

**THE PASSAGE OF THE PRISON RAPE ELIMINATION ACT:  
DISCURSIVE POLITICS AND THE RECONSTITUTION OF PRISONER RAPE  
IN A CULTURE OF CONTROL\***

**Valerie Jenness  
Department of Criminology, Law & Society  
Department of Sociology  
University of California  
Irvine, California 92697-7080  
e-mail: jeness@uci.edu**

**Michael Smyth  
Department of Criminology, Law & Society  
University of California  
Irvine, California 92697-7080  
e-mail: msmyth@uci.edu**

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**Abstract**

The passage of the Prison Rape Elimination Act (PREA) in 2003 signaled that prison rape has been rendered increasingly visible as an issue for corrections officials and lawmakers, redefined as a civil rights violation for inmates, and taken up by the courts as a form of "cruel and unusual punishment." Situating the legislative history of PREA in the context of the culture of control (Garland 2001), this article adopts a contextual approach to understanding the development of criminal justice policy (Ismaili 2006) by examining how "discursive political talk" (Katzenstein 1998; Martin 2005) is produced and disseminated by a policy community. We draw on archival data to present a genealogy of the claims put forth by key stakeholders, including first person testimony on the lived experience of prison rape; scientific claims by academics who study prison rape; moralistic claims by moral entrepreneurs committed to interpreting the causes, manifestations, and consequences of prison rape (e.g., Prison Fellowship Ministries, Stop Prisoner Rape, and the National Institute of Corrections and the American Correctional Association); and claims by federal lawmakers most proximate to the PREA. A simultaneous consideration of the repertoire of claims in the organizational field and the particular configuration of prison rape that has emerged in law reveals the "endogeneity of law" (Edelman 2002, 2005) insofar as the corrections industry has, more than any other entity, determined the parameters of the PREA. Ristoph (2006) and others have argued that this could work against the elimination of prison rape and the protection of prisoners' civil rights more generally.

It is important to be tough on crime, but turning a blind eye to prison rape has nothing to do with being tough on crime; it has everything to do with treating people humanely, reducing recidivism, and halting the spread of disease.

—Senator Jeff Sessions (R-Alabama)<sup>1</sup>

The scourge of prison sexual assault was recognized early in the history of U.S. corrections when the Reverend Louis Dwight of the Boston Prison Discipline Society condemned this “dreadful degradation” in 1826. Fast forward to the modern era. Shortly after the turn of the twentieth century, in 2003, President Bush affirmed bipartisan congressional efforts to define prison rape as a national social problem worthy of immediate legislative action and sizeable federal funding when he signed into law the Prison Rape Elimination Act (PREA).<sup>2</sup> During the 177 years that separate Reverend Dwight’s proclamation and the passage of the PREA, prison rape has been rendered increasingly visible as a pressing issue for corrections officials and lawmakers, redefined as a civil rights violation for inmates and wards, taken up by the courts as a form of “cruel and unusual punishment,” and politicized as an issue inextricably intertwined with faith-based initiatives, human rights, public health, and public safety.

Our point of departure is the passage of the Prison Rape Elimination Act (PREA), which was signed into law on September 4, 2003 by the President of the United States, George W. Bush. The PREA has many objectives, but the overall purpose of the PREA is “to provide for the analysis of the incidence and effects of prison rape in Federal, State, and local institutions and to provide information, resources, recommendations, and funding to protect individuals from prison rape” (Public Law 108-79, 117).<sup>3</sup> In the two months preceding its

passage, the PREA passed through both the House of Representatives and the Senate unanimously and with surprisingly little discussion and no contestation. Senator Edward Kennedy (D-Massachusetts), one of the primary architects of what was commonly referred to as the “Kennedy-Sessions-Wolf-Scott bill,” acknowledged the uncharacteristic bipartisan support that enabled its swift passage.

The swift and virtually uncontested passage of the PREA was surprising for a number of reasons. First, it is a rare event when the U.S. Congress passes legislation swiftly. Second, this piece of legislation required Congress to appropriate over 60 million dollars in federal expenditures at a time when “the war effort” and “tax breaks” were already straining the federal budget. Third, the PREA does not criminalize behavior anew nor does it provide a new “cause of action” for inmates if and when prison rape occurs. Almost a decade before the passage of the PREA, in *Farmer v. Brennan* (1994) the U.S. Supreme Court found that “deliberate indifference” to prison rape by prison officials constituted “cruel and unusual punishment.” Fourth, and perhaps most interestingly, the PREA came into being at a moment in history when the popular mood is at best indifferent and at worst unreservedly punitive toward the over 2.2 million people incarcerated in U.S. prisons.

From a socio-cultural perspective, suffering is considered by many to be an expected element of prison life, perhaps best captured by the adages “if you can’t do the time, don’t do the crime” and “this is jail, not Yale.” Seen in these terms, historically, prison rape can be considered a form of unexamined “permissible prejudice” whereby the general public, including lawmakers and politicians, silently condones this form of assault. The U.S. public holds an indifferent or retributive attitude toward victims of prison sexual assault. According to a *Boston Globe* survey, 50% of those polled agreed with the statement, “society accepts prison

rape as part of the price criminals pay for their wrongdoing” (*The Boston Globe* 1994, 22). As Robert Weisberg, Professor of Law at Stanford Law School, observed less than a month after the PREA became law: “the truth is that the United States has essentially accepted violence—and particularly brutal sexual violence—as an inevitable consequence of incarcerating criminals.”<sup>4</sup>

In accordance with this view, in 2001, California Attorney General Bill Lockyer implicitly referenced prison rape as an appropriate punishment for convicted felons. He did so when he indicated that if he were allowed to prosecute Kenneth Lay, former CEO for Enron, Inc. who was convicted for white collar crime costing many Enron employees and investors millions of dollars, “I would love to personally escort Mr. Lay to an 8-by-10 cell that he could share with a tattooed dude who says ‘Hi, my name is Spike, honey.’” These are telling words from the highest-ranking law enforcement official in the state with the largest prison system in the western world. Taking a lighter tone, but nonetheless making the point that prison rape is acceptable, if not laughable, Jay Leno was not the first to offer jokes about prison rape and get a stand-up comedian’s most valued reward—laughter from a live audience—for doing so. In one his monologues on *The Tonight Show* in 2005, Leno observed that Karl Rove, senior advisor to President Bush, was facing tough criticism from Democrats about his role in leaking to the press the identity of a former CIA agent (Valerie Plame); he then commented: “I think Karl Rove is getting a little worried. Like today he said the biggest problem facing Americans is prison rape.” Clearly, the laughter that ensued derived from the imagery of Rove going to prison for his wrongdoing and, while there, being raped by another male prisoner. More recently, *Let’s Go to Prison*, a film released by Universal Pictures/Carsey-Warner Productions in 2006 that purports to provide a “penetrating look” at the American penal system, featured a

bar of soap lying on a shower room floor—the quintessential metaphor for prison rape—as the central image in its publicity campaign.

These observations—the swift passage of law without sustained and consequential objections, sizable “social welfare” government expenditures by a Republican President and Congress, no new cause of action or criminalization, and a public attitude of indifference or even acceptance of prison rape—raise both empirical and theoretical questions. Empirically, what stakeholders constitute the driving forces driving this legislation? How has prison rape been envisioned, discussed, and “promoted” by those most strategically positioned to define its constitutive features, as well as the federal law designed to eliminate it.<sup>5</sup> More theoretically, how can we explain the passage and the content of the PREA, which reflects the state’s adoption of a managerial approach to prison rape that disembodies and desexualizes the very conduct it is designed to eliminate (i.e., non-consensual sexual contact in detention facilities)?

By addressing these questions, our aim is twofold. First, we provide an empirical genealogy of law (Grattet and Jenness 2005) by mapping key players, moments, and discourses in the development of the PREA. Our empirical focus is on how prison rape is variably constructed as it traverses diverse contexts inside and outside the criminal justice system. Second, in accordance with Ismaili’s (2006) recent call to understand criminal justice policy by “Contextualizing the Criminal Justice Policy-Making Process,” our theoretical focus is on how state and non-state actors comprising a policy community shaped the development of policy around prison rape such that an old problem is configured in new ways. We explain this historical legal development by drawing on two well-known concepts in sociolegal studies: the “endogeneity of law” (Edelman, Uggens, and Erlanger, 1999; Edelman 2002, 2005) and “a culture of control” (Garland 2001). With regard to the former, our focus is on the “process

whereby law is generated within the realm that it seeks to regulate” (Edelman 2005, 337). Identified and interrogated in the realm of civil rights law in the workplace, the workings of this process have been heretofore unexamined in the realm of criminal justice policy. To bring the endogeneity of law into this realm, we use the PREA—what is often thought of as a welfarist and human rights policy—into the context of a “culture of control” as described by Garland (2001).

This article is organized into four sections. First, we offer a brief overview of the theoretical concerns within which we situate our analysis. Thereafter, we describe the sources from which the data for this study were gathered and the means through which they were organized, coded, and analyzed. An analysis of discursive political talk about prison rape follows, with particular emphasis on how prison rape is constructed by multiple stakeholders existing in diverse institutional environments that comprise the prison rape policy community. Finally, we conclude with a discussion that relates our findings to the process of lawmaking, concerns about punishment and corrections, and modern cultures of control.

### **THEORETICAL CONSIDERATIONS**

We are interested in what the recent politicization of prison rape can reveal about punishment and corrections in particular and what David Garland has called “a culture of control” more generally. To do so requires first locating this work in a larger discussion about penalty and the culture of control that characterizes the U.S. scene; thereafter, we delineate what we mean by “policy community,” “endogeneity of law,” and “discursive politics” as central concepts anchoring the analysis presented in this work.

## **Culture of Control**

In *The Culture of Control* (2001), Garland develops a critical understanding of the practices and discourses of crime control—what he calls “the field of crime control and criminal justice”—that have come to characterize the U.S. and the U.K. Instead of focusing specifically or exclusively on penalty—the practices, laws, discourses, and representations that constitute the official penal system—as he did in his earlier work, in *The Culture of Control* Garland directs attention to a wider field that encompasses the practices of non-state as well as state actors and forms of crime control that are preventative as well as penal. As he explained in a subsequent publication, “the concept of a broad social field—as opposed to a narrower complex of state institutions—was adopted in the *Culture of Control* because the aim of the research was to address the ways in which crime now figures in the thought and action of lay people as well as legal actors, and to investigate how and why this came to be true” (Garland 2004, 161).

Accordingly, he went on to explain, “I widened my analytical focus to encompass not just the state’s penal responses to crime but the whole field of formal and informal practices of crime prevention, crime avoidance and control, together with forms of thought and feeling that organize and motivate these practices” (Garland 2004, 161).

Apropos the title of the book, Garland places cultural phenomena center stage in his analysis of recent transformations in the field of crime control. For Garland, the current patterns of crime control in the U.S. and the U.K. include the emergence and subsequent decline of the modernist style of thinking about crime and acting upon crime, the shift from a preoccupation with law enforcement to a growing concern with security management (even more so after 9/11), and the beginnings of a shift from differentiated crime control systems monopolized by the state to a de-differentiated system involving state and non-state partnerships. For Garland (2001, 193),

these and other historic transformations are “adaptive responses to the cultural and criminological conditions of late modernity.”

