



Stop Prisoner Rape

Submission to the House of Commons
Standing Committee on Justice and Human Rights

Bill C-9: An Act to Amend the Criminal Code
(Conditional Sentence of Imprisonment)

and

Bill C-10: An Act to Amend the Criminal Code
(Minimum Penalties for Offences Involving Firearms)
and to Make a Consequential Amendment to Another
Act

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I. Executive Summary

Stop Prisoner Rape (SPR) submits this brief to the Standing Committee on Justice and Human Rights of the House of Commons urging the Committee to oppose bill C-9, An Act to Amend the Criminal Code (Conditional Sentence of Imprisonment), and bill C-10, An Act to Amend the Criminal Code (Minimum Penalties for Offences Involving Firearms) and to Make a Consequential Amendment to Another Act.

Based in the United States, SPR is a human rights organization committed to ending sexual violence against men, women, and children in all forms of detention. The organization recently conducted a fact-finding mission in Canada to assess what makes Canadian institutions generally safer than their U.S. counterparts. The SPR delegation determined that the manageable size of the prison population, stemming directly from Canada's reasoned laws that afford judges discretion in sentencing, has played a critical role in maintaining safe facilities.

Enacting bills C-9 and C-10 would counteract the success of the Correctional Service of Canada (CSC) as well as the provincial correctional systems, and would tarnish Canada's reputation as a world leader in the humane treatment of inmates. Bills C-9 and C-10, in essence, would each create mandatory minimum sentencing schemes. C-9 is intended to incarcerate people who otherwise could have received a community sentence. C-10 will lengthen the sentences for defendants whom a judge believed deserved a minimal sentence.

As has become apparent in the United States, mandatory minimum sentences turn prisons and jails into warehouses. Rather than reducing crime levels, these sentencing

rules increase violence inside facilities as well as outside. Crowded facilities are inherently dangerous facilities, and harsh sentencing laws inevitably crowd prisons and detention centers. The U.S. experience with prison overcrowding has made it painfully clear that violence, particularly sexual violence, proliferates when correctional facilities house too many inmates. In addition, there is a direct link between prison overcrowding and community violence. Virtually all inmates are ultimately released, bringing their prison experiences, including learned violent behavior, back to their communities.

The experience of the U.S. illustrates the significant problems that may develop if Canada adopts the proposed harsh sentencing laws. Bills C-9 and C-10 would make the prison population in Canada increase significantly, causing Canadian prisons and detention centers to become larger, more difficult to manage, and more violent. Notably, the prisoners affected by these laws would not be the most dangerous and violent offenders, but rather those for whom a judge identified factors that supported community supervision or a minimal prison term. These defendants are among the most vulnerable to abuse in prison, and have the greatest prospect for rehabilitation in the community.

In light of the overwhelmingly negative impact of mandatory minimum sentencing laws in the U.S., Stop Prisoner Rape urges the Committee to:

1. *Reject bills C-9 and C-10.*
2. *Ensure that prisons and detention centers do not become overcrowded.*
3. *Allow judges to retain discretion in sentencing.*
4. *Prioritize rehabilitation and service provision in all correctional facilities.*

II. About Stop Prisoner Rape

Stop Prisoner Rape (SPR) is a U.S.-based human rights organization dedicated to ending sexual violence against men, women, and children in all forms of detention. SPR has three core goals for its work: to advocate for policies that ensure institutional 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.

More than a quarter century after its inception, SPR remains the only organization in North America dedicated exclusively to the elimination of prisoner rape. SPR was instrumental in securing passage of the U.S. Prison Rape Elimination Act (PREA), the first-ever federal law addressing prisoner rape. Since PREA was signed into law in September 2003, SPR has led the call to ensure its meaningful implementation.

III. SPR's Canada Initiative

In the North American context, prisoner rape is generally viewed as a U.S. problem, while Canada is rightfully held up as an example of a country with a significantly less violent correctional system. In May-June 2006, a delegation of SPR staff conducted a fact-finding mission in Canada to gather information for a report on Canadian and U.S. corrections policies and practices that influence the prevalence of sexual violence behind bars.¹

The SPR delegation interviewed inmates and officials in three federal prisons for men – Millhaven Institution, Kingston Penitentiary, and Collins Bay Institution – and the

male and female sections of the Québec Detention Centre in Québec City. The team also met with human rights advocates, staff from the Office of the Correctional Investigator, and officials at the CSC national headquarters in Ottawa.

