

Prison Rape: Have We Done Enough? A Deep Look Into the Adequacy of the Prison Rape Elimination Act

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The rapes seem to be for two main reasons. 1. They hurt, someone must pay. 2. Being deprived of consensual sex, and self-centered, any hole will do. Power, control, revenge, seem to top the “reasons” for rape. The person assaulted is either seen as weaker, or gang banged if seen as [a] stuck up kind of person. You know, refuses to swear, actually admits he is guilty, is seeking help [,] etc. . . . I have yet to hear of an inmate being charged in court with sexual assault of an inmate. Have you? If just one was found guilty, got more time, things would change.¹

INTRODUCTION

Until recently, prison rape was the “elephant in the room” of the American prison system. Non-prisoners and prisoners alike knew prison rape existed, yet the legal system was reluctant to directly address this prevalent and unfortunate problem. Not until 1994 did the Supreme Court first constitutionally recognize the problem of prison rape in the landmark case *Farmer v. Brennan*,² which held that a prison guard violates the United States Constitution’s Eighth Amendment prohibition against cruel and unusual punishment if she “ignores a substantial risk of serious harm” to the inmate.³ However, the ex-

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1. Human Rights Watch, *No Escape—Male Rape in U.S. Prisons: Prisoners’ Voices*, <http://www.hrw.org/reports/2001/prison/voices.html> (scroll down to “D.A., Nebraska, 9/6/96”) (last visited Oct. 8, 2006) [hereinafter Human Rights Watch, *Prisoners’ Voices*].

2. 511 U.S. 825 (1994).

3. *Id.* at 848.

tremely high burden of culpability required to prove such a claim made the judicial remedy insufficient to stop the problem. The most recent effort to combat prison rape came in 2003, when Congress enacted the Prison Rape Elimination Act⁴ (Act) in response to the horrific impacts of prison rape on prisoners and the community at large.

Although it appears that the Act is Congress's good faith effort to eliminate prison rape, it is an inadequate remedy because it focuses primarily on the symptoms of prison rape and does not sufficiently eliminate the causes. This Article examines the weaknesses of the Act and proposes alternate remedies to combat prison rape that may supplement legislative efforts. Part I of this Article discusses the social and institutional causes of prison rape from an interdisciplinary perspective, including the disciplines of psychology, sociology, and criminology. Part II provides background information on the Act and explains why the articulated remedy is inadequate to eliminate prison rape. Part III discusses *Farmer v. Brennan* and other ineffective judicial efforts to combat prison rape. Part IV discusses the link between prison rape and its overwhelming effects on the rise of HIV infections in the Black community as another incentive for Congress to strengthen their efforts to end prison rape. Part V discusses possible solutions to prison rape along with possible improvements to the Act. This Article concludes by emphasizing Congress' role in eliminating prison rape by strengthening the act.

I. SOCIAL AND INSTITUTIONAL CAUSES OF PRISON RAPE

In order to understand the institutional and social causes of prison rape, one must begin with the different scenarios in which prison rape arises. Many believe that rape is a sexual act, but that is rarely the case.⁵ Rape in prison is usually an act of "violence, politics, and [the] acting out of power roles."⁶ The most common situations which give rise to prison rape are: (1) bodily force; (2) coercion; (3) pimp inducement; and (4) punishment or control by the prison guards.⁷

4. 42 U.S.C. §§ 15601-15609 (2003).

5. Human Rights Watch, *No Escape Male Rape in U.S. Prisons: Rape Scenarios*, http://www.hrw.org/reports/2001/prison/report5.html#_1_5 (last visited Oct. 8, 2006) [hereinafter *Rape Scenario*]. Prisoners, rape victims, and experts alike agree that any type of rape, including prison rape, is rarely a result of purely sexual urges. *Id.*

6. *Id.* In the prison community, power and control are indications of one's status.

7. *Id.*

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A. “Bodily Force Rape”⁸

Overtly violent rape is the most publicized form of rape. American media depicts this form of rape in prison movies, television shows, and even commercials.⁹ Bodily force rape involves an individual or individuals approaching another prisoner with a weapon and offering the prisoner the choice of either solely being raped or being raped and brutally beaten.¹⁰ The prisoner then has the option of submitting to the rape silently or fighting back.¹¹ Either option typically will lead to rape, but when the victim fights back, more physical harm will result.¹² It is believed that most rapes in prison occur through coercive tactics because many of the victims do not show signs of physical harm.¹³

B. Coercion

According to prisoners who have spoken out about their experiences and experts alike, a more common form of prison rape is rape by coercion.¹⁴ Rape by coercion usually involves a stronger inmate exploiting a weaker inmate and convincing the weaker inmate to submit to sex.¹⁵ An unnamed prisoner from Florida provided a very common example of how rape by coercion usually occurs:

A new inmate arrives. He has no funds for the things he needs such as soap, junk food, and drugs. . . . Someone befriends him and tells him if he needs anything come to him. The new arrival is sometimes aware, but most times not, that what he is receiving has a 100% interest rate that is compounded weekly. When the [new arrival] is in deep enough the “friend” will tell him he can cover some of his debt by submitting to sex. This has been the “friend’s” objective from the beginning. To man[e]uver the [new arrival] into a corner where he [is] vulnerable.¹⁶

Another unnamed inmate stated, “I was never forced into sex physically, but mentally I wasn’t capable of saying no, as I feared for

8. *Id.*

9. Sabrina Oub & Lara Stemple, *Selling a Soft Drink, Surviving Hard Time: Just What Part of Prison Rape Do You Find Amusing?*, S.F. CHRON., June 9, 2002, at D2.

10. Human Rights Watch, *Prisoners’ Voices*, *supra* note 1.

11. *Id.*

12. *Id.* Therefore, it would seem that there is an incentive to submit to rape without putting up a fight.

13. *Id.* The threat of physical harm alone is usually enough to get a weaker inmate to submit to one’s wishes.