The culture of control described by Garland is shaped by the reactionary politics that have dominated the British and American scene over the past several decades and by “the new social relationships that have grown up around changing structures of work, welfare and market exchange” (Garland 2001, 193). These new social relations tend to be exclusionary and committed to social control as well as commensurate with private freedoms associated with a free market economy. The institutions of crime control and criminal justice have shifted their policies, practices, and representations to pursue the goals and invoke the cultural themes that currently dominate this new political scene; however, it is important to note, they do not always do so in ways that are entirely revealed as the so-called “punitive turn.” As Garland clarified in an article appropriately titled “Beyond the Culture of Control,”

I wanted to stress the complex, contradictory character of the field and its development trajectory....In discussing *The Culture of Control*, commentators and reviewers have often talked as if the key phenomenon to be explained is the punitive turn (Gelsthorpe 2004) or else ‘mass imprisonment’ (Bruner 2003) thereby excising much of what is interesting and instructive about the observed field [the field of crime control and criminal justice]. The recurring slippage is brought about by the force of established ways of thinking, which prompt us to focus more or less exclusively on the state’s penal policies without attending to informal or unofficial aspects of the social response to crime....[F]ew reviewers have picked up on what I take to be one of the book’s central insights—namely, the emerging tendency towards a break-up of the state’s supposed monopoly of crime control, the erosion of modernist conceptions of the crime problem, the shift from law enforcement to security management, and the de-differentiation of the governmental crime control response. Commentators who bemoan the ‘bleak,’ ‘dystopian’ outlook that the book supposedly evokes (Zedner 2002) or suggest that it entails a ‘criminology of catastrophe’ (Loader & Sparks 2004) might reflect on the non-punitive modes of managing crime that these deep transformations make possible....(Garland 2004, 170).

In essence, Garland is arguing that “to think in conventional criminological terms is to risk losing sight of shifting relationships between the state and non-state actors” (Garland 2004, 170) and

that the complex pattern of change along these lines (and others) reveals complex and contradictory forces not captured by reference to broad, homogenized social forces like “neo-liberalism” (Wacquant 2004), or neo-conservatism (Western 2004), or “governing through crime” (Simon 2007).<sup>6</sup> It is this central lesson that we take from Garland’s work to inform our analysis as we allow for the possibility of contradiction, fragmentation, and inconsistency to emerge.

It is beyond dispute that *The Culture of Control* is grand in scope, both empirically and theoretically. It offers an historical account of the emergence of the contemporary field of crime control in the U.S. and the U.K., a sociological description of the contemporary field, and an analysis of its social functions and significance. It does so by focusing on central discourses, strategies, and policies of crime control in a way that enables structural patterns at the level of the field, not at the level of a particular institution or agency, to be discerned. Appropriately, Garland’s analysis has been widely applauded for its “clear, cogent, and critical account of crime control and criminal justice in late modern societies” (Lyon 2003) as well as for its theoretical contributions to the field (Beckett 2001; Savelsberg 2002).

At the same time, it has been criticized for its perceived shortcomings.<sup>7</sup> One criticism is especially important in regard to the analysis that follows. Garland’s analysis focuses exclusively on new policies and practices that *did* become established in the newly transformed field and traces them to the cultural forces that led to their adoption while, at the same time, ignoring policies and practices that did not become established in the field. Garland acknowledged this limitation when he explained that “a consequence of this style of inquiry is that it tends to understate the importance of the actors whose preferences and policies lost out in the current conjecture but who continue to be a presence in the field and to exert a pressure for change”

(Garland 2004, 167). Clearly, deposed or displaced forces may continue to be operative—playing an ongoing role in the constitution (or reconstitution) of the field as they compete, resist, and otherwise press for change.<sup>8</sup> Thus, as a welcome corrective, we focus analytic attention on the policy community and the plethora of discourse produced by the diverse stakeholders who comprise it, quite apart from whether they, by some measure, “win” or “lose” in the politics of policymaking. This focus is informed by recent conceptualizations of “policy community” (Ismaili 2006) as it applies to criminal justice policy and “discursive politics” (Katzenstein 1998; Martin 2005) as it applies to sexual assault in carceral settings.

### **A Contextual Approach to Criminal Justice Policy**

In his recent article published in *Criminal Justice Policy Review*, Ismaili laments that “the policy-making process continues to be neglected in studies of crime policy” (Ismaili 2006, 256); invites more criminologists to engage in policy studies in order to “facilitate an understanding of how the political process negotiates change, to explore the constraints the process places on the translation of ideas and analysis into action, to describe the degree to which various actors influence the movement of criminal justice proposals through the policy process, and ultimately to provide insight into how politics determines what is and can be implemented” (Ismaili 2006, 255-256); and, most importantly for our purposes here, proposes a contextual approach to examining criminal justice policy-making that is anchored in an examination of the work of policy communities in varying socio-political contexts (see also Burstein’s work on policy domains (1991)).

In his call for a contextual approach to criminological policy studies, Ismaili (2004) promotes an approach to studying policy discourse and formation as a process that can only be understood by focusing on both the contextual (i.e., environmental) features in which it unfolds

as well as the structure and workings of the policy community with an expressed stake in the issue. With regard to the former, contextual features are dimensions of the environment in which policy is envisioned, formulated, proposed, and accepted or rejected, such as the political culture, which includes social and economic characteristics, political parties and partisanship (and ideology), and checks and balances/federalism; the politicization of crime, including the symbolic dimensions of crime and criminal justice, the definition and construction of policy “problems,” campaigns and elections, public opinion, policy networks within the policy community, and policy trends in other policy sectors and in other jurisdictions; and institutional (criminal justice system) cohesiveness/fragmentation (see Figure 1 in Ismaili 2006, 262).

The structure and working of the policy community is crucial. Ismaili (2006) promotes Pross’s (1986) conceptualization of a substantive policy community as consisting of “all actors or potential actors with a direct interest in the particular policy field, along with those who attempt to influence it—government agencies, pressure groups, media people, and individuals including academics, consultants, and other ‘experts.’” Ismaili (2006) subdivides the criminal justice policy community into two segments: the subgovernment and the attentive public.

According to him, “the subgovernment is composed of government agencies and institutionalized associations that actually make policy within the sector. It normally consists of a very small group of people who work at the core of the policy community” (Ismaili 2006, 263). The subgovernment includes: elected executive actors such as the president, governors, and mayors; elected legislative actors, such as senators and representatives; major interest/pressure groups; appointed heads of government departments and agencies, such as cabinet secretaries; and key judicial actors (see Figure 2 in Ismaili 2006, 267).<sup>9</sup> In contrast, the composition of the attentive public varies, “but it usually contains important though less central

government agencies, private institutions, pressure groups, specific interests and individuals” (Ismaili 2006, 263). The attentive public includes: the media; less central government agencies; experts, academics and consultants; interest/pressure groups; elected officials; interested members of the public; private institutions and NGOs; and judicial actors (see Figure 2 in Ismaili 2006, 267).

Formulated in this way, the prison rape policy community obviously includes the state. Distinguishing it from other participants in the policy community, the state is responsible for the organizations—prisons and other detention facilities comprising corrections—implicated in the problem of prisoner rape. That is, corrections and the state are mutually constitutive. In addition, of course, the state is implicated as the sovereign body most proximate to lawmaking and policymaking related to the criminal justice system, including the passage of the PREA. This observation raises questions about the endogeneity of lawmaking and law.

### **The Endogeneity of Law**

Recognizing the unique way in which the state and corrections are inextricably intertwined prompts consideration of the endogeneity of law. As formulated by Edelman and her colleagues (2002, 2005; Edelman, Uggen, and Erlanger 1999), a theory of law as endogenous disavows the notion that law is autonomous from organizations targeted for regulation, negating the idea that law is somehow “above” or “outside” the organizations subject to their control. Rather, to quote Edelman (2005, 337):

As organizations respond to legal ideas by themselves becoming legalized, they shape social understanding of law and the meaning of compliance.... As law becomes progressively institutionalized in organizational fields, it is simultaneously transformed by the very organizational institutions that it is designed to control.

In other words, the endogeneity of law is a process whereby law is “generated within the social

realm that it seeks to regulate” (Edelman 2005, 337).

This conceptualization of law as endogenous can be utilized to understand how and why laws regulating organizations often take unanticipated forms or forms that are at odds with the ideological commitments of others who are seemingly influential in the policy community. To quote Edelman (2005, 352) one more time,

The policy implications of legal endogeneity, moreover, are critical. To the extent that law is endogenous, or shaped within the organizational field that it seeks to regulate, the social control *of* organizations is in a very real sense social control *by* organizations—not overtly, but rather through the influence of institutionalized models of governance.<sup>10</sup>

One way in which this is achieved is through discursive political talk within the larger field.

### **Discursive Political Talk**

Stakeholders in the policy community produce and disseminate “discursive political talk” aimed at influencing how prison rape is understood and shaping policy relevant to identifying, responding to, and managing prison rape. Therefore an examination how the phenomenon of prison rape is constituted through “discursive politics” across a diverse array of stakeholders is imperative, even as a focus on the state in particular is crucial.

To examine the structure and workings of the prison rape policy community, we focus on “discursive politics.” Drawing on Katzenstein’s (1998, 17) work on institutional talk related to the women’s movement and more recently Martin’s (2005) book on *Rape Work: Victims, Gender, and Emotions in Organization and Community Context*,<sup>11</sup> by “discursive politics” we mean the effort to interpret, reformulate, rethink, and rewrite norms and practices of individuals, society, and the state. As Katzenstein (1998, 17) explains, “discursive politics relies heavily but not exclusively on language. It is about cognition. Its premise is that conceptual changes directly bear on material ones. Its vehicle is both speech and print—

conversations, debate, conferences, essays, stories, newsletters, books.” As “the politics of meaning making,” discursive politics is expressed in written, spoken, or visual form in reports and documents, panel presentations, public service announcements, videos, and other means of communication. As described in the next section, these forms of communication constitute an empirical venue through which we can understand how the constitutive features of prison rape are being actively constructed in the era of the PREA.

## **DATA AND METHOD OF ANALYSIS**

### **Data**

We collected five types of archival data that enabled us to create a genealogy of the politics of prison rape in general and discursive political talk in particular. By genealogy we mean an empirical record of the discourse, work, and (promoted and realized) policies connected to the policy community responsible for politicizing prison rape in the U.S. Described below, these data were ultimately combined to delineate the structure and workings of the policy community, examine the varying social contexts—legal and otherwise—in which the policy community exists and to which it responds, and explain how ideas—conveyed via discourse—affect policymaking by tracing how specific actors carried certain ideas into the policymaking arena (broadly construed).

We began by creating a legislative history of the Prison Rape Elimination Act that includes congressional hearings and attendant documents. A review of these hearings enabled us to identify many of the key stakeholders in the policy community. Many of the most visible stakeholders gave testimony at the hearings and some who gave testimony submitted formal documentation for the record. In the testimony given at the hearings and the documentation submitted by those giving testimony, stakeholders who were not present at the hearings were

nonetheless referenced in the hearings. Thus, we were able to include stakeholders who did not give testimony or submit documentation at the hearings in our inventory of the policy community. The official record of this lawmaking consists of 33 documents totaling 427 pages of dialogue in the form congressional hearings, congressional reports, and congressional debates. Combined, these materials reveal the legislative workings and attendant discourse of hundreds of lawmakers and other government officials as well as a slew of non-governmental officials, including activists, academics, victims, and representatives from social movement and watchdog organizations.

