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### Promise Amid Peril: PREA's Efforts to Regulate an End to Prison Rape

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# PROMISE AMID PERIL: PREA’S EFFORTS TO REGULATE AN END TO PRISON RAPE

Brenda V. Smith\*

## ABSTRACT

*This Article discusses the modest aspirations of the Prison Rape Elimination Act (“PREA”) that passed unanimously in the United States Congress in 2003. The Article posits that PREA created opportunities for holding correctional authorities accountable by creating a baseline for safety and setting more transparent expectations for agencies’ practices for protecting prisoners from sexual abuse. Additionally, the Article posits that PREA enhanced the evolving standards of decency for the Eighth Amendment and articulated clear expectations of correctional authorities to provide sexual safety for people in custody.*

## INTRODUCTION

Since the Prison Rape Elimination Act (“PREA”) passed unanimously in 2003, it has drastically changed the landscape of corrections. First, it expanded national understanding of the complexity of sexual abuse in custody,<sup>1</sup> shining a light on youth victimization in adult prisons and jails<sup>2</sup> and revealing the complexity of perpetration in custody.<sup>3</sup> Second, the Act validated the connections between

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1. See JASMINE AWAD ET AL., CAMPAIGN FOR YOUTH JUSTICE, IS IT ENOUGH? THE IMPLEMENTATION OF PREA’S YOUTHFUL INMATE STANDARD 4 (2018) (noting that, although PREA leaves much to be desired, the Act has succeeded in raising awareness about the issue of sexual assault and has encouraged more victims to report their incidents); see also Brenda V. Smith, *Rethinking Prison Sex: Self Expression and Safety*, 15 COLUM. J. GENDER & L. 185, 185–86 (2006) (proposing to “frame the discussion of prison sexuality” and encourage more scholarship from a “multidisciplinary perspective” following the passage of PREA).

2. AWAD ET AL., *supra* note 1, at 4.

3. See James E. Robertson, *The “Turning-Out” of Boys in a Man’s Prison: Why and How We Need to Amend the Prison Rape Elimination Act*, 44 IND. L. REV. 819, 842–43 (2011) (critiquing PREA’s definition of sexual abuse for failing to take into account that some sexual relations, especially between men and boys, may seem

correctional leadership and prisoner vulnerability.<sup>4</sup> This Article posits that sixteen years since its passage, PREA has invigorated prison litigation and advocacy. And while PREA “does not create a private right of action”—language inserted to help ensure passage of the legislation<sup>5</sup>—PREA helps to further define the Eighth Amendment analysis in sexual abuse cases and provides tools to litigators and advocates in ways that the initial proponents likely did not anticipate.

While several scholars have written about PREA’s deficiencies in supporting prisoner causes of action for sexual abuse in custody,<sup>6</sup> in my view, there is reason for hope in looking at the trajectory of litigation since the enactment of PREA.<sup>7</sup> This Article discusses four major developments that resulted from PREA. Part I discusses PREA’s provision of greater discovery tools for prisoners and their counsel. Part II discusses PREA’s role in supporting new articulations of the standard of care for preventing, investigating, and addressing sexual abuse in custody. Part III examines litigation challenges to filing PREA-related claims. Part IV explores how PREA is being used to bolster claims of constitutional violations. Finally, Part V discusses PREA’s role in creating new fora for prisoners, agencies, and civil society to address abuse in custody.

#### BACKGROUND

When introduced in 2002, PREA was intended to be a modest piece of legislation that addressed the rape of men in custody<sup>8</sup> after previous attempts to address sexual abuse of women in custody achieved little success.<sup>9</sup> Interest in the PREA

consensual but are actually coercive when considering the power dynamics); *see also* Gabriel Arkles, *Regulating Prison Sexual Violence*, 7 NE. U. L.J. 69, 112–13 (2015) (criticizing PREA’s final definition of sexual abuse for failing to consider officer-on-inmate searches, nonconsensual medical interventions, and the consequences of prohibitions on consensual sex).

4. NAT’L PRISON RAPE ELIMINATION COMM’N, REPORT 51–52 (2009), <https://www.ncjrs.gov/pdffiles1/226680.pdf> (emphasizing the need for leadership committed to preventing prison rape).

