (8th Cir. 1967) ("[C]ourts will not interfere with the conduct, management and disciplinary control of this type of institution except in extreme cases."); Sutton v. Settle, 302 F.2d 286, 288 (8th Cir. 1962) ("[C]ourts have no

courts have extended a host of constitutional rights to inmates.[118] Yet punks have

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power to supervise . . . such institutions."); Powell v. Hunter, 172 F.2d 330, 331 (10th Cir. 1949) ("The prison system is under the administration of the Attorney General . . . and not of the district courts."); Sarshik v. Sanford, 142 F.2d 676, 676 (5th Cir. 1944) (per curiam) ("The courts have no function to superintend the treatment of prisoners in the penitentiary, but only to deliver from prison those who are illegally detained there."); United States *ex rel.* Yaris v. Shaughnessy, 112 F. Supp. 143, 144 (S.D.N.Y. 1953) ("[I]t is unthinkable that the judiciary should take over the operation of . . . prisons."); *see also* SCOTT CHRISTIANSON, WITH LIBERTY FOR SOME: 500 YEARS OF IMPRISONMENT IN AMERICA 252 (1998) (stating that prior to the late 1960s, "Americans' constitutional rights effectively stopped at the prison gate"); Eugene N. Barkin, *The Emergence of Correctional Law and the Awareness of the Rights of the Convicted*, 45 NEB. L. REV. 669, 669 (1966) (observing that the constitutional status of prisoners is "the most neglected area" of correctional law).

Several factors led to the collapse of the hands-off doctrine: (1) attorneys committed to prison reform; (2) prison disturbances and riots that exposed the severe shortcomings of the penal system; and (3) the Supreme Court's commitment to advancing the rights of powerless minority groups. *See* LYNN S. BRANHAM & SHELDON KRANTZ, CASES AND MATERIALS ON THE LAW OF SENTENCING, CORRECTIONS, AND PRISONERS' RIGHTS 282-83 (5th ed. 1997).

118. Lower federal courts, not the Supreme Court, initially drove the expansion of prisoners' rights. *See, e.g.*, Kelly v. Brewer, 525 F.2d 394, 400 (8th Cir. 1975) (addressing the classification of inmates); Knell v. Bensinger, 489 F.2d 1014, 1018 (7th Cir. 1973) (addressing the discipline of inmates); Fitzke v. Shappell, 468 F.2d 1072, 1076 (6th Cir. 1972) (addressing inmates' medical care); Corby v. Conboy, 457 F.2d 251, 253 (2d Cir. 1972) (addressing inmates' access to the courts); Sostre v. McGinnis, 442 F.2d 178, 202 (2d Cir. 1971) (addressing freedom of speech), *overruled by* Davidson v. Scully, 114 F.3d 12 (2d Cir. 1997); Walker v. Blackwell, 411 F.2d 23, 28-29 (5th Cir. 1969) (addressing religious freedom); Collins v. Schoonfield, 344 F. Supp. 257, 272-73 (D. Md. 1972) (addressing prison rules); Sinclair v. Henderson, 331 F. Supp. 1123, 1129-31 (E.D. La. 1971) (addressing physical exercise).

The Supreme Court's rulings, however, have long since controlled prisoners' rights. *See, e.g.*, Sandin v. Conner, 515 U.S. 472, 483-85 (1995) (holding that procedural safeguards arise when disciplinary sanctions are a "dramatic departure from the basic conditions [of the sentence]" or impose "atypical and significant hardships"); Farmer v. Brennan, 511 U.S. 825, 847 (1994) (holding that deliberate indifference to a significant risk of inmate-on-inmate assault constitutes cruel and unusual punishment); Hudson v. McMillian, 503 U.S. 1, 4 (1992) (holding that malicious use of force by prison or jail staff inflicts cruel and unusual punishment); Wilson v. Seiter, 501 U.S. 294, 303 (1991) (holding that deliberate indifference to basic human needs may constitute cruel and unusual punishment); Thornburgh v. Abbott, 490 U.S. 401, 419 (1989) (holding that inmates possess a limited right to receive publications); O'Lone v. Estate of Shabazz, 482 U.S. 342, 350-51 (1987) (holding that inmates possess a limited right to religious freedom); Turner v. Safley, 482 U.S. 78, 91 (1987) (holding that inmates possess a limited right to receive and send correspondence); Hudson v. Palmer, 468 U.S. 517, 530 (1984) (holding that although inmates possess no reasonable expectation of privacy, they remain protected against cruel and unusual punishment); Vitek v. Jones, 445 U.S. 480, 488 (1980) (holding that transferring inmates to mental hospitals triggers procedural safeguards); Bell v. Wolfish, 441 U.S. 520, 535 (1979) (holding that pretrial detainees cannot be punished); Bounds v. Smith, 430 U.S. 817, 828-29 (1977) (holding that

just as much to fear. Human Rights Watch's *No Escape: Male Rape in U.S. Prisons* largely blames prison staff, contending that they "do little to stop [sexual assault]."[119] Earlier studies said the same,[120] with one social scientist reporting that correctional officers "[i]n the prison vernacular . . . seem to offer little assistance to inmates except the age-old advice of 'fight or f . . . .'"[121]

Courts are to blame as well. The district court in *Smith v. Ullman*[122] had this to say: "The courts, if indeed they are serious about decrying violence in the nation's prisons, might reexamine the court-created Eighth Amendment jurisprudence *which tolerates* that violence."[123] The jurisprudence in question has a clear lineage, one leading to *Farmer v. Brennan*.[124]

Farmer's facts involved inmates sexually assaulting a transsexual prisoner.[125] Transsexuals' standing in the prison population bears comparison to that of "turned-out" boy prisoners in that both fall far short of the "real" man status so prized in prison and thus become non-men by representing femininity. However, they do so in different ways; the transsexual has physically altered her body,[126] whereas the inmate subculture has socially constructed the boy prisoner as a

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inmates possess a right of meaningful access to the courts); Estelle v. Gamble, 429 U.S. 97, 104 (1976) (holding that "deliberate indifference to serious medical needs" inflicts cruel and unusual punishment); Wolff v. McDonnell, 418 U.S. 539, 558 (1974) (holding that procedural safeguards are triggered by threatened loss of good time—that is, the reduction of the inmate's time served based on a statutory formula for crediting good behavior); Cruz v. Beto, 405 U.S. 319, 322 (1972) (holding that inmates possess a limited right to practice religion); Johnson v. Avery, 393 U.S. 483, 490 (1969) (holding that "jailhouse lawyers" possess limited constitutional protection); Lee v. Washington, 390 U.S. 333, 333-34 (1968) (per curiam) (holding that racial segregation in prison violates equal protection except in emergencies).