Although the PREA hearings gave us a healthy start at constructing an empirical profile of the policy community, we were concerned that, in and of themselves, they were not able to provide a comprehensive inventory of the players in the policy community. After all, legislative hearings emerge well after a set of conditions have found a home in what Hilgartner and Bosk (1988) call the “social problems marketplace” (c.f., Baumgartner and Mahoney 2005), thus, they often select certain types of players for public show and not others (Chock 1991; Jenness 1999). We did not want to select on the dependent variable in this way.

Thus, we took a second step to ensure comprehensive data collection. Namely, we relied upon the news press to alert us to players and organizations in the policy community that might not have appeared in the legislative hearings. Using the Lexis search engine, we performed a “Guided News Search” using “prison rape,” “prisoner rape,” “rape in prison,” “inmate rape,” “prison sexual assault,” “sexual assault in prison,” and “sexual abuse in prison” to query the database for all “General News” and all “Major [News]Papers” for “all available dates.” The results of our search revealed that the first article on the topic appeared in 1982 in the *Washington Post* (“High Court Weighs Guard Liability in Prison Rapes”) and by the end of

December 2006 a total of 340 articles appeared in major newspapers across the country. Each of these articles held the possibility of revealing heretofore unidentified players in the politics of prison rape, but—at the end of the day—very rarely did. In other words, in the main, our Lexis search confirmed that the legislative hearings described above resulted in a comprehensive inventory of the key players. At the same time, it served to create yet another archival data set of discourse on prison rape (i.e., media discourse).

We collected a third type of archival data by executing a web search using the search terms “prison rape” and “prisoner rape.” This search yielded thousands of hits, with the vast majority of them identifying activists, organizations, policy proposals, etc. that were already revealed in the legislative history and Lexis search. Nonetheless, the web became a valuable source of data not only insofar as it confirmed our previously established inventory of the players in the policy community, but also because it allowed us to collect archival data that reveal position statements, policy proposals, agendas, and workings of some of the key players in the politics of prison rape (i.e., the Human Rights Watch, the Prison Fellowship Ministry, and Stop Prisoner Rape).

As we collected the archival data described above, it became clear that the discursive political talk produced by academics loomed large in the politics of rape. Prisoner rape first emerged as a focus of empirical research in the 1930s; since then, academics—including psychologists, sociologists, anthropologists, and criminologists—have increasingly contributed to an expanding body of scientific literature on the subject that frequently reflects a commitment to moralizing about prison rape. Therefore, we collected published studies of prison rape conducted and narrated by social science researchers, the vast majority of whom work in academic settings. This task was made easy because Gaes and Goldberg (2004)

recently inventoried the social science research on prison rape. We merely had to fill-in the gap with studies that have been published since their comprehensive inventory, which includes scholarship on the subject up to and including the year 2003. To do so, we undertook a web search using Google Scholar software and employing the search words “prison rape” and “prisoner rape.” Our search retrieved a handful of additional published studies, which we added to the sizable list compiled by Gaes and Goldberg (2004).

Finally, we collected archival data on first person accounts of prison rape. First, we examined the 2001 Human Rights Watch report on prison rape, a publication tellingly titled, *No Escape: Male Rape in US Prisons*. This landmark publication, which is frequently cited in political discussions of prison rape, is the result of three years of research and over a thousand inmate letters, both of which were designed to "describe the complex dynamics of male prisoner on prisoner sexual abuse in the United States" (Human Rights Watch 2001, xvi). It contains many graphic first person accounts of male-on-male prison rape in numerous states and types of detention facilities across the U.S. Second, we witnessed testimony given by five survivors of prison rape at a PREA commission hearing in San Francisco, California on August 19, 2005 and testimony given by another survivor of prison rape given at hearings in Represa, California on November 14, 2006. Thereafter, we examined transcripts of this testimony.

### **Method of Analysis**

Content analysis has a long history in the sociological study of politics and policymaking; indeed, Burstein (1991, 336) declared: “the best way to analyze policy change, and proposals for policy change, is content analysis.” In agreement with this observation, we undertook a content analysis of the data described above such that we could simultaneously examine discursive and policy developments that have found a home in prison rape politics as

well identify the “roads not taken” (Schneider and Ingram 1988).

Our initial task was to compile and arrange the five sources of archival documents described above in order to empirically document the structure and workings of the policy community and thereafter to produce a comprehensive empirical record of prison rape discourse produced by the policy community. We organized the discourse by stakeholder in order to discern how each stakeholder envisioned the nature of prison rape, construed it as a social problem, promoted some remedies over others, and otherwise imbued prison rape with meaning. In addition, we tracked whether and how changes in these dimensions of discourse occurred in varying contexts (e.g., in and out of legal contexts).

We also used the data described above to discern the structure of the policy community. As the analysis that follows reveals, we structured the community around how proximate the stakeholder is to the lived experience of prisoner rape and how proximate the stakeholder is to the formulation and adoption of policy. Prison rape victims and others who provide first person testimony are most proximate to the lived experience of prison rape. Academics and interest groups, and other individuals who interpret the experience of prison rape—its causes, manifestations, and consequences—for lawmakers and the public alike are further removed from the lived experience of prison rape yet remain more proximate to it than are lawmakers, whose understanding of prison rape is most directly consequential to the outcome of the policymaking process. Finally, the actual law—the PREA itself—constitutes the most abstracted, indeed disembodied, portrayal of prison rape.

Once these dimensions were coded and tracked over time, we undertook what is generally known as a comparative case study approach to our analysis (Jacob 1987; Lijphart 1975; Yin 1984). Each stakeholder was treated as a case, one that ultimately could be combined

with and compared to other individual cases. The logic of this approach is that "each individual case study consists of a whole study, in which convergent evidence is sought regarding the facts and conclusions for the case; each case's conclusions are then considered to be information needing replication by other individual cases" (Yin 1984, 52). This method of analysis allows for "pattern-matching" (Stake 1994; Yin 1984) through "controlled comparisons" (Lijphart 1975) as a primary method of increasing internal validity. By considering individual cases in comparison with other cases along relevant dimensions, empirical patterns and trends were identified, while theoretical ideas emerged and were continually reformulated via analytic induction (Glaser and Strauss 1967; Strauss and Corbin 1994; Yin 1984).

This method of analysis ultimately allowed us to move beyond empirical investigation toward the theoretical concerns identified earlier. In particular, it enabled us to examine the structure and workings of the prison rape policy community, how the political discursive talk emanating from it has constructed prison rape as a social problem, and the policies designed to remedy it. Consistent with the theoretical considerations identified in the previous section, the analysis that follows focuses on the entire corpus of thought articulated in the prison rape policy community, focusing not only on stakeholders who proved successful in the politics of prison rape, but those who did not; likewise, our focus is on the construction of prisoner rape that is formally expressed and officially endorsed in the PREA as well as the cultural forces behind that expression and endorsement, but also on possible alternative constructions of the phenomenon that did not become expressed in law.

### **THE POLICY COMMUNITY AND DISCURSIVE POLITICS OF PRISON RAPE**

We identify and describe three categories of "discursive political talk" generated by actors in the policy community and disseminated with the intention of influencing prison rape

policy. To begin, first person testimony is generated by individuals most proximate to the lived experience of prison rape. Second, there is what we are calling an "intermediary" arena of discursive political talk. This includes the discourse emanating from individuals and organizations interested in shaping the dialogue, owning the issue, and defining "prison rape" and all that surrounds it for policymakers and the public alike. The four main contributors to this intermediary arena include: academics who study prison rape, Prison Fellowship Ministries, Stop Prisoner Rape, and professional organizations associated with corrections (i.e., the National Institute of Corrections and the American Correctional Association). In one way or another, each of these contributors interprets the causes, manifestations, and consequences of prison rape for those most removed from the lived experience, but nonetheless are central to the formulation and institutionalization of public policy: lawmakers. We treat lawmakers as the third category of discursive political talk and a key player in the policy community.

### **Testimonials: Naming and Describing Prison Rape as a Lived Experience**

First person testimonials narrate the bodily experiences of rape as well as the fear, humiliation, and desperation that precedes, defines, and follows the lived experience of prison rape. In addition, they often note the failure of corrections officials to respond to prisoner rape in any meaningful or consequential way and they speak to the intersection between rape, sexuality, and gender. Consider, for example, the *first* testimonial presented in *No Escape*, an alarming report of how prison rape occurs, is experienced, and reacted to (or not):

I've been sentenced for a DUI offense. My third one. When I first came to prison, I had no idea what to expect. Certainly none of this. I'm a tall white male, who unfortunately has a small amount of feminine characteristics. And very shy. These characteristics got me raped so many times that I have no more feelings physically. I have been raped by up to five black men and two white men at a time. I had knives at my head and throat. I had fought and been beat so hard that I didn't ever think I'd see straight again. One time when I refused to enter a cell, I was brutally attacked by staff and taken to segregation though I had only wanted

to prevent the same and worse by not locking up with my cellmate. There is no supervision after lockdown. I was given a conduct report. I explained to the officer what the issue was. He told me that off the record. He suggested I find a man I would/could willingly have sex with to prevent these things from happening. I've requested protective custody only to be denied. It is not available here. He also said there was no where to run to, and it would be best for me to accept things....I probably have AIDS now. I have great difficulty raising food to my mouth from shaking after nightmares or thinking too hard on all this....I've laid down without physical fight to be sodomized. To prevent so much damage in struggles, ripping and tearing. Though in not fighting, it caused my heart and spirit to be raped as well. Something I don't know if I'll ever forgive myself for. (letter from A.H. to Human Rights Watch, August 30, 1996)<sup>12</sup> (Human Rights Watch 2001, xv)

In addition to first person accounts provided by currently incarcerated men (largely through letters), there are testimonials from formerly incarcerated individuals for the purposes of public hearings. On August 19, 2005, for example, five panelists, all of whom were incarcerated years ago, opened the PREA commission hearings in San Francisco, California by telling their stories of being raped while incarcerated. These narratives include sexually graphic details about bodily harm, the identification of the consequences of rape for mental and physical health (including contracting AIDS), and commentary about sexuality, homosexuality, and "lost manhood." The first speaker reported to the PREA commission and audience assembled in the Ceremonial Courtroom of the United States District Court for the Northern District of California:

My name is Chance Martin and I was raped in a county jail in Indiana when I was still a high school student. I was 18 and attending a party at the Holiday Inn with my girlfriend when I was taken to jail. I didn't even know why I was arrested until later. I found out later that a guy at the party had dropped a chunk of hash in the lobby in front of a hotel detective, and the police came and took everybody at the party away. It was very late when I was taken to jail. They put me in a cell, a big cage, really, with about 40 guys stacked in bunk beds. I was scared out of my mind. I was a little guy back then, and I had long hair. I was kind of pretty. I kept thinking that I was going to get to make a phone call and all of this would be over, but that didn't happen. I was assaulted within 24 hours. I must have looked as scared as I felt, because this guy came up to me and sat on the bunk next to me and said "Let's cheer you up and play some cards." I couldn't even figure out what they were playing. I thought we were playing poker, but then they said "Okay, You lost. Pay up." That's when one of these guys told me they were going

to fuck me. I said, "Oh, no, you're not." And they said "You see that other guy over there?" And this guy's face—I swear to God, I've never seen anybody's face that badly beaten. He looked like he had gone through the windshield of a car. They said, "Do you want that to happen to you?" And these guys were trustees. They started jamming me with a broomstick, and they just kept beating me. They knocked the wind out of me, and I curled up in a ball on the floor. They dragged me to a bunk, and this guy said, "Now you have to give me head." I didn't even know what he meant. I had never heard the term "head" before. One of them started sodomizing me, and it hurt so bad that later on with two of the other guys I was given a choice, and I chose to go down on them rather than get sodomized because the anal sex hurt so much. To the best of my recollection, it was six guys, but it could have been more. I don't remember any of their faces. [I] was humiliated. I knew a lot about embarrassment, but this was the first time I was humiliated. My mother picked me up from jail. And when I told her what happened to me she said I deserved it. After that I knew I was on my own. [W]hat happened to me in that cell has affected my life in so many ways. I think it permanently damaged my self-confidence. I had a girlfriend when I was arrested, but I've never really been able to have a functional relationship since then. Because of what happened to me in that cell, I've questioned my sexuality. There was a time between my second and third marriages when I really wanted to be gay because it would resolve so much conflict. I never questioned my sexuality before I went to jail.<sup>13</sup>

Similar themes emerged in the testimony put forth by T. J. Parsell, now a self-described "successful businessman and functional member of society" and the author of *Fish: A Memoir of a Boy in a Man's Prison* (Parsell 2006), one of a very few booklength publications providing a first person account of prison rape. As he explained what happened to him as a "skinny 17-year-old" who found himself in an adult prison after robbing a Photomat in Michigan:

Young men especially are targeted when they first arrive, and I didn't last 24 hours before an inmate spiked my drink with Thorazine and then ordered me down to his dorm. Even with the drug's heavy effect, it was the most agony I had ever experienced. They knocked me out of the bed and nearly suffocated me as they shoved my head into a pillow to muffle my screams. I was powerless under their weight as they ripped my pants off. One of them grabbed my hair and smacked me and pulled my head down while the others took turns sodomizing me. When I choked on my own vomit and gasped for air, it only made them laugh. They were unmoved by my crying. It felt like a battering ram being shoved up inside me, splitting and cracking me open. The crushing weight of that pain has never left me. Yet I was just a boy. My rectum bled for several days, but I was too afraid to come forward, even to see a doctor. I was terrified I'd have to explain what had happened. I just wanted to do my time and get out alive. Every

one knew that snitches were killed. What they took from me went beyond sex. They had stolen my manhood, my identity and part of my soul. They laughed about it afterwards and openly bragged while one of them flipped a coin to see who got to keep me. [T]he guards knew what had happened. The prison doctors knew as well. When I saw the proctologist for my bleeding, I raised concern about the size of his rectal scope, and his reply was, “Well, it’s not any larger than what’s been going up there.”<sup>14</sup>

Tellingly, narratives put forth by *men* who served time years ago and were raped while in prison often reference “lost manhood,” which in turn is connected to ongoing psychological problems, humiliation, and an inability to maintain heterosexual relationships. Kendall Spruce emphasized “robbed manhood” when he gave the following testimony:

I was sentenced to six years in prison in 1991 on a probation violation. I was originally convicted of forging a check to buy crack cocaine. When I went to prison, I was 28 years old, I weighted 123 pounds, and I was scared to death. I was right to be afraid. I am bisexual, but that doesn’t mean I want to have sex with just anyone. As soon as I got there, inmates started acting like they were my friends so they could take advantage of me. I told them I wasn’t going to put up with that. I didn’t want to be robbed of my manhood. But they jumped on me. They beat me. Within two weeks, I was raped at knife-point. By the way, being raped at knife-point was the worst thing I’ve ever imaged. The physical pain was devastating, but the emotional pain was even worse. I reported the rape, was sent into protective custody, but I wasn’t safe there either. They put all kinds of people in protective custody, including sexual predators. I was put in a cell with a rapist who had full-blown AIDS. Within two days he forced me to give—give him oral sex and anally raped me. I yelled for the guards, but it was so loud in there, no one came to help me. I finally had to flood the cell to get the guards to come. Because I was raped, I got labeled as a faggot, and everyone looked at me like I was a target. It opened doors for a lot of other predators. Even the administrators thought it was okay for a faggot to be raped. They said, “Oh, you must like it.”<sup>15</sup>

Mr. Spruce went on to reveal that he “went through nine months of torture,” “started bleeding bad from my rectum,” “felt like my whole world had come to an end,” and was “ashamed, embarrassed, degraded, and humiliated.” In addition, as he said, “I haven’t forgotten those feelings. You never forgot.” Key to these experiences and the weight they carry on memory, is the finding presented by Fleisher (2005) in his recent work on prison culture in general and rape

lore in particular; namely, he suggests that a hegemonic theme in prisoners' narratives about sexual assault is that "a man cannot be raped."

The testimonials presented in *No Escape* and the PREA Commission hearings, as well as elsewhere, serve to publicly "discover" and document prison rape.<sup>16</sup> More to the analytic point, this type of publicly disseminated testimony renders heretofore largely invisible violence—prison rape—visible. To use the terms of social problems theorists, it "discovers" the issue. It does so by publicizing both select cases of prison rape and, along the way, emphasizing the physical and psychological horror attached to prison rape, the gendered nature of prison rape, and the failure of corrections officials in particular and society in general to respond to this type of criminal behavior. As others have shown, however, rendering a set of social conditions visible is crucial to the incipient stages of policymaking, but it is not the end point of social problems construction or policymaking processes (Burstein 1991; Jenness and Grattet 2001; Meyer, Jenness, and Ingram 2005). As we show in the next section, institutional actors inevitably appropriate the "raw data" provided by these types of first person accounts to formulate new configurations of discourse, emphasizing some conceptualizations of "the problem" and proposals for reform—and not others—along the way.

### **Moral Entrepreneurs: Mediating the Experience and Constructing the Problem**

The following groups can all be usefully classified as mediators between first person accounts of prison rape and state behavior (i.e., lawmaking) related to prison rape: academic researchers, prison ministries, Stop Prisoner Rape, and the corrections profession as represented by the National Institute of Corrections and the American Correctional Association. Each of these players orients to the experience of prison rape as data in need of interpretation for policymaking purposes. In the process, the discursive politics generated by these groups

reconstitute prison rape by promoting certain interpretations of the problem and eclipsing others. As we argue in the conclusion, the outcome is an entirely new, historically specific, repertoire of meanings associated with prison rape as well as attendant practices and policies designed to respond to prison rape as a national problem in need of remedy.

*a. Academic Researchers.* Taking first person accounts as a starting point, academics have been preoccupied with accurately determining the incidence and prevalence rates of prison rape and other forms of sexual assault in correctional facilities. However, research on sexual victimization in correctional facilities has produced contradictory findings. Some researchers have suggested that sexual victimization in prisons is rare (Fuller and Orsagh 1977; Lockwood 1980; Moss, Hosford and Anderson 1979) and other researchers assert it occurs fairly frequently (Struckman-Johnson, Rucker, Bumby and Donaldson 1996; Weiss and Friar 1974; Wooden and Parker 1982). As Gaes and and Goldberg's (2004) recent inventory of estimates of prison rape reveals, prevalence estimates run from zero to 40%. Offering a "conservative estimate" of prison rape, the PREA reports 13% of inmates experience sexual assault in correctional facilities in the United States (Prison Rape Elimination Act, 2003, 42 USC § 15601). In contrast, other research estimates that the prevalence of forced sexual contact exceeds 40% in some correctional contexts (Struckman-Johnson and Struckman-Johnson 2000; Wooden and Parker 1982) and the most recently completed research reports 4.4% of randomly selected inmates report being sexually assaulted while incarcerated (Jenness, Maxson, Matsuda, and Sumner 2007).<sup>17</sup>

As academics continue to produce numbers, appointed and elected officials continue to acknowledge the problem and debate severity of the problem. For example, Roderick Q. Hickman, former Secretary of the Department of Corrections and Rehabilitation (CDCR), acknowledged in public hearings on August 19, 2005, almost two years after the passage of the

PREA, that the CDCR is beginning to try to quantify the problem, but outdated prison designs, inadequate electronic surveillance systems, and an antiquated computer system has stalled progress.<sup>18</sup> Nonetheless, in the same hearing, Senator Gloria Romero (D-24<sup>th</sup>) testified early in her remarks: “I believe we have underestimated the problem,” without referencing data to support this assessment.<sup>19</sup>

Adding fuel to the fire, one of the most recent, well-funded, and high profile studies of prison rape—an NIJ-funded study conducted by Mark Fleisher—generated national controversy, pitting researchers against each other for ownership of the epidemiological portrayal of prison rape in detention facilities in the U.S. In an article tellingly titled “‘It Ain’t Happening Here’: Working to Understand Prison Rape,” Fleisher and Krienert posit the following:

Common patterns and themes emerge again and again in interviews with men and women who were randomly sampled in high- and medium-security prisons. One of the most common themes, which emerged in several hundred hours of narratives with men and women inmates across the United States, is that in their aggregate experience of many hundreds of years in prison, inmates have not personally observed prison rape nor do they know inmates who were rapists or prison rape victims. (Krienert and Fleisher 2005, 4)

The report that elaborates this argument has been interpreted to suggest that prison rape is rare, if not a myth altogether. Once released to the Associated Press, these findings evoked quick responses by various experts and other stakeholders, leading to national headlines like “Disputed Study: Prison Rape, Sexual Assault Rare: Government Report Finds Sex Behind Bars Usually By Choice” (MSNBC.com, January 17, 2006) and “Study Claiming Rape Rare in Prisons Disputed by Experts” (Associated Press, January 26, 2006), as well as a publication by Stop Prisoner Rape titled “Special Report on the NIJ Research Travesty” (2006). Regardless of this controversy surrounding the findings of the NIJ study, leading experts and researchers on the criminal justice system continue to affirm the gravity of the problem of prison rape in U.S.

prisons. As Malcolm Feeley, Professor of Law at the University of California, Berkeley, declared in July of 2006, "It's a real and serious problem. It may be the single largest shame of the American criminal justice system, and that's saying a lot" (Miller 2006, 1).

While researchers struggle to reach agreement on the prevalence of prison rape,<sup>20</sup> they pay very little attention to the scholarship on rape by feminists over the last thirty years (Graham 2006; Ristoph 2006). Nonetheless, their work has rendered prison rape "empirically credible" (Gamson 1992; Jenness and Broad 1997) as a serious problem in need of remedy, even when research reveals low prevalence rates. For example, when the U.S. Department of Justice, Bureau of Justice Statistics (BJS) released the first national study of reported rape and sexual assault in U.S. prisons in July 2005 (U.S. Department of Justice 2005), Judge Reggie Walton, the Chair of the National PREA Commission, declared: "Even these low figures reveal that sexual abuse behind bars is a national scandal" (U.S. Newswire, 2005, 1).