SPR concluded that CSC prisons are generally safer than their U.S. counterparts. While provincial facilities vary with respect to the level of safety, overall, they appear to better protect detainees than American jails. At both the national and local levels, the difference primarily stems from the more manageable size of Canadian facilities and inmate populations. With few exceptions, Canadian correctional facilities are not overcrowded, while as a rule, American prisons and jails are. Overcrowding in the U.S., stemming directly from the mass incarceration and lengthy prison terms caused by mandatory minimum sentencing schemes, is one of the main reasons why U.S. facilities are unmanageable and dangerous.

IV. Mandatory Minimum Sentencing in the U.S. Has Failed

The U.S. experience with sentencing laws that mandate imprisonment or increase the minimum length of incarceration has shown that these limits on judicial discretion are costly and counterproductive.² Mandatory minimum sentences have defined U.S. federal and state sentencing laws for more than 20 years.³ During this time, prisons have become overcrowded and increasingly violent, crime rates have not consistently declined, and low-level offenders have been swept into the violent culture of detention facilities.

Without any clear benefit to the rates of violent crime, mandatory minimum sentences have caused the U.S. to incarcerate a larger percentage of its population than any other country in the world.⁴ At any given time, more than 2.2 million people are

behind bars in the U.S. in a federal facility, state prison or county jail.⁵ Even accounting for differences in population size, the incarceration rate in the U.S. is more than six times the rate in Canada.⁶ However, in 2000, the homicide rate in the U.S. remained three times higher than in Canada, the aggravated assault rate was more than double, and the robbery rate was 65% higher.⁷

Under mandatory minimum sentencing regimes, the U.S. inmate population size has swelled at a rate far greater than population growth as a whole.⁸ Between 1974 and 2001, when mandatory minimum sentencing was the norm, the number of inmates in federal and state prisons increased more than 600%, from 216,000 to 1,319,000.⁹ The incarceration rate grew just as dramatically: from 149 inmates per 100,000 population to 628 per 100,000 population.¹⁰ In this era of mandatory minimum sentences, more and more people have been imprisoned, even as the crime rate has remained steady or dropped.¹¹

Overcrowding plagues prisons and jails across the U.S. The capacity to build and operate prisons could not keep pace with the skyrocketing incarceration rates. From 1982 to 2003, total justice spending at the federal, state, and local levels increased approximately 432%, with corrections accounting for the largest increase.¹² Nonetheless, according to the U.S. Bureau of Justice Statistics, the prison systems of 24 states and the federal government were operating above capacity in 2004.¹³ For example, in that year, California housed nearly 158,000 prisoners in facilities designed to hold approximately 80,000 – operating at 195% of capacity.¹⁴ Illinois prisons were operating at 138% of capacity in 2003.¹⁵ Federal U.S. prisons were operating at 140% of capacity in 2000.¹⁶

While U.S. federal and state governments enacted harsh sentencing laws to “get tough on crime,” these laws have not served as effective deterrents to crime. Numerous factors influence crime rates, such as demographic shifts, fluctuating economic conditions, changes in firearm availability, the drug trade, and law enforcement practices.¹⁷ Thus, while homicide and firearm-related offenses in the U.S. declined in the late 1990’s (after peaking to all-time highs earlier that decade), mandatory minimum sentencing laws were not necessarily the reason for this decline.

In fact, after reviewing the research evaluating the effectiveness of mandatory drug and firearm laws in the U.S., criminal law professor Michael Tonry concluded that “enactment of mandatory penalties has either no demonstrable marginal deterrent effects or short-term effects that rapidly waste away.”¹⁸ State-by-state comparisons illustrate the meager impact that mandatory sentences have had on reducing crime. Between 1991 and 2001, the incarceration rate increased as a direct result of mandatory minimum sentences, by 51.6% nationwide, 139.4% in Texas, and 10.9% in New York. During this same period, the crime rate dropped by 29.5% nationwide, 34.1% in Texas, and 53.2% in New York. Thus, Texas expanded its prison population at three times the rate of the country overall and its crime rate improved only slightly more than the national average, while New York’s prison population grew at a rate one-fifth the national average and its crime rate improved at twice the national rate.¹⁹