119. HUMAN RIGHTS WATCH, *supra* note 7, at 143.

120. *See, e.g.*, LEE H. BOWKER, PRISON VICTIMIZATION 13 (1980) (observing that some correctional staff "tell them to fight it out"); TOCH, *supra* note 9, at 208 (observing that prison staff "advise inmates of the advantages of using violence when one is threatened"); *see also* LaMarca v. Turner, 995 F.2d 1526, 1533 (11th Cir. 1993) ("When alerted to specific dangers, prison staff often looked the other way rather than protect inmates. Rather than offer to help, the staff suggested that the inmates deal with their problems 'like men,' that is, use physical force against the aggressive inmate.").

121. Helen M. Eigenberg, *Rape in Male Prisons: Examining the Relationship Between Correctional Officers' Attitudes Toward Male Rape and Their Willingness to Respond to Acts of Rape*, *in* PRISON VIOLENCE IN AMERICA 145, 159 (Michael C. Braswell et al. eds., 2d ed. 1994).

122. 874 F. Supp. 979 (D. Neb. 1994).

123. *Id.* at 986 (emphasis added).

124. 511 U.S. 825 (1994).

125. *See id.* at 829-30.

126. *See* Anita C. Barnes, *The Sexual Continuum: Transsexual Prisoners*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 599, 632 (1998) (explaining that "recognizable physical traits place transgendered prisoners in substantial danger, and put officials on notice of an imminent and substantial risk to the prisoners" (internal citations omitted)).

punk.[127]

The *Farmer* decision reaffirmed that the deliberate indifference test applied to conditions of confinement in general and to prison sexual abuse in particular. In keeping with its earlier decision in *Wilson v. Seiter*,[128] the Court specified that this test has objective and subjective components. Regarding the objective component, Justice Souter's majority opinion explained that a risk of harm must be, "objectively, 'sufficiently serious.'"[129] The *Farmer* Court proceeded to characterize "deliberate indifference" as the subjective component, requiring proof that the defendant staff member actually "knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it."[130]

Justice Souter's majority opinion did include an addendum that marginally aids plaintiffs. First, actual knowledge embraces instances where the risk is so obvious that the defendants "must have known" of the perils facing the plaintiff.[131] Second, a substantial risk of harm can arise when "all prisoners in . . . [the plaintiff's] situation face such a risk."[132]

Nonetheless, the burden upon victims of sexual assault has since been a daunting one.[133] The "must have known" addendum establishes two inferential hurdles for plaintiffs to clear: first, the official must have had "aware[ness] of facts from which the inference [of excessive risk] could be drawn"; and second, the official "*must also draw the inference*."[134] Consequently, the defendant will

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127. *See supra* notes 83-116 and accompanying text (discussing the social construction of boy prisoners as punks).

128. 501 U.S. 294 (1991).

129. *Farmer*, 511 U.S. at 835 (quoting *Wilson*, 501 U.S. at 298).

130. *Id.* at 847.

131. *See id.* at 842.

> Whether a prison official had the requisite knowledge of a substantial risk is . . . subject to . . . [proof] in the usual ways, including inference from circumstantial evidence . . . . For example, if a[ ] . . . plaintiff presents evidence showing that a substantial risk of inmate attacks was "longstanding, pervasive, well-documented, or expressly noted by prison officials in the past, and the circumstances suggest that the defendant-official being sued had been exposed to information concerning the risk and thus 'must have known' about it, then such evidence could be sufficient to permit a trier of fact to find that the defendant-official had actual knowledge of the risk."

Id. (internal citations omitted).

132. *Id.* at 843.

133. *See* James J. Park, *The Constitutional Tort Action as Individual Remedy*, 38 HARV. C.R.-C.L. L. REV. 393, 431 (2003) (arguing that by distinguishing what prison staff "ought" to know from their "actual" knowledge, the first prong subtly "re-align[ed]" the Eighth Amendment prohibition of cruel and unusual punishment "in a way favorable to [defendant] prison officials."); Michele Westhoff, *An Examination of Prisoners' Constitutional Right to Healthcare: Theory and Practice*, 20 HEALTH LAW. 1, 6 (2008) (arguing that establishing such awareness is usually a very difficult task).

134. *Farmer*, 511 U.S. at 837 (emphasis added).

avoid liability, despite knowing the underlying facts, if he or she "unsoundly" concluded that the risk "was insubstantial or nonexistent."[135]

By adopting the subjective criminal standard of recklessness, the *Farmer* Court required a culpable state of mind on the part of the defendant prison officer. In so doing, the Court implicitly adopted a deontological model: "From this perspective . . . victimization is bilateral and individuated because it is defined in terms of 'concrete, individual acts by identifiable transgressors.' Accordingly, '[a] victim is someone injured by someone else . . . not the society as a whole . . . .'"[136] Stated plainly, this is a "bad man" model of cruel and unusual punishment, in which a readily identifiable and criminally culpable person inflicts harm under color of state law.

By contrast, turning-out a boy works a different form of victimization, occurring in a different realm of the prison experience and based upon a different form of power. Being turned out is relational. As one commentator observed of gender relations outside of prison, "Gender refers to the social construction of power relations between women and men, and the implications these relations hold for the identity, status, roles and responsibilities of women (and men)."[137] All-male prisons are no less gendered than their female counterparts—being turned out is a process of being socially constructed as a punk, giving rise to the adage that "fags are born," whereas "punks are made."[138] As in the outside world, sexual identity in prison is a verb rather than a noun.[139] Stephen Donaldson, himself a one-time prison punk (also known as "Donny the Punk"), put it best in observing that the inmate subculture "fuses sexual and social roles and assigns all prisoners accordingly."[140]

As demonstrated by the social construction of the boy prisoner "turned" punk, relational power arises from a cluster of relations that exist outside the bureaucratic prison but inside its subterranean core. Relational power is, as Hannah Arendt wrote, "never the property of an individual; it belongs to a group

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135. *Id.* at 844.

136. James E. Robertson, *A Punk's Song About Prison Reform*, 24 PACE L. REV. 527, 545 (2004) (quoting Stephen L. Carter, *When Victims Happen to Be Black*, 97 YALE L.J. 420, 421 (1988) (citation omitted)); *cf.* Eva S. Nilsen, *Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Discourse*, 41 U.C. DAVIS L. REV. 111, 115 (2007) (describing the Court's Eighth Amendment jurisprudence as one of "tidy categories, legal fictions, and hollow phrases").

137. Nicole LaViolette, *Gender-Related Refugee Claims: Expanding the Scope of Canadian Guidelines*, 19 INT'L J. REFUGEE L. 169, 211 (2007) (quoting Nahla Valji & Lee Anne De La Hunt, *Gender Guidelines for Asylum Determination*, UNIV. CAPETOWN LEGAL AID CLINIC 1, 6 (1999)).

138. *See* Robertson, *supra* note 136, at 528 n.7 ("Punks are distinguished from 'fags,' who are 'true' homosexuals. Hence, it is said that punks are 'made' while fags are 'born.'").

139. *See* Valorie K. Vojdik, *Gender Outlaws: Challenging Masculinity in Traditionally Male Institutions*, 17 BERKELEY WOMEN'S L.J. 68, 90 (2002) ("Gender is not a noun; gender is a verb—a process, a practice, a tool for marking and enforcing the bounds of gender within social structures such as the workplace, the state, and other institutions.").