This historical moment is replete with calls for more research on sexual assault in prisons as activists, policymakers, and correctional administrators proceed to fashion, adopt, and institutionalize policies designed to reduce or eliminate sexual assault in prison. To address how this has unfolded requires turning away from empirical studies and toward more overtly moralistic claims, recognizing that the two are only loosely coupled at best.<sup>21</sup>

*b. Prison Fellowship Ministries.* Although over thirty-five non-profit organizations, including organizations as diverse as Amnesty International, the Salvation Army, the Christian Coalition, Physicians for Human Rights, the American Probation and Parole Association, and the Soros Foundation, endorsed the PREA, Prison Fellowship Ministries (PFM) arguably has been the most significant catalyst for the formulation of the bill and the passage of the Act. According to their website, the PFM is the largest prison ministry in the world, partnering with thousands of

churches and tens of thousands of volunteers across the country to minister to inmates, recognizing that society in general “often scorns and neglects prisoners, ex-prisoners, and their families.”<sup>22</sup> Founded in 1976 by Chuck Colson, who served as special counsel to President Nixon and went to prison in 1975 for Watergate-related crimes and later deemed one of the twelve “Christian heavyweights” by *Newsweek* (2006), PFM “reaches out to prisoners, ex-prisoners, and their families both as an act of service to Jesus Christ and as a contribution to restoring peace to our cities and communities endangered by crime.”<sup>23</sup> This work is based in the belief that “the best way to transform our communities is to transform the people within those communities—and truly restorative change comes only through a relationship with Jesus Christ.”<sup>24</sup>

The PFM sponsors numerous programs and activities designed to encourage fellowship with Jesus and to welcome the children of prisoners to embrace the gospel. Specific programs are designed to equip Christians to develop and defend a clear Christian worldview and to integrate biblically based, restorative reforms into the criminal justice system.<sup>25</sup> To do so, those involved in the PFM visit inmates, sponsor a pen pal program, and produce and disseminate *Inside Journal*. Combined, these activities are designed to draw current and former prisoners and their families into a “vital relationship with Christ” such that every prisoner and his/her family in the U.S. is exposed to the gospel.<sup>26</sup>

With this larger set of objectives in mind, the PFM has relied on Colson’s “BreakPoint” radio commentaries, newsletters, congressional testimony, and prison ministries at the grassroots level to persuade its followers and the public more generally that the elimination of prison rape is a “moral imperative.” PFM has done so in stark terms, making comparisons to other forms of

immorality, sin, and evil along the way. For example, Chuck Colson (2003, 2) explained why prison rape is best seen as a moral issue in his essay on “The Horrors of Prison Rape”:

They were, Iraqis say, places of evil. As the recent war came to an end,<sup>27</sup> U.S. soldiers uncovered Saddam’s torture chambers, outfitted with cattle prods, wooden stocks, manacles, and meat hooks. One victim remembers, “They would beat us as we hung there. They did unthinkable things—electrocution, immersion in a bath of chemicals, and ripping off people’s finger and toenails. Many were forced to listen to tape recordings of their wives screaming as they were brutally raped. Americans were horrified to hear these grisly tales—and relieved to know that Saddam Hussein would never again persecute his people. But, ironically, the same compassionate Americans who abhor torture and rape in Iraq tolerate it on a grand scale here. I’m talking about America’s prisons, where hundreds of thousands of inmates—mostly men—are sexually assaulted every year. And yet, few people really seem to care. After all, these men are the “dregs” of society, we reason. If they get raped—well, so what? [A]s Christians we need to take the lead in fighting prison rape—and supporting this legislation [PREA]. Jesus called us to care for the “least of these,” and He specifically included people in prison. It is the mark of a Christian—and of a Christian country—that we act to halt the terrible exploitation of human beings inside our own institutions, buildings that all too often become homegrown torture chambers. We must wage an assault on prison rape—not because we may one day be victimized by released inmates, but because getting rid of our own “places of evil” is the human and Christian thing to do.

It is both predictable and surprising that the evangelical sector has taken up the cause of prison rape. It is predictable because the history of prison is replete with religious ideas infusing the structure and functioning of prisons (Foucault 1977; Ignatieff 1978; Meranze 1996); the modern evangelical sector has long since been committed to controlling sexual behavior and sexuality, especially when it involves same-sex participants, is shrouded in exploitation and violence, and relates to the AIDS epidemic; and the current U.S. President, George W. Bush—and the administration under which the PREA emerged and found support—has invited and supported “faith-based initiatives” to address contemporary social problems. Going beyond these specifics, Michael Horowitz, Senior Fellow at the Hudson Institute, surmised: “Combating prisoner rape is the third frontier where American evangelical commitment will make its mark on

the human rights area...just as with religious persecution and sexual trafficking (cited in Olsen 2002, 1).

On the other hand, it is surprising that the evangelical sector has taken up this cause in the latter part of the twentieth century. By all accounts, this is an era in which policymakers on both the right and the left have promoted crime control legislation that allows them to cultivate a “tough on crime” image; conversely, appearing “soft on crime”—in this case by passing legislation designed to protect inmates from harm—has become a major liability for both right and left-leaning policymakers, many of whom have adopted sterner stances on crime issues (Beckett 1997, 2003; Chambliss 1993; Currie 1998; Garland 2001). Within this context, studies have shown a complex, positive relationship between evangelicalism and support for capital punishment (Unnever and Cullen 2006).

It is surprising that the evangelical sector would treat the elimination of prison rape as a political cause when some of the most successful social movements of the 20<sup>th</sup> century have been silent on the topic, despite the fact that it implicates people of color, homosexuality and same-sex behavior, and girls and women. As Morse (2001) persuasively argued in “Brutality Behind Bars,” an article that addresses how the nascent movement against prison rape is sustained by Christian soldiers:

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

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

*c. Stop Prisoner Rape.* Stop Prisoner Rape (SPR), a Los Angeles-based organization, is the only human rights group exclusively devoted to “ending sexual violence against men, women, and youth in all forms of detention.”<sup>28</sup> Founded in 1980 by Russell D. Smith, “People Organized to Stop Rape of Imprisoned Persons (POSRIP) preceded SPR. The original mission of POSRIP was described in the first newsletter as “dealing with problems of rape, sexual assault, unconsensual sexual slavery, and forced prostitution in the prison context.”<sup>29</sup>

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

SPR is now a 501 (c 3) human rights organization with two co-executive directors (Katherine Hall-Martinez and Lovisa Stannow); a professional staff that includes a program assistant, press officer, intern, mental health program director, program development director, and senior policy associate; a Board of Directors; a Board of Advisors; and a Survivors’

Speakers Bureau committed to pursuing three goals: to advocate policies designed to ensure institutional accountability, to change society's attitudes toward prisoner rape, and to promote access to resources for survivors of sexual assault behind bars.<sup>30</sup> SPR's work to end sexual violence against men, women, and youth now includes all forms of custody, including immigration detention centers.

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

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

She went on to argue that "nationwide data on prisoner rape is sorely needed;" "reporting procedures, where they exist, are often ineffectual and complaints by prisoners about sexual assault are routinely ignored by prison staff and government officials;" "simple prevention

measures, such as pairing cellmates according to risk, are uncommon, and basic supervision is often lacking;" "punishment for prison rape is rare;" "prison rape has been used in some cases as a tool to punish inmates for misbehavior;" and "overcrowding and insufficient staffing are among the chief reasons for prison rape." Thereafter, three survivors' stories followed her comments, effectively coupling "the facts" with the "real experience" (Stemple 2002).

Pursuing reform at the state level, SPR played a key role in the development and passage of the Sexual Abuse in Detention Elimination Act (Chapter 303, Statutes of 2005) in California, which Governor Schwarzenegger signed into law on September 22, 2005. Similar to the PREA, this Act is designed to prevent, reduce and effectively respond to the sexual abuse of inmates and wards held in detention facilities operated by the CDCR. According to SPR, this law "lays the foundation for California, the largest prison system in the country, to be a national leader in the fight to end prisoner rape."<sup>31</sup> As Katherine Hall-Martinez, a spokesperson for SPR, explained in a press release, "The passage of this law is a significant milestone in California, finally giving this all-too-common human rights violation the attention it deserves in our state."<sup>32</sup>

In addition to promoting anti-prison rape law and policies, SPR devotes organizational resources to educating correctional administrators about prison rape, changing public opinion about prison rape, and providing prisoners and ex-prisoners with resources related to preventing and responding to prison rape. One way it does so is by making public "stories of survival," either by sponsoring events at which prison rape survivors tell their stories of rape or by publishing stories of prison rape on their webpage or in other outlets. With regard to public testimonials, for example, on June 24, 2003—less than three months before President Bush signed the PREA into law—SPR sponsored a Capital Hill event called "Stories of Survival:

Recognizing Prison Rape Behind Bars” in Washington, D.C.<sup>33</sup> The objective of this event was to marshal support for the PREA by “showing America the human face of prisoner rape” (Stemple 2003). More recently, SPR was responsible for ensuring survivors of prison rape appeared at the PREA Commission hearing in San Francisco, California on August 19, 2005 and at the first hearing on sexual violence convened by the Review Panel on Prison Rape sponsored by the U.S. Department of Justice on November 14, 2006 prepared to give testimony about their experience of rape while in custody. In addition to these “live” testimonials, SPR routinely publishes survivors’ stories on its webpage, both as first person accounts and as poetry.

Another way in which SPR pursues the goal of educating prisoners and ex-prisoners, corrections administrators, and the public at large about prison rape is by writing, publishing, and circulating short articles on a diverse array of topics related to prison rape. These articles include: “For Prisoners: Protective Custody: Pros or Cons,” “Predators: Who They are and How to Avoid Them,” “The Basics on Rape Behind Bars,” “No Refuge Here: A First Look at Sexual Abuse in Immigration Detention,” “The Sexual Abuse of Female Inmates in Ohio,” “The Prison Rape Reform Act Obstructs Justice for Survivors,” “Public Attitudes Toward Rape,” “Prisoner Rape Spreads Disease—Inside and Outside Prison,” “FBI Ignores Male Rape,” “Society Pays the Cost for Prison Rape,” “Juveniles in Adult Facilities are Vulnerable to Sexual Assault,” and “Still in Danger: The Ongoing Threat of Violence Against Transgender Prisoners.”

As SPR pursues its goals—ensuring institutional accountability, changing attitudes toward prisoner rape, and promoting access to resources for survivors—it puts forth a decidedly

secular, “human rights” version of prison rape as a social problem. As the homepage of the SPR webpage proclaims:

Prisoner rape—and the failure of the government to address it—represent one of the most egregious human rights violations in the U.S. today. With little institutional protection or recourse, victims have been left beaten and bloodied, they have suffered long-term psychological harm, they have been impregnated against their will, and they have contracted HIV.”<sup>34</sup>

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

Sexual assault of prisoners, whether it is perpetrated by corrections officers or by other inmates is not only a crime—in many cases, it is also a form of torture under international law. Torture has long been prohibited under international human rights law—a standard that has been characterized as “one of the most basic principles of human rights,” comparable to the right to life or the prohibition of slavery. More than 65 countries expressly provide for the right to be free from torture or cruel and unusual punishment, and international customary law also bars the use of torture. Torture is behavior that the United States has denounced in other nations. But the torture of American prisoners though sexual assault has long been allowed to flourish. This inattention to a widespread form of institutionalized brutality is a violation of the United States’ duty to uphold basic standards of international human rights.<sup>35</sup>

Commensurate with this statement, SPR posts on its webpage legalistic understandings of prison rape, along with case law relevant to battling it. For example, a 20 plus page document reports on *Farmer v. Brennan* (1994), the landmark Supreme Court case involving a pre-operative male-to-female transsexual who was raped while serving a 20 year sentence for credit card fraud in a men’s maximum security federal prison in Terre Haute, and reports on “A Circuit-by-Circuit Survey of Its Progeny.”

