

CHANGING THE POLICY OF PRISONER-CIDE IN AMERICA: PROVIDING ACCESS TO CONDOMS

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This article discusses the prevalence of sex behind bars with a specific focus on prisoner rape. The masculine subculture latent in prisons coupled with the current mass incarceration phenomenon are major factors contributing to prisoner sexual violence and the subsequent transmission of HIV/AIDS. Thus, failing to provide access to condoms violates the constitutional rights of incarcerated individuals. Further, this article examines how federal legislation effectively bars prisoners from pursuing these rights under the Prisoner Litigation Reform Act. It also examines how federal legislation fails to protect the right to health by neglecting to expressly address preventive measures in the provisions of the Prison Rape Elimination Act. Finally, it discusses how public perceptions further exacerbate oppression of the prison population.

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INTRODUCTION

Sex in prison is a reality and the United States government, specifically the federal and state prison systems, have an obligation to provide prisoners with the means to protect themselves from contracting HIV. Refusing to take the reasonable and necessary steps to prevent contraction amounts to a violation of basic human rights. In its conservative estimates,¹ Congress declared, “nearly 200,000 inmates now incarcerated have been or will be the victims of rape. The total number . . . assaulted in the past 20 years likely exceeds [one million].”² In 2008, 20,449 state prisoners and 1,538 federal prisoners were reported as confirmed cases of HIV/AIDS,³ five times the rate of the general population with HIV/AIDS;⁴ these numbers do not account for unknown cases. Further, one of six people who have HIV/AIDS will enter the prison or jail system each year,⁵ making it a breeding ground for disease.⁶ As such, AIDS is widespread in prison and is the second leading cause of death for prisoners.⁷ This statistic alone signals a need to change current policy. The result is an unspoken “prisoner-cide”⁸ among

¹ 42 U.S.C. § 15601.2, stating “experts have conservatively estimated that at least 13 percent of inmate in the United States have been sexually assaulted in prison.”

² 42 U.S.C. § 15601.

³ Maruschak L. *US Department of Justice, Bureau of Justice Statistics. HIV IN PRISONS*, 2007-08. 2009; NCJ 228307 available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/hivp08.pdf> (last visited on September 18, 2011).

⁴ *US correctional facilities: Complex approach needed for HIV, HCV screening, treatment* available at <http://www.infectiousdiseaseneews.com/article/83800.aspx> (last visited on September 18, 2011).

⁵ *Id.*

⁶ Mary McLean Jordan, *Care to Prevent HIV Infection in Prison: A Moral Right Recognized in Canada, While the United States Lags Behind*, 37 U. Miami Inter-Am. L. Rev. 319, 321 (2006).

⁷ AIDS is currently the second leading cause of death among inmates, after natural causes. See No Escape, Male Rape in U.S. Prisons, New York: Human Rights Watch, 2001, at pt. VI. available at <http://www.hrw.org/reports/2001/prison/report2.html#-1-8> (citing U.S. Dept of Justice, Bureau of Statistics, *HIV in Prison & Jails*, (1995) (1998), <http://www.ojp.gov/pub/pdf/hivpj95.pdf>). Prison systems have reported as high as nearly 50% of its inmates were HIV positive. See 30 Suffolk U. L. Rev. 863, 865 citing Theodore M. Hammett, U.S. Dep’t of Justice, (1994) Update: HIV/AIDS and STDs in Correctional Facilities 17 (1995) (reporting rate of 48.6% in Baltimore City, Maryland penal system).

⁸ Prisoner-cide is the assertion that large members of the prison population are dying unnecessarily, resulting from prison policy. It is a variation of the definition of ‘genocide’ in that a subgroup of the population is specifically affected. Variations have been argued in other contexts; See e.g., Jill Radford and Diana E.H. Russell, *“Femicide: the Politics of Woman Killing”* Twayne Publishers, New York (1992). They argue “femicide is the killing of woman qua woman, often condoned by, if not sponsored, by the stated and/or religious institutions.” *Id.* at 15.

The Convention on the Prevention and Punishment of the Crime of Genocide defines genocide as: ‘any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial, or religious group, such as:

inmates because failing to provide access to condoms contributes to the transmission of terminal HIV/AIDS.

Take, for instance, the story of Roderick Keith Johnson, a gay inmate who was subjected to repeated acts of sexual violence over a period of 18 months while incarcerated in a Texas prison. He was repeatedly raped and sold as a sex slave by prison gangs for \$3-\$7 a sex act.⁹ He appeared before the prison's classification committee seven separate times, requesting transfer to protective custody, safekeeping, or a different prison. Each time his request was repeatedly refused, with officials declaring he must 'fight or fuck'¹⁰ and that he must "bring bruises or stay out of my face"¹¹ because prison officials "don't protect punks on this farm."¹² While his account is appallingly customary, his reaction was not; he sought judicial relief, arguing that prison officials actively and passively allowed the rapes.¹³ At trial, prisoner witnesses testified to hearing the screams from Johnson while officials looked the other way.¹⁴ But because of a high threshold a prisoner must prove, Johnson lost his case. Worse still is that Johnson could be considered perversely fortunate—he did not contract HIV.¹⁵ But, for the multitude of inmates subjugated to prisoner sexual realities, the inmate's only option from contracting HIV/AIDS—protective condoms—is not readily available in most U.S. prisons.

The right to be free from sexual violence is recognized in

(a) killing members of the group;

(b) causing serious bodily harm or mental harm to members of the group;

(c) inflicting on he group conditions of life calculated to bring about its physical destruction in whole or in part; . . . "

78 U.N.T.S. 277 (1948), Art. II. (adopted Dec. 9, 1948) (entered into force Jan. 12, 1951).

This article explores prisoner rape and the unnecessary transmission of HIV/AIDS that results from a policy that denies access to condoms. The HIV/AIDS virus exists among the prison population at estimates of 5 to 7 time the general population (*See infra*, note 251). Prisoner sex exists and methods of reducing AIDS/HIV include access to condoms. Failure to provide access to condoms effectively sanctions mass prisoner death, while incarcerated or post-incarceration.

⁹ *ACLU Presents Closing Statement in Texas Prison Sex Slave Trial 10/17/2005* available at <http://www.aclu.org/prisoners-rights/aclu-presents-closing-statement-texas-prison-sex-slave-trial> (last visited on 6/07/11).

¹⁰ *Id.*

¹¹ Bruce Shenitz, *Prison Sex Slave*, OUT, 112 (2004).

¹² Daniel Brook, *The Problem of Prison Rape*, 2004-APR Legal Aff. 24 (March/April 2004) available at http://www.legallaffairs.org/issues/March-April-2004/feature_brook_marapr04.msp (last visited on 6/05/11).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ However, his aunt states he still lives in constant fear that he may have contracted disease from his 18 months as a sex slave. *See* Vivian Edwards, "Stories of Survival: Recognizing Rape Behind Bars, Text of Survival Stories" available at <http://www.justdetention.org/en/survivorstories/sovedwards.aspx> (last visited on 6/07/11).

international law.¹⁶ Indeed, in light of recognized principles, most Americans were shocked and embarrassed by the sexually degrading photos of the prisoners at Abu Ghraib prison.¹⁷ However, Congress has stated that “members of the public and government officials are largely unaware of the epidemic character of prison rape and the day-to-day horror experienced by victimized inmates”¹⁸ because awareness of prisoner rape and prisoner sexual violence is minimal or the knowledge is intentionally untouched.¹⁹ Public ignorance and fear fosters the denial of prisoners’ rights that access to condoms can help protect.²⁰ As one prison rape survivor who contracted HIV as a result of prison rape stated, “[p]eople don’t want to believe it [prison rape] because they’re scared of the knowledge. . . because if they believe this, maybe they would have to do something about it.”²¹

Several theories are accepted as justification for imposing prison sentences, including: deterrence,²² retribution,²³ restitution,²⁴ and

¹⁶ See *International Covenant on Civil and Political Rights*, Art. 7, opened for signature Dec. 16, 1996, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976, adopted by the United States Sept. 8, 1992) where it states in part, that “no one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment”; See also Universal Declaration of Human Rights, Art. 5 (adopted Dec. 19, 1948); See also the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (entered into force June 26, 1987). The Convention declares the main elements of torture as: (1) acts which intentionally inflict severe physical or mental pain or suffering; (2) for an illicit purpose; (3) committed, consented, or acquiesced to by a public official; (4) not arising only from, inherent in, or incidental to a lawful restriction.

¹⁷ After the photos became public, President George W. Bush declared that “the actions of these few people do not reflect the hearts of the American people” and that “This is not America.” Mary Sigler, *By the Light of Virtue: Prison Rape and the Corruption of Character*, 91 Iowa L. Rev. 561, 578 (2006).

¹⁸ 42 U.S.C.A. §15601.12.

¹⁹ Understanding Prison Health Care, Myths: The Prisoner Patient available at <http://movementbuilding.org.prisonhealth/myths.html>

²⁰ *Protect Prisoners’ Human Right to Health: Support AB 1677, Letter to California Governor Arnold Schwarzenegger to Support Distribution of Condoms in Prison* available at <http://www.hrw.org/en/news/2005/04/26/protect-prisoners-human-right-health-support-ab-1677> last on 6/07/11.

²¹ Statement of prison rape survivor Michael Blucker who contracted HIV as a result of prison rape available at http://www.vincebeiser.com/debt-to-society/prisons_download/disease.html (last visited on 6/07/11).

²² Defined as: “The act or process of discouraging certain behavior, particularly by fear; esp., as a goal of criminal law, the prevention of criminal behavior by fear or punishment.” Deterrence is further categorized as: (1) special deterrence, where the goal of the punishment is to discourage people from committing crimes and; (2) general deterrence, where the goal is to dissuade the offender from committing crimes in the future. BLACK’S LAW DICTIONARY, Second Pocket Edition, Bryan A. Garner, Ed-In-Chief, West Group, (2001).

²³ Defined as: “Punishment imposed as repayment or revenge for the offense committed; requital.” *Id.*

²⁴ Defined as: “Compensation for benefits derived from a wrong done to another.” *Id.*

rehabilitation.²⁵ However, rape and transmission of disease are not part of the penalty under any punishment theory. There is no right to engage in sex in any form, but yet the problem of prisoner sex—whether in the form of violent rape, coerced sex, or consensual sex—is pervasive, and unwanted sex violates prisoners’ rights. As a result, prisoners are contracting communicable diseases, including HIV/AIDS, because protection is denied on several levels. First, structural limitations, such as the lack of resources, staff, space, and motivation make it difficult to stop prisoner sexual violence.²⁶ Then, because sex in prison is not prevented, the state denies necessary protection from HIV/AIDS by failing to provide condoms.

The right to health is a fundamental right in the international arena as well.²⁷ The World Health Organization states in its Constitution “all prisoners have the right to health care, including preventive measures, equivalent to that available to the community.”²⁸ With emphasis on preventive measures, prisoners therefore must have access to condoms as a method of HIV/AIDS prevention. The cost of condoms and the accompanying HIV/AIDS education is minimal compared to the costs to society with the HIV/AIDS public health crisis. High-risk activities involved in the spread of HIV/AIDS are not strictly voluntary,²⁹ and the

²⁵ Defined as: “The process of seeking to improve a criminal’s character and outlook so that he or she can function in society without committing other crimes.” *Id.*; See also Leslie E. Wolf and Richard Venzina, *Crime and Punishment: Is There a Role For Criminal Law in HIV Prevention Policy?*, 25 Whittier L. Rev. 821, 837 (2004).

²⁶ Terry A. Kupers, *Rape and the Prison Code*, PRISON MASCULINITIES, Philadelphia: Temple University Press, 113, (2001). Where the author recounts the brutal rape of a male who had been held in protective custody with two gang members. At the time of the rape, one officer was responsible for observing a day room, a dining area, and two floors of cells with open doors. It was impossible for the one officer on duty to observe the entire unit. The rape of the victim took place over a 45-minute span on the second floor, while the officer was in the day room and unable to see any cells on the second floor.

²⁷ See e.g., *Universal Declaration of Human Rights*, Art., 25. “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services. . . .” (adopted Dec. 10, 1948); *International Covenant on Economic, Social, and Cultural Rights*, (opened for signature Dec. 16, 1966) (entered into force on Jan. 3, 1976), Art. 12(1), (2)(a), “The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health” [including] “the prevention, treatment and control of epidemic, endemic, occupational and other diseases;” *International Covenant on Civil and Political Rights* (opened for signature Dec. 16, 1966) (entered into force March 23, 1976) Art. 22, where the Convention repeatedly references protections of public health.

²⁸ Preamble, WHO Constitution, available at http://www.opbw.org/int_inst/health_docs/WHO-CONSTITUTION.pdf (last visited on 6/08/11).

²⁹ Ralf Jurgens, *HIV/AIDS in Prisons: Final Report, Responsibility of Prison Systems* available at

international community recognizes the necessity of condom access to prisoners as a measure to limit the spread of HIV/AIDS.³⁰

Many countries, two states, and several cities presently allow prisoners condom access,³¹ thus recognizing the health and human rights of inmates. These include prison systems in most European Union countries, Australia, Canada, Mississippi, Vermont, and jails in New York, Philadelphia, Washington, D.C., San Francisco, and Los Angeles.³² None have reported major problems in allowing condom access.³³ The Canadian system is a laudable example of condom access, which became available to prisons in 1992.³⁴ It applies clear, specific rules throughout the prison system with minimal discretion left to local prison officials.³⁵ The directive requires that condoms be made “easily and discreetly” available in gyms, laundry rooms, schools, libraries, and other areas where inmates can access them without feeling embarrassed or afraid.³⁶ Follow-up reports indicated that 82% of Canadian correctional officers found that making condoms available did not create any problems. Eighteen percent that did cite problems reported issues unrelated to safety and security (which are legitimate penological goals)³⁷ and instead cited problems such as using ‘too many’ condoms.³⁸

<http://www.aidslaw.ca/publications/interfaces/downloadFile.php?ref=585> at 108 (last visited on 6/08/11).