5. Brenda V. Smith, *The Prison Rape Elimination Act: Implementation and Unresolved Issues*, 3 CRIM. L. BRIEF 10, 11 (2008) [hereinafter *Implementation and Unresolved Issues*].

6. *See* Gabriel Arkles, *Prison Rape Elimination Act Litigation and the Perpetuation of Sexual Harm*, 17 N.Y. U. J. LEGIS. & PUB. POL’Y 801, 802–03 (2014); Heather Schoenfeld, *Mass Incarceration and the Paradox of Prison Conditions Litigation*, 44 LAW & SOC’Y REV. 731, 759–60 (2010) (discussing the unintended harms of prison reform litigation).

7. *See, e.g.*, Robert A. Schuhmann & Eric J. Wodahl, *Prison Reform Through Federal Legislative Intervention: The Case of the Prison Rape Elimination Act*, 22 CRIM. JUST. POL’Y REV. 111, 124 (2011) (noting the optimism for legislative change in prison reform in the wake of PREA); Sarah K. Wake, *Not Part of the Penalty: The Prison Rape Elimination Act of 2003*, 32 J. LEGIS. 220, 235 (2006) (“[I]t initially appears that the PREA is meeting some of its goals and causing a change in the way that prison rape is viewed in America.”).

8. H.R.1765, 108th Cong. (2003); H.R.1707, 108th Cong. (2003).

9. *See Implementation and Unresolved Issues, supra* note 5, at 10 (“Though [Human Rights Watch] had published several reports on sexual violence in U.S. prisons dating back to its initial report on the rape of female prisoners, . . . there was little traction in Congress to pass legislation aimed at ending sexual violence in custody. In fact, an early effort to pass legislation introduced by Congressman John Conyers, Jr. (D. MI) to create a registry of staff involved in sexual abuse of inmates in custody failed to garner enough support even for consideration. The legislation, ‘The Custodial Sexual Abuse Act of 1998,’ was stripped from the reauthorization bill for the ‘Violence Against Women Act’ and was never reintroduced.”).

legislation was initially generated by a report from Human Rights Watch entitled *No Escape: Male Prisoner Rape in U.S. Prisons*.<sup>10</sup> The primary proponents of the legislation, Senators Edward Kennedy (D-MA) and Jeff Sessions (R-AL), and Representatives Bobby Scott (D-VA) and Frank Wolf (R-VA), garnered support from Human Rights Watch, Concerned Women of America, Stop Prisoner Rape, and conservative-leaning groups concerned about the victimization of vulnerable white men in custody.<sup>11</sup>

Linda Bruntmyer, the mother of seventeen-year-old Rodney Hulin, a white youthful inmate<sup>12</sup> from Texas, testified in support of the Act's passage.<sup>13</sup> Rodney was raped while incarcerated in the Texas Department of Criminal Justice and subsequently attempted suicide by hanging.<sup>14</sup> He later died from his injuries.<sup>15</sup> Others testifying in support of the legislation included Mark Earley, President of the Prison Fellowship Ministries; Rabbi David Saperstein, the Director of the Religious Action Center of Reform Judaism; and Robert Dumond, a clinical mental health counselor and board member of Stop Prison Rape.<sup>16</sup>

The initial legislation moved swiftly through Congress with little input from organizations and agencies such as the National Institute of Corrections ("NIC") or the Association of Correctional Administrators, that had been working on the issue of sexual abuse of women in custody for many years.<sup>17</sup> The NIC would subsequently

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10. HUMAN RIGHTS WATCH, *NO ESCAPE: MALE RAPE IN U.S. PRISONS* (2001); *see generally* WOMEN'S RIGHTS PROJECT, HUMAN RIGHTS WATCH, *ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS 1* (1996) (examining the sexual abuse of female prisoners largely at the hands of male correctional employees); WOMEN'S RIGHTS PROJECT, HUMAN RIGHTS WATCH, *NOWHERE TO HIDE: RETALIATION AGAINST WOMEN IN MICHIGAN STATE PRISONS 1* (1998) (examining reports on retaliatory behavior by corrections officers against women victims who pursued legal action).