In some ways, this human rights discourse is similar to the discourse disseminated by PFM. However, in at least one important way it is distinct: namely, SPR discourse calls on a decidedly secular understanding of human rights, while PFM relies upon a biblical one. In other

words, what is wrong for PFM on religious grounds is wrong for SPR on legal grounds, even as they join forces to eliminate the “wrong” behavior: torture in the form of sexual assault.

*d. Correctional Professionals and Associations.* The final “mediator between first person accounts of prison rape and state behavior (i.e., lawmaking)” —to use the language that opened this analysis—is the industry most proximate to prison rape: corrections. The most revealing way to determine the contribution to discursive politics made by corrections is to examine the actions, including speech as action (MacKinnon 1993), taken by the National Institute of Corrections (NIC) American Correctional Association (ACA) as well as leading spokespeople, especially administrators, in corrections.

Founded in 1977, the NIC was formed shortly after riots in New York’s Attica prison in 1971 focused national attention on corrections, including the policies and practices that determine the conditions of imprisonment in the U.S. In response to heightened public concern generated by riots in Attica, John N. Mitchell, then the U.S. Attorney General, convened a National Conference of Corrections devoted to addressing problems in the U.S. correctional systems at the federal, state, and local levels. In his keynote address to conference attendees, Chief Justice Berger called for the creation of a national training academy of corrections, the goals of which would be to “encourage the development of a body of corrections knowledge, coordinate research, and formulate policy recommendations; provide training of the highest quality for corrections employees and executives; provide a forum for the exchange of advanced ideas in corrections; and bring about long-delayed improvements in professionalism in the corrections field.”<sup>36</sup> In response, the NIC was formed in 1974 and received its first funding from the Federal Bureau of Prisons in 1977.

By the 1990s, sexual misconduct on the part of correctional staff emerged as a topic of considerable concern for corrections officials; accordingly, it was taken up by the NIC. In 1996, LIS, Incorporated and the NIC Information Center in cooperation with the Prisons Division of the U.S. Department of Justice released a special report, "Sexual Misconduct in Prisons: Law, Agency Response, and Prevention" that provided correctional officials an "overview" of what it termed a "serious, if seldom acknowledged problem" (LIS, Inc., National Institute of Corrections Information Center, and the National Institute of Corrections, Prison Division 1996, 1) and outlined a three-pronged approach to addressing sexual misconduct in corrections. Later, in 2001, the NIC produced and broadcast "Addressing Staff Sexual Misconduct with Prisoners," a three-hour satellite video conference that, among other things, promoted the development of professional standards for institutional response to what had become identified as a pervasive problem within the industry.

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

Perhaps even more troubling to corrections officials than the criminalization of staff-on-inmate sexual misconduct was the apparently marked increase in individual and class action suits

based on allegations of sexual misconduct filed against various departments of corrections since 1990. According to the NIC, in the early 1990s approximately half of all Departments of Corrections in the U.S. had been party to litigation stemming from staff-on-inmate sexual misconduct allegations. At the time the NIC's special report was released, 19 of the 53 reporting correctional jurisdictions were embroiled in litigation related to sexual misconduct and, of those 19, five had been involved in other similar litigation during the preceding five-year period while an additional five DOCs that were not actively responding to such litigation in 1996 had been involved in such suits at some point during that same period. Judgments in a number of class action suits favored the plaintiffs and were resolved through the consent decrees designed to remedy institutional deficiencies that, the courts opined, amounted to unconstitutional conditions of confinement at a number of prisons.

The issue of sexual assault in prisons emerged as a significant domestic policy issue in the latter part of the twentieth century—the last decade of the twentieth century to be more precise.<sup>37</sup> Representatives of the NIC attribute the organization's focus on developing strong agency responses to staff sexual misconduct to a recent “decade of scrutiny” of corrections by legislatures, courts, and other outside organizations. Tellingly, during the 1990s the central focus was on sexual engagement between correctional officers and inmates; within that focus, the dominant imagery was one of male officers having sexual relations with female inmates. Inmate-on-inmate sexual assault was, for the most part, eclipsed in this early formulation. As the discussion below suggests, another professional body, the American Correctional Association (ACA), was also delayed in directing administrative, policy, and operational attention to the issue of inmate-on-inmate sexual assault.

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

The American Correctional Association is the oldest, and largest international correctional association in the world. ACA serves all disciplines within the corrections profession and is dedicated to excellence in every aspect of the field. From professional development to certification to standards and accreditation, from networking to consulting to research and publications, and from conferences and exhibits to technology and testing, ACA is your resource and the world-wide authority on corrections.<sup>38</sup>

Surprisingly, however, the ACA was late coming to the politics that inform and surround the passage of the PREA. Compared to academics, the PFM, and SPR, the ACA were comparatively silent on the matter in early hearings. When, on July 21, 2002, Senator Kennedy (D-Massachusetts) held hearings on the Prison Rape Reduction Act of 2002, he opened the hearings by recognizing that:

An extraordinary coalition of churches, civil rights groups, and concerned citizens have joined together to act on this issue. It is not a liberal issue or a conservative issue. It is an issue of basic decency and human rights. I commend this coalition for its impressive moral leadership.<sup>39</sup>

The ACA was notably absent from this “moral leadership” as the primary witnesses at the hearings included: Linda Bruntmyer, the mother of a young man who committed suicide after being raped in a correctional facility; Robert Dumand, Clinical Mental Health Director and Counselor and Member of the Board of Advisors for SPR; Mark Early, PFM; Rabbi Saperstein, Director of the Religious Action Center of Reform Judaism; and the Honorable Frank R. Wolf (R-Virginia-10<sup>th</sup> District).

Corrections officials have acknowledged their lack of participation in the coalition most responsible for envisioning, promoting, and ensuring the passage of the PREA. As A.T. Wall,

the Director of Corrections for the State of Rhode Island, explained in *Facing Prison Rape, Pt. 1*, a 2004 video on “The 2003 Prison Rape Act—An Introduction for Correctional Administrators”:

Prison rape is an uncomfortable subject. But it does occur and it tarnishes the reputation of the corrections profession. [T]he Prison Rape Elimination Act was passed with broad support across the political spectrum. When the bill first surfaced it was something that caught the corrections profession unaware. We had not been involved in crafting the bill. However, Congress was interested in knowing how corrections directors felt about the legislation. Fortunately, our core concerns were heard and addressed and this legislation is far more useful to corrections departments now than when it was originally proposed.<sup>40</sup>

Framed in this way, it is useful to ask: when did corrections officials get involved in political discourse surrounding the passage of the PREA? And, what did they contribute to the growing repertoire of meaning related to prison rape?

In 2001 the U.S. Department of Justice initiated a Prison Rape Working Group to work with supporters of the legislation and with organizations such as the ACA. At this time, the Justice Department drafted a framework for new standards and worked with the ACA to have them adopted. The new standards are now in effect and representatives from the Department of Justice have reported confidence that the new standards will assist in the prevention of prison rape and the effective handling of prison rape and sexual assault that occurs in prisons and jails.<sup>41</sup>

Thereafter, in the final Congressional Hearings on the PREA, a corrections official gave testimony before the Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary for the U.S. House of Representatives. Specifically, A.T. Wall, the Director of the Department of Corrections, State of Rhode Island, spoke on behalf of The Association of State Correctional Administrators, a professional association for the 50 Directors of Corrections and the Administrators of the nation’s largest jail systems, and on behalf of the

Council of State Governments, which represents all elected and appointed State officials. He said:

We appreciate very much the bipartisan concern regarding sexual assault in correctional facilities. After all, protecting inmates and staff, as well as the public safety, are the core of our correctional mission, a mission I have upheld since I began in this profession some 29 years ago. We in corrections know that sexual assault occurs. We support the objectives of this bill. We want to prevent prison rape, assess the extent to which it occurs, respond swiftly and effectively, and we recognize this bill represents a moderate approach to dealing with the issue. We also recognize that, as corrections officials, we are accountable for the operations of our systems, including the implementation of the initiatives that come about as a result of this legislation. There is[sic] some provisions that we, as directors of corrections, believe would impede as opposed to assist the efforts to reduce prisoner rape. We are also concerned that the bill does not allocate significant resources to combat prison rape while overlooking another major issue in corrections that has widespread implications for the public safety.<sup>42</sup>

In the same hearing, Wall went on to cite concerns about how data collection would unfold, how the review panel would hold public hearings and with what consequence, how national standards would be developed, and how states would be encouraged to comply with mandates of the PREA. He concluded his comments by thanking the committee for allowing him to “present specific, practical changes that will help correctional administrators combat rape.”<sup>43</sup>

This testimony exemplifies discourse developed and disseminated by the corrections industry more generally. It reveals a commitment to thinking about rape as an operations issue. And, like all operations issues, that means it is an issue of “safety and security” for both staff and inmates alike. Accordingly, concerns about moral imperatives fall to the background, if not disappear completely, when administrators talk about “safe prisons” and how best to create and manage them.

More analytically, the political discourse emanating from the field of corrections reflects what others have called a “new managerialism” (Enteman 1993; Pollitt 1990). New managerialism rests on the belief that social, economic, and political problems can be solved

through effective and efficient management; related, it promotes explicit standards and measures of performance in quantitative terms that set specific targets for the accountability of personnel. In short, new managerialism is a form of disciplinary knowledge that leans heavily on rationality and actuarial thinking.

In this case, actuarial thinking prioritizes the efficient management of personnel and populations based on a statistically grounded risk assessment of the problem at hand. As Simon (1988, 797) argues, “the institutional fabric of society is colonized by actuarial practice.” Thus, trends in policing—and here we argue corrections as a type of policing—reflect a broader growth in actuarialism in the criminal justice system and society at large.<sup>44</sup> Just as the rise of actuarial practices in law enforcement has led to the displacement of other disciplinary practices related to the allocation and operation of power in society and the organizations that comprise it (c.f., Lynch 1998), here it displaces claims related to human suffering as well as more overtly moralistic claims about Christian duty and human rights.

#### **Lawmakers & the Law: Delineating the Problem and Specifying Institutional Response**

As key players in the policy community under study, prison rape survivors, academics, the PFM, SPR, and the corrections industry (i.e., the NIC and the ACA) have, each in their own way, contributed to the development of a political discourse and policy context that, in turn, has shaped legislation and attendant discourse in a larger culture of control (Garland 2001). From issue creation to the development of a plethora of diagnostic and prognostic frames related to prison rape, this discourse constitutes the very context in which the PREA was developed, took form, and ultimately became law. Indeed, Garland’s (2004, 181) observation that “our tendency to focus upon legislators, politicians and policy makers as the prime movers in bringing about penal change may appear to be a realistic focus on power holders and on the arena in which

power is exercised, but it is somewhat un-sociological nevertheless.” Often lawmakers are more easily seen as the final levers of social change, which is certainly the case in the politics of prison rape. They are best seen as political actors operating within a structured field of forces and attendant frames to which they have responded and upon which they have left their imprint. But what, empirically speaking, is their imprint? And, what does their imprint tell us about the production of a culture of control?