14. *Id.*

15. *Id.*

16. Human Rights Watch, *Prisoners’ Voices*, *supra* note 1.

my life.”¹⁷ Some experts do not recognize rape by coercion because it is more subtle than bodily force rape.¹⁸

C. The Pimp Scenario

Another scenario of prison rape involves one inmate selling another inmate to an individual or group of individuals against his will for certain valuable items, such as cigarettes, magazines, soap, or any other desirable item.¹⁹ In the pimp scenario, the “punk”²⁰ becomes emasculated by his “pimp.”²¹ The punk usually has no recourse because he is usually smaller and weaker in size than his pimp.²² As the lyrics from the following song played on a radio station illustrating the “pimp scenario” demonstrate, society still does not recognize the severity of prison rape. “[Be]cause you’re my prison bitch, my prison bitch, and I have no regrets, I got you for a candy bar and a pack of cigarettes, [a]t first you were resistant, but now you are my friend, I knew that I would get you in the end. . . .”²³

D. Rape as a Means of Control and Punishment

Oftentimes, prison guards tolerate rape amongst the prisoners as a means of control or punishment.²⁴ Prison officials may allow rape to occur as a way of keeping the violence amongst the prisoners contained.²⁵ Guards who allow the rapes follow a particular logic: if the prisoners are violent against one another, then there will be less aggression directed toward prison guards. “That the victims, who comprise as much as twenty percent of 2,000,000 inmates held in U.S. prisons and jail[s], live in perpetual fear is also conducive to con-

17. *Id.*

18. *Id.*

19. *Id.*

20. Carl Weiss and David J. Friar define a “punk” as a person forced to perform sexual acts in prison. CARL WEISS & DAVID J. FRIAR, TERROR IN THE PRISONS: HOMOSEXUAL RAPE AND WHY SOCIETY CONDONES IT 132 (1974).

21. Human Rights Watch, *The Rules of the Game: Prison Rape and Reform*, <http://www.hrw.org/reports/2001/prison/video.html#reform> [hereinafter Human Rights Watch, *Rules of the Game*] (last visited Oct. 8, 2006).

22. *Id.*

23. Steve J.B., *Nothing Funny About It, Prison Bitch*, COUNTERPUNCH, <http://www.counterpunch.org/steve08012003.html> [hereinafter J.B., *Nothing Funny*] (last visited Oct. 8, 2006). The song aired on the Bob & Tom Show on radio station WFJX, FM 105.7. *Id.* This song takes a lighthearted and comical approach to being raped in prison. The song may be a reflection of the larger society’s view on this issue. *Id.*

24. Neve Gordon, *Rape Used as Control in U.S. Prisons*, NAT’L CATH. REP., Sept. 14, 2001.

25. *Id.*

trol.”²⁶ The officials are not concerned with the well-being of and the violations committed against the victims because the victims are other prisoners. “At night the guards locked themselves in a cage and slept while inmates sexually and physically assaulted others.”²⁷ Therefore, the rapes may actually make a prison guard’s job easier.²⁸

The above-listed scenarios shed light on the reasons prison rape occurs, and in turn, point to the changes needed to eliminate prison rape. Congress must point its focus toward the scenarios in which the rapes occur. Once Congress realizes that the rapes occur in particular situations and under particular circumstances, it can then respond with more pointed and effective remedies.

II. THE PRISON RAPE ELIMINATION ACT

A. Purposes of the Act

The main purpose of the Act is to make the elimination of prison rape a top priority in prison facilities across the country. Congress envisions prison systems where the underreporting of rape is not a bar to its elimination. Congress summarizes the purposes of the Act in nine very broad statements.²⁹

B. Findings of the Act

The Act gives a broad definition of the terms “prison” and “rape.”³⁰ It defines prison as “any confinement facility of a Federal, State, or local government, whether administered by such government or by a private organization on behalf of such government, and in-

26. *Id.*

27. *Id.*

28. *Id.*

29. 42 U.S.C.A. § 15602 (2003). The purposes of the Act are as follows:

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

Id.

30. 42 U.S.C.A. § 15609 (2003).

cludes (A) any jail or police lockup; and (B) any juvenile facility used for the custody or care of juvenile inmates.”³¹ The Act defines rape as:

(A) the carnal knowledge, oral sodomy, sexual assault with an object, or sexual fondling of a person, forcibly or against that person’s will;

(B) the carnal knowledge, oral sodomy, sexual assault with an object, or sexual fondling of a person not forcibly or against the person’s will, where the victim is incapable of giving consent because of his or her youth or his or her temporary or permanent mental or physical incapacity; or

(C) the carnal knowledge, oral sodomy, sexual assault with an object, or sexual fondling of a person achieved through the exploitation of the fear or threat of physical violence or bodily injury.³²

There are also several findings outlined in the text of the Act that reveal the legislative intent behind its enactment.³³ Congress found that nearly 200,000 current inmates have been or will be victims of sexual assault in prison.³⁴ The total number of inmates who have been sexually assaulted in the past twenty years exceeds 1,000,000.³⁵ Congress also found that inmates with mental illnesses and young first-time offenders are at an increased risk for sexual victimization.³⁶ The majority of prison staff is not trained to handle sexual assaults.³⁷ HIV and AIDS are major public health problems within America’s correctional facilities.³⁸ Prison rape undermines the public health by contributing to the spread of these diseases, and often gives a potential death sentence to its victims.³⁹

C. Legislative History of the Act

The Act was presented on the Senate floor July 21, 2003, and passed without amendment that same day.⁴⁰ The Senate Reports emphasize the importance of the Act to “address prison rape in a meaningful way and to bring accountability into America’s prisons and jails.

31. *Id.*

32. *Id.* These broad definitions of “prison” and “rape” may allow a more all-inclusive remedy.

33. *Id.* § 15601.

34. *Id.* § 15601(2).

35. 42 U.S.C.A. § 15601(4) (2003).

36. *Id.* § 15601(3), (4).

37. *Id.* § 15601(5).

38. *Id.* § 15601(7).