³⁰ For example, UNAIDS has recommended several intervention components to prevent HIV/AIDS in prisons, including access to condoms. Other methods of intervention included education on HIV transmission risks, introduction of peer risks, provision of syringes (to prevent intravenous drug use transmission), availability of bleach, and improved drug treatment program. See Power Point Presentation, HIV/AIDS Unit, United Nations Office on Drugs and Crime, (Sept 27, 2004) Power Point Presentation, available at [www.pck.org.pl/.../Prisons_&_HIV-AIDS_\(Monica_Beg\)_updated_IL.ppt](http://www.pck.org.pl/.../Prisons_&_HIV-AIDS_(Monica_Beg)_updated_IL.ppt) (last visited on 6/08/11).

³¹ Megan McLemore, *Access to Condoms in U.S. Prisons*, HIV/AIDS Policy & Law Review 13(1), 20, 21-22 (July 2008).

³² *Protect Prisoners' Human Right to Health*, *supra* note 20.

³³ See generally, Kate Dolan, David Lowe & James Shearer, *Evaluation of the Condom Distribution Program*, *supra* note 29. See also, *Ensure Access to Condoms in US Prisons and Jails*, Human Rights Watch, March 2007 reporting no problems with condom distribution programs in Washington D.C., Canada or Australia prison systems, available at <http://www.hrw.org/sites/default/files/reports/condoms0307web.pdf> last on September 18, 2011.

³⁴ Ralf Jurgen & Diane Riley, *Responding to AIDS and Drug Use in Prisons In Canada* available at <http://www.drugtext.org/library/articles/97814.htm> last on 6/08/11; See also Cal. Assembly Bill 1677, Assembly Committee On Public Safety, Comment 2.

³⁵ Brent Staples, *Fighting the Aids Epidemic by Issuing Condoms in Prisons*, New York Times (Sept. 7, 2004) available at <http://www.nytimes.com/2004/09/07/opinion/07tues4.html> (last visited on 6/08/11).

³⁶ *Id.*

³⁷ *Procunier v. Martinez*, 416 U.S. 396, 424 (1974) “The State has legitimate and substantial concerns as to the security, personal safety, institutional discipline, and prisoner rehabilitation not applicable to the community at large.”

³⁸ Comments to Cal. Assembly Bill 1677, *supra* note 34.

Thus, commonly cited concerns, such as using condoms to smuggle drugs or using condoms as weapons, have not erupted.

Because prisoner rape exists, whether in the form of rape, coerced sex, or consensual sex, condoms must be available to lessen the alarming rate of HIV/AIDS transmission. Prisoners have fundamental rights that survive incarceration, and they are guaranteed a degree of physical protection and medical care by virtue of their deprivation of liberty.³⁹ In the context of HIV/AIDS, this mandates giving prisoners the ability to protect themselves from exposure to HIV by providing access to condoms. Failure to provide access effectively sanctions a prisoner-icide.⁴⁰

Part I of this article discusses the prevalence of sex behind bars with a specific focus on prisoner rape. It highlights the masculine subculture latent in prisons and the current incarceration policy as major factors contributing to prisoner rape and subsequent transmission of HIV/AIDS.

Part II discusses several constitutional rights of prisoners and how failing to provide access to condoms violates these rights. First, it discusses rights that result from incarceration by virtue of deprivation of the inmate's liberty; it also discusses fundamental rights that survive incarceration. Then, it analyzes the "deliberate indifference" standard of *Farmer v. Brennan* as it applies to conditions of confinement and failure to provide condom access. Finally, it examines how this policy fails to meet the deferential standard articulated in *Turner v. Safely*.

Part III examines how federal legislation effectively bars prisoners from pursuing these rights under the Prisoner Litigation Reform Act. It also examines how federal legislation fails to protect the right to health by neglecting to expressly address preventive measures in the provisions of the Prison Rape Elimination Act.

Part IV explains how public perceptions exacerbate further oppression of the prison population. It also explains the roles public perceptions and perceptions within the prison system play in changing condom policy. Concluding remarks follow.

I. PRISONER RAPE EXISTS

A. Background

Mass incarceration in the United States encourages the spread of HIV/AIDS in prisons. With over 2 million incarcerated individuals,⁴¹ the United States has the highest prison population in the world and it holds

³⁹ U.S. Const. Amend., 8; U.S. Const. Amend. 14; *See* Part II.B.

⁴⁰ *See supra*, note 4.

⁴¹ Gloria J. Browne-Marshall, *America's Epidemic, HIV/AIDS and People of Color*, 31-FALL Hum. Rts. 15, 15 (2004).

25% of the world's prisoners.⁴² In 1995, over 90% of prisoners were male.⁴³ Many of the prisoners are non-violent offenders, usually imprisoned for drug offenses.⁴⁴ Minority populations are incarcerated disproportionately,⁴⁵ which contributes directly to the increased transmission of HIV to these populations.⁴⁶ Prisoners also tend to be poorer and less educated.⁴⁷ Sixteen percent of prisoners in the U.S. are mentally ill.⁴⁸ Furthermore, the majority of prison terms served average less than 2 years.⁴⁹

Moreover, most prisons are under-resourced and overpopulated,⁵⁰ creating a conducive environment for the prison subculture to manifest.⁵¹ Many prisons do not have enough staff for effective observance,⁵² permit communal showers and multiple occupancy cells,⁵³ and have staff that is minimally trained in recognizing sexually vulnerable individuals.⁵⁴ Mass incarceration, combined with the lack of prison resources, contribute to the regularity of prisoner rape and the subsequent transmission of HIV/AIDS.

Prisoner rape victims are the most vulnerable members of the prison

⁴² ACLU Presents Closing Statement, *supra* note 9.

⁴³ James E. Robertson, *Rape Among Incarcerated Men: Sex, Coercion and STDs*, 17 AIDS Patient Care and STDS 423 (2003) available at www.justdetention.org/pdf/soc/rapeamongincarceratedmen.pdf (last visited June 8, 2011).

⁴⁴ *No Escape: Male Rape in U.S. Prisons*, *supra* note 7.

⁴⁵ More than 65 percent of prisoners are people of color and one out of four African-American men has experienced some form of incarceration. Gloria J. Browne-Marshall, *America's Epidemic*, *supra* note 25, at 15; See also Terry Keleher, *Condoms = Contraband*, According to Law, which states that in 2001, African Americans comprised of 15% of Illinois' population but nearly 65% of the state's prisoners available at http://colorlines.com/archives/2007/03/condomscontraband_according_to.html (last visited on September 18, 2011).

⁴⁶ *Id.*

⁴⁷ John V. Jacob, *Prison Health, Public Health: Obligations and Opportunities*, 31 Am. J.L. & Med. 447, 450 (2005).

⁴⁸ James E. Robertson, *A Clean Heart and an Empty Head: The Supreme Court and Sexual Terrorism in Prison*, 81 N.C. L. Rev. 433, 463 (2003). Furthermore, jails and prisons house more mentally ill persons than hospitals. See Chris Sigurdson, *The Mad, Bad, and Abandoned*, Corrections Today, (Dec. 2000) at 70.

⁴⁹ See Bureau of Justice Statistics, Compendium of Federal Justice Statistics, 1995 reporting the average length of prison term served was 26 months available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cfjs95i.pdf> (last visited on June 8, 2011); See also Cal. Assembly Bill 1677, Comment 2, *supra* note 34.

⁵⁰ See *Interpersonal Dynamics That Influence Safety and Abuse*, Commission on Safety and Abuse (Nov. 1 2005) available at http://www.prisoncommission.org/transcript/public_hearing_3_day_1_interpersonal_dynamics.pdf

⁵¹ See *infra*, Part I.B.

⁵² 42 U.S.C. § 15601.5

⁵³ James Robertson, *Rape Among Incarcerated Men*, *supra* note 43.

⁵⁴ ACL Presents Closing Statement, *supra* note 9.

population⁵⁵ and are typically young, non-violent, first-time offenders;⁵⁶ prisoners suffering from mental disorders;⁵⁷ and transgender and gay inmates.⁵⁸ Juveniles are also five times more likely to be sexually assaulted in adult facilities than in juvenile facilities within the first 48 hours of incarceration.⁵⁹ Once raped, the inmate is ‘marked’ as a target of rape and repeatedly abused⁶⁰ unless he “hooks up.”⁶¹ Some victims become property of individual aggressors or gangs, and are used, traded, or sold as sexual currency.⁶² Prisoners who are victims of sexual aggression experience serious emotional problems as a result,⁶³ and they usually do not disclose the rape⁶⁴ out of shame or fear. As one survivor explained, “[f]or males, it’s the ultimate humiliation. . . And that silences most of us.”⁶⁵ Family members who are aware, however, are also

⁵⁵ The most vulnerable prisoners include: sex offenders, “snitches,” men of smaller stature, men with feminine appearance, mentally ill inmates, gay inmates, and transgender inmates. See James Robertson, *Clean Heart*, *supra* note 48, at 463-465.

⁵⁶ *No Escape: Male Rape In U.S. Prisons*, *supra* note 7.

⁵⁷ Terry A. Kupers, *Rape and the Prison Code*, *supra* note 26, at 117.

⁵⁸ Sexual aggressors frequently target gay and transgender inmates, expecting little resistance. Robertson, *Clean Heart*, *supra* note 48, at 464.

⁵⁹ 42 U.S.C.A § 15601.4

⁶⁰ Christopher D. Man & John P. Cronan, *Forecasting Sexual Abuse in Prisons: The Prison Subculture of Masculinity as a Backdrop for “Deliberate Indifference”* 92 J. Crim. L. & Criminology 153 (Fall 2001/Winter 2002).

⁶¹ “Hooking up” is a relationship in which performing sexual acts is exchanged for protection. The senior partner is known as the “man”, “daddy,” “old man,” “jocker,” “pitcher,” and other terms who offers protection to the prisoner rape victim, known as the “punk,” “kid,” “boy,” “sweet boy,” “catcher,” and other terms. The prison population quickly learns that the inmate has ‘hooked up’ and leaves him alone. See Stephen Donaldson, *Hooking Up: Protective Pairing for Punks* available at http://www.justdetention.org/en/ps_hookingup.aspx (last visited on June 08, 2011). Moreover, regarding transmission of HIV/AIDS, Donaldson matter-of-factly states “It may be very hard for you to deal with belonging to somebody else and having to substitute for a girl and satisfy a guy sexually, but at least you only have to do it with one guy or a small number, rather than anybody who can catch you. Your risk of infection with the AIDS virus is greatly reduced, often to the risk of zero. You don’t have to fight at all and can avoid physical injury, and it is some comfort knowing that a dead punk is of no value to anybody.”

⁶² *No Escape: Male Rape in U.S. Prisons*, *supra* note 7, at pt. V. Prison rape victims are enslaved, rented, and sold.

⁶³ Struckman-Johnson et al., *Sexual Coercion Reported by Men and Women in Prison*, 33 J. of Sex Research 67 (1996) available at <http://www.justdetention.org/pdf/soc/SexualCoercionReportedMenWomenPrison.pdf> (last visited on June 08, 2011). Of the surveyed prisoners, prisoners experience depression (62%), flashbacks or nightmares (42%), suicidal thoughts (38%), and physical injuries (17%); See also Robert W. Dumond and Doris A. Dumond, *The Treatment of Sexual Assault Victims*, *Prison Sex: Practice and Policy* 82 (2002).

⁶⁴ *Id.* About 80% of the victims indicated they told no one about the attack, while about 20% had disclosed the attack to counselors, clergy, or prison staff.

⁶⁵ Daniel Brook, *The Problem of Prison Rape*, 2004-APR Legal Aff. 24 (March/April 2004) available at

paralyzed by their helplessness and devastation.⁶⁶

One in five prisoners will be sexually assaulted behind bars according to several comprehensive studies to date.⁶⁷ Considering the amount of repeat incidents of sexual violence,⁶⁸ this amounts to over 80,000 sexual assaults behind bars.⁶⁹ Reasons that the sexually coercive climate thrives, and thereby produces an interminable climate of fear,⁷⁰ include: (1) use of barracks housing;⁷¹ (2) racial conflict;⁷² (3) lax security;⁷³ (4) having inmate populations greater than 1000;⁷⁴ and (5) having a greater proportion of inmates who have committed a crime against a person.⁷⁵ Furthermore, the prisons with the highest sexual

<http://www.justdetention.org/pdf/The%20Problem%20of%20Prison%20Rape.pdf> (last visited on June 2008, 2011).

⁶⁶ See Vivian Edwards, *supra* note 15, where she states “[F]or the last two and a half years, my family and I have been paralyzed by this knowledge [of the sexual slavery] and our inability to stop the rape and abuse. . . Prison rape is a serious crime that not only affects the victim, but also the family.” She and her family pleaded unsuccessfully for safety from sexual violence on Johnson’s behalf.