140. Donaldson, *supra* note 89, at 118.

and remains in existence only so long as the group keeps together."[141] The group, in this instance, consists of prisoners; they express themselves collectively through the inmate subculture. Created primarily by the deprivations of imprisonment as well as imported values,[142] the inmate subculture functions as a distorted reproduction of the larger social order, especially inter-male power relationships. Consequently, as I have argued before, "[r]elational power in prison privileges hypermasculine attributes by constructing various male and female roles and then subordinating the latter."[143]

Moreover, relational power is ongoing, as illustrated by the boy prisoner who has been socially constructed as a punk. His new identity is not episodic; it defines him to others and becomes part of the ongoing relational hierarchy. By contrast, the *Farmer* Court's deliberate indifference standard is episodic, "arising," as a commentator wrote,

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141. HANNAH ARENDT, ON VIOLENCE 44 (1970); *see also* Steven L. Winter, *The "Power" Thing*, 82 VA. L. REV. 721, 742 (1996) ("It is a contingent product of common ways of understanding and living in a social world, a function of reciprocally enacted roles, routines, institutions and understandings.").

142. *See* Robertson, *supra* note 136, at 535-37.

> The symbiotic relationship between masculinity and dominance originates in cultural worlds occupied by inmates prior to and during their incarceration. The inmate population largely reflects Western norms, which instruct males that masculinity must be aggressively acquired by controlling people and resources. Also, much of the prison population had been raised in lower class subcultures that equate aggressiveness and domination with manly virtues. Imprisonment further fuels the need to affirm masculinity by subjecting inmates to an emasculating environment. What Sykes called the "pains of imprisonment"—deprivations of liberty, autonomy, goods and services, personal safety, and contact with heterosexual female companions—represent "a set of threats or attacks which are directed against the very foundations of the prisoner's being [as a man]." Foremostly, the lack of heterosexual relationships deprives inmates of a reference for defining masculinity and experiencing the status and power it bestows. In addition, the many official rules governing when to eat, sleep, and otherwise partake of daily life represent "a profound threat to the prisoner's self image because they reduce the prisoner to the weak, helpless, dependent status of childhood."

Id. (internal citations omitted); *see also, e.g.*, Lee H. Bowker, *Victimizers and Victims in American Correctional Institutions*, *in* THE PAINS OF IMPRISONMENT 63, 64 (Robert Johnson & Hans Toch eds., rev. ed. 1988) ("[V]ictories in the field of battle reassure the winners of their competence as human beings in the face of the passivity enforced by institutional regulations. This is particularly important for prisoners whose masculinity is threatened by the conditions of confinement."); Kevin N. Wright, *The Violent and Victimized in the Male Prison*, *in* PRISON VIOLENCE IN AMERICA, *supra* note 121, at 103, 119 ("The literature suggests that prison violence is related to the threat incarceration poses to the individual's identity and particularly his sense of masculinity."); Carolyn Newton, *Gender Theory and Prison Sociology: Using Theories of Masculinities to Interpret the Sociology of Prisons for Men*, 33 HOW. J. CRIM. JUST. 193, 197 (1994) ("[T]he prisoner's masculinity is in fact besieged from every side. . . .").

143. Robertson, *supra* note 136, at 535.

> only when . . . [staff] happen to notice possible threats to prisoners' well-being. On such a standard, conditions cannot be judged cruel even when prison officials fail to notice risks that any reasonably attentive prison official, mindful of his duty to ensure the provision of prisoners' basic needs, would have noticed and addressed.[144]

For boy prisoners in danger of being turned out, *Farmer*'s deliberate indifference test focuses on the mental state of the defendant officer rather than the state's complicity in operating an institution that privileges hypermasculinity. Justice White, prior to *Farmer*, identified the failings of this deontological model: "Inhumane prison conditions often are the result of cumulative actions and inactions by numerous officials inside and outside a prison, sometimes over a long period of time . . . . In truth, intent simply is not very meaningful when considering a challenge to an institution, such as a prison system."[145]

While the odds often favor the rape of a boy prisoner, they rarely favor his proving deliberate indifference by his keepers. The plaintiff in *Webb v. Lawrence County*[146] would likely agree. He was not a boy prisoner, but at age nineteen, standing 5'4" and weighing in at a mere 120 pounds, he could have passed for one.[147] At some point in county jail, he was celled with a prisoner who had been convicted of raping a minor.[148] Moreover, come nightfall, when the prisoners were locked down, security was woefully lacking in the maximum security section housing the plaintiff. The only surveillance camera could not see inside cells.[149] Scheduled visual checks by attending officers occurred every thirty minutes, providing ample time for a rape.[150] Moreover, the plaintiff alleged that jailers in fact entered this section once a day.[151] What followed was hardly unpredictable. According to the plaintiff's allegations, his cellmate raped him repeatedly, but he said nothing until four days after the initial assault for fear of his cellmate's retaliation.[152] Finally, he managed to slip his keepers a note, and in short order, they moved him elsewhere.[153] In his suit, he alleged the obvious: "his youth, physical size, and status as a new admittee" should have alerted the defendant jailers that celling him with a child rapist made his rape foreseeable.[154] Yet the Eighth Circuit affirmed the summary judgment handed down by the district court. Although the circuit panel agreed that the defendant jailers had

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144. Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 945 (2009).

145. Wilson v. Seiter, 501 U.S. 294, 310 (1991) (White, J., concurring).

146. 144 F.3d 1131 (8th Cir. 1998).

147. *See id.* at 1133.

148. *Id.*

149. *Id.*

150. *See id.*

151. *Id.*

152. *Id.* at 1134.

153. *Id.*

154. *Id.*

"general" knowledge that "rape and assault is pervasive in this nation's prison system" and that his cellmate was a sex offender, such knowledge did not satisfy the subjective prong of the deliberate indifference test.[155] According to the panel, the missing link was the lack of evidence showing that the defendants actually drew the inference that this particular cellmate presented an "excessive risk" to this particular victim.[156]

IV. BOY PRISONERS AND THE PREA

In 2003, Congress unanimously enacted the PREA amid a chorus of denunciation of the prisons that tolerated the sexual abuse of prisoners.[157] Its enactment lacked modern precedent. The passage of the PREA defied the received truth among some prisoners' rights advocates that only the judiciary will safeguard inmates from abuse.[158] Indeed, the Act sets forth an ambitious nine-point agenda:

> (1) establish[ing] a zero-tolerance standard for . . . prison rape . . . ;
> (2) [making] the prevention of prison rape a top priority . . . ;
> (3) develop[ing] and implement[ing] national standards for the detection, prevention, reduction, and punishment of prison rape;
> (4) [increasing] the available data and information on the incidence of prison rape . . . ;
> (5) [standardizing] the definitions used for collecting data on the incidence of prison rape;
> (6) [increasing] the accountability of prison officials who fail to detect, prevent, reduce, and punish prison rape;
> (7) protect[ing] the Eighth Amendment rights of Federal, state, and local prisoners;
> (8) [increasing] the efficiency and effectiveness of federal expenditures through grant programs . . . ; and
> (9) [reducing] the costs that prison rape imposes on interstate

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155. *Id.* at 1135.