39. *Id.*

40. S. 1435, 108th Cong. (2003).

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It is intended to make prevention and prosecution of sexual assault within correctional facilities a priority for federal, state, and local institutions; and require the development of national standards for detection, prevention, reduction, and punishment of these incidents.”⁴¹ Senator Kennedy, one of the authors of the Act along with Senators Sessions, Wolf, and Scott, stated that prisoners who are subject to violence in jail should have some recourse against prison officials who are aware of and ignore the violence.⁴² Senator Kennedy acknowledged prison officials’ duty to protect inmates.⁴³ Quoting the Supreme Court, Senator Kennedy stated, “being violently assaulted in prisons is simply not part of the penalty that criminal offenders pay for their offenses against society.”⁴⁴

The Act, co-sponsored by both Republicans and Democrats, had unanimous support.⁴⁵ Senator Sessions stated that “knowingly subjecting a prisoner to a circumstance where [he or she] could be sexually assaulted, and raped, is cruel and unusual punishment, clearly, under the Eighth Amendment to the Constitution.”⁴⁶ Senator Sessions also stated that the sexual assault one encounters is an additional punishment to that of being in jail.⁴⁷ This additional punishment is unconstitutional.

The legislative history of the Act provides insight into the inadequacies of the Act. The Senate Reports reveal that the Act was meant to be a “moderate and necessary response” to the prison rape epidemic.⁴⁸ The term “moderate” reveals that Congress’s efforts to combat prison rape were far from aggressive. The Act itself demonstrates the lackadaisical approach Congress is taking in fighting prison rape.

D. Implementation of the Act

The most critical aspect of any piece of legislation shows the actual ways in which it will be implemented to achieve its stated purposes. The Act requires: (1) the Bureau of Justice Statistics to conduct an annual comprehensive statistical review and analysis of the incidence and impact of prison rape; (2) a Review Panel on Prison

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. S. 1435, 108th Cong. (2003).

47. *Id.*

48. *Id.*

Rape within the Department of Justice to hold public hearings on the operation of three prisons with the highest incidence of prison rape and the two prisons with the lowest incidence in each of the prison facilities surveyed; (3) the Attorney General to provide funding to states for personnel, training, technical assistance, data collection, and equipment to prevent and prosecute prison rape; (4) a National Prison Rape Reduction Commission consisting of nine members to conduct a comprehensive study on the impacts of prison rape; and (5) the Attorney General to publish a final rule establishing national standards for detecting, preventing, reducing, and punishing prison rape.⁴⁹

As the implementations shown above illustrate, the Act has no teeth. The Act does not speak of any real and concrete ways of ending prison rape. The Act does not touch on the institutional, societal, or psychological remedies for prison rape. The first step to remedying the problem must come from Congress' efforts to attack the problem from a more diverse angle. The Act focuses more on the reporting aspect than on the actual processes by which it will eliminate prison rape. Surely, Congress does not believe that awareness of the problem alone is enough to eliminate the problem.

III. *FARMER V. BRENNAN* AND OTHER CASE LAW ADDRESSING PRISON RAPE

A. *Farmer v. Brennan*

The Supreme Court addressed the issue of prison rape in *Farmer v. Brennan*.⁵⁰ In *Farmer*, the petitioner-inmate was a preoperative transsexual who exhibited female characteristics due to hormones he took prior to and while in prison.⁵¹ Due to discipline problems, petitioner was taken out of segregation and placed in the general population of the United States Penitentiary in Terre Haute, Indiana.⁵² Within two weeks, he was beaten and raped by another inmate.⁵³ Petitioner reported the incident to the officials and was placed in segregation several days later.⁵⁴ Petitioner filed a complaint alleging that Respondents placed him in the general population despite their

49. 42 U.S.C. § 15603 (2003).

50. *Farmer v. Brennan*, 511 U.S. 825 (1994).

51. *Id.* at 829. The opinion stated that petitioner's appearance in jail was unclear from the record, but before incarceration, petitioner did receive silicon breast implants and underwent estrogen hormone therapy. The petitioner continued hormone therapy while in prison.

52. *Id.* at 831.

53. *Id.*

54. *Id.*

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knowledge that the environment was a violent one and despite the knowledge that he would be subjected to increased abuse because of his appearance.⁵⁵ Among other things, Petitioner sought an injunction barring future confinement in any penitentiary.⁵⁶

Petitioner's claim was that Respondents' failure to prevent the assault violated the Eighth Amendment's protection against cruel and unusual punishment.⁵⁷ The District Court granted summary judgment in favor of Respondents, finding that Respondents did not have the requisite knowledge.⁵⁸ The United States Court of Appeals for the Seventh Circuit affirmed without opinion.⁵⁹

The U.S. Supreme Court articulated that "prison officials have a duty . . . to protect prisoners from violence at the hands of other prisoners."⁶⁰ In order to hold the prison official liable, he must possess the culpable state of mind.⁶¹ The culpable state of mind articulated by the Court is "deliberate indifference."⁶² The Court's reasoning in *Farmer* hinged upon its definition of "deliberate indifference."

The Court found that the Court of Appeals has "routinely equated deliberate indifference with recklessness."⁶³ "It is, indeed, fair to say that acting or failing to act with deliberate indifference to a substantial risk of serious harm to a prisoner is the equivalent of recklessly disregarding that risk."⁶⁴ When defining recklessness, Petitioner argued that the Court should adopt the definition used in civil cases.⁶⁵ In civil cases, the courts use an objective standard.⁶⁶ The objective standard makes the defendant guilty if he knew of or should have known of the risk.⁶⁷ On the other hand, Respondent contended that the Court should adopt the definition of recklessness used in criminal cases.⁶⁸ The subjective standard used in criminal cases makes the de-

55. *Id.* at 831. It is generally well-known that individuals exhibiting female characteristics in male prisons are at an increased risk of being sexually assaulted.

56. *Farmer v. Brennan*, 511 U.S. 825, 831 (1994). Petitioner also sought compensatory and punitive damages. *See id.*

57. *Id.*

58. *Id.*

59. *Id.* at 832.

60. *Id.* at 833 (citing *Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556, 558 (1988)).

61. *Id.* at 834.

62. *Farmer v. Brennan*, 511 U.S. 825, 831 (1994).

63. *Id.* at 836.

64. *Id.*

65. *Id.* at 837.