⁶⁷ Struckman-Johnson et al., *Sexual Coercion Reported by Men and Women in Prison*, *supra* note 63. All four of Nebraska’s state prisons were surveyed, using answers of over 500 prisoners. The survey concluded that 22.3 percent of men had been ‘pressured or forced to have sexual contact against [their] will.’ These acts included: anal penetration, oral sex (8%), ‘genital contact’ (14%), and attempts (14%). Half of the incidents involved a single aggressor, a tenth involved groups of six or more perpetrators, prison staff was involved in one-fifth of the incidents, a weapon was used in over one-quarter, and injuries resulted in almost one-third of the reported incidents. Furthermore, Struckman-Johnson performed a similar anonymous survey of sexual coercion in seven Midwest facilities in 2000 that produced similar analysis that just over one-fifth of inmates experienced sexual assault while incarcerated. See also Struckman-Johnson, Cindy and Struckman-Johnson, David, *Sexual Coercion Rates in Seven Midwestern Prison Facilities for Men*, *The Prison Journal*, Vol. 80 No. 4, (Dec. 2000), at pp. 379-389. Of the inmate responses, 21% indicated that they had experienced at least one incident of coerced or forced sex while incarcerated. See also *New Statewide Data Show Prison Rape a Widespread Problem*, *Corrections Digest*, (March 24, 1995) available at <http://www.justdetention.org/en/academicarticles/statewide.aspx> (last visited on June 08, 2011).

⁶⁸ Struckman-Johnson et. al., *Sexual Coercion Reported by Men and Women*, *supra* note 63, where a little over a quarter of victims said they were attacked once, 66% indicated repeat attacks, and the rest did not specify.

⁶⁹ *New Statewide Data Show Prison Rape a Widespread Problem*, *Corrections Digest*, (March 24, 1995) available at <http://www.justdetention.org/en/academicarticles/statewide.aspx> (last visited on June 08, 2011).

⁷⁰ Struckman-Johnson, Cindy and Struckman-Johnson, David, *Sexual Coercion Rates in Seven Midwestern Prison Facilities for Men*, *supra* note 67 at p. 386.

⁷¹ *Id.*

⁷² *Id.* See also *No Escape: Male Rape in U.S. Prisons*, *supra* note 7, which reports “race has become the great divide in prison. Not only whites versus blacks, it is also Hispanics versus blacks, whites versus Hispanics, and so on.”

⁷³ Struckman-Johnson, Cindy and Struckman-Johnson, David, *Sexual Coercion Rates in Seven Midwestern Prison Facilities for Men*, *supra* note 67, at 386.

⁷⁴ *Id.* at 389.

⁷⁵ *Id.*

coercion rates had larger inmate populations and understaffing,⁷⁶ a frequent combination in many prisons.⁷⁷ Accordingly, prisons with the lowest rates of sexual coercion tended to have small population sizes, racial homogeneity, a low proportion of violent offenders as inmates⁷⁸, motivated security staff,⁷⁹ and facilities that used tight security measures, including lockdown procedures.⁸⁰ Given the frequency of prisoner rape and inmate sexual coercion combined with the failure to provide condoms, risk of HIV/AIDS in prison is high. Moreover, actual prisoner rape statistics are difficult to establish because of the methodological limitations or because victims are afraid to disclose the abuse out of fear or shame.⁸¹ Thus, rates could be much higher.

Some estimates have stated that more than 15% of people with AIDS spend time behind bars in any given year.⁸² A March 2002 Report by the National Commission on Correctional Health Care (NCCHC) approximated the amount of prisoners with AIDS was five times the rate in the general population.⁸³ Other studies have found that rates of HIV/AIDS are 8-10 times higher among the incarcerated population.⁸⁴ With the majority of sentences averaging 2 years,⁸⁵ more than 11 million people pass through the system each year.⁸⁶ HIV transmission in prison rapidly converts to HIV transmission to the general population⁸⁷ and a public health crisis.⁸⁸ Minority communities are most impacted, where

⁷⁶ *Id.* at 387.

⁷⁷ *No Escape: Male Rape in U.S. Prisons*, *supra* note 3, at point VII.

⁷⁸ Struckman-Johnson, Cindy and Struckman-Johnson, David, *Sexual Coercion Rates in Seven Midwestern Prison Facilities for Men*, *supra* note 67, at 387-388.

⁷⁹ *Id.* at 389.

⁸⁰ *Id.*

⁸¹ Factors include, among others: uneducated or illiterate inmates, embarrassed or ashamed inmates, or inmates who choose not to respond for fear of confidentiality. Also, low participation in the studies signal potential conservative estimates and accuracy in reporting. *Id.* at 388.

⁸² *US correctional facilities: Complex approach needed for HIV, HCV screening, treatment*, *supra* note 4; See also *A Simple Way to Fight H.I.V. and AIDS*, N.Y. Times, (April 29, 2005), available at <http://www.nytimes.com/2005/04/29/opinion/29fri2.html> (last visited on September 18, 2011).

⁸³ Other diseases include: HIV, syphilis, Chlamydia, gonorrhea, hepatitis B, hepatitis C, and tuberculosis. See Robertson, *Clean Heart*, *supra* note 44, citing National Commission on Correctional Health Care. The Health Status of Soon-To-Be-Released Prisoners: A Report to Congress. Vol. 1; 2002 available at http://www.ncchc.org/pubs/pubs_stbr.html (last visited on June 08, 2011).

⁸⁴ *What is the Role of Prisons in HIV, Hepatitis, STD and TB Infection?*, University of California San Francisco, Center for AIDS Prevention Studies available at <http://www.heart-intl.net/HEART/Institut/Comp/WhistheroleofprisonsinHIV.htm> (last visited on June 08, 2011).

⁸⁵ See *supra*, note 49.

⁸⁶ *A Simple Way to Fight H.I.V. and AIDS*, *supra* note 82.

⁸⁷ Gloria J. Brown-Marshall, *America's Epidemic*, *supra* note 41.

⁸⁸ 42 U.S.C.A. § 15601.7, stating "HIV and AIDS are major public health problems within America's correctional facilities. . . prison rape undermines the public health by

released inmates often reside and where a disproportionate number of new HIV infections are concentrated.⁸⁹ This impact is evident in the increasing number of African-American females with HIV/AIDS.⁹⁰ The prison system's inability to rehabilitate and the legislature's authority to punish harshly for non-violent crimes contribute to the mass incarceration.⁹¹ Combined with the prisoner's quest for dominance in the prison hierarchy,⁹² all contribute to the prevalence of rape and HIV/AIDS.

B. The Prison Subculture of Masculinity

The practice of prisoner rape can be attributed to the conditions of confinement and to the cultural and sub-cultural values instilled in the prisoner.⁹³ Men construct their masculinity within their social setting,⁹⁴

contributing to the spread of these diseases, and often giving a potential death sentence to its victims.”; See also John V. Jacobi Prison Health, *Public Health*, *supra* note 47, where he summarizes public health as: “(1) the health of the safety of populations rather than the health of individual patients; (2) prevention of injury and disease rather than treatment or care; (3) relationships between the government and the community rather than the physician and patient; and (4) population-based services ground on scientific methodologies of public health. . .rather than personal medical services” citing Lawrence O. Gostin, *Public Health Law: A Renaissance*, 30 *J.L. Med & Ethics* 136, 136 (2002).

⁸⁹ Cal. Assembly Bill 1677, *supra* note 34.

⁹⁰ Gloria Browne-Marshall, *America's Epidemic*, *supra* note 41. More than 65% of the U.S. incarcerated population is people of color. The increase in the number of black ex-offenders living with HIV/AIDS corresponds with increasing infection rates for black women, who often contract HIV through heterosexual relationships.

⁹¹ Judy Greenspan, *Fighting for a Real Harm Reduction Plan for Prisoners*, available at <http://www.harmreduction.org/pubs/news/spring04/greenspan.html>. “This so-called drug war which has incarcerated an unprecedented number of Black, Latino, Native American, and even white people for the crime of drug addiction and use, is responsible for the massive growth in the prison industry in the last 15 years.” It is also responsible for the creation of a prison system comprised of nonviolent offenders; See also *No Escape: Male Rape in U.S. Prisons*, *supra* note 7. The increase in the incarceration population reflects a change in state and federal sentencing rules, with a trend toward longer prison terms, mandatory minimum sentences, more stringent parole policies, and “three strikes” laws. See also *What is the Role of Prisons in HIV, Hepatitis, STD and TB Prevention?*, *supra* note 84. The main reason for incarceration for federal prisoners is drug offenses. Drug offenders represented 58% of the federal prison population in 1991 and 63% in 1997. Prisons would seem to be the ideal venue to rehabilitate for drug treatment by providing education and other rehabilitative services. However, in 1997, only 13% of State prisoners and 15% of all Federal Prisoners who regularly used drugs had received treatments since admission.

⁹² See *infra*, Part I.B.

⁹³ James E. Robertson, *Cruel and Unusual Punishment in United States Prisons: Sexual Harassment Among Male Inmates*, 36 *Am. Crim. L. Rev.* 1, 12 (1999).

⁹⁴ James W. Messerschmidt, *Masculinities, Crime and Prison*, in *Prison Masculinities*, Philadelphia: Temple University Press, (2001), p. 67. Masculinities in prison include: (1) “rats”, who convey information to officials; (2) “merchants,” who deal illegal commodities inside the prison, and (3) “gorillas,” who use violence or the threat of violence to advance their own interests.

and prison subculture values equate masculinity with domination.⁹⁵ Men experience strong social and psychological pressure to compensate for their loss of personal power,⁹⁶ as a constant control over the prisoner is viewed as an unceasing attack on the prisoner's masculinity.⁹⁷ Thus, prisoner rape occurs for the same reasons rape occurs in the general community—to hurt, humiliate, dominate, control, and degrade.⁹⁸ The purpose is not for the sexual release but instead, for domination and power.⁹⁹ Accordingly, most inmate sexual aggressors view themselves as heterosexual.¹⁰⁰

Sex might appear consensual when it is in fact coercive. Coercive sex extorts and pressures the victim and is a form of rape;¹⁰¹ usually accompanied by the presence of a weapon, threat of harm, and intimidation from the size and strength of the aggressor.¹⁰² First-time

⁹⁵ Alice Ristrophe, *Sexual Punishments*, 15 Colum. J. Gender & L. 139, 152 (2006).

⁹⁶ Stephen Donaldson, *Administrative Policy and Prisoner Rape* available at http://www.justdetention.org/en/docs/doc_01_policy.aspx (last visited on September 18, 2011).

⁹⁷ James E. Robertson, *Clean Heart*, *supra* note 48, at 440-441.

⁹⁸ James E. Robertson, *Cruel and Unusual Punishment*, *supra* note 93, at 14.

⁹⁹ James E. Robertson, *Rape Among Incarcerated Men*, *supra* note 43; See also Judge William Wayne Justices' comment where he refers to "a prison underworld in which rape, beatings, and servitude are the currency of power," *US Must End Torture of Prisoners in America As Well As In Iraq*, ACLU Says, (5/11/2004), available at <http://www.aclu.org/national-security/us-must-end-torture-prisoners-america-well-iraq-aclu-says> (last visited on June 08, 2011).

¹⁰⁰ *Id.*; See also Christopher D. Man & John Cronan, *Forecasting Sexual Abuse in Prison*, *supra* note 60, at 149. The idea that prison rape aggressors are homosexual is a "groundless myth."

¹⁰¹ 42 U.S.C. § 15609.9.

The Prison Rape Elimination Act defines rape as:

(9) Rape

The term "rape" means—

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

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

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

¹⁰² Struckman-Johnson et al., *Sexual Coercion Reported By Men and Women in Prison*, *supra* note 63, at 67-76. The problem of distinguishing rape/coerced sex from consensual sex is exacerbated in the prison context, where "strong incentives," such as obtaining protection from random rape, "lead" some inmates to be coerced into outwardly consensual relationships. See also Brenda V. Smith, *Rethinking Prison Sex: Self-Expression and Safety*, 15 Colum. J. Gender & L. 185, 228-233 (2006). Commentators have set forth various penological goals that can be fulfilled by allowing prisoner self-expression, including the ability to better classify coerced sex from consensual sex. Note that the Prison Rape Elimination Act (PREA) requires prison

inmates¹⁰³ are especially vulnerable to sexual extortion, where predatory inmates offer them “loans” upon their arrival, and the new prisoner must settle his debt with sex.¹⁰⁴ In addition, young men in prison often must seek protection from stronger and more powerful inmates, and in exchange for protection, they must become the sexual slave to the “protectors.”¹⁰⁵ Prisoners “hook up” as a form of protection to lessen the risk of being attacked at anytime by anyone.¹⁰⁶ When a prisoner “hooks up,” it is the lesser of two evils in that the victim knows his attacker and what is expected of him; “hooking up” also reduces the spread of diseases because there are fewer partners.¹⁰⁷ Furthermore, some inmates practice preemptive aggression to avoid being targeted as sexual preys themselves,¹⁰⁸ and non-participant inmates may turn a blind eye as well to retain their own position in the prison hierarchy.¹⁰⁹ As such, the “masculine” environment is constantly reinforced. First, the sexual aggressor has fulfilled his masculine role and attained his position in the prison hierarchy.¹¹⁰ Next, the prisoner as victim is further solidified as falling lower on the hierarchy from the standpoint of the general prison population.¹¹¹ Finally, the victim’s personal view of himself reinforces the masculine sub-culture as he feels emasculated for failing to defend himself from the rape.¹¹²

Inmates have little recourse after being raped or sexually assaulted. Most inmates will not report attacks because of the “prison code.”¹¹³ The prison code is based on intimidation¹¹⁴ and strictly prohibits “snitching,”

officials to report all incidents of prison rape. Appropriate identification of the type of sex involved suggests higher accuracy in reporting.

¹⁰³ First-time inmates are typically inexperienced with prison culture and thus susceptible targets. See *No Escape: Male Rape in U.S. Prisons*, *supra* note 7.

¹⁰⁴ James E. Robertson, *Cruel and Unusual Punishment*, *supra* note 93, at 10.

¹⁰⁵ James Messerschmidt, *Masculinities, Crime and Prison*, *supra* note 94, at 67.