156. *See id.*

157. *See* James E. Robertson, *Compassionate Conservatism and Prison Rape: The Prison Rape Elimination Act of 2003*, 30 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 1, 2-7 (2004) (discussing the origins of the PREA).

158. *Cf.* Amanda L. Tyler, *Is Suspension a Political Question?*, 59 STAN. L. REV. 333, 361 (2006) ("The Framers viewed the judicial branch, unlike its counterpart branches, as the ultimate forum for protecting individual and minority rights from unfounded infringement by the majority."). *But see* Darren Lenard Hutchinson, *The Majoritarian Difficulty: Affirmative Action, Sodomy, and Supreme Court Politics*, 23 LAW & INEQ. 1, 13 (2005) ("Constitutional law and political science scholars have actively criticized countermajoritarian discourse. Their critiques center primarily upon two fault lines . . . . First, the countermajoritarian critics exaggerate the extent to which the 'political' branches respond to majoritarian interests. Second, the critics fail to recognize the numerous majoritarian influences upon Court doctrine." (internal citations omitted)).

commerce.[159]

The PREA came into being because of a timely confluence of policy entrepreneurs "discovering" prison rape.[160] Prominent conservatives, including evangelicals such as Charles Colson,[161] expressed their dismay over prison rape, blaming prison staff for what Eli Lehrer described in 2002 in the *National Review* as "epidemic" levels of prison rape.[162] Later that year, Human Rights Watch issued its comprehensive and damning report, *No Escape: Male Rape in U.S. Prisons*.[163] It received extensive coverage in the popular media.[164]

Does the PREA speak to boy prisoners "turned" into punks? Professor Ristroph's insightful critique of the Act bodes ill for punks.[165] First, she faults the PREA as "a mostly hortatory statute, seemingly intended primarily to express condemnation of physically violent sexual aggression."[166] Moreover, Professor Ristroph argues that

> [t]he PREA assumes a "bad man" (a very, very bad man) account of prison rape: there is a clear aggressor and a clear victim, and the aggressor is an evil and brutal character who deserves still further punishment. Prison rape, like all rape and indeed all crime, is a problem that can be traced to individual agency, to the evil choices of a particular individual. This description of the problem of prison rape and its corresponding solutions do not question, and in fact reassert, the basic logic and legitimacy of the prison.[167]

Finally, she asserts that the "bad man" feature of the PREA is at odds with most prison sex.[168] She correctly portrays prison sex as mostly nonviolent and the product of the duress arising from institutional forces that leave inmates with little control over their lives and create stark inequalities in their ranks.[169]

How does her critique fare in 2011 with regard to boy prisoners? The Act's

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159. 42 U.S.C. § 15602 (2006).

160. *See* Pat Nolan & Marguerite Telford, *Indifferent No More: People of Faith Mobilize to End Prison Rape*, 32 J. LEGIS. 129, 129 (2006) (noting "a unique coalition of civil rights groups and religious organizations that pressed prison rape onto Congress'[s] agenda").

161. *See* Chuck Colson, *God's Surprises: The Influence of C.S. Lewis*, BREAKPOINT (May 27, 1998), http://www.breakpoint.org/commentaries/4814-gods-surprises.

162. Eli Lehrer, *No Joke*, NAT'L REV. ONLINE (June 20, 2002), http://www.nationalreview.com/comment/comment-lehrer062002.asp.

163. HUMAN RIGHTS WATCH, *supra* note 7.

164. *See* Robertson, *supra* note 157, at 6 ("*No Escape* became a catalyst for mainstream media coverage of prison rape.").

165. Alice Ristroph, *Sexual Punishments*, 15 COLUM. J. GENDER & L. 139 (2006).

166. *Id.* at 175.

167. *Id.* at 183 (internal citation omitted).

168. *See id.* at 154-56.

169. *See id.* at 156; *see also supra* note 142 (discussing the emasculating aspects of imprisonment).

admirable goal—"zero tolerance" of prison sexual abuse[170]—will not easily be achieved by the means at hand—that is, by data collection and the writing of standards. The need for empirical data is manifest given that the Act references a dated 1989 study as to the likelihood of sexual victimization.[171] Subsequent data collection has done little to address this matter, with the latest victimization survey having been administered exclusively to inmates age eighteen or older.[172]

The U.S. Department of Justice's proposed PREA standards,[173] with their emphasis on education, classification, and monitoring, have promise but for three major shortcomings. First, the standards are truly a "no frills" affair; the PREA prohibits the establishment of any national prevention standards that "would impose substantial additional costs compared to the costs presently expended by Federal, State, and local prison authorities."[174] Second, while the standards are binding on federal detention facilities,[175] and the Act stipulates the loss of 5% of federal correctional funding for states that fail to implement the standards,[176] there is no formal enforcement mechanism. Lastly, and alarmingly, the Department of Justice announced in 2011 that the proposed definition of "sexual abuse" does not include "consensual activity between inmates."[177] Section 115.77 provides, "Any prohibition on inmate-on-inmate sexual activity shall not consider consensual activity to constitute sexual abuse."[178] Although the proposed standards mandate screening for risk of victimization and abuse by considering age[179] and physical build,[180] these measures alone will be porous in identifying child prisoners who are already turned out because, as one court observed, "[b]y the time an inmate reaches his initial classification destination . . . it is difficult to discern nonconsensual homosexual activity, because the resistance of most nonconsensual victims has been broken by that time."[181] Correctional officers

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170. *See* 42 U.S.C. § 15602 (1) (2006).

171. *See supra* notes 76-79 and accompanying text (examining the study's findings).

172. BECK ET AL., *supra* note 65, at 6.

173. PREA Notice of Proposed Rulemaking, *supra* note 100.

174. 42 U.S.C. § 15607(a)(3).

175. *Id.* § 15607(b).

176. *Id.* § 15607(c)(2).

177. PREA Notice of Proposed Rulemaking, *supra* note 100, at 6251. There is recognition of "nonconsensual sexual acts involving pressure . . . [and] abusive sexual contacts." *Id.* at 6268.

178. *Id.* at 6283; *see also id.* at 6251 ("The proposed definition of sexual abuse excludes consensual activity between inmates, detainees, or residents, but does not exclude consensual activity with staff."); *id.* at 6263 ("[T]he standard provides that an agency must not consider consensual sexual contact between inmates to constitute sexual abuse. This standard is not intended to limit an agency's ability to prohibit such activity, but only to clarify that consensual sexual activity between inmates does not fall within the ambit of PREA.").

179. *Id.* at 6280.