11. *See The Prison Rape Reduction Act of 2002: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 1–2 (2002) [hereinafter *Hearing Before the S. Comm. on the Judiciary*]; *see also* Alex Friedman, *Prison Rape Elimination Act Standards Finally in Effect, but Will They be Effective?*, PRISON LEGAL NEWS (Sept. 15, 2013), <https://www.prisonlegalnews.org/news/2013/sep/15/prison-rape-elimination-act-standards-finally-in-effect-but-will-they-be-effective/>; *see also Implementation and Unresolved Issues*, *supra* note 5, at 10 (“[T]he initial version of PREA only sought to address male prison rape. In the initial congressional hearing, most of the survivors were male. One of the significant critiques of the initial legislation was its failure to include sexual violence against women in custody, which was more likely to be staff initiated. In its second iteration, PREA included staff sexual misconduct against inmates, but continued to focus heavily on male-on-male inmate rape.”).

12. 28 C.F.R. § 115.5 (2012) (“General definitions: . . . Youthful inmate means any person under the age of 18 who is under adult court supervision and incarcerated or detained in a prison or jail.”).

13. *Hearing Before the S. Comm. on the Judiciary*, *supra* note 11, at 8–9.

14. *Id.*

15. *Id.*

16. *Id.* at 9–15.

17. *See generally* WILLIAM C. COLLINS & ANDREW W. COLLINS, NAT'L INST. OF CORR., *WOMEN IN JAIL: LEGAL ISSUES*, 1 (1996), <https://www.prearesourcecenter.org/sites/default/files/library/womeninjaillegalissues.pdf>; *see also* NAT'L PRISON RAPE ELIMINATION COMM'N, *supra* note 4, at 48, 120–21. NIC began work on addressing staff sexual misconduct in early 1996. *Implementation and Unresolved Issue*, *supra* note 5, at 112. Shortly thereafter, NIC awarded the first of several cooperative agreements to American University to provide training on staff sexual misconduct and related legal issues such as cross-gender supervision, legal liability for sexual abuse in custody, and investigations of sexual abuse in custody.

push for the inclusion of women in custody in the legislation's execution.<sup>18</sup>

The final legislation, which passed both houses of Congress unanimously and became law, amounted to only nineteen pages, but it provided structure and resources for research and analysis of sexual abuse in correctional settings.<sup>19</sup> The legislation called for the creation of the National Prison Rape Elimination Commission (the "Commission") and indicated how the Commission would be composed.<sup>20</sup> Likewise, it ordered a study of the causes and consequences of sexual abuse in custody that examined the penological, physical, mental, medical, social, and economic impacts of prison rape.<sup>21</sup> The final legislation required the Commission to issue a report of its findings two years after its passage.<sup>22</sup>

The Act also called for the Bureau of Justice Statistics ("BJS") to conduct a national survey of the prevalence of sexual abuse in all custodial settings: prison, jail, lockup, immigration detention, juvenile, and military facilities, along with an appropriation of \$15 million for each fiscal year from 2004 through 2010 for the survey's implementation and analysis.<sup>23</sup> It also required NIC to direct funding to states and localities to develop strategies to address sexual victimization in custody, with an appropriation of \$5 million each year over the same period.<sup>24</sup> The largest allocation of funding was \$40 million per year over the same time period for personnel, training, technical assistance, data collection, and equipment to prevent and prosecute prison rape, with no less than fifty percent of these funds to be given in grants of up to \$1 million to states for protecting inmates from prison rape.<sup>25</sup>

After conducting hearings, empaneling experts, and gathering data, the Commission developed draft standards for the prevention, detection, and punishment

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18. See NAT'L INST. OF CORR., PREA/OFFENDER SEXUAL ABUSE, <https://nicic.gov/prea-offender-sexual-abuse> ("The National Institute of Corrections has been a leader in this topic area since 2004, providing assistance to many agencies through information and training resources.").

19. Prison Rape Elimination Act, 34 U.S.C. ch. 301 (2018).

20. 34 U.S.C. § 30306(a)–(c) (2018).

21. 34 U.S.C. § 30306(d).

22. *Id.*

23. 34 U.S.C. § 30303.

24. 34 U.S.C. § 30304.