In recent years, due to the high costs and minimal gains of mandatory minimum sentencing schemes, jurisdictions throughout the United States have begun to reconsider those laws. In the 2003 legislative session alone, 25 states modified their sentencing and corrections policies or otherwise sought to lessen sentences.²⁰ Five of these states

repealed or reduced mandatory minimum terms.²¹ While largely motivated by budget deficits, policy makers have supported these reforms because they have come to realize that allowing judges to impose sentences that respond to the specific circumstances of a crime and a defendant is more effective than requiring them to impose pre-determined inflexible penalties.²²

Numerous judges have also expressed their objections to mandatory minimum sentences.²³ As noted by the late Chief Justice William Rehnquist, a Reagan-appointee to the U.S. Supreme Court, mandatory minimum sentences are “perhaps a good example of the law of unintended consequences.”²⁴

V. Overcrowding Causes Violence Behind Bars and in the Community

Unquestionably, mandatory minimum sentences in the U.S. have led to massive increases in incarceration, irrespective of the crime rate. The skyrocketing U.S. prison population resulting from these sentences has created more dangerous facilities across the country. The density of the prison population and the lack of space for inmates are directly related to inmate misconduct and violence.²⁵

The safety risks of overcrowding cannot be overstated. The connection between overcrowding and sexual and physical violence in detention has been the subject of numerous lawsuits,²⁶ academic studies,²⁷ and human rights reports.²⁸ Corrections officials and policy experts both in the U.S. and Canada have repeatedly attributed prison violence to overcrowded conditions.²⁹

One of the most horrific results of this overcrowding, and the focus of SPR’s work, is the rampant sexual abuse of prisoners that permeates facilities housing too many

inmates. In prisons and jails that are overcrowded, corrections officials cannot prevent sexual violence or adequately respond when it occurs. Victims are left beaten and bloodied, are impregnated against their will, and contract HIV and other sexually transmitted diseases. Prisoner rape survivors also suffer from long-term mental health problems,³⁰ and some may themselves turn to violence to prove to other prisoners that they can fight off aggressors.³¹

The increased violence in prisons ultimately leads to more violence in the community too. As inmates return home, they bring their violent experiences with them. The U.S. Congress has recognized that societal violence is fueled by prison violence. In the Prison Rape Elimination Act of 2003 (PREA),³² Congress found that “[p]rison rape endangers the public safety by making brutalized inmates more likely to commit crimes when they are released.”³³ Additionally, it notes that “[p]rison rape increases the level of homicides and other violence against inmates and staff, and the risk of insurrections and riots.”³⁴ In the many letters it receives from survivors of prisoner rape on a daily basis, SPR hears first-hand about the negative impact that sexual abuse behind bars has had on their subsequent criminal behavior.

Survivors of sexual violence behind bars are forever affected by their experience, often resulting in drug addiction, suicide attempts, and problems with law enforcement. Survivor and former SPR President Tom Cahill attested to this downward spiral in his 2005 testimony before the National Prison Rape Elimination Commission, a bipartisan commission appointed by President Bush in accordance with PREA. As Mr. Cahill explained:

After I was released from jail, I tried to live a normal life, but the rape haunted me. I had flashbacks and nightmares. I was diagnosed with post-traumatic stress

disorder. My marriage and my business failed. I have been arrested over and over again for acting out. I've had sexual problems. I've been filled with anger for nearly 40 years.³⁵

VI. The Proposed Bills Would Lead to Dangerous Facilities

Bills C-9 and C-10 would lead to an influx of inmates at Canadian prisons and detention centers. The incarceration of people who otherwise would have been diverted from prison, as proposed in bill C-9, and the longer sentences proposed in bill C-10 would significantly increase the demand for prison beds. Even if the federal and provincial governments dedicate significant funds to building new facilities, overcrowding will have overwhelmed existing prisons and detention centers before new ones can be constructed and become operational.³⁶