180. *Id.*

181. Anderson v. Redman, 429 F. Supp. 1105, 1117 n.31 (D. Del. 1977); *see also* Christine A. Saum et al., *Sex in Prison: Exploring Myths and Realities*, 75 PRISON J. 413, 418 (1995) (concluding that "some sexual activity may appear consensual although the inmate may actually

would likely agree; Professor Eigenberg reported that 96% of surveyed correctional officers found it "sometimes difficult to tell whether inmates were being forced to participate in sexual acts or if they were willing partners in consensual sexual activities."[182]

Moreover, even if a boy prisoner has reached the statutory age of consent, he belongs to a subgroup of inmates—youthful prisoners writ large—that is "physically, cognitively, socially, and emotionally . . . ill-equipped to respond to sexual advances."[183] Consequently, his own deficits, in combination with his being situated in a coercive environment, rob him of the moral agency he could exercise outside of prison.[184]

Unless the "bad man" theory of prison rape loses ground to a more nuanced theory of prison rape, the PREA as now written could do the least for the group of inmates arguably in need of the most protection—boy prisoners.[185]

V. The Turn-Out Amendment to the PREA

The PREA should not be seen as a completed work. Whereas the PREA may well be "hortatory," it can also be classified as an aspirational statute which "express[es] goals that we wish we could achieve, rather than what we can realistically achieve."[186] Aspirational statutes can legitimate calls for additional reforms—such as the proposal delineated below: a new federal cause of action (1) dictating that the imprisoning authority bear strict liability for the sexual victimization of boy prisoners; (2) exempting boy prisoners using this cause of action from certain onerous provisions of the Prison Litigation Reform Act (PLRA); and (3) mandating the appointment of a guardian ad litem for each boy prisoner.

A. A Strict Liability Cause of Action

1. Elements.—Given the underprotection afforded by the Eighth Amendment to boys in a man's prison and the uncertainty as to whether the extant PREA can

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be coerced"); *cf.* Christopher Hensley, *Consensual Homosexual Activity in Male Prisons*, 26 Corr. Compendium no. 1, at 1 (2001) (stating that estimates of consensual inmate sexual activity vary, ranging from 2% to 65%, and explaining that inmates underreport sexual activity, fearing they will be labeled as "weak").

182. Eigenberg, *supra* note 101, at 425.

183. Nat'l Crim. Justice Reference Serv., *supra* note 76, at 142-43.

184. *See generally* Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 Brook. L. Rev. 39 (1998) (delineating and critiquing state statutes that prohibit rape by coercion).

185. Since the PREA's passage in 2003, there has been a yearly increase in the estimated number of nationwide allegations of sexual victimization (5386 in 2004; 6241 in 2005; 6528 in 2006). *See* Beck et al., Sexual Violence Reported, *supra* note 50, at 2. However, it would be premature to fault the "bad man" theory given that the increase may be the result of better reporting procedures.

186. Carolyn McNiven, Comment, *Using Severability Clauses to Solve the Attainment Deadline Dilemma in Environmental Statutes*, 80 Cal. L. Rev. 1255, 1295 (1992).

remedy that underprotection, this Article recommends amending the PREA to provide for a new federal cause of action that exclusively addresses sexual abuses visited upon boy and girl prisoners detained while awaiting trial or under a sentence of confinement. This statutory cause of action would lie against the relevant correctional authority, including the Federal Bureau of Prisons, Immigration and Naturalization Service, state departments of correction, county jails, and city lock-ups. As a species of tort liability, the statute would provide for actual and punitive damages as well as injunctive relief. The actionable sexual injuries would consist of two analytical categories: (1) sexually motivated assault, i.e., sex acts involving the use of force; and (2) sexual exploitation, i.e., sexual acts committed without physical force irrespective of purported consent but against the will of the victim.[187] The actionable injuries would mirror the proposed PREA definitions of "sexual abuse"[188] and "sexual harassment,"[189] excepting the proposed exclusion of consensual sexual activity.[190]

The plaintiff would have to show by a preponderance of the evidence that the prohibited behavior occurred, but the state of mind of the defendant would be irrelevant because the statute would impose strict liability. The statute's reach would be narrow—with the eligible plaintiffs being children under the age of eighteen who have been certified as adults and confined as such—so as not to present a broad challenge to fault-based law. As a species of tort liability, this cause of action would be informed by common law to the extent that such case law does not impede the goals of the legislation as delineated below. The victim, his or her guardian, or his or her guardian ad litem[191] could initiate litigation under this amendment. The federal magistrate or the U.S. district court having jurisdiction could appoint counsel for the victim and provide for his or her fair compensation.[192]

By imposing strict liability, the proposed cause of action represents the civil justice counterpart to state criminal statutes providing for strict liability for sex crimes against juveniles.[193] Both share the same objective: the protection of

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187. This nomenclature is that of Donald A. Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780, 1797-1800 (1992).

188. PREA Notice of Proposed Rulemaking, *supra* note 100, at 6282.

189. *Id.*

190. *See supra* notes 183-84 and accompanying text (critiquing the notion that boy prisoners are capable of consenting to prison sex).

191. *See infra* notes 240-43 and accompanying text (advocating the appointment of guardians ad litem).

192. Appointment in such cases would be an exception to the rule that "[e]xcept in very limited circumstances, courts routinely decline to provide court-appointed counsel in civil cases." Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1544 (2005).

193. *See* Alisa Graham, Note, *Simply Sexual: The Discrepancy in Treatment Between Male and Female Sex Offenders*, 7 WHITTIER J. CHILD & FAM. ADVOC. 145, 155 (2007) ("Courts have consistently ruled that sex crimes against children are strict liability crimes and therefore consent

children from sexual exploitation by adults.[194]

2. Rationale.—The justification originally offered by Justice Marshall for the deliberate indifference standard—"the common-law view that '[i]t is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself'"[195]—requires the discharge of a corresponding, extraordinary duty for boy prisoners. Discharging this duty requires an amendment to the PREA that provides for strict liability for the sexual abuse and sexual harassment of boy prisoners.

An appropriate common law analogy can be found in the seminal decision of English courts in *Rylands v. Fletcher*.[196] The defendant's reservoir had burst and eventually flooded the plaintiff's coal mine.[197] At trial, Judge Blackburn held that a "person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and . . . is prima facie answerable for all the damage which is the natural consequence of its escape."[198] In affirming judgment for the plaintiff, the House of Lords imposed a strict liability standard for abnormally dangerous activities and conditions arising from non-natural use of land.[199]

Some 150 years after *Rylands*, imprisonment of boy prisoners represents an unduly hazardous use of state authority. Commentators correctly describe men's prisons as a "world of violence,"[200] a "walled battlefield,"[201] "Hobbesian,"[202] and like "urban jungle warfare."[203] As documented earlier, it is far worse for boy prisoners.[204] Fault primarily resides in the subterranean prison, where a subculture rewards men at their worst. "In prison," wrote one noted penologist, "men . . . are explicitly and almost unanimously encouraged to be uncivil and amoral . . . ."[205] For the prison rapist, manhood finds affirmation in the sexual

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is not a defense.").

194. *See id.* ("The sexual assault laws make assumptions regarding the age at which a person is old enough and mature enough to give informed consent to sexual behavior. These laws are borne out of society's desire to protect its children from the sexual exploitation of adults." (internal citations omitted)).