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

Taking up where academics have yet to reach agreement, Section 2 of the PREA acknowledges that “insufficient research has been conducted and reported on prison rape,” but nonetheless confirms the “epidemic character of prison rape” (Public Law 108-79, 972). Embracing a “conservative” estimate, the PREA claims “at least 13% of the inmates in the United States have been sexually assaulted in prison” (Public Law 108-79, 972). According to the PREA, “nearly 200,000 inmates now incarcerated have been or will be the victim of prison rape. The total number of inmates who have been sexually assaulted in the past 20 years likely exceeds 1,000,000” (Public Law 108-79, 972). In short, the PREA establishes the magnitude of

harm for the nation; indeed, the “13%” is often quoted by the press, activists, and other policymakers as “the number” granting empirical credibility to the problem of prison rape.

Also without reference to any particular research, the PREA identifies a subpopulation of individuals who are thought to be most at risk for sexual victimization: inmates with mental illness, young first-time offenders, and juveniles incarcerated in adult facilities. In other words, those who might be considered the most vulnerable in prison in general are identified as the most vulnerable to sexual assault in prison in particular. Tellingly, however, no claim is made about the racial or gendered nature of sexual assault in detention facilities, even as the PREA extols that “prison rape often goes unreported” (Public Law 108-79, 973).

For federal lawmakers, and later state legislators, the “associated impacts” connected to alarming rates of prison rape provide the basic rationale for legislation like the PREA. The associated impacts are twofold: public health and public safety. With regard to the former, recognizing that the incidence of diseases known to be transmitted through intimate contact are especially high among those in detention facilities, the PREA defines prisoner rape as a threat to public health in general. As Section 2 states:

HIV and AIDs are major public health problems within America’s correctional facilities. In 2000, 25,088 inmates in Federal and State prisons were known to be infected with HIV/AIDS. In 2000, HIV/AIDS accounted for more than 6 percent of all deaths in Federal and State prisons. Infection rates for other sexually transmitted diseases, tuberculosis, and hepatitis B and C are also far greater for prisoners than for the American population as a whole. Prison rape undermines the public health by contributing to the spread of diseases, and often giving potential death sentences to its victims (Public Law 108-79, 973).

Prison rape, therefore, is understood to “undermine the public health” by contributing to the spread of sexually transmittable diseases.

Another associated impact is the endangerment of public safety. According to the PREA, prison rape is a threat to public safety in at least three ways. First, “prison rape endangers the

public safety by making brutalized inmates more likely to commit crimes when they are released—as 600,000 inmates are each year” (Public Law 108-79, 973). Second, “the frequently interracial character of prison sexual assaults significantly exacerbates interracial tensions, both within prisons and, upon release of perpetrators and victims from prison, in the community at large” (Public Law 108-79, 973). Third, “prison rape increases the level of homicides and other violence against inmates and staff, and the risk of insurrections and riots” (Public Law 108-79, 973).

Finally, the PREA puts forth an analysis of prison rape that is anchored in a concern with “cost effective” and efficient state policy. For example, it warns: “victims of prison rape suffer severe physical and psychological effects that hinder their ability to integrate into the community and maintain stable employment upon release from prison. They are thus more likely to become homeless and/or require government assistance” (Public Law 108-79, 973). More broadly, it explains:

States that do not take basic steps to abate prison rape by adopting standards that do not generate significant additional expenditures demonstrate such indifference [i.e., “deliberate indifference” found in *Farmer v. Brennan*, 511 U.S. 825 (1994)]. Therefore, states are not entitled to the same level of Federal benefits as other states (Public Law 108-79, 973).

Furthermore,

The high incidents of prison rape undermines the effectiveness and efficiency of United States government expenditures through grant programs such as those dealing with health care; mental health care; disease prevention; crime prevention; investigation; prison construction, maintenance, and operation; race relations; unemployment and homelessness (Public Law 108-79, 973).

As English and Heil (2005) conclude, the PREA contains a rationale for addressing prison rape that details some of the suspected and documented societal consequences. From the legislators’/law’s point of view, the consequences of prison rape include: increasing a victim’s

likelihood of committing a crime when released, decreasing a victim's likelihood of stable employment and positive integration into the community when released, increasing violence and homicides against staff and inmates, and increasing interracial tension in prison and the community. Consistent with this focus on how prison rape effects not just the inmate, but the entire community to which the inmate is embedded, the PREA contains a provision to provide funding to "safeguard communities" 42 U.S.C. § 15605(b)(2).

Consistent with these expressed concerns, lawmakers articulated nine "purposes" of the PREA, including: 1) Establish a zero-tolerance standard for the incidence of prison rape in prisons in the United States; 2) Make the prevention of prison rape a top priority in each prison system; 3) Develop and implement national standards for the detection, prevention, reduction, and punishment of prison rape; 4) Increase the available data and information on the incidence of prison rape, consequently improving the management and administration of correctional facilities; 5) Standardize the definitions used for collecting data on the incidence of prison rape; 6) Increase the accountability of prison officials who fail to detect, prevent, reduce, and punish prison rape; 7) Protect the Eighth Amendment rights of federal, state, and local prisoners; 8) 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) Reduce the costs that prison rape imposes on interstate commerce. This is undeniable historic state action in and of itself; it is also legislation that could, according to Roderick Hickman, the former Secretary of California's Department of Corrections and Rehabilitations, constitute a "watershed moment" in the history of corrections in the U.S.<sup>45</sup>

In the final section of this article, we draw on the empirical genealogy and discursive analysis presented in this section to address a series of questions raised earlier, including: how did this “watershed” moment and historic law come into being? Why did the PREA take one form and not others in terms of the way it constructs prisoner rape as a social-legal problem, the remedies it provides, and the parameters of compliance it mandates? And, what do answers to these questions tell us about lawmaking, modern penalty, and a culture of control?

### **DISCUSSION AND CONCLUSION**

The policy community and attendant discourse analyzed above is historically significant because it has generated recognition of a new type of social problem—the problem of prison rape. As Ristoph (2006, 140) explained in her recently published article on “Prison and Punishment: Sexual Punishments,” “For much too long the general attitude toward prison rape was: ‘That’s just part of the penalty; those criminals deserve whatever they get in prison,’ or, only slightly better, ‘It’s too bad such rapes occur, but there’s nothing we can do about it.’” In sharp contrast, this article reveals that historically developed constructions of prison rape are under attack in the modern moment. Prisoners’ rights advocates on the left and the right have labored to show that prison rape is a problem that can and should be remedied by state action. And, state action has been taken, most visibly in the form of the PREA.

The multitude of claims and discursive themes put forth in survivors’ testimonials, by moral entrepreneurs, and codified in law have forced new ways of thinking about prison rape. In first person testimony given by survivors of prison rape, the lived experience of prison rape has been presented in a way that emphasizes the corporeality of rape, complete with accompanying physical and psychological horror with long-term mental and physical health consequences, “lost manhood,” and the predictable failure of correctional officials and the general public to respond.

Showcasing the intersection of rape, sexuality, gender, and the conditions of confinement, first person accounts have been instrumental in rendering prison rape visible to policymakers and the public alike. This constitutes a crucial step in the initial identification of social problems.

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

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

violations fade as concerns about risk management, public health and public safety concerns, and cost reduction become paramount.

In some ways, it is not surprising that the PREA magnifies and codifies claims about public health, public safety, and cost-effectiveness; after all, the interest groups that have traditionally had the most influence on criminal justice policy are those that represent professionals and others involved in the operation of the criminal justice system—police associations, bar associations, judicial organizations, and correctional associations (Grattet and Jenness 2005). In this case, claims related to correctional operations and their connection to community welfare have trumped claims related to pain and suffering, human rights violations, and the importance of relying upon faith-based initiatives to solve social problems. In her analysis of the content of the PREA, Ristoph (2006, 175) rightfully concluded, “recent efforts to address sexual assault in prisons have not centered on the Eighth Amendment, but on the development of better prison policies.”

The predominance of correctional language and attendant policy remedies in the legal codification of prison rape as a social problem reflects the endogeneity of law: the content and meaning of law is [largely] determined within and by the social/organizational field it is designed to regulate (Edelman et al. 1999). In this case, the PREA was initiated, formulated, and promoted by non-state actors; however, it ultimately took legal shape at the hands of corrections officials who represent the very organizations—detention facilities, including prisons and jails—that the PREA seeks to expose, regulate, and target for systematic reform. Despite entering the political discursive talk late in the game, the organizational field in receipt of the regulation—the corrections industry—effectively imposed constructions of prison rape, remedies for reform, and the rules of compliance on the law. To quote Edelman (2005, 345), “as the law becomes

managerialized,<sup>46</sup> the logic of efficiency and rationality will often trump the logic of rights and justice....[t]he rhetorical reconstruction of legal<sup>47</sup> ideals occurs as managerial rhetoric reframes the goals of law in ways that conform to managerial objectives.” In this case, the law conforms to established correctional models of governance and discourse, which is informed by a highly institutionalized penology.

What does this configuration of prison rape and PREA-related responses to it reveal about what Garland (2004, 161) called “the penological present” in general and the “culture of control” more generally? First, the passage of the PREA and the politics of prison rape that surround it reveal that penal policies are not necessarily driven by or in sync with public opinion.<sup>48</sup> Despite public opinion, a law that is supportive of reducing the harm inflicted on prisoners as a result of rape is in place; federal funds have been and continue to be allocated; the development and implementation of national standards for the detection, prevention, reduction, and punishment of prison rape is underway; policies and programs commensurate with the “zero tolerance” component of the PREA are emerging and being institutionalized; and oversight commissions and boards are in place. This is no small amount of social, policy, and organizational change in a very short period of time. On the surface, this is being done in the name of protecting inmates from harm (primarily from other inmates); somewhat below the surface, it is being done to enable corrections officials to run safe, secure, and constitutional prisons.

Because *legislative* efforts to address sexual assault in prisons have not centered on academics’ epidemiological reports (which are far from in agreement on the “facts” of prison rape), the faith-based community’s efforts to restore communities (which are not mentioned in the law at all), or SPR’s image of prison rape as torture (which is only mentioned as a judicial

issue in the law), it is difficult if not impossible to directly trace the configuration of prisoner rape found in the PREA to any of the various cultural forces whose discursive political talk contributed to its initial appearance on the national agenda (i.e. rape as emasculation, rape as an affront to Christian morality, rape a torture, etc.). As a result,

The PREA does not contemplate the measures that prisoners and several activists and researchers have identified as most important to reducing sexual assaults in prison and their devastating consequences: opportunities for conjugal visits; condom distribution; the elimination of regulations against 'non-assaultive' sexual relations among prisoners; and most generally, 'any measures which give prisoners a feeling of more control over their own life' without breaching institutional security (Ristoph 2006, x).<sup>49</sup>

Rather, the PREA evokes calls for better classification and more stringent confinement as a way to prevent prisoner rape as well as more punitive responses—detection, prosecution, and punishment—for those who perpetrate it. From a corrections point of view, the solution to the problem of prison rape is to expand and intensify imprisonment instead of focusing on sexual coercion in prison as a product of the prison environment. The latter requires attending to the corporal experiences associated with life in prison and the ways in which modern prisons are organized around and function to reinforce inequalities based on sexuality and race (Ristoph 2006; see also Smith 2006).