¹⁰⁶ Stephen Donaldson, *Hooking Up: Protective Pairing for Punks*, *supra* note 61.

¹⁰⁷ *Id.*

¹⁰⁸ Alice Ristrophe, *Sexual Punishments*, *supra* note 95, at 154; See also Daniel Lockwood, *Prison Sexual Violence* 18, 49 (1980).

¹⁰⁹ *Id.* at 70. Men are acculturated to be team players and cannot show fear in the group. “Either you’re down or you’re not down. And if you’re not down, you can’t hang out,” quoting Hills and Santiago, at 26 (1992).

¹¹⁰ Christopher Man & John Cronan, *Forecasting Sexual Abuse in Prison*, *supra* note 60, at 155.

¹¹¹ Mary Sigler, *By the Light of Virtue*, *supra* note 17, at 578.

¹¹² *Id.*, citing *No Escape: Male Rape in U.S. Prisons*, *supra* note 7, at pt. VI (quoting a prison rape survivor: “men are supposed to be strong enough to keep themselves from being raped.”); *supra* note 7, at pt. V (noting “the common belief that a real man would never submit to rape.”)

¹¹³ See *supra*, note 20. Robertson, *Clean Heart*, *supra* note 48, at 464. Mentally ill patients do not understand the repercussions of breaking the prison code. Terry A. Kupers, *Rape and the Prison Code*, *supra* 26, at 112.

¹¹⁴ Terry A. Kupers, *Rape and the Prison Code*, *supra* 26, at 117.

which is an act of betrayal according to the inmate code.¹¹⁵ As a result, most inmates will not report incidents of sexual violence for fear of being branded a “snitch.”¹¹⁶ Inmates who defy the prison code risk being re-victimized by the prison system or by fellow prisoners. First, for inmates who do report, prison officials have ignored official policy and turned a blind eye, or encouraged it as an indirect method of inmate control and surface order.¹¹⁷ Or, if taken seriously, victims that are placed in protective custody are further punished for disclosing the attack¹¹⁸ because they are in constant isolation and deprived of prison activities. Lastly, if fellow prisoners learn of the disclosure, breaking the prison code by reporting is punishable by repeated beatings, rapes, or even death.¹¹⁹

C. Rape and Rehabilitation Cannot Coexist

Prisons do not rehabilitate. The occurrence of prisoner rape either reinforces the use of violence for some prisoners or teaches non-violent offender inmates to use violence to protect themselves from sexual

¹¹⁵ The act of snitching is a betrayal on the inmate community in general, and not just on the parties involved. See James E. Robertson, *Clean Heart*, *supra* note 48, at 461, citing Gersham M. Sykes, *The Society of Captives* 71, 87 (1958).

¹¹⁶ See also James E. Robertson, *Cruel and Unusual Punishment*, *supra* note 93 at 39.

¹¹⁷ Stephen Donaldson, *Administrative Policy and Prisoner Rape*, *supra* note 96. See also Richard D. Vetstein, *Rape and Aids in Prison: On a Collision Course to a New Death Penalty*, 30 Suffolk U. L. Rev. 863, 893 (1997) citing 60 Minutes: Profile: Prison Rape; Gang Rape Victims Advocate More Protection for Inmates (CBS Television Broadcast, Mar. 3, 1996); “Prison officials either are disinterested in stopping abuse of prisoners by other prisoners or incapable of doing so. . .”, *United States v. Bailey*, 444 U.S. 394, 420 (1980) (Blackmun, J., dissenting); See also U.S. Must End Torture of Prisoners, *supra* note 99, where in one class action case about Texas prison conditions, U.S. District Court Judge William Wayne Justice surmised: “evidence has shown that, in fact, prison officials deliberately resist providing reasonable safety to inmates. The result individuals prisoners who seek protection from their attackers are either not believed, disregarded, or told that there is a lack of evidence to support action by the prison system.”

¹¹⁸ Stephen Donaldson, prison rape survivor and founder of Stop Prisoner Rape (now Just Detention International), has stated “Protective custody, in reality, punishes the victim for reporting assaults to authorities, and often does not even protect them.” quoted in “New Statewide Data Show Prison Rape a Widespread Problem,” *Corrections Digest*, March 24, 1995 available at <http://www.justdetention.org/en/academicarticles/statewide.aspx> (last visited on June 08, 2011); Other commentators have also stated that protective custody is “a prison within a prison” as the prisoner is subject to many hours of seclusion in lockdown, loss of privileges, and removed from prison activities. See Sigler, *By the Light of Virtue*, *supra* note 17, at 591, citing Michael Davis, *Setting Penalties: What Does Rape Deserve?*, 3 L. & Phil. 61, 61 and 106.

¹¹⁹ *Id.*

attacks.¹²⁰ Thus, not only does prisoner rape perpetuate disease by transmitting it to the general community, it also continues the cycle of violence inside and outside the prison system.¹²¹ The risk that inmates leave prison and practice prison behaviors such as protective violence and unprotected sex exists. Furthermore, mentally ill inmates are mistakenly placed in jails and prisons when they should be in hospitals.¹²² Recidivist rates are high,¹²³ and the cycle of incarceration is a way of life for many prisoners who leave prison without skills and face stigma and legal limitations to procuring employment.¹²⁴ Finally, the control over prisoners' time, such as scheduling all activities, does not teach prisoners personal responsibility, which is critical in disease prevention.¹²⁵

Providing access to condoms in prison teaches prisoners responsible sex practices that can be applied in their communities post-incarceration.¹²⁶ Given that millions of inmates pass through the system each year and the majority of inmates have sex within the first 24 hours of release,¹²⁷ the benefits to society are clear. Without access to condoms, safe sex practices are not reinforced; for instance, studies have shown that inmates have a desire for "pure" sex, meaning sex without condoms.¹²⁸ But education about risks and access to prevention can teach or reinforce safe practices. Furthermore, the transmission to the general community is undeniable. Non-prisoners have a right to health and a right to be free from disease, and where actions within prison can affect the non-prisoners rights, the Supreme Court has declared prison policies

¹²⁰ See Congressional findings, 42 U.S.C.A. § 15601.10 stating "Prison rape increases the level of homicides and other violence against inmates and staff, and the risk of insurrections and riots;" See also § 15601.14(3) stating that the high incidence of prison rape "increases the risks of recidivism, civil strife, and violent crimes by individuals who have been brutalized by prison rape."

¹²¹ *Id.* Not only does prisoner rape encourage violence, but prisoner rape is itself a very serious crime. The general public is either unaware of the existence of prison rape or indifferent about it, but not acknowledging prison rape and not making efforts to stop it essentially indicates that prison and government officials are not serious about stopping crime.

¹²² Jails have been referred to as "the new asylums." John V. Jacobi, *Prison Health, Public Health*, *supra* note 47, at 452.

¹²³ Congress formally recognized that effects of prison rape contribute to increasing recidivism. 42 U.S.C. § 15601.14(3)

¹²⁴ John V. Jacobi, *Prison Health, Public Health* *supra* note 47, at 468.

¹²⁵ *What is the Role of Prisons?*, *supra* note 84.

¹²⁶ Kate Dolan, David Lowe & James Shearer, *Evaluations of the Condom Distribution Program*, *supra* note 33, at 127.

¹²⁷ Cal Assembly Bill 1677, *supra* note 34; See also "Unsafe Sex is Common Among HIV-Infected Prisoners Shortly After Release" reporting over half of HIV-infected inmates having unsafe sex soon after release, available at http://www.natap.org/2003/feb/022003_4.htm (last visited on June 08, 2011).

¹²⁸ *What is the Role of Prisons in HIV, Hepatitis, STD and TB Prevention?*, *supra* note 84.

unreasonable.¹²⁹ Most inmates are not tested for HIV/AIDS or other sexually transmitted diseases while incarcerated,¹³⁰ so those who contract HIV in prison and do not manifest symptoms for years, potentially unknowingly spreading the disease to their respective communities post-incarceration.¹³¹ Access to condoms in prison lessens the transmission of HIV/AIDS inside and outside prisons.

I. TERMINAL DISEASE “NOT PART OF THE PENALTY”;¹³² FUNDAMENTAL RIGHTS WHICH SURVIVE INCARCERATION¹³³ MANDATE ACCESS TO CONDOMS

It is well established that “prison walls do not form a barrier separating prison inmates from the protections of the Constitution.”¹³⁴ Prisoners are protected from cruel and unusual punishment under the Eighth Amendment and guaranteed fundamental rights under the Fourteenth Amendment. While the Supreme Court has recognized that “being violently assaulted in prison is simply not part of the penalty that criminal offenders pay for their offenses against society,”¹³⁵ the few victims who do seek judicial relief arguing conditions of confinement claim have an impossibly high bar to prove under the subjective “deliberate indifference” standard established in *Farmer v. Brennan*.¹³⁶ Furthermore, in evaluating prison policies that infringe upon constitutional rights, the Court developed a deferential balance test in

¹²⁹ See *Turner v. Safely*, 482 U.S. 78, 85 (1987) quoting *Procurier v. Martinez*, *supra* note 37 at 409 [where the holding turned on the rights of those who are not prisoners; the Court highlighted “although not urged by the respondents, this implication of the interests of non-prisoners may support the application of the Martinez standard, because the regulation may entail a ‘consequential restriction on the {constitutional} rights of those who are not prisoners.’”]

¹³⁰ Gloria J. Brown-Marshall, *America’s Epidemic*, *supra* note 41, at 1.

¹³¹ *Id.*

¹³² Quoting widely known language from *Farmer v. Brennan*, 511 U.S. 825, 834 (1994), wherein the Court stated: “Being violently assaulted in prison is simply ‘not part of the penalty that criminal offenders pay for their offenses against society’” quoting *Rhodes v. Chapman* 452 U.S. 337, 347 (1981). Implicit in this statement is that HIV/AIDS transmission resulting from such violent assaults is not part of the penalty either.

¹³³ This discussion is not an exhaustive of all fundamental rights implicated by access to condoms. For example, an exhaustive analysis of the right to privacy is beyond the scope of this analysis.

¹³⁴ *Turner v. Safely*, *supra* note 129, at 84.

¹³⁵ *Farmer v. Brennan*, *supra* note 132, at 834.

¹³⁶ *Id.* at 825, 842. The standard articulated as “whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence, and a fact-finder may conclude that a prison official knew of a substantial risk from the very fact the risk was obvious.”

Turner v. Safely.¹³⁷

A. Prisoners' Rights Which Result From or Survive Incarceration

Prison systems must provide health care to prisoners by virtue of their deprivation of liberty.¹³⁸ In *Estelle v. Gamble*,¹³⁹ the Supreme Court reasoned that “it is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of liberty, care for himself.”¹⁴⁰ Prison staff have a constitutional duty under the Eighth Amendment not to be “deliberately indifferent to serious medical needs” of inmates.¹⁴¹ The Court further stated, “[t]his is true whether the indifference is manifested by prison doctors in their response to the prisoner’s needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed.”¹⁴²

Prison policies make the guaranteed minimum health standards difficult to achieve, however.¹⁴³ The World Health Organization defines health as: “...a state of complete physical, mental, and social well-being and not merely the absence of disease or infirmity.”¹⁴⁴ The right to health is not just curative, but also includes: promotive, preventive, or rehabilitative.¹⁴⁵ Thus, the right to health is not limited to treating known cases of HIV/AIDS, but also preventing HIV transmission. Since prevention is one of the only effective methods of fighting HIV/AIDS in prisons, preventive measures are necessary medical care and are required

¹³⁷ Turner v. Safely, *supra* note 129, at 78.

¹³⁸ *Estelle v. Gamble*, 429 U.S. 97, 103 (1976), stating “It is but just that the public be required to care for the prisoner, who cannot by reason of his liberty, care for himself. . . these elementary principles establish the government’s obligation to provide medical care for those whom it is punishing by incarceration.”

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 103-104.

¹⁴¹ *Id.* at 104.

¹⁴² *Id.* at 104-105.

¹⁴³ See “Understanding Prison Health Care, Barriers to Care” available at <http://movementbuilding.org/prisonhealth/barriers.htm> Prisoners have barriers to health care. First, they must fill out a medical request form for review. Then, medical technical assistants (MTAs), who have very little medical training, decided whether the prisoner would see the physician; granting allowance does not assure access. Depending on the state, the prisoner may be required to pay an unaffordable co-pay fee for care. Prisoners also have to wait a prolonged period of time, sometimes until the next day, thus missing another day of work (which can result in another day of sentence in some states). Prisoner medication is also sub-par. Prisoners have to wait in line and there is the possibility of a breach of confidentiality.

¹⁴⁴ World Health Organization, Constitution, in Basic Documents, 36th ed. (Geneva: WHO, 1986).

¹⁴⁵ <http://www.ohchr.org/Documents/Publications/Factsheet31.pdf>

by the Eighth Amendment.¹⁴⁶ Ensuring a prisoner's right to health thus necessitates giving prisoners the means to protect themselves from exposure to HIV¹⁴⁷ by providing access to condoms and information about HIV/AIDS. However, the vast majority of correctional facilities prohibit condom access or distribution.¹⁴⁸ Presently, there are complaints about the difficulty of obtaining condoms in the few U.S. prisons and county jails that do allow condoms.¹⁴⁹ Moreover, prisons and jails may be hesitant to offer voluntary testing for HIV and other communicable diseases because of the potential required medical costs associated with a known infected prisoner who must have access to medications.¹⁵⁰

Prisoners have a right to reasonable safety from sexual violence and its effects, as prison officials have a duty to protect the prisoner.¹⁵¹ The Court stated: "[t]he affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him but from the limitations which it has imposed on his freedom to act on his own behalf."¹⁵² Also, "when a State takes a person into custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being."¹⁵³ The Court enumerated "some responsibility" to include providing for "basic human needs," including food, clothing, shelter, medical care, and reasonable safety.¹⁵⁴ When reasonable safety from prison rape is denied, reasonable safety from its repercussions, namely HIV transmission, must be available through condom access. That is, in the context of HIV, a prisoner's right to reasonable safety includes having access to condoms.