195. Estelle v. Gamble, 429 U.S. 97, 103-04 (1976).

196. [1866] 1 L.R. Exch. 265, *aff'd*, [1868] 3 L.R.E. & I. App. 330 (H.L.).

197. *See id.* at 265-67.

198. *Id.* at 279.

199. *Rylands*, 3 L.R.E. & I. App. at 330.

200. MATTHEW SILBERMAN, A WORLD OF VIOLENCE: CORRECTIONS IN AMERICA 2 (Roy Roberg ed., 1995).

201. Robertson, *supra* note 105, at 341.

202. James E. Robertson, *Surviving Incarceration: Constitutional Protection from Inmate Violence*, 35 DRAKE L. REV. 101, 102 (1986).

203. *See, e.g.*, TOCH, *supra* note 9, at 330.

204. *See supra* notes 49-82 and accompanying text (examining the prevalence of sexual abuse).

205. ROBERT JOHNSON, HARD TIME: UNDERSTANDING AND REFORMING THE PRISON 99 (Todd Clear ed., 3d ed. 2002).

domination of another.[206] For his victim, manhood gives way to the socially constructed "pussy" and "bitch."[207]

Moreover, like the non-natural land use present in *Rylands*, imprisonment represents an anomalous exercise of state power; it deprives boy prisoners of both liberty and safety.[208] While the loss of considerable liberty invariably accompanies incarceration, surely prison rape falls outside the sentence imposed by statute. "[H]aving stripped . . . [inmates] of virtually every means of self-protection and foreclosed their access to outside aid," wrote the Supreme Court in *Farmer v. Brennan*, "the government and its officials are not free to let the state of nature take its course."[209]

3. Objectives.—

a. Maximum deterrence.—Deborah Golden observed that "[r]ape disrupts the sense of autonomy, control, and mastery over one's body. The body's boundaries are violated, orifices are penetrated, aversive sensory stimuli cannot be escaped, and motor and verbal functions are controlled by the assailant."[210] Being turned out, and thus having one's gender socially reconstructed, represents an especially profound deprivation of autonomy. Hence, protecting boys in a man's prison merits a statutory response designed for maximum deterrence. In such instances, strict liability becomes both necessary and proper:

> Maximum deterrence would be achieved not by the fault-based regime of qualified immunity but by holding governments strictly liable for all injuries caused by unconstitutional behavior. Strict liability would force government to internalize the costs of constitutional violations, including those not avoided by cost-justified precautions in hiring, training, supervision, and the like. Requiring government to bear the full costs of such actions would not only induce it to take such precautions, it would also depress activity levels for conduct that is likely to involve constitutional error despite reasonable care.[211]

Strict liability becomes all the more important when hazardous activities, such as imprisoning boys, operate under a cost avoidance scheme. Regrettably,

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206. *See supra* note 109 and accompanying text (discussing the subcultural equation of masculinity with domination).

207. *See supra* notes 107-10 and accompanying text (describing the feminization of the rape victim in prison).

208. *Cf., e.g.*, Bill v. Super. Ct. of S.F., 137 Cal. App. 3d 1002, 1008 (Cal. Ct. App. 1982) ("[T]he first obligation of government is to maintain the peace and enforce the law . . . .").

209. Farmer v. Brennan, 511 U.S. 825, 833 (1994).

210. Deborah M. Golden, *It's Not All in My Head: The Harm of Rape and the Prison Litigation Reform Act*, 11 CARDOZO WOMEN'S L.J. 37, 53 (2004) (citation omitted).

211. John C. Jeffries, Jr., *Disaggregating Constitutional Torts*, 110 YALE L.J. 259, 265-66 (2000) (internal citations omitted); *see also* Joseph H. King, Jr., *A Goals-Oriented Approach to Strict Tort Liability for Abnormally Dangerous Activities*, 48 BAYLOR L. REV. 341, 352 (1996) ("This . . . aims at imposing liability in a way that reduces the number and severity of accidents." (internal citations omitted)).

Congress legislatively imposed a form of cost avoidance upon the PREA standards. The Act provides in relevant part that "[t]he Attorney General shall not establish a national standard under this section that would impose substantial additional costs compared to the costs presently expended by Federal, State, and local prison authorities."[212] The proposed strict liability cause of action would incentivize correctional authorities to institute additional protective measures even if they imposed substantial costs.[213]

The proposed amendment would also advance deterrence through cost internalization. Whereas the damages arising from sexual misconduct are presently channeled by the current fault-based deliberate indifference standard onto the supposed "bad men" (the front-line officers who failed to protect the boy prisoner from sexual assault), strict liability would redirect them to the prison as an instrument of public policy.

b. Fairness.—A strict liability statute would also advance the goal of fairness. As explained by George Fletcher, "a victim has a right to recover for injuries caused by a risk greater in degree and different in order from those created by the victim . . . in short, for injuries resulting from nonreciprocal risks."[214] As we have seen, the "turning-out" of boy prisoners arises because of a hypermasculine prison subculture as well as prison officers' indifference to their victimization, which are risks not formally part of their sentence or ones prisoners have created.[215] These risk are thus nonreciprocal, and fairness dictates recovery of damages. To bar recovery in the absence of fault by prison officers would effectively subject turned-out boys to the doctrine of assumption of risk.

B. PLRA Exemptions

Congress passed the Prison Litigation Reform Act to deter "recreational" litigation by inmates[216] and to limit the extent and duration of injunctive relief.[217]

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212. 42 U.S.C. § 15607(a)(3) (2006).

213. However, provisions must be made to minimize the use of solitary confinement as a protective measure, given the harm it can inflict. *See* Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL'Y 325, 354 (2006) ("The restriction of environmental stimulation and social isolation associated with confinement in solitary are strikingly toxic to mental functioning . . . .").

214. George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 542 (1972). However, a strict liability provision could place deterrence and individual autonomy at cross-purposes. Namely, extreme security measures such as solitary confinement could diminish autonomy by impairing the boy prisoners' already limited liberty interests. Thus, a strict liability proviso in the PREA should be accompanied by language that directs prison authorities to house them in the least restrictive manner that is compatible with their safety.

215. *See supra* notes 83-116 and accompanying text (examining the social construction of boys as punks).

216. *See, e.g.*, Mitchell v. Farcass, 112 F.3d 1483, 1488 (11th Cir. 1997) ("Congress promulgated the Act to curtail abusive prisoner . . . litigation."); United States v. Simmonds, 111 F.3d 737, 743 (10th Cir. 1997) ("The main purpose of the Prison Litigation Reform Act was to curtail abusive prison-condition litigation."), *overruled by* United States v. Hurst, 322 F.3d 1256

While the PLRA applies to boys imprisoned in juvenile and adult institutions,[218] the Congressional Record gives no indication that boy prisoners contributed to the evils that the legislation intended to remedy. On the other hand, as explained below, absent statutory exemptions, two provisions of the Act would undermine the objectives of the proposed cause of action.