25. 42 U.S.C. § 15605(g)(2) (2011) Section 15605 was editorially reclassified as 34 U.S.C. § 30305, Crime Control and Law Enforcement. ("(g) Authorization of appropriations (1) In general. There are authorized to be appropriated for grants under this section \$40,000,000 for each of fiscal years 2004 through 2010. (2) Limitation. Of amounts made available for grants under this section, not less than 50 percent shall be available only for activities specified in paragraph (1) of subsection (b)."). Subsection (b)(1) specifies: "(b) Use of grant amounts . . . Amounts received by a grantee under this section may be used by the grantee, directly or through subgrants, only for one or more of the following activities: (1) Protecting inmates Protecting inmates by— (A) undertaking efforts to more effectively prevent prison rape; (B) investigating incidents of prison rape; or (C) prosecuting incidents of prison rape." Congress appropriated \$25 million dollars for the grant program in 2004, and another \$20 million in 2005. The Bureau of Justice Assistance awarded \$10 million of its 2004 PREA appropriation in the fourth quarter of that year. See also NAT'L INST. OF CORR., REPORT TO THE CONGRESS OF THE UNITED STATES ACTIVITIES OF THE DEPARTMENT OF JUSTICE IN RELATION TO THE PRISON RAPE ELIMINATION ACT (Public Law 108–70), <https://s3.amazonaws.com/static.nicic.gov/Library/022675.pdf>. The largest grants that year, \$1 million each, went to five state departments of corrections: Iowa, Michigan, New York, Texas, and Washington.

of prison rape, and issued them in August 2009.<sup>26</sup> Following lengthy notice, comment, and consultation with corrections professionals, experts, and other stakeholders through listening sessions, the Department of Justice (“DOJ”) issued final standards on August 20, 2012.<sup>27</sup> Conceding to opponents, the DOJ delayed the effective date of certain standards for particular custodial settings.<sup>28</sup>

The DOJ’s standards require staff training, inmate training, reporting options for prisoners, availability of mental and medical health resources, cross-gender supervision policies, and general oversight of compliance with PREA standards.<sup>29</sup> Every agency must employ an agency-wide PREA coordinator who has sufficient time and authority to implement PREA and oversee agency compliance efforts.<sup>30</sup> In addition, each facility within the agency must employ a PREA compliance manager who similarly has sufficient time and authority to coordinate the facility’s efforts to comply with the PREA standards.<sup>31</sup> Congress intended that the PREA standards would be minimum standards.<sup>32</sup> If agencies know of a particular vulnerability or threat based on the circumstances of their environment, they need to address those even if the standards do not do so.<sup>33</sup>

#### I. THE DEVELOPMENT OF PREA PROVIDED GREATER DISCOVERY TOOLS FOR PRISONERS AND THEIR COUNSEL

Though not initially envisioned as a boon to prisoner litigants, the process for developing the PREA standards created an important cache of discoverable information that has been useful to regulators and, surprisingly, prisoners and their counsel. Records of public comments and participation of state correctional agencies in the regulatory phase of development of PREA standards have made it

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26. NAT’L PRISON RAPE ELIMINATION COMM’N, *supra* note 4, at 2–3.

27. Prison Rape Elimination Act National Standards, 28 C.F.R. § 115 (2019).

28. NAT’L PREA RES. CTR., WHAT ARE THE PREA STANDARDS AND WHEN ARE THEY EFFECTIVE? (June 2, 2015), <https://www.prearesourcecenter.org/node/3198> (delaying “[t]he restrictions on cross-gender pat-down searches of female inmates in prisons, jails, and community confinement facilities (115.15(b) and 115.215(b)) [until] August 20, 2015, for facilities whose rated capacity is 50 or more inmates, and do not go into effect until August 21, 2017, for facilities whose rated capacity does not exceed 50” and making “[t]he standard on minimum staffing ratios in secure juvenile facilities (115.313(c)) [ ] not go into effect until October 1, 2017, unless the facility is already obligated by law, regulation, or judicial consent decree to maintain the minimum staffing ratios set forth in that standard”).

29. 28 C.F.R. § 115.

30. *Id.* § 115.11(b).

31. *Id.* § 115.11(c).