¹⁴⁶ M. Parts, *The Eighth Amendment and the Requirement of Active Measures to Prevent the Spread of AIDS in Prison*, 22 Col. Hum. Rts. L. Rev. 217, 217 (1991); See also Ralf Jurgens, *HIV/AIDS in Prisons*, *supra* note 29.

¹⁴⁷ *ACLU Presents Closing Statement*, *supra* note 9.

¹⁴⁸ Gloria J. Browne-Marshall, *America's Epidemic*, *supra* note 41, at 15; What is the Role of Prisons in HIV, Hepatitis, STD and TB Prevention?, *supra* note 84.

¹⁴⁹ Katya Lezin, "Life at Lorton: An Examination of Prisoners' Rights at the District of Columbia Correctional Facility", 5. B.U. Pub. Int. L. J. 165, 188 (1996). There have also been reports where the prisoners were required to make an appointment with a case manager to obtain condoms, which required a wait of several hours to several days.

¹⁵⁰ *What is the Role of Prisons?*, *supra* note 84.

¹⁵¹ *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 200 (1988).

¹⁵² *Id.* at 200. "The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic needs-e.g., food, clothing, shelter, medical care, and reasonable safety-it transgresses the substantive limits on state action set forth by the Eighth Amendment."

¹⁵³ *Id.* at 199-200, quoting *Youngberg v. Romeo*, 45 U.S. 307, 317 (1982) ["When a person is institutionalized and wholly dependent on the State[.]. . . a duty to provide certain services and care does exist."]

¹⁵⁴ *DeShaney v. Winnebago County*, *supra* note 151, at 200.

Moreover, prisoners have a fundamental right to bodily autonomy that survives incarceration.¹⁵⁵ The Supreme Court has stated that decisions about sex and sexuality “involv[e] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy.”¹⁵⁶ The right to bodily autonomy includes the right to be free from sexual assault, rape, coerced sex, and other forms of sexual violence;¹⁵⁷ combined with a right to health, bodily integrity also encompasses the right to govern one’s body in a healthy manner,¹⁵⁸ which includes disease-preventive measures associated with sex. The Supreme Court recognized the realities of prison rape more than 20 years ago,¹⁵⁹ but yet violation of bodily integrity is rampant in the prison system. Justice Blackmun stated, “[a] youthful inmate can expect to be subjected to homosexual gang rape his first night in jail, or, it has been said, even in the van on the way to jail. Weaker inmates become the property of stronger prisoners or gangs, who sell the sexual services of the victim.”¹⁶⁰ Bodily autonomy encompasses an individual’s choice to assume the risk of contracting HIV/AIDS by deciding whether to use preventive measures, but inmates are denied this choice, and victims of rape and coercive sex are forcefully exposed to HIV/AIDS. A prisoner’s right to bodily autonomy survives incarceration and must be recognized through access to condoms. Moreover, Congress has noted that “prison rape...give[s] a potential death sentence to its victims,” a violation to a prisoner’s right to life that cannot be violated without due process of law.¹⁶¹

B. “Deliberate Indifference” Standard of *Farmer v. Brennan*

Farmer v. Brennan articulated the standard in confinement claims. The Eighth Amendment prohibition against “cruel and unusual

¹⁵⁵ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992); *See also Rochin v. California*, 342 U.S. 165 (1951) [the first case where the right to bodily autonomy was recognized]; *Winston v. Lee*, 470 U.S. 753, 754 (1985) discussing bodily integrity regarding search for evidence where the “. . . intrusion into an individual’s body. . . implicates expectations of privacy and security of such magnitude that the intrusion may be “unreasonable” even if likely to produce evidence;” *Washington v. Harper*, 494 U.S. 210, 110 S. Ct. 1028, 1045 (1990) stating “Every violation of a person’s bodily integrity is an invasion of his or her liberty. The invasion is particularly intrusive if it creates a substantial risk of permanent injury and premature death.” (Stevens J., concurring in part, dissenting in part).

¹⁵⁶ *Lawrence v. Texas*, 539 U.S. 558 at 574 (2003), citing *Planned Parenthood of Southeastern Pa. v. Casey*, *supra* note 155.

¹⁵⁷ Joel Feinberg, *Autonomy, Sovereignty, and Privacy: Moral Ideals in the Constitution?*, 58 *Notre Dame L. Rev.* 445, 453 (1983).

¹⁵⁸ *See supra*, notes 27, 28.

¹⁵⁹ *United States v. Bailey*, *supra* note 117, at 394.

¹⁶⁰ *Id.* at 421 (1980) (Blackmun, J., dissenting).

¹⁶¹ U.S. Const. Amend. 14, Art. I; *See* 42 U.S.C.A. § 15601.7

punishment” is an intangible notion judged by contemporary societal standards.¹⁶² The deplorable prison conditions have been judicially recognized,¹⁶³ but prison rape and transmission of HIV/AIDS continue. The Supreme Court has stated that rape is “not part of the penalty,”¹⁶⁴ and implicitly neither is the accompanying spread of disease. Moreover, prison condition jurisprudence has been guided by “evolving standards of decency that mark the progress of a maturing society”¹⁶⁵ and “extreme deprivations are required to make out a conditions-of-confinement claim.”¹⁶⁶ Failing to provide access to condoms is a deprivation of a medical necessity, in light of present knowledge regarding prisoner rape and HIV transmission.

In *Farmer*, Dee Farmer was a pre-operative transsexual with a feminine appearance, imprisoned for fraud.¹⁶⁷ Farmer was raped and beaten by a fellow prisoner, and she¹⁶⁸ argued that the prison officials knew or should have known of the substantial risk that she would be seriously harmed by being placed in a facility for men and that prison officials acted with deliberate indifference to the risk.¹⁶⁹ The Court rejected that argument and instead heightened the standard a prisoner must prove by employing a subjective component to the deliberate indifference standard by: (1) requiring that some prison official have actual knowledge of a substantial risk to the health or safety of inmates;¹⁷⁰ and (2) failed to take reasonable steps to eradicate the risk.¹⁷¹

¹⁶² *Estelle v. Gamble*, *supra* note 138, at 102; *See also Trop v. Dulles*, 356 U.S. 86, 101 (1958)

¹⁶³ *See e.g.*, Justice Blackmun’s sober description. “The horrors experienced by many young inmates, particularly those who, like petitioner, are convicted of nonviolent offenses, border on the unimaginable. Prison rape not only threatens the lives of those who fall prey to their aggressors, but is potentially devastating to the human spirit. Shame, depression, and a shattering loss of self-esteem accompany the perpetual terror the victim thereafter must endure.” *Farmer v. Brennan*, *supra* note 128, at 853, (Blackmun, J., concurring).

¹⁶⁴ *Farmer v. Brennan*, *supra* note 132, at 834.

¹⁶⁵ *Estelle v. Gamble*, *supra* note 138, at 102 quoting *Trop v. Dulles*, *supra* note 162 at 101 (1958).

¹⁶⁶ *Hudson v. McMillian*, 509 U.S. 1, 9 (1992).

¹⁶⁷ The Court stated that Farmer wore clothing in a ‘feminine manner’, had received breast implants, underwent estrogen therapy and noted that both parties agreed that Farmer ‘project[ed] feminine characteristics.’ *Farmer v. Brennan*, *supra* note 132, at 828. 168 Although born male and a pre-operative transsexual, biologically male Farmer preferred to be referred to as female. *See Marjorie Riftkin, Farmer v. Brennan: Spotlight on an Obvious Risk of Rape in a Hidden World*, 26 Colum. Hum. Rts. L. Rev. 273, n. 1 (1995).

¹⁶⁹ *Farmer v. Brennan*, *supra* note 132, at 831.

¹⁷⁰ *Id.* at 837.

¹⁷¹ *Id.* Souter articulated the standard in holding: “We hold instead that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from

This holding seriously limited the accountability of a prison official who fails to physically protect inmates from sexual violence and the diseases which emerge because the threshold is so high.¹⁷²

C. Failing to Provide Condoms Amounts to Deliberate Indifference

In *Farmer*, the Court clarified that inmates may offer circumstantial evidence that officials actually knew of an excessive risk to inmate health and safety.¹⁷³ Where the prisoner plaintiff can show that a substantial risk was “longstanding, pervasive...well-documented, or expressly noted by prison officials in the past”¹⁷⁴ and that “all prisoners...or those inmates similarly situated face such a risk,”¹⁷⁵ courts will infer that prison officials possessed the requisite knowledge.¹⁷⁶ Prison officials’ actual knowledge of risk of HIV transmission can be inferred from circumstantial evidence. First, the federal government has recognized the problem of prisoner rape and subsequent transmission of disease through legislation.¹⁷⁷ Second, it is axiomatic that the best sexually transmitted disease prevention method is condom use.¹⁷⁸ Studies, in conjunction with legislative response, indicate an awareness that cannot be denied by prison officials,¹⁷⁹ even with the higher

which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.”

¹⁷² Commentators acknowledge the holding as a defeat for prisoners. *See*, for example, The Supreme Court, 1993 Term, Leading Cases, 108 Harv. L. Rev. 231, 236 (1994), which sums up the *Farmer* holding as: “At best, *Farmer* encourages passivity; at worst, despite the Court’s protestations to the contrary, it rewards willful blindness to the risks that prisoners face.”

¹⁷³ *Farmer v. Brennan*, *supra* note 132, at 842. The Court recognized that proving prison officials had actual knowledge could be proven by inference from circumstantial evidence.

¹⁷⁴ *Id.* at 842 (quoting Respondent’s Brief).

¹⁷⁵ *Id.* at 843.

¹⁷⁶ *Id.* Although the court here states, “if . . . plaintiff presents evidence showing that a substantial risk of inmate attacks’, substantial risk of inmate health and safety is implied by earlier Court statements, *See Farmer* holding, *supra* n. 79. *See* also discussion of *Farmer* and circumstantial evidence in Vetstein, Rape and Aids in Prison, *supra* note 117.

¹⁷⁷ *See* Prison Rape Elimination Act of 2003, Pub. L. No. 109-79, 117 Stat. 972 (2003) (codified at 42 U.S.C. §§ 15601-15609).

¹⁷⁸ Jin Hee Lee, *Chapter 22: AIDS in Prison*, 31 Colum. Hum. Rts. L. Rev. 355, 359 (2000).

¹⁷⁹ Studies show a general awareness of prisoner rape on behalf of prison officials. Robertson cites a study where prison officials agreed that: (1) “forced or pressured sexual encounters [between inmates] are very common; (2) “homosexual inmates have a more difficult time than heterosexual inmates, due to [sexual] pressure. . .;” and (3) “it is very common for young, straight boys to be turned out, or forced into being punks.” *See* James E. Robertson, *Cruel and Unusual Punishment*, *supra* note 93, at 40, citing Wayne S. Wooden & Jay Parker, *Men Behind Bars*, 22, 189-204 (1982).

threshold standard.¹⁸⁰ Failing to provide access to condoms poses an excessive risk to health and safety, given current information about HIV/AIDS prevention and prison rape and prisoner sex. Failing to provide access to condoms where actual knowledge of the risk of HIV/AIDS can be inferred amounts to deliberate indifference.

D. Alternatively, Prison Policies That Deny Access to Condoms Fail The Turner Test

Courts are extremely deferential to prison officials regarding prison policy;¹⁸¹ when a prison regulation infringes on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological goals, as stated by the Supreme Court in *Turner v. Safely*.¹⁸² *Turner v. Safely* involved two Missouri prison regulations: the first regulation restricted the rights of inmates to correspond with prisoners at different facilities and was upheld.¹⁸³ The second regulation involved an infringement on the prisoner's right to marry whereby the prisoner was required to obtain prison warden approval, which the court concluded was not reasonably related to asserted penological goals.¹⁸⁴ The four factors of the *Turner* standard include: (1) there must be a "valid, rational connection" between the prison regulation and the legitimate governmental interest put forward to justify it¹⁸⁵ and the governmental objective must be a legitimate and neutral one;¹⁸⁶ (2) whether any alternative means of exercising the right remain open to prison inmates;¹⁸⁷ (3) the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of

¹⁸⁰ However, more research is necessary. Congressional findings state "Insufficient research has been conducted and insufficient data reported on the extent of prisoner rape." 42 U.S.C.A. § 15601.2

¹⁸¹ In articulating its highly deferential standard, the *Turner* court stated: "[s]ubjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate problems and to adopt innovative solutions to the intractable problems of prison administration. The rule would also distort the decision-making process, for every administrative judgment would be subject to the possibility that it had a less restrictive way of solving the problems at hand. Courts inevitably would become the primary arbiters of what constitutes the best solution to every administrative problem, thereby 'unnecessarily perpetuat[ing] the involvement of the federal courts in affairs of prison administration'" quoting *Procnier v. Martinez*, *supra* note 37, at 407.

¹⁸² *Turner v. Safely*, *supra* note 129, at 78.

¹⁸³ *Id.* at 91. The regulation restricting mail between prisoners was upheld because it was "logically connected to...legitimate security concerns," inmates had other means of expressing themselves and were not deprived of all expression, and the security threat posed would have a 'ripple effect' on the security of other prison systems.

¹⁸⁴ *Id.* at 97.

¹⁸⁵ *Id.* at 89.

¹⁸⁶ *Id.* at 90.