The politics of prison rape and the policies and protocols that are flowing from the PREA reveal what Hutchinson (2006, 443) recently described as the "braided nature of modern liberal punishment."<sup>50</sup> The new penology of "risk control" coexists with an old penology of vengeance and vindication. Likewise, punitive modes of crime control, in this case the legal call for more detection and prosecution, operate along side non-punitive modes of crime control, such as the development of educational programs for inmates and corrections officials alike. In other words, there is more punishment alongside more prevention and intervention. The current politics of

prison rape reveal a tendency to have it both ways—punishment and reform—in a single policy issue.

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<sup>1</sup> *Congressional Record*. 2005. July 25. H7766.

<sup>2</sup> Prison Rape Elimination Act of 2003, 42 U.S.C. § 15601-15609.

<sup>3</sup> In addition, the PREA is designed to: 1) Establish a zero-tolerance standard for the incidence of prison rape in prisons in the United States; 2) Make the prevention of prison rape a top priority in each prison system; 3) Develop and implement national standards for the detection, prevention, reduction, and punishment of prison rape; 4) Increase the available data and information on the incidence of prison rape, consequently improving the management and administration of correctional facilities; 5) Standardize the definitions used for collecting data on the incidence of prison rape; 6) Increase the accountability of prison officials who fail to detect, prevent, reduce, and punish prison rape; 7) Protect the Eighth Amendment rights of federal, state, and local prisoners; 8) 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) Reduce the costs that prison rape imposes on interstate commerce.

<sup>4</sup> <http://www.slate.com/id/2089095/>, last visited May 20, 2007.

<sup>5</sup> Earlier formulations of this legislation were titled The Prison Rape Reduction Act (H.R. 1765 [108]:Prison Rape Reduction Act of 2003).

<sup>6</sup> As we discuss in the conclusion, more recent analyses of epochs and ruptures in penalty have argued against broad characterizations captured by these terms and, instead, suggested penalty is “braided” insofar as it contains elements of both punishment and reform (Hutchinson 2006).

<sup>7</sup> For a summary of critiques, see Garland (2004).

<sup>8</sup> For more along these lines with regard to policymaking more generally, see Burstein (1991).

<sup>9</sup> Ismaili (2006, 267) notes that key judicial actors are not active participants in the work of the subgovernment, but they are nonetheless a major influence on the product of the work of the subgovernment sector.

<sup>10</sup> Emphasis in the original.

<sup>11</sup> Surprisingly, Martin’s (2005) book does not make a single reference to prison rape. Likewise, in another important book on public discourse around rape and legal reform, *Rape on Trial: How the Media Construct Legal Reform and Social Change*, Cuklanz (1996) makes a single reference to prison rape in passing (see page 7), but then proceeds to discard it for purposes of her analysis.

<sup>12</sup> As with other excerpts presented in *No Escape*, here the text of the inmate’s letter is reproduced without correcting spelling and grammar.

<sup>13</sup> [http://www.nprec.us/docs/sf\\_cmartin\\_statement.pdf](http://www.nprec.us/docs/sf_cmartin_statement.pdf), last visited on May 20, 2007.

<sup>14</sup> [http://www.nprec.us/docs/sf\\_tjarsell\\_statement.pdf](http://www.nprec.us/docs/sf_tjarsell_statement.pdf), last visited May 20, 2007.

<sup>15</sup> [http://www.nprec.us/docs/sf\\_kspruce\\_statement.pdf](http://www.nprec.us/docs/sf_kspruce_statement.pdf), last visited on May 20, 2007.

<sup>16</sup> For the most recent installment of first person accounts, see *Violence in California Correctional Facilities: An Empirical Examination of Sexual Assault* (2007), by Valerie Jenness, Cheryl Maxson, Kristy Matsuda, and Jennifer Sumner.

<sup>17</sup> Estimates of prison rape, like estimates of other types of violence occurring in correctional facilities—or other types of rape outside the confines of prison life for that matter—vary considerably for numerous reasons. Research on sexual assault in correctional facilities is limited and the research that does exist often suffers from small sample sizes, definitional problems, and low response rates (Gaes and Goldberg 2004). Moreover, the extent and nature of the sexual assault among inmates, especially in large

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prison industry states like California, is unknown due to institutionalized beliefs and practices within the correctional system, including inmates' fear of retaliation and staff's understanding of this particular form of violence.

<sup>18</sup> [http://www.nprec.us/docs/sf\\_sechickman\\_statement.pdf](http://www.nprec.us/docs/sf_sechickman_statement.pdf), last visited on May 20, 2007 and reported in the *New York Times*, 2005:A8).

<sup>19</sup> [http://www.nprec.us/docs/sf\\_senromero\\_statement.pdf](http://www.nprec.us/docs/sf_senromero_statement.pdf), last visited on May 20, 2007.

<sup>20</sup> Indeed, the PREA mandates national data collection on prison rape and funds state-level data collection on prison rape.

<sup>21</sup> As a 2005 article on "Prison Rape: What We Know Today" reported: In 2000 R.W. Dumond expressed the failure of research on this topic [sexual assault in prison] to influence policy: "Although the problem of inmate sexual assault has been known and examined for the past 30 years, the body of evidence has failed to be translated to effective intervention strategies for treating inmate victims and for ensuring improved correctional practices and management" (English and Heil 2005, 1).

<sup>22</sup> <http://www.pfm.org/contentindex.asp?ID=8>, last visited on May 20, 2007.

<sup>23</sup> <http://www.pfm.org/contentindex.asp?ID=8>, last visited on May 20, 2007.

<sup>24</sup> <http://www.pfm.org/contentindex.asp?ID=8>, last visited on May 20, 2007.

<sup>25</sup> <http://www.pfm.org/contentindex.asp?ID=8>, last visited on May 20, 2007.

<sup>26</sup> <http://www.pfm.org/contentindex.asp?ID=8>, last visited on May 20, 2007.

<sup>27</sup> This statement was made shortly after President Bush declared "Mission Accomplished."

<sup>28</sup> <http://www.spr.org/>, last visited on May 20, 2007.

<sup>29</sup> <http://www.spr.org/>, last visited on May 20, 2007.

<sup>30</sup> <http://spr.org/>, last visited on May 20, 2007.

<sup>31</sup> <http://www.spr.org/>, last visited May 20, 2007.

<sup>32</sup> Stop Prisoner Rape Press Release, September 22, 2005.

<sup>33</sup> Seven survivors of prison rape were scheduled to speak at this event, along with three legislators (Rep. Robert C. Scott (D-VA), Rep. Roscoe G. Bartlett (R-MD), and Rep. Frank R. Wolf (R-VA)), the Executive Director of SPR, and the President of Justice Fellowship.

<sup>34</sup> <http://www.spr.org/>, last visited May 20, 2007.

<sup>35</sup> <http://www.spr.org/en/factsheets/torture.asp/>, last visited May 20, 2007.

<sup>36</sup> <http://www.nicic.org/History>, last visited May 21, 2007.

<sup>37</sup> Sexual assault of persons detained or incarcerated by the state was first politicized in the international arena. Concern with rape and other forms of sexual assault perpetrated by troops involved in armed conflicts, as well as the sexual abuse of refugees and prisoners of war, ultimately led a number of organizations to take up the issue of custodial rape. In particular, various bodies working under the auspices of the United Nations High Commissioner for Human Rights were instrumental in promoting international attention on this issue (e.g., The Committee Against Torture (the body of independent experts monitoring implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by its State parties), the UN Special Rapporteur on torture, and the UN Special Rapporteur on violence against women). In 1992, the Special Rapporteur on Torture declared: "it was clear that rape or other forms of sexual assault . . . in detention were a particularly ignominious violation of the inherent dignity and right to physical integrity of the human being, they accordingly constituted an act of torture" (Summary Record of 21st Meeting, U.N. ESCOR, Comm'n Hum. Rts, 48th Sess., para 35, U.N. Doc. E/CN.4/1992/SR.21, 1992). It is notable that, in the international arena, "prison rape" was constructed almost exclusively as custodial rape and in that context, was understood in gendered terms, with perpetrators generally understood to be male and victims female.

<sup>38</sup> <http://www.aca.org/>, last visited May 20, 2007.

<sup>39</sup> The Prison Rape Reduction Act of 2002. Hearing before the Committee on the Judiciary, United States Senate. One Hundred Seventh Congress, Second Session. July 31, 2002. Serial No. J-107-99. p. 2.

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<sup>40</sup> *Facing Prison Rape, Part I: The 2003 Prison Rape Act—An Introduction for Correctional Administrators*. 2004. Washington, D.C. The Moss Group.

<sup>41</sup> The Prison Rape Reduction Act of 2003. Hearing before the Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary, United States House of Representatives. One Hundred Eighth Congress, First Session. April 29, 2003. Serial No. 36. p. 12.

<sup>42</sup> The Prison Rape Reduction Act of 2003. Hearing before the Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary, United States House of Representatives. One Hundred Eighth Congress, First Session. April 29, 2003. Serial No. 36. p. 17-18.

<sup>43</sup> The Prison Rape Reduction Act of 2003. Hearing before the Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary, United States House of Representatives. One Hundred Eighth Congress, First Session. April 29, 2003. Serial No. 36. p. 18.

<sup>44</sup> Feeley and Simon (1992; see also, Simon and Feeley (1995)) delineate three distinct elements of new penology inextricably tied to new managerialism and actuarialism: 1) it is characterized by a new discourse that emphasizes risk and probability rather than diagnosis and moralistic judgments to make sense of problem populations facing the criminal justice system; 2) there is a discernable move away from an ideology of punishing or normalizing wrongdoers and toward identifying and managing classes of criminals; and 3) the shift in discourse and ideology identified above has led to the development of a new set of practices that sustain the criminal justice system, including the intensification of commitments to measuring and assessing risk via the use of statistical/actuarial methods (for a succinct review of these distinctions, see Lynch 1998).

<sup>45</sup> Testimony given to the First Hearing on Sexual Violence by the Review Panel on Prison Rape, U.S. Department of Justice, Office of Justice Programs, on November 14, 2006.

<sup>46</sup> For Edleman (2002, 199), "The managerialism of law, then, is a process by which the implementation or conception of law is influenced by managerial values or goals." The focus in this article is on the conception of law.

<sup>47</sup> Emphasis in the original.

<sup>48</sup> Savelsberg's (1994) work, for example, suggests that popular sentiment can be translated into law with ease because of the populist character of the U.S. political structures.

<sup>49</sup> Interestingly, one of the PREA Commissioners, Brenda Smith, Professor of Law at American University, recently published an article tellingly titled "Analyzing Prison Sex: Reconciling Self-Expression with Safety." In this article she identifies numerous reasons for delineating a clear distinction between consensual sex and coercive sex in prison and negating the notion that "all sex in prison is coercive because it is in prison." For example, she argues, "recognizing and granting inmates a degree of sexual expression may enhance inmate safety by decreasing prison rape" (Smith 2006, 2).

<sup>50</sup> In "Countering Catastrophic Criminology: Reform, Punishment, and the Modern Liberal Compromise," Hutchinson (2006) argued that modern liberal punishment has always been about both punishment and reform; punishment and reform have always braided together in modern liberal penalty and they continue to do so (see also, Vaughan 2000).

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