32. N.Y.C. BD. OF CORR., NOTICE OF ADOPTION OF RULES, 1–2 (2016), <https://www1.nyc.gov/assets/boc/downloads/pdf/Jail-Regulations/Rulemaking/2016-PREA/PREA%20Rules%20-%20FINAL%20FOR%20POSTING%2011.10.16%20w%20certification.pdf> (adopting basic PREA standards while also adding additional rules such as expanding on the reporting requirements).

33. *See* NAT’L PRISON RAPE ELIMINATION COMM’N, *supra* note 4, at 3 (“The Eighth Amendment of the U.S. Constitution forbids cruel and unusual punishment—a ban that requires corrections staff to take reasonable steps to protect individuals in their custody from sexual abuse whenever the threat is known or should have been apparent.”).

difficult for these agencies to justify conditions and actions exhibiting noncompliance with standards in prisoner litigation.

*A. Shining a Light on Agency Practices in the Standards Development Process*

After the quick passage of PREA, President George W. Bush, the House of Representatives, and the Senate appointed nine commissioners to the Commission.<sup>34</sup> Five commissioners were appointed by the Republican majority, while the other four were appointed by the Democratic minority.<sup>35</sup> Each brought a range of experience to the Commission, including knowledge of human rights and constitutional norms, connections to faith communities, and experience in research design.<sup>36</sup> After initial struggles to organize the effort, the Commission contracted the Vera Institute for Justice to manage the standards development effort.<sup>37</sup> Vera, and later the National Council on Crime and Delinquency, assisted the Commission in organizing hearings around the country, drafting the initial standards, and developing the process for gaining public input on the draft and final standards.<sup>38</sup>

At the same time that the Commission was developing its standards, the BJS was developing its process for determining the prevalence of sexual abuse in custodial settings.<sup>39</sup> At each stage of the development of the standards, organizations such as the American Probation and Parole Association, the Association of State Correctional Administrators, and the American Correctional Association organized states, localities, and agencies to comment on the standards.<sup>40</sup> Typically, these organizations developed charts which they submitted as public comments on

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34. 34 U.S.C. § 30306(a)–(b) (2018).

35. *Id.* The Commission members were Judge Reggie Walton (Chair), John Kaneb, Pat Nolan, Gus Puryear, Professor Cindy Struckman-Johnson, James Aiken, Professor Brenda V. Smith, Jamie Fellner, and Professor Nicole Stelle Garnett. NAT'L PRISON RAPE ELIMINATION COMM'N, THE COMMISSIONERS (Aug. 17, 2009), <http://nprec.us/home/commissioners/> [<https://cybercemetery.unt.edu/archive/nprec/20090820154824/http://nprec.us/home/commissioners/>].

36. NAT'L PRISON RAPE ELIMINATION COMM'N, *supra* note 4, at vii-x (providing brief biographies of commission members and highlighting expertise related to their appointments to the Commission).

37. *See* ALLISON HASTINGS, VERA INST. OF JUSTICE, NATIONAL PRISON RAPE ELIMINATION COMM'N, <https://www.vera.org/projects/national-prison-rape-elimination-commission> (“Vera staff provided technical assistance to help the commission develop its standards, which were submitted for public comment in 2008.”).

38. *See* Tara Graham, *NCCD Now: Ending Prison Rape*, NAT'L COUNCIL ON CRIME & DELINQUENCY (June 3, 2013), <https://www.nccdglobal.org/newsroom/nccd-blog/nccd-now-ending-prison-rape> (“[Tara Graham] vividly recall[s] [her] earliest visits on behalf of the National Prison Rape Elimination Commission (NPREC) to collect information to inform the development of NPREC’S recommended standards.”).

39. 34 U.S.C. § 30303(a)(1) (requiring the BJS to collect data and conduct a statistical review of prison rape each calendar year).