¹⁸⁷ *Id.*

prison resources generally,¹⁸⁸ and (4) the absence of ready alternatives is evidence of the reasonableness of a prison regulation. In the same way, the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an “exaggerated response” to prison concerns.¹⁸⁹

Arguments typically set forth as legitimate penological goals include the preservation of internal order and discipline, the maintenance of institutional security, and the rehabilitation of prisoners.¹⁹⁰ However, the Court has stated “prison conditions may be restrictive and even harsh, but gratuitously allowing the beating or rape of one prisoner by another serves no legitimate penological objective, any more than it squares with the evolving standards of decency.”¹⁹¹ Furthermore, in *Estelle*, the Court stated, “denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose.”¹⁹² Implicitly, transmission of disease resulting from prison rape or consensual prisoner sex serves no penological purpose either. Thus, having a policy that denies access to condoms serves no legitimate penological purpose that can justify violating a prisoner’s fundamental rights that survive incarceration.

The current prison policy implicates fundamental rights to life and bodily integrity and serves no legitimate penological purpose that outweighs these rights. As such, it fails to meet the deferential standard of *Turner*. First, most states have laws declaring sex among prisoners as illegal. Prison officials will argue that a policy that fails to provide access to condoms promotes the governmental interest in prohibiting sex in prison¹⁹³ with disregard to the spread of disease. However, they do not take the necessary steps to prohibit sex, such as increased security and surveillance. Where necessary steps to prevent sex in prison, whether in the form of rape, coercion, or consensual, are not taken, condoms must be provided as a basic safety measure. The National Commission on Correctional Health Care (NCCHC) has endorsed the implementation of condom distribution in US prisons and jails, stating “[w]hile NCCHC clearly does not condone illegal activity by inmates, the public health

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Procunier v. Martinez*, *supra* note 37, at 412, 424, where “The state has legitimate and substantial concerns as to the security, personal safety, institutional discipline, and prisoner rehabilitation not applicable to the community at large”; *Turner v. Safely*, *supra* note 129, at 78, where the prison restriction denying right to marry was based on security and rehabilitation concerns.

¹⁹¹ *Farmer v. Brennan*, *supra* note 132, at 833.

¹⁹² *Estelle v. Gamble*, *supra* note 138, at 103, quoting *Gregg v. Georgia* 428 U.S. 153, 173 (1976).

¹⁹³ The obvious contradiction is that rape is illegal in prison also.

strategy to reduce the risk of contagion is our primary concern.”¹⁹⁴ Further, prison officials may argue that failing to provide access to condoms furthers the legitimate governmental interest in reducing crime because many prisons view condoms as contraband that smuggle drugs or weapons. These arguments fail because prison systems with a policy of condom access have reported no problems.¹⁹⁵ Moreover, speculated security concerns do not outweigh the assured human rights violations that occur from denying access to condoms.

Next, for victims of prison rape and coerced sex, there are no feasible alternatives available to be free from disease. The major alternative, of course, is better security guards to monitor prisoner sexual behaviors, but where that option is not available because of structural limitations or lack of genuine concern, prisoners have condoms as their last source of protection from HIV/AIDS. Prevention is the only effective way to lessen the spread of HIV, and this means providing access to condoms.

Furthermore, accommodation of the constitutional rights of safety, health, and bodily autonomy will have little negative impact on guards and other inmates and on the allocation of prison resources generally. Presently, prison systems must offer HIV/AIDS medical treatment to infected prisoners at a cost of, in California, for example, nearly \$24,000 a year.¹⁹⁶ In light of prisoner sex realities, the cheaper response and practical answer is to provide access to condoms. While it is true that many HIV/AIDS cases go undetected because prisoners do not self-disclose¹⁹⁷ or are unaware of their health status,¹⁹⁸ the high cost will likely fall on the prison or government-subsidized health care at some point, given the high rates of recidivism and the transmission of HIV/AIDS to one’s community post-incarceration.¹⁹⁹ On the other hand, the low cost of condom access minimally impacts prison resources.²⁰⁰ Condoms can be placed discreetly in gyms, libraries, or bathrooms, and with access to disposal units, a policy of condom access minimally

¹⁹⁴ NCCHC Position Statement, *Journal of Correctional Health Care*, Vol. 11, No. 4 (2005).

¹⁹⁵ *Ensure Access to Condoms*, *supra* note 34 at 4-6.

¹⁹⁶ See Cal. Assembly Bill 1677, Comments, *supra* note 34.

¹⁹⁷ Some prisoners do not self-disclose to avoid being segregated to HIV/AIDS prisons because there are fewer opportunities available to them in segregation and because of the stigma associated with the disease. See e.g., Jin Hee Lee, Chapter 22: AIDS in Prison, *supra* note 178, at 389-393.

¹⁹⁸ Gloria Browne Marshall, *America’s Epidemic*, *supra* note 41, at 15.

¹⁹⁹ See e.g., John V. Jacobi, *Prison Health, Public Health* *supra* note 47, at 456 stating “prisoners return to society, and we harm society when the conditions of their imprisonment predictably render released prisoners a health hazard to their communities.”

²⁰⁰ Also, in California for example, CDC does not pay for the condoms; they are provided by non-profit organizations and other public health agencies. See Cal. Assembly Bill, *supra* note 34.

impacts prison guards.²⁰¹

Finally, the absence of ready alternatives to preventing HIV/AIDS transmission suggests the unreasonableness of the current condom denial policy. Sex in prison prohibitions can remain—access to condoms is not sanctioning sex behind bars. It simply recognizes prisoner sex realities and attempts to lessen the transmission of HIV/AIDS. Furthermore, beyond the right to life and bodily autonomy of the inmate, rights of the non-prisoners who are affected are also compelling. Failing to provide access to condoms in prison consequently restricts the constitutional rights of those who are not prisoners,²⁰² as it makes them susceptible to HIV/AIDS.

In sum, prisoners have rights that survive and result from incarceration. Where protection from prisoner rape is denied, protection from the repercussions, including HIV/AIDS, in the form of condom access, must be afforded to the prisoner under the affirmative duty to protect by the State, the prisoners' right to health care, and the prisoners' right to bodily autonomy, subsumed in his right to life. Failing to provide condom access amounts to "deliberate indifference" by prison officials. Alternatively, a prison policy failing to provide access to condoms fails the Turner balance test.

III. U.S. LEGISLATION FAILS TO ADDRESS RIGHTS BY IGNORING ACCESS TO CONDOMS

Federal legislation regarding prisoners has not improved conditions for prisoners; in fact, barriers are practically insurmountable when evaluating federal law according to the judicial standard of "deliberate indifference." A policy that permits condom access to prisoners is the best policy to date because it recognizes the sexual realities of prisoner life. In fact, prisoner legislation has not protected prisoners from sexual aggression in prison, much less from the diseases associated with it, which raises questions as to the ultimate U.S. policy regarding prisoners.

A. The Prison Litigation Reform Act of 1996

In 1996, Congress enacted the Prison Litigation Reform Act (PLRA)²⁰³ as an attempt to limit the number of lawsuits by prisoners by

²⁰¹ Brent Staples, *Fighting the AIDS Epidemic*, *supra* note 35.

²⁰² *Turner v. Safely*, *supra* note 129, at 85, quoting *Procunier v. Martinez*, *supra* note 37 at 409 [where the holding turned on the rights of those who are not prisoners; the Court highlighted, "although not urged by the respondents, this implication of the interests of nonprisoners may support the application of the Martinez standard, because the regulation may entail a 'consequential restriction on the {constitutional} rights of those who are not prisoners].

²⁰³ Prison Litigation Reform Act of 1995, Pub. L. NO. 104-34, 1100 Stat. 1321 (1996) codified at 42 U.S.C. § 1997(e) Proponents of the PLRA wanted to limit the

imposing barriers between them and judicial relief. In essence, the PRLA makes substantive changes to prisoners' federal rights²⁰⁴ and limits inmates' access to judicial relief by: (1) restricting the availability of attorneys' fees for successful suits, thus restricting the availability of willing attorneys;²⁰⁵ (2) mandating exhaustion of the internal prisoner grievance process;²⁰⁶ (3) requiring filing fees from indigent defendants who have filed unsuccessful claims;²⁰⁷ and (4) limiting the scope and duration to any injunctive relief to a period of two years.²⁰⁸ Most problematic, however, is that the PRLA imposes a physical injury requirement on the prisoner as a prerequisite to having a sustainable claim.²⁰⁹

Prior to the enactment of the PRLA, the Supreme Court held that a resultant injury was not required to state an Eighth Amendment claim as long as the inmate was exposed to "an unreasonable risk of serious damage to his future health"²¹⁰ stating that "[i]t would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing had happened to them."²¹¹ The combination of prisoner sex realities and a majority of prisons denying access to condoms exposes inmates to serious risks of HIV/AIDS. The physical injury requirement of the PRLA undermines the Supreme Court's decision that non-physical injury can warrant judicial relief.²¹² In effect, the physical injury requirement of the PRLA bars inmates from raising claims based on access to condoms. Essentially, a prisoner must first contract HIV/AIDS until he can file a claim, assuming he overcomes other hurdles integral to the PRLA. As such, the physical injury requirement of the PRLA needs to be removed or modified with subsequent legislation.

number of frivolous lawsuits by prisoners and claimed that the number of prisoner lawsuits filed since 1975 increased from 6606 to 39,065 in 1994. However, the proponents did not disclose the corresponding increase in the US prison population. In fact, the "rate at which inmates filed petitions declined by approximately 17 percent." See Jennifer Winslow, *The Prison Litigation Reform Act's Physical Injury Requirement Bars Meritorious Lawsuits: Was it Meant To?*, 49 UCLA L. Rev. 1655, 1662-1663 (2002).

²⁰⁴ See Jennifer Winslow, *supra* note 203, at 1667, quoting Senator Paul Simon stating "[h]istory is replete with examples of egregious violations of prisoners' rights. These cases reveal abuses and inhumane treatment that cannot be justified no matter what the crime. In seeking to curtail frivolous lawsuits, we cannot deprive individuals of their basic civil rights" at 141 Cong. Rec. S2297 (1996).

²⁰⁵ By restricting the attorneys' fees, the bill restricts the pool of attorneys will to argue on behalf of a prisoner. See 42 U.S.C. § 1997e(d) (2000).

²⁰⁶ *Id.* at §1997e(a).

²⁰⁷ See 28 U.S.C. § 1915 (b)(1)(2000).

²⁰⁸ See 18 U.S.C. §§ 3626(a)-(g) (2000).

²⁰⁹ 42 U.S.C. § 1997(e)(e)

²¹⁰ *Helling v. McKinney*, 509 U.S. 25, 35 (1993).

²¹¹ *Id.* at 33.

²¹² Jennifer Winslow, *The Prison Litigation Reform Act's Physical Injury Requirement*, *supra* note 204, at 1670.

Moreover, for victims of prisoner rape, the PRLA imposes high financial and emotional costs and risks physical safety.²¹³ The internal grievance exhaustion provision requires the prisoner to break the prison code and “come out.”²¹⁴ He must disclose his role as the “punk” and likely must identify his assailants, threatening any remaining safety by becoming a “snitch.”²¹⁵ In addition to the requisite filing costs, the physical proof requirement is an insurmountable barrier²¹⁶ for the victim of coercive sex. He is effectively barred from filing a claim since he is not likely to have a physical injury. The PLRA provides no recourse for victims of prisoner rape and sexual harassment. It leaves prisoners to accept their situation, even if that includes contracting HIV/AIDS.

B. The Prison Rape Elimination Act of 2003

In 2003, Congress formally recognized prisoner sexual realities and passed the federal Prison Rape Elimination Act of 2003²¹⁷ (PREA). PREA attempts to establish a “zero tolerance standard for the incidence of prisoner rape”²¹⁸ and to make the elimination of prison rape a “top priority.”²¹⁹ It applies to all correctional and detention facilities, including federal, states, and local jails, prisons, police lock-ups, private facilities, and immigration detention centers.²²⁰ PREA requires: (1) annual surveys to determine the prevalence of rape;²²¹ (2) public hearings to hear testimony from advocates, experts, survivors of prison rape, and corrections officers;²²² (3) a clearinghouse to aid state and local correctional staff in their attempts to lessen prisoner sexual violence;²²³

²¹³ Terry A. Kupers, *Rape and the Prison Code*, *supra* note 26, at 112.

²¹⁴ *Id.* According to the prison code, the worst offense is snitching. The aggressor may retaliate by killing the snitch or arranging for another prisoner to kill the snitch.

²¹⁵ James E. Robertson, *A Punk’s Song About Prison Reform*, 24 Pace L. Rev. 527, 551 (2004); *See also* Terry A. Kupers, *Rape and the Prison Code*, *supra* note 26, at 112 where ‘snitching’ is the worst offense under the code, but being known as a ‘punk’ or displaying weakness of any kind ranks high also.

²¹⁶ *Id.*; *See also* Alice Ristrophe, *Sexual Punishments*, *supra* note 95, at 166.

²¹⁷ Prison Rape Elimination Act of 2003, Pub. L. No. 109-79, 117 Stat. 972 (2003) (codified at 42 U.S.C. §§ 15601-15609). PREA defines rape as: “carnal knowledge, oral sodomy, sexual assault with an object or sexual fondling of a person” either forcibly or against that person’s will,” “where the victim is incapable of giving consent because of his or her youth or . . . mental incapacity,” or “through the exploitation of the fear or threat of physical violence or bodily injury.” *Id.* at § 15609(9)(A)-(C) 2005; *See also* Alice Ristrophe, *Sexual Punishments*, *supra* note 95, at 175.