66. *Id.*

67. *Id.*

68. *Farmer v. Brennan*, 511 U.S. 825, 835 (1994).

defendant guilty of deliberate indifference only if he actually knew of the risk.⁶⁹

The Court accepted Respondant's criminal definition of recklessness when it defined deliberate indifference.⁷⁰ "Subjective recklessness as used in the criminal law is a familiar and workable standard."⁷¹

[A] prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.⁷²

This burden of proof is extremely high and almost impossible to meet. The Petitioner brought forth a civil claim against the prison guards, not a criminal claim. It was not rational for the Court to adopt the criminal definition of recklessness and apply that definition to a civil case. Under this standard, an inmate will not survive a motion for summary judgment unless he shows:

evidence from which it can be inferred that the defendant-officials were at the time suit was filed, and are at the time of summary judgment, knowingly and unreasonably disregarding an objectively intolerable risk of harm, and that they will continue to do so; and finally to establish eligibility for an injunction, the inmate must demonstrate the continuance of that disregard during the remainder of the litigation and into the future.⁷³

The requisite showing to survive a motion for summary judgment is almost impossible to meet. The most difficult requirement is that the inmate show that the prison guard-defendant acted with deliberate indifference throughout the litigation. It is not enough that the inmate makes the actual showing of deliberate indifference once. The deliberate indifference must continue throughout the litigation.⁷⁴ Therefore, in order for the court to grant the inmate the preliminary injunction, must the petitioner be raped during the litigation process? In addition, the inmate must show that the guard will behave consistently in the future.⁷⁵ It is virtually impossible for an inmate to show

69. *Id.* at 844.

70. *Id.*

71. *Id.* at 839.

72. *Id.* at 837.

73. *Id.* at 846.

74. *Farmer v. Brennan*, 511 U.S. 825, 846 (1994).

75. *Id.*

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how a prison guard may act in the future. The standard articulated by the Court is arbitrary and capricious. Therefore, *Farmer* presents an unworkable standard for proving deliberate indifference needed to impute blame onto a prison guard.

After defining deliberate indifference, the Court still concluded that summary judgment in favor of the Respondents was improper and remanded the decision for further consideration.⁷⁶ On remand, the district court quickly dismissed Petitioner's complaint.⁷⁷ Because the district court rendered its decision so quickly, the Court of Appeals for the Seventh Circuit ruled on the case after remand. On remand, the Appellate Court vacated the district court's dismissal with respect to all but one defendant.⁷⁸ The Court of Appeals found that the district court did not allow Petitioner to present enough evidence in order to make an appropriate ruling on the Respondent's motion for summary judgment.⁷⁹

B. More Lenient Standards of Deliberate Indifference

Before the Court's decision in *Farmer*, many federal courts had a more lenient standard for deliberate indifference. For example, the court in *Martin v. White* held that prison officials may be liable where they are deliberately indifferent to a prisoner's constitutional rights, either because they actually intended to deprive him of some right or because they acted with reckless disregard of his right to be free from violent attacks by fellow inmates.⁸⁰ In *Morgan v. District of Columbia*, the court held that deliberate indifference occurs when there is an obvious unreasonable risk of harm to a prisoner or group of prisoners.⁸¹ Finally, in *Redman v. County of San Diego*, the court held that the deliberate indifference standard requires a finding of some degree of "individual culpability" but does not require an express intent to punish.⁸²

76. *Farmer v. Brennan*, 81 F.3d 1444, 1445 (7th Cir. 1996).

77. *Id.*

78. *Id.*

79. *Id.*

80. *Martin v. White*, 742 F.2d 469, 474 (8th Cir. 1984).

81. *Morgan v. District of Columbia*, 824 F.2d 1049, 1058 (D.C. Cir. 1987).

82. *Redman v. County of San Diego*, 942 F.2d 1435, 1442 (9th Cir. 1991).

C. Case Law Interpreting the *Farmer* Decision

In *Mervin v. Furlong*, the court denied summary judgment to the defendant prison guards on the grounds that they did not qualify for governmental immunity because their actions violated Plaintiff's constitutional rights.⁸³ In this case, the plaintiff alleged that the defendants were placed on notice that an inmate had sexually assaulted another inmate.⁸⁴ During the investigation, the defendants placed the known sex offender in the same cell as the Plaintiff.⁸⁵ The sex offender then choked, beat, and raped the Plaintiff.⁸⁶ Before the *Farmer* decision, the Tenth Circuit defined deliberate indifference by stating "a prison official acts with deliberate indifference if his conduct disregards a known or obvious risk that is *very likely* to result in the violation of a prisoner's constitutional rights."⁸⁷ However, the court found that the *Farmer* decision did not absolve the defendants of their responsibility to protect the inmate because the defendants' level of culpability also met the *Farmer* standard of deliberate indifference.⁸⁸ It seems that the court did not actually apply the extremely high and unworkable *Farmer* standard because this court was primarily concerned with reaching a just result for the assaulted inmate.

In *K.F.P. v. Dane County*,⁸⁹ Plaintiff was serving a less than fifty day sentence in a dormitory-like prison facility for operating a motor vehicle after his license was revoked.⁹⁰ Within a week of being incarcerated, K.F.P. was sexually assaulted.⁹¹ After the attacker threatened K.F.P. with another attack, K.F.P. filed a complaint against Dane County, its sheriff, two unnamed guards, and his attacker.⁹² Plaintiff claims that the defendants were aware of the substantial risk the attacker posed because of the attacker's reputation.⁹³ The attacker was arrested in the past for rape, second degree sexual assault, aggravated battery, and lewd and lascivious behavior, amongst other

83. *Mervin v. Furlong*, No. 99-1135, 2000 U.S. App. LEXIS 3421 (10th Cir. Mar. 6, 2000).

84. *Id.* at *4.

85. *Id.*

86. *Id.*

87. *Id.* at *8 (emphasis added).

88. *Id.*

89. *K.F.P. v. Dane County*, 110 F.3d 516 (7th Cir. 1997).

90. *Id.* at 517.

91. *Id.*

92. *Id.*

93. *Id.* at 518.