40. *See* American Probation and Parole Association, Comment Letter on Proposed Rule for National Standards to Prevent, Detect, and Respond to Prison Rape (Apr. 4, 2011) (expressing concern that PREA standards do not apply to non-residential community corrections agencies); Association of State Correctional Administrators, Comment Letter on Proposed Rule for National Standards to Prevent, Detect, and Respond to Prison Rape (May 10, 2010) (claiming that NPREC exaggerated the extent of prison rape, expressing concern over the cost of compliance, rejecting the restrictions on cross-gender searches, etc.); American Correctional Association, Comment Letter on Proposed Rule for National Standards to Prevent, Detect, and Respond to Prison



PREA that indicated that they already met a given standard or indicated those standards that they could not or would not be willing to meet.<sup>41</sup> These documents were then uploaded into the public comment website for the DOJ.<sup>42</sup> While provided for a different purpose, these documents have become useful in litigation and have been used by both plaintiffs and defendants to show knowledge of and compliance (or lack thereof) with federal standards for eliminating abuse in custody.<sup>43</sup>

### B. *PREA Discovery in Litigation*

Three recent cases illustrate the availability and importance of the BJS data in shining a light on sexual abuse in custody. In *Does 1–12 v. Michigan Department of Corrections*,<sup>44</sup> a class of juvenile boys who were imprisoned with adult men sued the Michigan Department of Corrections, claiming violations of state and federal law.<sup>45</sup> The boys alleged that they were physically and sexually abused by older prisoners<sup>46</sup> and that prior to the enactment of the standards, Michigan knew of their vulnerability and did nothing to protect them.<sup>47</sup> The plaintiffs complained that even after the enactment of PREA and with substantial funding from the DOJ of over \$1 million,<sup>48</sup> Michigan continued its policy of housing youth with adults as late as 2017.<sup>49</sup> To support their claims, they were able to point to testimony of Michigan's PREA Coordinator Nancy Zang that, as Administrator, she trained

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Rape (Mar. 21, 2011) (encouraging the Attorney General to reconsider the training, certifying, and auditing policies).

41. See American Probation and Parole Association, *supra* note 40; see also NAT'L PREA RESOURCE CENTER, PUBLIC COMMENT REPORTS TO THE NATIONAL PRISON RAPE ELIMINATION COMMISSION PROPOSED STANDARDS (Jul. 23, 2008), <https://www.prearesourcecenter.org/file/787/public-comment-reports-national-prison-rape-elimination-commission-proposed-standards>.

42. Press Release, Office of Pub. Affairs, DOJ, Justice Department Releases Final Rule to Prevent, Detect and Respond to Prison Rape (May 17, 2012), <https://www.justice.gov/opa/pr/justice-department-releases-final-rule-prevent-detect-and-respond-prison-rape> (taking into account over 1300 public comments on the proposed standards in promulgating the final rule).

43. See, e.g., *Does 1–12 v. Mich. Dep't of Corr.*, No. 13-14356, 2018 WL 5786199, at \*1 (E.D. Mich. Nov. 5, 2018).

44. *Id.*

45. *Id.* at \*2.

46. *Id.*

47. *Id.* at \*1.

48. See 34 U.S.C. § 30305 (2018); see also Maurice Chammah, *Rape in the American Prison*, THE ATLANTIC (Feb. 25, 2015), <https://www.theatlantic.com/politics/archive/2015/02/rape-in-the-american-prison/385550/>. In 2004, Michigan received the maximum amount of \$1 million awarded to individual states per the PREA grant provision. Michigan received additional amounts of \$490,740 from the Bureau of Justice Assistance, the Michigan Department of Corrections (2011-H5430-MI-RP), and a \$100,000 grant in 2017 to Wayne County from the PREA Resource Center.

49. MICH. DEPT. CORR. POLICY DIRECTIVE, PRISONER PLACEMENT AND TRANSFER 05.01.140 (Nov. 1, 2017), [https://www.michigan.gov/documents/corrections/05\\_01\\_140\\_629177\\_7.pdf](https://www.michigan.gov/documents/corrections/05_01_140_629177_7.pdf) (“All prisoners who are under 18 years of age shall be housed in specialized areas at TCF [Thumb Correctional Facility] or WHV [Women's Huron valley Correctional Facility].”).



every warden and other staff on PREA requirements.<sup>50</sup> The plaintiffs were also able to use the Michigan Department of Corrections' responses to the public comment period as evidence of its knowledge about the potential impact of its practice of housing youthful male inmates with adult male inmates.<sup>51</sup>