²¹⁸ Prison Rape Elimination Act of 2003, 42 U.S.C.A. § 15602.1

²¹⁹ § 15602.2

²²⁰ § 15609.3; § 15609.7; *See also* PREA Update, Stop Prisoner Rape’s Report on the Prison Elimination Act, May 2005 available at <http://www.justdetention.org/pdf/preaupdate0505.pdf> (last visited on June 09, 2011).

²²¹ § 15602.4

²²² § 15606 (e)(2)c

²²³ § 15605 (b)(2)

(4) grants to state and local jurisdictions;²²⁴ and (5) a commission to study prison rape that includes a recommended set of standards for the detection, reduction, prevention, and punishment of prisoner rape.²²⁵

Essentially, PREA acknowledges the existence of prisoner rape, which is a groundbreaking advance for prisoners' rights, but it fails to specifically acknowledge prisoner protection from diseases associated with rape in its provisions.²²⁶ Instead, it leaves to its legislatively-created commission, the National Prison Rape Elimination Commission,²²⁷ the option of recommending suggested prison policy,²²⁸ but preventive measures where prisoner rape continues, such as condom access, are not guaranteed.²²⁹ This raises skepticism as to the governmental intent concerning treatment of prisoners because its practical effects, to date, have been largely symbolic.²³⁰ The actual requirements have not been fulfilled or have been questionably fulfilled since the passing of PREA in 2003.²³¹ Prisoners' rights advocates have reported the progress of PREA as "slow" because of a lack of qualified staffing problems, dubious methodological samplings, and a lack of administrative records.²³² Moreover, the U.S. Department of Justice, through its National Institute of Justice (NIJ), spent \$939,233 on prisoner rape research that was "flawed, sloppy, and irresponsible"²³³ according to advocates. Partially

²²⁴ § 15605

²²⁵ *Id.* § 15606

²²⁶ The closest provision states the commission can make recommendations regarding: "educational and medical testing measures for reducing the incidence of HIV transmission due to prison rape." § 15606(e)(2)(F) and "post-rape prophylactic medical measures for reducing the incidence of transmission of sexual disease." § 15606(e)(2)(G) However, neither provision addresses preventing transmission of disease when prisoner rape cannot be stopped.

²²⁷ § 15606(a)

²²⁸ § 15606(e)(2)(M) states the commission may make recommendations regarding: "such other matters as may be reasonably related to the detection, prevention, reduction, and punishment of prison rape." The present commission is developing recommendations that include access to condoms, but there was no guarantee of such recommendations under PREA.

²²⁹ *Id.*

²³⁰ Mary Sigler, *By the Light of Virtue*, *supra* note 17, at 606.

²³¹ PREA Update, Stop Prisoner Rape's Periodic Report on the Prison Rape Elimination Act, Special Report on NIJ Research Travesty, (February 2006) available at <http://www.justdetention.org/pdf/preaupdate0206.pdf> (last visited on June 09, 2011).

²³² For example, the National Prison Rape Commission, whose purpose was to conduct comprehensive studies and to hold public hearings, had several staffing problems which undercut the effectiveness of the Commission; See PREA Update, Stop Prisoner Rape's Report on the Prison Elimination Act, (May 2005), *supra* note 217.

²³³ PREA Update, Stop Prisoner Rape's Periodic Report on the Prison Rape Elimination Act, Special Report on NIJ Research Travesty, (February 2006), *supra* note 231; SPR (now known as Just Detention International) wrote a report questioning the validity of recent research on prisoner rape which used funds allocated by the PREA. The comprehensive report includes: questioning the vague definitions used by the research report, the research does not meet basic scientific research standards as the it has not been

satisfying the administrative requirements of PREA is not going to reduce the spread of HIV/AIDS in prison. Allocating even a small part of federal funds²³⁴ to harm reduction through a specific disease prevention provision, namely access to condoms, would prevent transmission of HIV/AIDS.²³⁵ In the years since its passage, sex behind bars continues without providing protection from the risk of HIV/AIDS.²³⁶ A policy that permits funding access to condoms targets the problem at its source, as opposed to strictly funding lengthy and methodologically-problematic studies.

While PREA fails to specifically address simple, life-saving measures, its legislatively-created commission can make recommendations regarding prison policy.²³⁷ Condoms can stop the spread of disease immediately and must be incorporated in commission recommendations. Additionally, other simple and cost-effective prison policies should include granting cell changes without questions,²³⁸ pairing cellmates according to risk of sexual abuse,²³⁹ revising grievance procedures,²⁴⁰ and creating inmate handbooks on prisoner rape and on HIV/AIDS.²⁴¹ Rehabilitative programs should encourage gender equality and de-emphasize aggressive practices so that male inmates can change their perceptions of “masculinity.”²⁴² Ultimately, though, for the prisoner who cannot escape his assailant or who exchanges sex for protection, allowing access to condoms is his final preventive measure from contracting HIV/AIDS. Recognition of prisoner rape thus necessitates incorporation of disease prevention, and federal legislation presently fails to specifically address this sexual corollary.

peer-reviewed, there is no review of academic literature, there is no indication of the raw data, there are few citations used, and the report is internally contradictory.

²³⁴ A provision of PREA forbids the implementation of standards that “impose additional costs.” § 15605(e)(3). An argument is foreseeable from opposition that condom access will impose high costs. This argument fails, though. First condoms cost much less than providing prison health care or government-subsidized health care out of prison. Second, nearly one million dollars were already spent on a problematic study. Using a fraction of those funds could lessen transmission of disease as opposed to write about it.

²³⁵ § 15605(b) authorizes grants to protect inmates and safeguard communities.

²³⁶ Only a handful of U.S. prisons allow access to condoms. *See supra*, notes 31, 32.

²³⁷ § 15606, Section 7, National Prison Rape Reduction Commission.

²³⁸ PREA Update (May 2005), *See supra*, note 231.

²³⁹ *Id.*; *See also* Christopher D. Man & John P. Cronan, *Forecasting Sexual Abuse in Prison*, *supra* note 60, at 181.

²⁴⁰ PREA Update (May 2005), *supra* note 23.

²⁴¹ *Id.*

²⁴² Men want to be perceived as manly and are determined as masculine or not through their behavior and appearance. Thus, for many men, crime serves as a way of asserting their masculinity, especially where men lack other resources to ‘accomplish gender.’ *See* James W. Messerschmidt, *Masculinities, Crime and Prison*, *supra* note 94, at 68-69.

It is universally acknowledged that condoms prevent the spread of sexually transmitted diseases, such as HIV/AIDS. Formally recognizing the existence of sex behind bars, without providing access to condoms, informally condemns prisoners to a high risk of contracting terminal disease.

IV. CHANGING PERCEPTIONS ARE KEY TO SHAPING PRISONER POLICY

A. Changing Public Perceptions

Fyodor Dostoevsky famously stated, “the degree of civilization in society can be judged by entering its prisons.”²⁴³ That is to say, society is reflected by how it treats its prisoners. Failing to provide condoms signals the lack of respect our society has for human life. Perhaps where we as members of society are not directly accountable for the harm, we easily dissociate ourselves from its infliction, especially where the victims are prisoners.²⁴⁴ Regardless, the character²⁴⁵ of society is eroding because we, as Americans, are collectively acquiescing to a policy of prisoner-cide.

Public awareness is key in shaping prisoners’ rights policy.²⁴⁶ Unfortunately, stopping sexual assault in prison is not an area of imminent importance,²⁴⁷ despite the prisoners’ rights violations and the effect of HIV transmission on the general community. Public attitudes toward prisoners influence the response to the problem,²⁴⁸ including

²⁴³ Fyodor Dostoyevsky, *House of the Dead* (1861-62).

²⁴⁴ Mary Sigler, *By the Light of Virtue*, *supra* note 17, at 593.

²⁴⁵ For a discussion of national character in the context of prisoner treatment, *See* Mary Sigler, *By the Light of Virtue*, *supra* note 17.

²⁴⁶ Advocacy groups, such as Stop Prisoner Rape (now known as Just Detention International or JDI) and CorrectHELP have advocated on behalf of prisoners with marked changes. SPR’s campaign against a 7-up commercial that joked about prison rape brought awareness to the issue; then it urged vehemently for the passing of the 2003 Prison Rape Elimination Act, and publishes updates on the status of the law. JDI’s stated mission is: “to ensure government accountability for prisoner rape; to transform ill-informed public attitudes about sexual violence in detention; and to promote access to resources for those who have survived this form of abuse.” *See* http://www.justdetention.org/en/mission_statement.aspx (last visited on June 09, 2011). CorrectHELP is an organization that provides HIV education, condom distribution, and re-entry programs to inmates in Los Angeles County jails; along with Assembly man Koretz, CorrectHelp urged for condom access legislation in California, Assembly Bill 1677. *See*, for example, L.A. Jail to Distribute Condom to Inmate available at <http://www.npr.org/templates/story/story.php?storyId=4662471> (last visited on June 09, 2011).

²⁴⁷ Prison rape has been referred to as “the most tolerated act of terrorism in the United States.” *See* James E. Robertson, *Clean Heart*, *supra* note 48, at 436.

²⁴⁸ *See*, for example, *Stop Prisoner Rape, Public Attitudes Toward Prisoner Rape* available at <http://www.spr.org/en/factsheetattitudes.html>. Examples of public attitudes include: (1) indifference: where general society does not care what happens to inmates;

influencing the possibility of prisoner access to condoms. For instance, in determining the potential relief in a condition of confinement claim, the Supreme Court has stated that a court must “assess whether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to such a risk [emphasis in original]. In other words, the prisoner must show that the risk of which he complains is not one today’s society chooses to tolerate.”²⁴⁹ Most people would not personally find a predatory sexual environment tolerable, but society has little sympathy for those who commit crimes, and skewed perceptions of prisoner sexual realities emerge. As one lobbyist opposing access to condoms stated, “Condoms are not the answer. Enforcement of the law is”²⁵⁰ without realizing that law is not enforced daily, as inmates are raped, violently or coercively. Instead, since sexual activity among inmates is prohibited under existing law,²⁵¹ society incorrectly assumes that sex in prison is voluntary²⁵² between homosexuals,²⁵³ a perception that impedes change to condom policy. Even faced with the prevalence of HIV/AIDS, most state correctional facilities refuse to distribute condoms,²⁵⁴ and condoms are currently treated as contraband.²⁵⁵ However, no system that has provided condoms has lifted a ban on sexual activity,²⁵⁶ and sex behind bars can remain “illegal.”

Furthermore, society has little confidence that prisoners will use condoms if provided. While there is virtually no case law to date regarding a prisoner’s access to condoms, at least one district court’s perception is instructive: “[f]irst of all, prisoners are not supposed to engage in sexual acts with other prisoners. Why should the prison provide condoms so prisoners can perform what is prohibited? Second, in reality, we are dealing with a prison environment and prisoners are not model citizens. Should we trust that prisoners...will reliably use

(2) retribution: where the public views the prisoner as justly deserving the rape for his actions that landed him in prison; and (3) deterrence, where the general public views the act as a way to lessen the amount of crimes committed because people know they will be subject to sexual assault behind bars.

²⁴⁹ *Helling v. KcKinney*, *supra* note 51, at 36.

²⁵⁰ TVC Lobbyist Testifies Against Prison Condom Distribution Plan, (April 28, 2005) available at <http://www.traditionalvalues.org/content/home>

²⁵¹ Mary Sylla, *Prevention in Practice: Access to Condoms in California* available at <http://www.ncchc.org/pubs/CC/condoms.html> (last visited on September 18, 2011).

²⁵² Ralf Jurgens, *HIV/AIDS in Prisons*, *supra* note 29.

²⁵³ Christopher Man & John P. Cronan, *Forecasting Sexual Abuse in Prison*, *supra* note 60, at 149.

²⁵⁴ Gloria J. Browne-Marshall, *America’s Epidemic*, *supra* note 41, at 15; *What is the Role of Prisons in HIV, Hepatitis, STD and TB Prevention?*, *See supra* note 84.

²⁵⁵ *HIV Transmission and Prevention in Prisons, Education*, available at <http://hivinsite.ucsf.edu/InSite?page=kb-07-04-13#S10.1X> (last visited on June 09, 2011).

²⁵⁶ Cal. Assembly Bill 1677, *supra* note 34.

condoms when performing prohibited sex misconduct?”²⁵⁷ First, this judge denies prison sex realities and assumes that all sex is consensual. Furthermore, speculation and mistrust are inadequate legal arguments and perpetuate oppression²⁵⁸—if prisoners are relegated to these stereotypes, it seems inevitable that they will consummate the role. This position also undermines the role of education on HIV prevention and the captive prisoner audience.²⁵⁹ Ultimately, though, ignorant public attitude exacerbates oppression on an already aggrieved population.

Alternatively, society easily forgets about prisoners or views prisoners as society’s pariahs.²⁶⁰ Or, sex in prison is mocked or glorified,²⁶¹ even by elected officials,²⁶² indicating that society accepts prison rape as part of the punishment.²⁶³ Paradoxically, though, more than three-quarters of Americans agreed that people who knowingly

²⁵⁷ *Gibbs III v. Martin*, 2003 WL 21909780 (E.D. Mich.)

²⁵⁸ Inmates are poorer, less well-educated, and more likely to be members of racial minorities. Approximately 75% of state prison inmates and 69% of local jail inmates did not complete high school, compared to 18% of the population. See John V. Jacobi, *supra* note 47, at 450; See also Gloria J. Browne-Marshall, *America’s Epidemic*, *supra* note 41, at 15.

²⁵⁹ *What is the Role of Prisons?* *supra* note 84; See also *HIV Transmission and Prevention in Prisons*, *supra* note 256.