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things.⁹⁴ The attacker was also suspected of sexually assaulting other inmates twice in the past in the Dane County jail.⁹⁵

The court reiterated that in order to show deliberate indifference, a plaintiff must first show that the prison officials were subjectively aware of the risk.⁹⁶ Thus, a plaintiff must show that the defendant-prison guards actually knew “that [the] inmate[] faced a substantial risk of serious harm and disregarded that risk by failing to take reasonable steps to abate it.”⁹⁷ In contrast to the Tenth Circuit in *Mervin v. Furlong*, the Seventh Circuit held true to the subjective standard articulated in *Farmer*. The court ruled in favor of all defendants because the plaintiff failed to conduct discovery.⁹⁸ The discovery may have revealed the identities of the unnamed guards in the initial complaint.⁹⁹ The court reasoned that the plaintiff could not prove the mind state of the defendant guards because their identities were unknown.¹⁰⁰ Further, the plaintiff could not prove that the sheriff acted with deliberate indifference because the sheriff claimed to have no knowledge of the day to day workings of the correctional facility.¹⁰¹

In *Langston v. Peters*,¹⁰² plaintiff Langston was placed in protective custody after witnessing and reporting a murder in Statesville prison. Still in protective custody, Langston was later transferred to Joilet, where the guards placed him in a two-man cell.¹⁰³ Another inmate was subsequently placed in Langston’s cell.¹⁰⁴ Langston stated that ten days after the inmate was placed in his cell, the inmate raped him.¹⁰⁵ Langston also claimed that the guards failed to give him medical treatment for an hour after the rape.¹⁰⁶ Langston filed suit alleging violation of his Eighth Amendment protection from cruel and unusual punishment.¹⁰⁷

The Seventh Circuit also stated the *Farmer* standard of deliberate indifference, emphasizing the importance of the guards’ actual subjec-

94. *Id.*

95. *K.F.P. v. Dane County*, 110 F.3d 516, 518 (7th Cir. 1997).

96. *Id.* at 519.

97. *Id.*

98. *Id.*

99. *Id.* at 519.

100. *Id.*

101. *K.F.P. v. Dane County*, 110 F.3d 516, 519 (7th Cir. 1997).

102. *Langston v. Peters*, 100 F.3d 1235 (7th Cir. 1996).

103. *Id.* at 1236.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

tive knowledge, as opposed to constructive objective knowledge.¹⁰⁸ The court stated that it was the procedure of the Joilet prison system not to place inmates who are in protective custody in two-man cells. However, “ignoring internal prison procedures does not mean that a constitutional violation has occurred.”¹⁰⁹ Once again, the plaintiff-inmate could not sufficiently prove that the defendant-prison guards’ mental state amounted to deliberate indifference.

Further, the court found for the defendants on the claim that their failure to get the plaintiff immediate help after the rape occurred violated the Eighth Amendment. “A prison official may evidence deliberate indifference by failing to treat or delaying the treatment of a serious medical need. However, for liability to exist the medical need must be objectively serious.”¹¹⁰ Although the guards’ response may have been “inappropriate,” it was not necessarily unconstitutional according to the court. The court stated that the plaintiff did not show any substantial harm resulting from the one hour delay. There was no evidence that the delay caused more pain to the plaintiff.¹¹¹ In affirming the summary judgment previously granted to the defendants, the court ruled that the plaintiff could not meet the requisite showing of deliberate indifference.¹¹²

D. Justice Blackmun’s View

Although not directly addressing the deliberate indifference standard, Justice Blackmun spoke of the cruel and unusual punishment often inflicted upon inmates due to prison rape in *United States v. Bailey*.¹¹³ In *Bailey*, several prison inmates escaped one night and were recaptured a few months later.¹¹⁴ The prisoners argued that the living conditions were so threatening and dangerous that they either had to escape or face death.¹¹⁵ The majority ruled against the defendants and stated that in order for the defendants to successfully assert coercion, they must show that not only were they threatened upon their escape, but also that they were continually threatened with death

108. See *Langston v. Peters*, 100 F.3d 1235, 1239 (7th Cir. 1996).

109. *Id.* at 1238.

110. *Id.* at 1240 (citing *Estelle v. Gamble*, 429 U.S. 97, 94 (1976)).

111. *Id.* at 1241.

112. *Id.* at 1241.

113. *United States v. Bailey*, 444 U.S. 394, 419 (1980) (Blackmun, J., dissenting).

114. *Id.* at 396.

115. *Id.* at 398.

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while they were at large.¹¹⁶ This continual threat of death must be the reason why the defendants did not return to the prison.¹¹⁷ Justice Blackmun dissented from the standard articulated by the majority and stated that necessity or duress should be viable defenses for inmates convicted of escape from prison based on the harsh conditions that some prisons inherently create.¹¹⁸ Blackmun also stated that failure of prison officials to protect inmates from homosexual rape does violate the Eighth Amendment's prohibition against cruel and unusual punishment.¹¹⁹ Blackmun further emphasized the likelihood of an inmate being sexually assaulted in prison.

A youthful inmate can expect to be subjected to homosexual gang rape his first night in jail, or, it has been said, even in the van on the way to jail. Weaker inmates become the property of stronger prisoners or gangs, who sell the sexual services of the victim. Prison officials either are disinterested in stopping abuse of prisoners by other prisoners or are incapable of doing so, given the limited resources society allocates to the prison system.¹²⁰

It is apparent that Blackmun understood the necessity of some remedy for the "cruel and unusual punishment" created by prison rape.

As several cases after *Farmer* demonstrate, its standard of deliberate indifference provides an almost unworkable standard for inmates attempting to prove violations of their constitutional rights. Difficulty in making this showing only adds to the necessity of strengthening the Act. In accordance with Justice Blackmun's dissent in *Bailey*, the Act must pick up where *Farmer* left off and protect the constitutional rights of all inmates, regardless of what they can prove in the courtroom.

IV. PRISON RAPE AND HIV IN THE BLACK COMMUNITY

HIV and AIDS are public health problems that plague American's prison system.¹²¹ The transmission of HIV occurs through intimate contact with bodily fluids. The two most prevalent methods of infection are through sexual contact and sharing needles used to inject

116. *Id.* at 410.

117. *Id.*

118. *Id.* at 420.

119. *United States v. Bailey*, 444 U.S. 394, 423 (1980) (Blackmun, J., dissenting).

120. *Id.* at 421.