1. Exhaustion Requirement.—The Supreme Court in *Porter v. Nussle*[219] held that exhaustion is statutorily mandated under 42 U.S.C. § 1997e(a),[220] which provides: "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."[221] The proposed PREA standards permit persons other than the victim to file a grievance on his behalf,[222] but they also allow the victim to withdraw the complaint.[223] If he does not withdraw it, he could be "personally" required to exhaust the grievance process.[224]

The Prison Rape Commission unsuccessfully advocated exempting all prison rape victims "[b]ecause of the emotional trauma and fear of retaliation or repeated abuse that many incarcerated rape victims experience, as well as the lack of confidentiality in many administrative grievance procedures, many victims find it extremely difficult—if not impossible—to meet the short timetables of administrative procedures."[225] For punks, the grievance process imposes an even

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(10th Cir. 2003); Hampton v. Hobbs, 106 F.3d 1281, 1286 (6th Cir. 1997) ("The legislation was aimed at the skyrocketing numbers of claims filed by prisoners—many of which are meritless—and the corresponding burden those filings have placed on the federal courts."); Santana v. United States, 98 F.3d 752, 755 (3d Cir. 1996) ("Congress enacted the PLRA primarily to curtail claims brought by prisoners under 42 U.S.C. § 1983 and the Federal Torts Claims Act, most of which concern prison conditions and many of which are routinely dismissed as legally frivolous."); 141 CONG. REC. S14418 (daily ed. Sept. 27, 1995) (statement of Sen. Hatch) (urging legislation to "bring relief to a civil justice system overburdened by frivolous prisoner lawsuits").

217. *See* Kincade v. Sparkman, 117 F.3d 949, 951 (6th Cir. 1997) ("The text of the Prison Litigation Reform Act itself reflects that the drafters' primary objective was to curb prison condition litigation."); 141 CONG. REC. S14419 (daily ed. Sept. 27, 1995) (statement of Sen. Abraham) ("[N]o longer will prison administration be turned over to [f]ederal judges for the indefinite future for the slightest reason.").

218. 18 U.S.C. § 3626(g)(5) (2006) (providing that the PLRA applies to persons confined in "prison," a term that embraces juvenile facilities).

219. 534 U.S. 516 (2002).

220. *Id.* at 524.

221. 42 U.S.C. § 1997e(a).

222. PREA Notice of Proposed Rulemaking, *supra* note 100, § 115.52(c)(1).

223. *Id.* § 115.52(c)(2).

224. *Id.* § 115.52(c)(3).

225. Letter from the Nat'l Prison Rape Elimination Comm'n to Hon. Bobby Scott and Hon. Randy Forbes, Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary (Jan. 24, 2008), *available at* http://www.savecoalition.org/pdfs/PREA_letter_urging_reform_PLRA.pdf; *see also* Golden, *supra* note 210, at 39 ("[F]or the sake of clarity and good

greater cost. First, it comprises a status degradation ceremony by requiring the victim to publicly "come out" as a rape victim and punk, thus subjecting him to shame and ridicule for being less than a "real" man. Also, the intellectual development of boy prisoners, as well as their limited schooling, poorly equips them to navigate successfully through the labyrinth of grievance procedures.[226]

2. Physical Injury Requirement.—The PLRA provides under 42 U.S.C. § 1997e(e) that "[n]o [f]ederal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury."[227] The Act fails to define "physical injury," but some courts hold that it must be more than de minimis but not necessarily significant.[228] Lower federal courts have long been in agreement that § 1997e(e) bars only compensatory damages, leaving nominal damages, punitive damages, and equitable relief on the table.[229]

While several courts have concluded that rape is more than de minimis[230] and that common sense dictates that a rape qualifies as physical injury,[231] other forms of sexual abuse may not pass muster under § 1997e(e) and will therefore not be compensable. For instance, in *Smith v. Shady*,[232] the "[p]laintiff's allegations in the complaint concerning Officer Shady grabbing his penis and holding it in her hand . . . [did] not constitute a physical injury or mental symptoms."[233] The court reasoned that the defendant inflicted at worst a de minimis injury rather than the

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public policy, the PLRA should be amended to state that a rape in the custodial setting is compensable. Victims of rape should not be forced to navigate through unnecessary procedural hurdles and endless court motions to receive compensation for their injuries." (citation omitted)).

226. *See supra* note 99 and accompanying text (delineating the several impairments of boy prisoners).

227. 42 U.S.C. § 1997e(e) (2006). Lower federal courts are divided over the meaning of § 1997e(e). The most common interpretation "focuses on the type of relief sought. Thus, requesting relief for a 'mental or emotional injury'—regardless of the underlying constitutional or statutory right in question—requires the showing of a concurrent physical injury." James E. Robertson, *"Let's Get Physical": Section 1997e(e) of the Prison Litigation Reform Act*, 22 CORR. L. REP. 7, 9 (2010) (internal citations omitted).

228. *E.g.*, Liner v. Goord, 196 F.3d 132, 135 (2d Cir. 1999); Siglar v. Hightower, 112 F.3d 191, 193 (5th Cir. 1997).

229. *See, e.g.*, Allah v. Al-Hafeez, 226 F.3d 247, 251 (3d Cir. 2000) (permitting nominal and punitive damages); Waters v. Andrews, No. 97-CV-407A(F), 2000 U.S. Dist. LEXIS 16004, at *23 (W.D.N.Y. Sept. 15, 2000) (permitting nominal and punitive damages); McGrath v. Johnson, 67 F. Supp. 2d 499, 508 (E.D. Pa. 1999) (permitting nominal damages). *But see* Davis v. Dist. of Columbia, 158 F.3d 1342, 1348 (D.C. Cir. 1998) ("[Section] 1997e(e) draws no such distinction [between compensatory and punitive damage claims]. It simply prevents suits 'for' mental injury without prior physical injury.").

230. *E.g.*, Oliver v. Keller, 289 F.3d 623, 627 (9th Cir. 2002).

231. *See id.* at 627; *see also Liner*, 196 F.3d at 135 ("[T]he alleged sexual assaults qualify as physical injuries as *a matter of common sense*." (emphasis added)).