²⁶⁰ Judge Posner, in his dissent from a majority opinion upholding viewing of naked male inmates by female prison staff, stated “We must not exaggerate the distance between ‘us’ the lawful ones, the respectable ones, and the prison and jail population; for such an exaggeration will make it too easy for us to deny the population the rudiments of humane consideration.” *Johnson v. Phelan*, 69 F. 3d 144, 152 (1995) (Posner, J., dissenting). Justice Stevens also referenced the prisoner pariah and stated, “Prisoners are truly the outcasts of society. Disenfranchised, scorned and feared . . . shut away from public view, prisoners are surely a ‘discrete and insular minority.’” *Hudson v. Palmer*, 468 U.S. 517, 557 (1984) (Stevens, J., dissenting).

²⁶¹ Media portrayals such as HBO’s show “Oz” or commercials, such as the 7-up commercial which jokes about prison rape and assumes its consumers will understand and find humor, glorifying the prison experience and suggesting prison rape is an acceptable practice. See Mary Sigler, *By the Light of Virtue*, *supra* note 17, at 563, 565. Moreover, the phrase “don’t drop the soap” is understood to imply prison rape. An internet search of the phrases “don’t drop the soap” and “prison” on the Yahoo! search engine found 19,800,000 results as of June 09, 2011.

²⁶² See, for example, the “State Attorney General’s top 10 list of frivolous inmate lawsuits” published in jest by the National Association of Attorney Generals. Fred Cohen, *The Limits of Judicial Reform of Prisons: What Works; What Does Not*, 40 No. 5 *Crim. Law Bulletin* 1. Consider that 43 states elect the Attorney General and 5 states appoint by governor. See www.naag.org/naag/about_naag.php Thus, the attorney general is either directly the choice of the general population, or an indirect choice of the populous via its vote for governor. See also rebuttal Top Ten Lit of Non-Frivolous Lawsuits at available at http://archive.acluor.org/archive/Leg_2005/pdf/Leg_2005_HB2140_top10.pdf (last visited on June 09, 2011).

²⁶³ Survey wherein 50% of respondents believed that prison rape was “part of the price criminals pay for wrongdoing.” See Mary Sigler, *By the Light of Virtue*, *supra* note 17, citing Charles M. Sennott, *Poll Finds Wide Concern About Prison Rape; Most Favor Condoms for Inmates*, *Boston Globe*, (May 17, 1994) at 22.

infect another person with HIV should face criminal charges, according to one survey.²⁶⁴ This curious anomaly further illustrates the lack of critical awareness by the public because given the universal understanding that: (1) condoms are a necessary preventive measure in the transmission of HIV and (2) non-consensual sex behind bars exists; but (3) condoms are not accessible in most prison systems; then (4) society knowingly allows transmission of terminal disease that may result in the death of prisoners to continue, without any accountability.

Blind-eye deterrence is another potential reason for societal acceptance of prison rape,²⁶⁵ that is, we as a society officially commit to end prisoner rape and the subsequent transmission of HIV/AIDS through legislation, recognizing prisoner sex realities but not curbing immediate effects of sex in prison.²⁶⁶ Without effectuating change within prisons immediately through harm reduction methods, society silently endorses prisoner rape and the inevitable spread of HIV/AIDS.²⁶⁷ Despite legislation and prisoners' rights jurisprudence recognizing that HIV/AIDS is spread through prisoner sex,²⁶⁸ in practice, rape and disease still exist, indicating the artificial or deficient character of our country.²⁶⁹ Unless and until more funds go towards improving structural impediments,²⁷⁰ thereby stopping prisoner rape and transmission of HIV/AIDS, we must acknowledge the realities of prison sex and respect for life by taking protective measures and providing condom access.

²⁶⁴ Leslie E. Wolf & Richard Vezina, *Crime and Punishment*, *supra* note 25, at 840. There is strong public support for criminal HIV exposure laws, a view in tension with strong public support to reduce HIV transmission. Federal policy has provided explicit support for criminalization of intentional exposure to HIV. From 1990 to 2000, the Ryan White Comprehensive AIDS Resources Emergency (CARE) Act of 1990 provided funds to states for AIDS treatment and care, but required states to certify that their laws were "adequate to prosecute any HIV infected individual" who knowingly exposed another to HIV through donation of blood, semen, breast milk, sexual activity, or needle sharing" See 42 U.S.C. § 300ff-47 (2000). By 2000, all states had statutes addressing intentional HIV exposure and this requirement was removed from the Act. Wolf & Vezina, *Crime and Punishment* at 883.

²⁶⁵ Mary Sigler, *By the Light of Virtue*, *supra* note 17.

²⁶⁶ See PREA Updates, *supra* note 231.

²⁶⁷ Mary Sigler, *By the Light of Virtue*, *supra* note 17. Sigler argues that society may not openly endorse prison rape, but ascent to a blind eye deterrence where "the tougher, the colder, and more cruel and inhuman a place is, the less chance a person will return" quoting Robertson, *Clean Heart*, *supra* note 48, at 446.

²⁶⁸ 42 U.S.C. § 15601.7

²⁶⁹ See Sigler's discussion of national character, where she explains that "motive and character in personal morality has an analog in the life of a nation or people. That is, what matters is not only what actions nations perform and what policies they pursue, but the attitudes and dispositions with which they characteristically undertake such actions and policies." Mary Sigler, *By the Light of Virtue*, *supra* note 17, at 598-601.

²⁷⁰ In a forceful concurrence, Justice Blackmun stated, "[w]here a legislature refuses to fund a prison adequately, the resulting barbaric conditions should not be immune from constitutional scrutiny simply because no prison official acted culpably." *Farmer v. Brennan*, *supra* note 132 at 855, (Blackmun, J., concurring).

Society needs to be educated regarding the realities of prisoner sexual violence. Furthermore, jokes at the expense of raped prisoners should not be acceptable in television, film, or other forms of entertainment.

Moreover, the quality of our moral national character is further eroded as the underlying beliefs associated with prison rape are repeatedly reinforced on the aggressor and rape survivor.²⁷¹ As one commentator writes, “[i]nstead, if they [prisoners] are paying attention, they will learn that human life lacks intrinsic value, that the strong can have their way by preying on the weak, and that the concern of the human community only extends to those who never transgress its laws.”²⁷² Failing to provide protection from transmission of HIV/AIDS further propagates the erosion of society as a whole. Access to condoms is the legal route, the public health route, the ethical route, and the moral route.

B. Changing Perceptions Within the Prison System

Commentators have suggested that the prison environment must be normalized²⁷³ with clear and consistent policies. For example, since sexual harassment precedes rape,²⁷⁴ strict sexual harassment policies must be put into effect. Lack of explicit prohibitions of sexual harassment between male inmates signals institutional apathy to prisoner sexual realities.²⁷⁵ Sexual harassment through words and touching must be stopped in prisons and programs must transform the environment to one of respect that is enforced consistently.²⁷⁶ Policies that promote a large degree of autonomy²⁷⁷ and communicate aggressive feelings in group settings to create group norms²⁷⁸ encourages individual responsibility,²⁷⁹ which is an essential component to promoting condom

²⁷¹ Sigler describes this as: “By treating wrongdoers this way, we effectively eliminate any chance of restoring them to correct moral values or instilling in them a respect for the physical and psychological integrity of other persons.” Mary Sigler, *By the Light of Virtue*, *supra* note 17, at 604.

²⁷² *Id.* at 604-605.

²⁷³ See James Robertson, *Cruel And Unusual Punishment*, *supra* note 93, at 47. “‘Normalization’ means that the same norms that check homosexual activity in free communities should check homosexual activity in prison. . . . A male inmate is not to be accepted as a female surrogate in any sense for to do this is to invite problems associated with sexual aggression.”

²⁷⁴ Sexual harassment includes: “(1) statements that feminize the targeted inmate; (2) sexual propositions; (3) sexual extortion; (4) and unwanted kidding, toughing or fondling of inmate body areas.” *Id.* at 50.

²⁷⁵ James Robertson, *Cruel and Unusual Punishment*, *supra* note 93, at 44-45.

²⁷⁶ *Id.* at 47.

²⁷⁷ *Id.* at 49, citing David J. Cooke, *Containing Violent Prisoners: An Analysis of the Barlinnie Special Unit*, 29 *Brit. J. Criminology* 129, 140 (1989).

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 49-50.

use.²⁸⁰ While prisoners are by definition deprived of their liberty, the Supreme Court has noted they should not be deprived of their sense of self.²⁸¹

Education is a crucial component to lessening the spread of disease.²⁸² Inmates who are educated on the high risk of HIV/AIDS and prevention through condom use will likely use condoms post-incarceration.²⁸³ Comprehensive employee training on sexual assault and open discussions between staff and inmates will help facilitate the prison's ability to discuss sex and HIV prevention.²⁸⁴ Because of the prevalence of prisoner rape and other forms of prisoner sex, HIV prevention within jails must begin immediately upon inmate arrival. But education about HIV prevention, without the necessary preventive barriers provided by condom access, is futile. Moreover, education on preventing HIV transmission through condom use affects the incarcerated community and the general community upon inmate release.²⁸⁵ One study showed that pre-release inmates who were educated on HIV prevention and condom use were significantly more likely to use a condom the first time they had sex after release.²⁸⁶ Thus, education is beneficial for the community in general.

CONCLUSION

Sex behind bars occurs. However it is characterized—as rape, coerced sex, or consensual sex—the common characteristic is the risk of HIV/AIDS that accompanies sex. Federal legislation and prisoners' rights jurisprudence formally recognize the occurrence of prison rape and its resultant spread of HIV/AIDS, yet fail to formally and specifically provide access to condoms. The PRLA makes it impossible for a prisoner

²⁸⁰ Commentators suggest that tighter control of inmates likely will be counterproductive because such measures further challenge the inmate's masculinity, marking him more likely to engage in sexually aggressive behaviors. Robertson discusses a 'direct supervision' prison policy that has been successful. Inmates are divided into small, manageable groups and house in smaller units with staff that works among, not apart from, the prisoners. This approach has successfully reduced inmate violence in several correctional facilities. *See Id.* at 48.

²⁸¹ *See e.g., Proconier v. Martinez, supra* note 37, at 428, where Justice Marshall noted: "When the prison gates slam behind an inmate, he does not lose his human quality; his mind does not become closed to ideas; his intellect does not cease to feed on a free an open interchange of opinions; his yearning for self-respect does not end; nor is his quest for self-realization concluded. If anything, the needs for identity and self-respect are more compelling in the dehumanizing prisoner environment." (J. Marshall, concurring).

²⁸² *HIV Transmission and Prevention in Prisons, supra* note 255.

²⁸³ *Id.*

²⁸⁴ Stephen Donaldson, *Administrative Policy, supra* note 96.

²⁸⁵ Gloria Brown Marshall, *America's Epidemic, supra* note 41, at 15.

²⁸⁶ *What is the Role of Prisons?, supra* note 84, citing Olga A. Grinstead, Barry Zack, Bonnie Faigeles et al. Reducing postrelease HIV Risk Among Male Prison Inmates, 26 *Criminal Justice and Behavior* 453-465, (1999).

to bring a claim for condom access because of the physical injury requirement; even if a prisoner overcomes the PRLA requirements, applicable judicial standards pose a high hurdle for a prisoner. However, circumstantial evidence that prisoner rape exists is established formally under PREA, and scientific evidence as well as universal understanding establish the high risk of HIV/AIDS associated with unsafe sex. Failure to provide access to condoms thus amounts to deliberate indifference. Additionally, interest in protecting rights of safety, health, and bodily integrity outweighs prison policy reasons for failing to provide condoms.

Moreover, “the argument for prison reform is strongest, of course, when it is supported by both principle and pragmatism.”²⁸⁷ Unfortunately, negative public perceptions of prisoners further oppress an already marginalized and struggling population by failing to recognize prisoner sexual realities and by failing to support condom access policy. The result is failure to provide condoms, which leads to the proliferation of HIV/AIDS in prisoners. Ultimately, many opponents are unaware of the realities of prisoner rape and view access to condoms as state-sanctioned sex,²⁸⁸ when it should be viewed as a judicious strategy to lessening HIV/AIDS.²⁸⁹ It also recognizes condom access as the practical solution, because the financial cost of providing access to condoms is significantly less than the financial cost society incurs when a prisoner has HIV/AIDS and is treated²⁹⁰ or when an inmate contracts HIV/AIDS in prison and spreads it to the community in general upon release. When AIDS is the second leading cause of death among prisoners, and prisoner sexual realities are noted by the judiciary and the legislature, the immense human rights violation—the prisoner-cide—that occurs by failing to provide access to condoms is indisputable. Failure to provide access to condoms ignores prisoners’ rights and defies reason; in effect, it sanctions the death of prisoners through contraction of a terminal but avoidable disease that simply was not part of their sentence.

²⁸⁷ John V. Jacobi, *Prison Health, Public Health*, *supra* note 47, at 463.

²⁸⁸ TVC Lobbyist Testifies Against Prison Condom Distribution Plan, *supra* note 250, where Traditional Values Coalition lobbyist Ben Lopez argued before the Assembly Committee that because sex is illegal, giving condoms to inmates encourages sexual activity, making it akin to giving clean needles to prison inmates who are injecting illegal drugs, and stated “Condoms are not the answer. Enforcement of the law is.”

²⁸⁹ See *supra* note 34, Comment 8 to AB 1677 where Honorable Henry Waxman is quoted as saying “distribution of condoms is not condoning sexual activity among prisoners. Rather, it is a recognition that lives can be saved by simple measures.”

²⁹⁰ Shauntel Lowe, Calif. prison condom program still causing controversy available at <http://www.correctionsone.com/news/1843690-Calif-prison-condom-program-still-causing-controversy/> (last visited on September 18, 2011) which reports research indicates a cost of \$25,000 a year to provide medical care for an HIV-positive inmate compared to \$35,000-\$45,000 to provide condoms in the prison.