121. Richard D. Vetstein, *Rape and AIDS in Prison: On a Collision Course to a New Death Penalty*, 30 SUFFOLK U. L. REV. 863 (1997).

intravenous drugs.¹²² When male rape occurs, it usually involves violent, anal penetration. As a result, the receiver suffers rectal bleeding, which could leave the victim and his attacker exposed to HIV-infected blood and semen.¹²³ During anal sex, tears of the rectum's mucous membranes are generated.¹²⁴ This fluid is highly receptive to HIV-infected semen and blood.¹²⁵ As a result, anal sex remains one of the riskiest ways of infection.¹²⁶

Because prison populations are disproportionately Black, it naturally follows that the atrocities that take place inside prison walls have a disproportionate effect on the Black community. "While many studies have documented the prevalence of HIV in prisons, researchers are now examining the link between high rates of imprisonment among African Americans and the high HIV [and] AIDS rates in African American communities outside prison."¹²⁷ One of the findings in the Act is that in the year 2000, 25,088 inmates in Federal and State prisons were infected with HIV and AIDS, accounting for six percent of all deaths in the Federal and State prisons.¹²⁸ Of the newly HIV-infected among men in the United States, the Center for Disease Controls estimates that approximately fifty percent are Black, thirty percent are White, and twenty percent are Hispanic.¹²⁹ The overall rate of confirmed AIDS among the prison population in the United States is about four times the rate in the United States at large.¹³⁰ Furthermore, statistics indicate that the infection rates for prisoners are greater than the infection rate of Americans as a whole.

Recent studies reveal that Black women between the ages of twenty-five and forty-four are thirteen times more likely to die because of AIDS than women of other races.¹³¹ The question remains: "What accounts for such disproportionate infection rates among the races?" Several researchers have hypothesized this answer. Some

122. *Id.* at 873.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. Lynette Clemetson, *United States: Links Between Prison and AIDS Affecting Blacks Inside and Out*, N.Y. TIMES, Aug. 6, 2004, available at <http://www.aegis.com/news/ads/2004/AD041599.html>.

128. 42 U.S.C.A. § 15601 (2003).

129. Steve Mitchell, *Prison Rapes Spreading Deadly Diseases*, UNITED PRESS INT'L, July 26, 2002.

130. *Id.*

131. Jon Cohen, *A Silent Epidemic: Why is there Such a High Percentage of HIV and AIDS among Black Women?*, SLATE, Oct. 27, 2004, <http://www.slate.com/id/2108724>.

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suggest the disproportionate infection rates stem from Black men who profess to be heterosexual but who secretly have sex with men, also known as men on the “down-low.”¹³² Still others offer strong links between poverty and HIV infection,¹³³ the contraction of other sexually transmitted diseases that create open sores that facilitate the transmission of HIV,¹³⁴ and the incarceration of Black men as answers.¹³⁵ The most important reason with regard to this discussion is the incarceration of Black men.

Phill Wilson, executive director of the Black AIDS Institute in Los Angeles, suggests . . . that the single biggest driver of the heterosexual spread to [B]lack women is the incarceration of [B]lack men. “The prison industry in America is an almost exact replication of the mining industry in South Africa, where you take large groups of men and move them from their families for an extended period of time,” says Wilson. As studies conducted in South Africa have shown, men who leave their homes for the mines often have new sexual partners—as do the women they leave behind. The increased sexual mixing spreads HIV in both the migrant men and their regular partners. When they return home, the men may infect their regular partners—or vice versa. This pattern of sexual networking is called concurrent partnering, which means that relationships overlap, and there’s nothing that HIV likes more.¹³⁶

I also argue that due to the prison rape dynamics, a man who is assaulted in prison and then returns home to a girlfriend or wife is not inclined to come forward with information regarding the assault. Therefore, the woman may believe she has no reason to suspect that her partner was exposed to HIV in prison. She then places herself at an extremely high risk of contracting HIV by having unprotected sex with her boyfriend or husband.

One superb study of concurrency in African Americans in rural North Carolina found that 53 percent of the men and 31 percent of the women reported concurrent partners during the preceding five years. Interestingly, 80 percent of the men in the study who said they had been incarcerated for more than 24 hours reported having had concurrent partners within five years; that percentage plum-

132. *Id.*

133. *Id.* (noting that one in four Black people live in poverty).

134. *Id.* (finding that Black people are twenty-four times more likely to contract gonorrhea and eight times more likely to get syphilis).

135. *Id.*

136. *Id.*

meted to 43 percent if a man had not been locked up for a day or longer.¹³⁷

According to the National Commission on AIDS, “no other institution in the nation possesses a higher percentage of people at substantial risk of HIV infection.”¹³⁸ Low-income drug offenders are among those at the highest risk of HIV infection.¹³⁹ The National Commission on AIDS also stated that “by choosing mass imprisonment as the . . . government’s response to the use of drugs, we have created a de facto policy of incarcerat[ing] more and more individuals with HIV infection.”¹⁴⁰

Ninety-five percent of the prison population is released back into society at one time or another.¹⁴¹ Therefore, if prisoners contract HIV or AIDS while incarcerated, they become not only a burden to society through medical costs, but also a threat to society’s general welfare.¹⁴² The executive director of the human rights group Stop Prisoner Rape, Lara Stemple, stated that “rape and HIV in prison is eight to ten times as high as in the general population.”¹⁴³ Most prisons refuse to distribute condoms because of the belief that distribution of condoms will lead to increased sexual activity.¹⁴⁴ The Stop Prisoner Rape organization believes that AIDS is a way of sentencing prisoners to death because, although they may be sentenced to a relatively short period of incarceration, the contraction of HIV sentences prisoners to a lifetime of pain and ultimately death.¹⁴⁵ Allowing prison rape to continue will not only harm prisoner-victims, but will also have adverse effects on the community at large due to the likelihood that the prison rape victims will contract HIV.

V. ALTERNATE SOLUTIONS

Congress must not leave the Act as it is, that is, without any teeth. Congress must enact specific mandates that give prison directors and officials guidance on how to stop prison rape. To do this, Congress must create its own directives in combination with plans around the

137. Cohen, *supra* note 131.

138. Vetstein, *supra* note 121, at 863.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. Clemetson, *supra* note 127.

145. Stop Prisoner Rape, Prisoner Rape Spreads Disease—Inside and Outside of Prison, <http://www.spr.org/en/factsheets/disease.asp> (last visited Oct. 8, 2006).