The practices that have kept Canada's national and provincial correctional systems relatively safe, and which have helped turn Canadian facilities into international models, will be compromised by this overcrowding. During SPR's recent visit to Canada, CSC officials uniformly agreed that their success in maintaining order within CSC prisons was largely attributable to the comparatively small size of these institutions and their inmate populations. CSC administrators specifically cited the manageable population size as critical to everything from appropriate risk assessment and security classification of inmates to being able to transfer inmates before a violent incident occurs.³⁷

One of the foremost reasons for the CSC's effectiveness has been its detailed prisoner assessment and classification process. Ensuring the safety of inmates and officers requires knowing which inmates are at greatest risk for violence, either as

perpetrator or victim. During SPR's visit to the CSC's national headquarters, Director of Research Larry Motiuk noted that the impressive assessment tools developed by the CSC would be rendered meaningless if there was not enough space to adequately apply them.³⁸

The U.S. experience with mandatory minimum sentences proves his point. Even in jurisdictions with proper classification systems, overcrowding has caused U.S. corrections officials to abandon their previous practice of segregating vulnerable prisoners from predators. As a result, vulnerable non-violent inmates are frequently housed together with predatory ones and subjected to violence that could have been prevented. Worse still, in U.S. prisons and jails, the alarming overcrowding has led to double-bunking (when more than one inmate is housed in a single cell) even in protective custody. As a result, inmates who have explicitly requested protection have instead found themselves subjected to rape and other acts of violence while housed in protective custody.

In addition to causing overcrowding, bills C-9 and C-10 would also make assessment more difficult by seriously limiting the amount of information available to Canadian reception facilities, to which inmates are sent to be evaluated and classified after sentencing. With less discretion at sentencing, defense attorneys will provide the courts with less information about mitigating factors, such as mental illness, drug addiction, and history of physical and/or sexual abuse, as such information will have no impact on the sentence.³⁹ This background is vital to the inmate assessment process at the reception facilities.⁴⁰ Without it, these facilities will have to devote more resources to obtaining relevant information, and will need more time to acquire this data and develop the mandated individualized corrections plans for each inmate. This absence of relevant

information coupled with the increased number of correction plans needed as more people are incarcerated, will create backlogs at reception facilities throughout Canada.

The consequences of such backlogs can be dramatic. Warden Mike Ryan shared with SPR the problems that had plagued Millhaven Institution, Ontario's reception facility, before his arrival there last year. As inmates waited for extended periods to be assigned a security level, transferred to an appropriate institution, and provided with a corrections plan, they became restless and serious safety breaches ensued, including numerous acts of physical violence and mass inmate protests.⁴¹ With more people entering prison, and less information about each prisoner upon intake, bills C-9 and C-10 would cause similar backlogs throughout the country.

The CSC's current focus on "dynamic security" has further helped maintain safety and order. Dynamic security requires corrections staff "to develop an ever increasing knowledge of the offender through meaningful interaction, and thereby diminish the likelihood of unexpected behavior on the part of those offenders."⁴² With higher incarceration rates, officials would not be able to monitor inmates with this level of detail. Officers in overcrowded prisons would, at best, be able to respond to inmate disturbances as they occur. They would lack the resources or ability to prevent incidents from arising.

One of the most important preventative measures available to corrections officials is the ability to move a prisoner whose presence in a certain facility, dorm or cell unit creates a safety risk to him or her, another inmate or corrections staff. As CSC Director of International Relations Dave Connor noted to SPR, by maintaining most CSC facilities at or below 90% capacity, problem inmates can be transferred quickly and appropriately,

thereby avoiding potential problems.⁴³ The passage of bills C-9 and C-10 would increase the population size, such that the ability to transfer inmates will be greatly hampered.

Beyond such safety concerns, Canada has a statutory requirement that the “least restrictive measures” be imposed on all inmates, with an emphasis toward rehabilitation.⁴⁴ The proposed legislation does not allow for the least restrictive measure for many of the most vulnerable detainees. The mandatory imprisonment of bill C-9 and longer prison terms of bill C-10 are purely punitive and would not ensure a positive readjustment to community living. Rather, without the judicial discretion to show leniency, individuals who are not likely to re-offend would unnecessarily have to adjust to an institutional lifestyle and learn the violent behaviors of the prison setting.