232. No. 3:CV-05-2663, 2006 WL 314514, at *1 (M.D. Pa. Feb. 9, 2006).

233. *Id.* at *2.

type of actionable injury envisaged by Congress.[234]

Section 1997e(e) makes recovery for sexual harassment problematic.[235] Sexual harassment in prison can involve kissing, touching, or fondling as well as verbal remarks intended to feminize the future target, proposition him, or extort him.[236] The Department of Justice's proposed PREA standards correctly recognize that sexual harassment can be a precursor to sexual assault.[237] However, courts have invoked the PLRA in denying recovery for harassing behavior, even if it included some physical contact, finding the behavior "not sufficiently serious"[238] or not "literally shocking to the conscience."[239]

C. Guardians Ad Litem

Two distinguished commentators on prisoners' rights warn that "[e]xclusive reliance on the courts [to protect prisoners] . . . is misplaced: judges can only remedy problems once a constitutional violation is found; they are not in a position to prevent problems in the first place. The far wiser approach is to develop preventive oversight mechanisms . . . ."[240] Oversight is especially important for boy prisoners. As Human Rights Watch observed, "[t]he history of prison rape is a history of officials who denied the problem existed, tolerated it, or thought nothing could be done to stop it."[241]

This Article's proposed "turn-out" amendment would require the appointment of a guardian ad litem for every boy prisoner. To ensure his or her independence, the trial judge would appoint the guardian ad litem at sentencing. Ideally, many guardians ad litem could be drawn from civilian organizations with a history of

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234. *See id.*

235. *Cf.* Jason E. Pepe, *Challenging Congress's Latest Attempt to Confine Prisoners' Constitutional Rights: Equal Protection and the Prison Litigation Reform Act*, 23 HAMLINE L. REV. 58, 59-60 (1999) ("Common examples of claims that may be barred by § 1997e(e) include compensatory damages claims for government racial discrimination, sexual harassment, interference with religious freedoms, and infliction of psychological torture.").

236. *See* Robertson, *supra* note 100, at 7 n.21 (discussing the nature of sexual harassment in prison).

237. PREA Notice of Proposed Rulemaking, *supra* note 100, at 6251.

238. Boddie v. Schnieder, 105 F.3d 857, 862 (2d Cir. 1997). A female correctional officer made "'a pass' at him" and later "squeezed his hand, touched his penis and said, '[Y]ou know your [sic] sexy black devil, I like you;'" on another occasion, she bumped into him "with her whole body[,] vagina against penis," but this contact was deemed "not sufficiently serious." *Id.* at 859-62.

239. *See* Gilson v. Cox, 711 F. Supp. 354, 355-56 (E.D. Mich. 1989) (ruling that allegations that female correctional officer "made various sexual advances toward him and physically abused him by grabbing his genitals and buttocks," if true, were not "literally shocking to the conscience").

240. Michael B. Mushlin & Michele Deitch, *Opening Up a Closed World: What Constitutes Effective Prison Oversight?*, 30 PACE L. REV. 1383, 1384 (2010).

241. Press Release, Human Rights Watch, US: Prevent Prison Rape (June 23, 2009) (quoting Jamie Fellner, Senior Counsel for the U.S. Program of Human Rights Watch), *available at* http://www.hrw.org/en/news/2009/06/23/us-prevent-prison-rape.

prison oversight, such as the Correctional Organization of New York.[242]

The guardian ad litem would be charged with monitoring the boy's welfare and, if merited, could initiate and represent his interests in grievance procedures and litigation. He or she would be empowered to visit regularly and unannounced. All communication between the boy prisoner and his guardian ad litem would be confidential. The guardian ad litem would have access to all reports addressing the boy or his cellmates and would have to receive notice of pending classification decisions, disciplinary hearings, or grievances to which the boy prisoner would be a party or witness. Additional provisions regarding the selection, training, expenses, and powers of the guardian ad litem could draw upon the practice of appointing guardians ad litem for juvenile victims in criminal proceedings.[243]

CONCLUSION

"Until we begin to make it wrong to condone rape in a prison context—or to dismiss it as inevitable—we will continue to allow staggering numbers of individuals to be victims and to remain voiceless in the face of continued victimization."[244] Statutory or constitutional responses to prison rape will likely have limited effectiveness unless they can impair the prison subculture's capacity to construct and transmit a coherent rationale for same-sex sexual abuse. The transmission of that rationale, which equates weakness with femininity, and femininity with inferiority, could be interrupted by a dissonant norm—one that prizes a civil, empathetic masculinity. Israeli prisons provide some guidance in this regard. Rates of sexual abuse are thought to be exceedingly low in Israel's prisons, but not because of educational programs or beefed-up security. Rather, for various reasons, a dissonant set of norms lead "Israeli inmates [to] see coerced same-sex sexual relations and other betrayals of the prisoners' code as a perverse symbol of their own abuse by society."[245] In the United States, there may be no more perverse symbol of societal abuse of inmates than the turning-out of boy prisoners and no stronger a deterrent than the shaming of inmates who prey on them. Indeed, when an adult-age inmate sees in the glint of a boy prisoner's eyes

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242. *See generally* Jack Beck, *Role of the Correctional Association of New York in a New Paradigm of Prison Monitoring*, 30 PACE L. REV. 1572 (2010); John M. Brickman, *The Role of Civilian Organizations with Prison Access and Citizen Members—the New York Experience*, 30 PACE L. REV. 1562 (2010).

243. *See, e.g.*, David Finkelhor et al., *How the Justice System Responds to Juvenile Victims: A Comprehensive Model*, JUV. JUST. BULL., Dec. 2005, at 5, *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/210951.pdf (noting that "about 18 percent of child victims received such representation").

244. Anthony C. Thompson, *What Happens Behind Locked Doors: The Difficulty of Addressing and Eliminating Rape in Prison*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 119, 176 (2009).

245. Tomer Einat, *Inmate Harassment and Rape: An Exploratory Study of Seven Maximum- and Medium-Security Male Prisons in Israel*, 53 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 648, 660 (2009).

a reflection of himself, he will no longer accept the subcultural rationale for the turning-out of boy prisoners.

To constrain the emasculating features of the contemporary prison that drive the social construction of punks,[246] I see no alternative to "normalizing" prison life[247] so as to render it as much like the broader society as security concerns permit.[248] Until then, states must be deterred from imprisoning boys absent a compelling, individualized justification. Deterrence of this sort requires strict liability for their victimization. In the meantime, men outside of prison ought to lead by example.

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246. *See* Robertson, *supra* note 100, at 12 ("An inmate confined in California's Soledad Prison observed, 'Not only is the State of California going to take away your freedom, but also your manhood . . . .' Imprisonment represents more than the loss of freedom; it also diminishes you as an adult male. As one commentator wrote, '[T]he prisoner's masculinity is in fact besieged from every side." (internal citations omitted)).

247. *See* Peter L. Nacci & Thomas R. Kane, *Sex and Sexual Aggression in Federal Prisons*, 48 FED. PROBATION 46, 51 (1984) ("'Normalization' means that the same norms that check homosexual activity in free communities should check homosexual activity in prisons . . . . A male inmate is not to be accepted as a female surrogate in any sense for to do this is to invite problems associated with sexual aggression.").

248. As indicated below, the "normalization of prison life" via coed imprisonment may primarily benefit boys:

> In the situation of women incarcerated in a mixed closed prison with young men at Ringe in Denmark, we have a striking example of the instrumentalisation of women, their explicit dedication to the normalisation of the boys' lives. While economic rationality could be seen as a factor (the "low numbers" again), still, the officially stated objective is "normalisation" in the Danish penal and correctional system. In the case of Ringe, it means normalising the lives of young heterosexual men inmates.

Marie-Andrée Bertrand, *Incarceration as a Gendering Strategy*, 14 CAN. J.L. & SOC'Y 45, 58 (1999).