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country that have been effective in stopping the problem. For example, the Ohio Department of Rehabilitation and Correction Director, Reginald A. Wilkinson, implemented a ten point program for eliminating sexual assault in his prison facilities.¹⁴⁶ Unfortunately, every prison director is not as proactive in preventing prison rape as Wilkinson, so Congress must pick up the slack and mandate that certain actions be taken in accordance with its orders.

A. Ohio's Ten-Point Program for Ending Prison Sexual Assault

Ohio correctional facilities have implemented a very successful ten-point program to eliminate prison rape. The first step is staff training, where all employees receive specific training on inmate sexual assault as well as inappropriate staff-inmate relationships.¹⁴⁷ The second step involves inmate education, which entails inmates receiving information relating to sexual assault ranging from prevention, self protection, and reporting to treatment and self counseling.¹⁴⁸ The third step is enforcing sanctions against the prison for allowing rape to occur without taking affirmative steps to stop it.¹⁴⁹ The fourth step is victim support, led by a victim support staff consisting of people who have been specially trained to deal with victims of prison rape.¹⁵⁰ The fifth step involves providing all department investigators with training on investigating sexual assaults.¹⁵¹ The sixth step is an electronic means of tracking sexual aggressors and inmates who have engaged in inappropriate practices with staff.¹⁵² This tracking system will help when making housing and institutional assignments.¹⁵³ The seventh step is data collection of inappropriate action.¹⁵⁴ The eighth step is the development of internal management audit standards to ensure that every facility complies with the program.¹⁵⁵ The ninth step is the development of a process improvement team to figure out ways to improve the reporting of sexual assaults by the inmates.¹⁵⁶ The tenth

146. OHIO DEP'T OF REHAB. & CORRECTIONS, OHIO CORRECTIONAL INSTITUTION SEXUAL ASSAULT ABATEMENT: A TEN POINT PLAN (2004).

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. OHIO DEP'T OF REHAB. & CORRECTIONS, *supra* note 146.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

and final step in the program is the creation of a committee that will ensure compliance¹⁵⁷

B. Utilizing Ohio's Ten-Point Program

According to step one of Ohio's ten point program, the Act could mandate and provide funding for staff training. Staff training should consist of training guards on how to prevent sexual assaults. For example, guards should be aware of where and under what circumstances most rapes occur. In addition, the guards should be informed that young inmates and those inmates displaying female characteristics, such as long hair, pretty eyes, and a skinny build, are at greater risk of being assaulted.¹⁵⁸ In response, the trained staff could alert these individuals that they are high risk and should avoid placing themselves in certain risky situations and locations. This relates to the second step of Ohio's ten-point program, inmate education.

The Act should incorporate mandatory education sessions for inmates. These sessions should be devoted solely to dealing with inmate sexual assault. The Act should mandate two inmate education meetings every six months. At the meetings, the supervising guards should discuss the consequences of a prisoner sexually assaulting another inmate. This education aspect would alert all inmates that the prison will not stand by idly and allow prisoners to be sexually assaulted. Prisoners should also be made aware that anyone caught assaulting an inmate will be subject to public scrutiny. The perpetrator, not the victim, will be placed in isolation until formal charges are brought against him. In addition, the inmates will be reminded of the consequences of engaging in high risk sexual acts in the absence of condoms, including both rape and consensual sex.

The Act could mandate the third step of Ohio's ten-point plan by imposing sanctions upon any institution not in compliance with the mandates of the Act. These sanctions should not come in the form of cutting funds because cutting funds will most likely hurt the inmates more than the non-complying institution. Cutting funds may decrease prison staff or decrease beneficial programs to the inmates. Instead, sanctions could exist in the form of punishments to the supervising

157. *Id.*

158. Human Rights Watch, *Rape Scenarios*, *supra* note 5 (follow "IV. PREDATORS AND VICTIMS" hyperlink).

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individuals of the institutions. For example, in the public institutions, the punishment could consist of salary decreases or a similar penalty.

Next, the Act should mandate a victim support staff. Support staff would be responsible for effectively counseling victims. The staff should emphasize the importance of giving notice to the authorities so no more inmates will be placed in vulnerable situations with the attacker. The staff should also help the inmate by telling him what types of physical and psychological issues to expect as a result of the attack so the victim will know how to deal with his feelings when experiencing certain reactions.

Further, the Act should mandate that all department investigators go through special training on how to investigate sexual assault. Much like the fifth step of Ohio's plan, the Act should mandate that federal, state, and local prison investigators work in conjunction with the National Institute of Corrections for assistance in this matter. This mandate could ensure that prison officials are not sitting by idly, either subjectively or objectively, while sexual assaults occur in their prisons.

In addition, the Act should order each correctional facility to electronically track known offenders. The main purpose of this provision would be to prevent the house assignment of sex offenders with other inmates. The prison could then send the electronically identifiable offenders to an elevated level security institution. As outlined above, the Prison Rape Commission could learn a great amount from the effort's of Ohio's correctional facilities regarding articulating concrete ways to prevent sexual assaults.

C. Other Effective Remedies

In January 2005, the National Institute of Corrections held a Prison Rape Elimination Act town hall meeting focused on understanding the Act and ways to supplement it.¹⁵⁹ The panel consisted of law professors, directors of correctional facilities, and a member of the National Prison Rape Commission. The town hall meeting provided other possible remedies to the prison rape problem that may be carried out with the assistance of the Act.¹⁶⁰

159. DVD: A Town Hall Meeting: Addressing the Prison Rape Elimination Act (National Institute of Corrections 2005) (on file with National Institute of Corrections) [hereinafter A Town Hall Meeting].

160. *Id.* The remedies suggested at the town hall meeting are meant to supplement the Act, not replace it.

One solution, suggested by Bob Dylan, consultant for the National Prison Rape Elimination Commission, is that all prison guards go through rape certification.¹⁶¹ The rape certification process involves working closely with the state prosecutors and learning investigative techniques along with medical investigation.¹⁶² The guards learn how to effectively investigate and report the rape incidents.¹⁶³ The effects of rape certification could be twofold. If the guards can effectively report and investigate the assaults, the victim-inmate might be encouraged to report the incidents at a higher rate. Secondly, rape certification may also lead to deterrence as offenders know that the prison officials will effectively investigate and punish their conduct.