The higher numbers of inmates would also frustrate rehabilitation efforts. More prisoners means more corrections plans, all of which mandate participation in appropriate rehabilitative programs. The demand for treatment and educational and vocational services will dramatically increase. While on waiting lists for these services, prisoners will be idle, frustrated, and looking for outlets to expend their energy. Without access to positive outlets, gang activity and other violence will likely proliferate.⁴⁵

VII. The Least Dangerous Offenders Would Be the Most Affected

While the Canadian general public may believe that mandatory minimum sentencing laws will protect them from the most violent offenders, this perception is wrong. By imposing minimum terms of imprisonment, bills C-9 and C-10 would only affect the low end of the sentencing range. The maximum sentences available by law would remain unchanged. As a result, truly violent recidivists and gang leaders, who already receive

lengthy sentences, would not be affected by C-9 and C-10. Rather, defendants with mitigating factors that support community supervision or minimal incarceration would be disproportionately punished. For these inmates, the prosecutors' decisions as to what crimes to charge would determine the sentence, because judges will lack the power to consider circumstances that disfavor imprisonment.

In accordance with its criminal jurisprudence, Canada has appropriately afforded wide discretion to judges so that harsh penalties can be imposed on the most dangerous offenders while those posing less of a risk to society can be rehabilitated in the community.⁴⁶ In addition to considering prior convictions, as already required under the Criminal Code,⁴⁷ Canadian judges are authorized to assess the full range of factors that either support harsh punishment or encourage leniency. By removing the possibility of leniency, bills C-9 and C-10 would render judges powerless in shielding those who are unlikely to become recidivist offenders and are most at risk for abuse in prison.

One of the true dangers of enhanced prosecutorial power and reduced judicial discretion is that the very people intended to be punished more harshly are the ones most likely to benefit. Prosecutors offer favorable plea offers to people who can provide information to them. While mid- and high-level gang leaders have the connections and the ability to negotiate for reduced charges, people less connected to criminal enterprises, or at the bottom rungs of these ventures, suffer. In particular, women, who often participate in criminal activity at the behest of an abusive partner, tend to receive disproportionately harsh sentences.

Young, first-time offenders would also be among the hardest hit by these bills, and are among the most vulnerable to prisoner rape and other acts of violence.⁴⁸ Research

of U.S. inmates has shown that prisoners serving a firearm or firearm-related offense are disproportionately young.⁴⁹ Where Canadian judges can now order community supervision or a relatively low sentence to someone charged with a firearm-related offense who is unlikely to become a career criminal, incarceration would be mandatory under bills C-9 and C-10. Upon entering prison unschooled in the ways of prison life, these first-time inmates would be likely targets for abuse and prone to learn violent behavior as a means of protection.

The proposed legislation purports to respond to the general public's concern about gun crimes, but it targets far more than firearm offenses. Under bill C-9, individuals charged with crimes that are non-violent and/or are unlikely to result in future criminality will automatically be imprisoned, solely because a judge *could* impose more than ten years incarceration for that type of crime in extreme circumstances.⁵⁰

VIII. Conclusion and Recommendations

Rather than better protecting Canadians from violence, the passage of bills C-9 and C-10 would ultimately result in more violent communities. Persistent violent offenders already receive harsh sentences under current Canadian laws and would not be affected by increases in the required minimum terms. Rather, the prison population would swell with defendants for whom a judge identified mitigating factors and a strong potential for rehabilitation. These inmates would overcrowd facilities, creating conditions where violence proliferates. Upon their release, many of them would return to their communities with violent experiences and behaviors, and without the tools for a law-abiding life that they could have acquired in community-based programs.

In light of what has been learned by the U.S. experience with similar laws, Stop Prisoner Rape makes the following recommendations to the Committee:

1. *Reject bills C-9 and C-10.* Mandatory minimum sentencing laws in the United States have proven that such legislation is ineffective, costly, and dangerous. Rather than reducing violent crime, these laws will create more dangerous prisons, where violence is bound to proliferate and vulnerable inmates will be victimized.
2. *Ensure that prisons and detention centers do not become overcrowded.* The manageable size of the Canadian prison population has been central to the success of the CSC and the provincial correctional systems in maintaining relatively safe facilities. Increased incarceration rates and prison terms, which would be the result of bills C-9 and C-10, can only undermine these efforts and damage Canada's international reputation for having one of the world's foremost correctional systems.
3. *Allow judges to retain sentencing discretion.* Lengthy prison terms should be reserved for the most serious offenders. A judge familiar with the circumstances and the particular defendant is best suited to provide the case-by-case analysis to determine when prison is necessary, and when it will do more harm than good.
4. *Continue to prioritize rehabilitation and service provision in all correctional facilities.* Even with the harsher terms proposed, virtually all inmates will eventually be released back to the community. To maintain a serious commitment to reducing crime, rehabilitation must remain a priority over excessive punishment.

¹ This report will be released in late 2006.

² For the sake of convenience, this submission will use the phrase "mandatory minimum sentencing law" to refer to legislation such as C-9, in which people who otherwise would have served their sentence in the

community are incarcerated, and C-10, in which people convicted of specified offenses are kept in prison longer.

³ Forty-nine of the 50 states had mandatory minimum sentences for some crimes by 1983. *See* U.S. SENTENCING COMMISSION, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 9 (1991). The federal government began adopting similar legislation for gun crimes in 1984. 18 U.S.C. §924(c). Unlike Canada, the U.S. has wholly separate criminal laws and procedures at the state and federal level. Federal crimes are limited to offenses against the country or interstate commerce, such as terrorism or importation of drugs. The vast majority of crimes, especially violent crimes, are state offenses.

⁴ ROY WALMSLEY, KING'S COLLEGE LONDON, WORLD PRISON POPULATION LIST (6th ed. 2005).

⁵ *Id.*; PAIGE M. HARRISON & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2004 (2005).

⁶ For every 100,000 people in Canada, 116 are incarcerated; for every 100,000 people in the U.S., 714 are incarcerated. *See* WALMSLEY, *supra* note 4.

⁷ MAIRE GANNON, CANADIAN CENTRE FOR JUSTICE STATISTICS, CRIME COMPARISONS BETWEEN CANADA AND THE UNITED STATES, Catalogue No. 85-002, at 5 (2001)

⁸ Alfred Blumstein & Allen J. Beck, *Population Growth in U.S. Prisons, 1980-1996*, 26 CRIME & JUST. 17, 18-19 (1999).

⁹ THOMAS BONCZAR, BUREAU OF JUSTICE STATISTICS, PREVALENCE OF IMPRISONMENT IN U.S. POPULATION, 1974-2001 (2003).

¹⁰ *Id.*

¹¹ Blumstein & Beck, *supra* note 8, at 55 .

¹² KRISTEN HUGHES, BUREAU OF JUSTICE STATISTICS, JUSTICE EXPENDITURE AND EMPLOYMENT IN THE UNITED STATES, 2003 at 2 (2006).

¹³ HARRISON & BECK, *supra* note 5, at 7.

¹⁴ CAL. DEP'T OF CORRECTIONS & REHABILITATION, CALIFORNIA PRISONERS AND PAROLEES 2004 at 7 (2005).

¹⁵ ROGER E. WALKER, ILL. DEP'T OF CORRECTIONS, 2003 STATISTICAL PRESENTATION *passim* (2004).

¹⁶ JAMES J. STEPHAN & JENNIFER C. KARBERG, U.S. DEP'T OF JUSTICE, CENSUS OF STATE AND FEDERAL CORRECTIONAL FACILITIES, 2000 at 4 (2003).

¹⁷ JUSTICE KENNEDY COMMISSION, AMERICAN BAR ASSN., REPORT TO THE ABA HOUSE OF DELEGATES 19-20 and citations therein (2004).

¹⁸ BARBARA S. VINCENT & PAUL J. HOFER, FEDERAL JUDICIAL CENTER, THE CONSEQUENCES OF MANDATORY MINIMUM PRISON TERMS: A SUMMARY OF RECENT FINDINGS 11 (1994) (quoting Michael Tonry, *Mandatory Penalties*, 16 CRIME & JUSTICE: A REVIEW OF RESEARCH 243-44 (Michael Tonry, ed. 1990)). In a review of mandatory minimum sentences for drug offenses, the U.S. Department of Justice came to a similar conclusion: “[t]he great majority of recidivism studies of State and all studies of Federal prison releasees report that the amount of time inmates serve in prison does not increase or decrease the likelihood of recidivism, whether recidivism is measured as a parole revocation, rearrest, reconviction, or return to prison.” *Id.* at 12 (quoting U.S. DEP'T OF JUSTICE, AN ANALYSIS OF NON-VIOLENT DRUG OFFENDERS WITH MINIMAL CRIMINAL HISTORIES 42 (December 1993)).