Another solution is to eliminate the reasons that inmates are scared to report an assault. In some cases, after the victim reports an assault, he is isolated from the general population and he loses his privileges for the purpose of preventing further assault.¹⁶⁴ Some experts view the isolation of the victim as re-victimizing the assaulted.¹⁶⁵ Once a victim is isolated, everyone in the prison population knows what occurred and the victim is permanently stigmatized.¹⁶⁶ One way to prevent re-victimizing the assaulted is to isolate the offender instead of the victim.¹⁶⁷ By isolating the offender, the offender may have to deal with a negative stigmatization, as opposed to the victim. Victims may also be more forthcoming if they are questioned privately about the incident. A victim should not be expected to affirmatively state that he was raped in the presence of his attacker.

In addition, staff education is a critical aspect in the elimination of prison rape.¹⁶⁸ Education of the staff will reduce the occurrence of prison rape because the staff will be made aware as to the location of the assaults and they may change their practices based on such information.¹⁶⁹ The staff will also be aware of the particular situations that usually lead to sexual assault. With this knowledge, the staff may intervene when they see situations that usually lead to rape.¹⁷⁰ In addi-

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. A Town Hall Meeting, *supra* note 159.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *See supra* Part I.

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tion, education will place staff on notice that they will face punishment for allowing prison rape to occur.

A support group is another vehicle that may facilitate reporting sexual assaults. It is a known fact that individuals are more comfortable around people with whom they can identify. Offering a support group to victims should encourage reporting and help victims cope with the problems that may arise when one is sexually violated.

Lieutenant Senia Bruno from San Francisco County Jail 3 claims that the reason that sexual assault is such a recurring issue is because the guards cannot see every angle in the more traditionally-styled jails.¹⁷¹ Bruno also asserts that it is hard to see in some showers, causing the location to be a magnet for sexual assaults.¹⁷² To combat the problems posed by the traditional jails, Sheriff Mike Hennessey in San Francisco County suggests direct supervision jails. “If you have adequate staff and if you have decent architecture, you should be able to prevent every sexual assault.”¹⁷³ Sheriff Hennessey based this statement on the architecture of newer direct supervision jails. Direct supervision jails are built in a semicircle, similar to a coliseum.¹⁷⁴ The semicircle structure allows the deputy on post to see all over the jail from one location without any blind spots.¹⁷⁵ In addition, these jails are equipped with glass panel doors, enabling guards to see inside without obstruction.¹⁷⁶ Staff education coupled with institutions that facilitate staff awareness may significantly abate prison rape.

San Francisco County jail has also implemented a preventative policy of objective classification.¹⁷⁷ Objective classification is in essence a type of background check on the prisoners for the purpose of housing assignments. The purpose of objective classification is to separate the “hardened criminals” from those who are new to the prison system.¹⁷⁸ As former inmate Steve J.B. states,

I was in prison for shoplifting. Should I have been locked in a cell with a guy twice my size and weight who was doing life for a violent crime? I don't object to having been incarcerated for committing a

171. Human Rights Watch, *Rules of the Game*, *supra* note 21.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. Human Rights Watch, *Rules of the Game*, *supra* note 21.

178. J.B., *Nothing Funny*, *supra* note 23; Human Rights Watch, *Rules of the Game*, *supra* note 21.

crime. But I don't think it was right that I was made a gift to another inmate.¹⁷⁹

The result of objective classification is that inmates more accustomed to the prison lifestyle, and theoretically more capable of taking advantage of another inmate, will not be placed in the same cell or area as new inmates.¹⁸⁰

Implementation of the above-mentioned suggestions is one of the ways Congress may strengthen the Act. Congress should mandate a number of procedures that have worked throughout the country in the elimination of prison rape, such as Ohio's ten-point program and direct supervision architecture. These effective programs should be used throughout every jurisdiction in the United States. Additionally, Congress must provide real punishments to those correctional facilities that do not implement its mandates. For example, Congress could take away certain benefits of wardens who have high incidences of recurring prison rape. Punishments in the form of reduced funding are ineffective. Reducing funding will reduce staff and resources needed to combat the problem and will most likely lead to more assaults. Furthermore, Congress should develop a standardized methodology throughout the country for investigating and prosecuting the problem.

CONCLUSION

The purpose of the prison system is multifarious. Although punishment may be one of its main purposes, it is not the only purpose. Other purposes of the prison system include deterrence and reform. The allowance of a prison system so violent and hurtful not only frustrates the purpose of reform, but it makes for a more dangerous society. One of the findings of the Act is that individuals assaulted in prison are more likely to assault other individuals upon release from prison.¹⁸¹ In this situation, there is no reform. Congress has a responsibility to make sure all of the goals of the prison system are equally met. The only way to reach this goal is by eliminating the dangers inherent in the prison system that allow for the brutal assault of individuals sent to prison for, among other things, reformation.

179. J.B., *Nothing Funny*, *supra* note 23.

180. Human Rights Watch, *Rules of the Game*, *supra* note 21.

181. 42 U.S.C.A. § 15601(8) (2003).

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The problem of prison rape does not have to continue. This is a problem that Congress can remedy. Through the Prison Rape Elimination Act of 2003, Congress has taken one step to end the recurring problem of prison rape; however, the Act must be aimed at the causes of prison rape. Merely treating the symptoms—while leaving the illness in tact—is not an adequate remedy because the problem will only continue to resurface. The Act must eliminate the institutional and social causes of prison rape. If Congress takes no further steps towards the elimination of prison rape, it does a great disservice not only to prison inmates, but also to the community at large, especially due to the effects prison rape has on the rise of HIV in the general community and particularly in minority communities who are disproportionately imprisoned.

Congress's lack of guidance in the Act gives correctional facilities an excuse not to comply. The facilities may claim they do not know how to stop sexual assault because the Act does not provide the necessary solutions. Unfortunately, the prison facilities are correct. Providing federal, state, and local prison systems with specific ways to eliminate prison rape is the next necessary step to substantially improve the Act. Until such guidance to the prison facilities is included, the Act will remain deficient and fail to prevent substantial harm to American communities due to prison rape's multifaceted negative effects.