¹⁹ JUSTICE KENNEDY COMMISSION, *supra* note 18, at 21.

²⁰ *See* JON WOOL & DON STEMEN, VERA INSTITUTE OF JUSTICE, CHANGING FORTUNES OR CHANGING ATTITUDES? SENTENCING AND CORRECTIONS REFORMS IN 2003 (2004).

²¹ *Id.*

²² JUSTICE KENNEDY COMMISSION, *supra* note 18, at 22.

²³ *See, e.g.*, Hon. Anthony M. Kennedy, Justice of the U.S. Supreme Court, Speech at the American Bar Association Annual Meeting, August 9, 2003 (available on-line at http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html) (“I can accept neither the necessity nor the wisdom of federal mandatory minimum sentences. In too many cases, mandatory minimum sentences are unwise and unjust.”); Hon. Morris E. Lasker, District Judge, S.D.N.Y., Remarks Before the Symposium on Sentencing Guidelines, Sept. 9, 1997 (available on-line at http://www.vcl.org/Judges/Lasker_J.htm) (“The enactment of mandatory minimums has been a perhaps understandable, but nevertheless misguided, political reaction by Congress to fear by the public of the level and nature of crime in the past decade.”).

²⁴ William H. Rehnquist, Luncheon Address (June 18, 1993), in U.S. SENTENCING COMMISSION, PROCEEDINGS OF THE INAUGURAL SYMPOSIUM ON CRIME AND PUNISHMENT IN THE UNITED STATES 286 (1993).

²⁵ Christopher Hensley, *Introduction: Life and Sex in Prison* in PRISON SEX PRACTICE & POLICY 1, 5 (Christopher Hensley ed., 2002).

²⁶ See, e.g., *Hutto v. Finney*, 437 U.S. 678, 688 (1978); *Hale v. Tallapoosa County*, 50 F.3d 1579, 1583 (11th Cir. 1995); *Morgan v. District of Columbia*, 824 F.2d 1049 (D.C.Cir.1987).

²⁷ See, e.g., CHRISTOPHER HENSLEY, PRISON SEX PRACTICE AND POLICY 5-6 (2002); DAVID HEILPERN, FEAR OR FAVOUR: SEXUAL ASSAULT OF YOUNG PRISONERS 82-84 (1998); Melvin Gutterman, *The Contours of Eighth Amendment Prison Jurisprudence: Conditions of Confinement*, 48 SMU L. REV. 373, 404 (1995).

²⁸ See, e.g., STOP PRISONER RAPE, IN THE SHADOWS: SEXUAL VIOLENCE IN U.S. DETENTION FACILITIES 13 (2006); CONFRONTING CONFINEMENT: A REPORT OF THE COMMISSION ON SAFETY AND ABUSE IN AMERICA'S PRISONS 23-27 (2006) (hereinafter "CONFRONTING CONFINEMENT"); HUMAN RIGHTS WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISONS 148-49 (2001).

²⁹ See, e.g., CONFRONTING CONFINEMENT, *supra* note 29, at 23-24; see also SPR interview with corrections staff at Millhaven Institution (May 30, 2006); SPR interview with corrections staff at Kingston Penitentiary (May 30, 2006); SPR interview with corrections staff at Collins Bay Institution (May 31, 2006), SPR interview with Larry Motiuk, CSC Director of Research (May 29, 2006); SPR interview with Dave Connor, Director of International Relations (May 31, 2006).

³⁰ Robert W. Dumond & Doris A. Dumond, *The Treatment of Sexual Assault Victims*, in PRISON SEX POLICY AND PRACTICE 67, 71, 81-83 (Christopher Hensley ed., 2002); Terry A. Kupers, *Mental Health in Men's Prisons*, in PRISON MASCULINITIES 192, 194 (Don Sabo, Terry A. Kupers & Willie London eds., 2001); HUMAN RIGHTS WATCH, *supra* note 29, at 112-17.

³¹ Julie Kunselman et al., *Nonconsensual Sexual Behavior*, in PRISON SEX POLICY AND PRACTICE 27, 38-40 (Christopher Hensley ed., 2002); HUMAN RIGHTS WATCH, *supra* note 29, at 118-20; DANIEL LOCKWOOD, PRISON SEXUAL VIOLENCE 95 (1980).

³² Pub. Law 108-79, 42 U.S.C. §§ 15601-15607. PREA is the first-ever U.S. law to acknowledge the acute human rights crisis of sexual violence in U.S. prisons and jails. It mandates analysis of the incidents and effects of prisoner rape, and authorizes funding for information, resources and services to protect individuals from sexual violence behind bars.

³³ 42 U.S.C. § 15601(8).

³⁴ 42 U.S.C. § 15601(10).

³⁵ *The Cost of Victimization: Why Our Nation Must Confront Prison Rape: Hearing Before the National Prison Rape Elimination Commission* (June 14, 2005) (statement of Tom Cahill).

³⁶ BILL SPELMAN, ROUNDTABLE OF THE URBAN INSTITUTE, THE DECLINE IN CRIME: WHY AND WHAT NEXT? (2000) ("If you decide to build more prisons, you will not have that prison capacity tomorrow. You will have that prison capacity in somewhere between five and seven years from now, because you've got to do the architecture and engineering, you've got to construct the thing, you've got to staff it up, and so on. That means that if you're making a decision today about whether to expand prisons or not, you're not dealing with that number, you're actually dealing with whatever that number is going to look like seven years from now.").

³⁷ SPR interview with Larry Motiuk, *supra* note 30; SPR interview with Dave Connor, *supra* note 30.

³⁸ SPR interview with Larry Motiuk, *supra* note 30.

³⁹ As discussed in the next section, the lack of judicial discretion increases prosecutorial power. To the extent that plea bargain agreements continue or increase, the prosecution may compile information pertaining to what sentence it will support but this information will never become part of the court record.

⁴⁰ Indicative of the importance given to this information, the Corrections and Conditional Release Act (CCRA) requires that administration of sentences be carried out with "regard to all relevant available information, including the stated reasons and recommendations of the sentencing judge [and] other information from the trial or sentencing process...." CCRA § 4(b).

⁴¹ SPR interview with Warden Mike Ryan, Millhaven Institution (May 30, 2006).

⁴² Correctional Service Canada, Commissioner's Directive No. 560 ¶ 2 (1987).

⁴³ SPR interview with Dave Connor, *supra* note 30.

⁴⁴ CCRA §§ 3(b), 4(d); *see also* Corrections and Conditional Release Regulations 102 (requiring development of individual correction plan for each inmate).

⁴⁵ Carla I. Barrett, *Does the Prison Rape Elimination Act Adequately Address the Problems Posed by Prison Overcrowding? If Not, What Will?*, 39 NEW ENG. L. REV. 391 (2005) (citing *Johnson v. Levine*, 588 F.2d 1378, 1380 (4th Cir. 1978); *Campbell v. Cauthron*, 623 F.2d 503, 505-06 (8th Cir. 1980)); *see also* Terry A. Kupers, *Rape and the Prison Code*, in PRISON MASCULINITIES 111, 113 (Don Sabo, Terry A. Kupers, and Willie London eds., 2001) (discussing lawsuit in which overcrowding caused young man to be raped by two gang members while in protective custody).

⁴⁶ Canada Criminal Code § 718.3 (1), (2).

⁴⁷ Canada Criminal Code § 725.

⁴⁸ 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 127, 173 (2001) (reviewing prior research that showed that the criminal history of prisoner rape victims was generally non-violent).

⁴⁹ *See* CAROLYN WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, FIREARM USE BY OFFENDERS 4 (2001) (reporting that, in 1997, 62.3 percent of state prisoners and 41.6 percent of federal prisoners serving gun sentences were under 25 years old).

⁵⁰ For example, many forgery and property offenses, while serious, are not violent but would become swept into the zeal to incarcerate. *See, e.g.*, Canada Criminal Code §§ 367 (authorizing sentence of up to ten years for forgery), 376 (authorizing sentence of up to fourteen years for counterfeiting a stamp or mark), 455 (authorizing sentence of up to 14 years for clipping and uttering a clipped coin).