In a second instance, multiple women in a class action lawsuit, *Brown v. State of New Jersey Department of Corrections*,<sup>52</sup> claimed that they had been routinely sexually abused while in custody at Edna Mahan Women's Correctional Facility, following a hearing before the New Jersey Senate Law and Public Safety Committee held on the widespread sexual abuse at the facility.<sup>53</sup> This was not the Edna Mahan Facility's first instance of reports of sexual abuse of women prisoners.<sup>54</sup> Past sexual abuse scandals had resulted in changes in staffing,<sup>55</sup> changes in policies,<sup>56</sup> and several criminal convictions.<sup>57</sup> Yet male guards continued to oversee women inmates, in spite of continued demands by women inmates to abandon the practice.<sup>58</sup> Being a strong union state, New Jersey had been unable to prevail against its unions in the fight for same-gender staffing at the Edna Mahan Facility.<sup>59</sup>

Critical to that hearing were audit data that the New Jersey Department of Corrections ("NJDOC") submitted each year about the prevalence of abuse in each

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50. See Nancy Zang, MDOC Administrator, Remarks at the Nat'l Prison Rape Elimination Comm'n, Public Meeting at the University of Notre Dame Law School (Mar. 31, 2005), [https://cybercemetery.unt.edu/archive/nprec/20090820154955/http://nprec.us/home/public\\_proceedings/proceedings\\_notredame.php](https://cybercemetery.unt.edu/archive/nprec/20090820154955/http://nprec.us/home/public_proceedings/proceedings_notredame.php) (explaining she "personally, . . . trained every warden, deputy warden, assistant deputy warden, executive policy team member in the Michigan Department of Corrections relative to the requirements of PREA."); see also Chammah, *supra* note 48.

51. See *Mich. Dep't of Corr.*, No. 13-14356, 2018 WL 5786199, at \*1.

52. *Brown v. State of New Jersey Department of Corrections* was filed in Mercer County Court, New Jersey, on Mar. 12, 2018, after the February hearing before the New Jersey Senate Law and Public Safety Committee on the Edna Mahan Correctional Facility. Complaint, *Brown v. State of N.J. Dep't of Corr.*, No. MER-L-000503-18 (Mercer Cty. Ct. Mar. 12, 2018). The complaint alleged numerous instances of sexual abuse perpetrated by facility staff on female inmates. *Id.* at 2–3. The case was later settled in April 2019. See Derek Gilna, *New Jersey DOC Settles Sexual Abuse Suit, but More Cases Are Pending*, PRISON LEGAL NEWS (Apr. 2, 2019), <https://www.prisonlegalnews.org/news/2019/apr/2/new-jersey-doc-settles-sexual-abuse-suit-more-cases-are-pending/>. In another example, *Bernat v. State of New Jersey Department of Corrections*, the plaintiff alleged sexual abuse by staff at Edna Mahan Correctional Facility, which also settled for \$35,000 in June 2018. Complaint, *Bernat v. State of N.J. Dep't of Corr.*, No. 3:12-cv-02649-MAS-LHG (D.N.J. Mar. 26, 2013); see also Gilna, *supra* note 52.

53. Nick Muscavage, *Edna Mahan Inmates Testify About Sexual Assault Allegations Before State Senate*, MY CENT. JERSEY, Feb. 22, 2018.

54. See, e.g., *Heggenmiller v. Edna Mahan Corr. Inst. for Women*, 128 F. App'x. 240, 244 (3d Cir. 2005) (recording six sexual assault incidents between 1994 and 1998).

55. *Id.* (stating that at least five guards were fired for sexual incidents).

56. *Id.* at 247 ("Moreover, the Administrative Defendants had promulgated policies forbidding sexual contact between correctional officers and inmates; these policies were communicated to all officers in their training, and were enforced by the regulations and criminal laws of the States of New Jersey").

57. *Id.* at 249 (noting that five prior sexual assaults either resulted in firing and/or criminal convictions).

58. See generally N.J. STATE LEGISLATURE, COMMITTEE MEETING OF SENATE LAW AND PUBLIC SAFETY COMMITTEE (Feb. 22, 2018), <https://www.njleg.state.nj.us/legislativepub/pubhear/slp02222018.pdf> [hereinafter COMMITTEE MEETING OF SENATE LAW AND PUBLIC SAFETY COMMITTEE] (containing testimony concerning allegations of sexual abuse at the Edna Mahan Correctional Facility for Women).

59. *Id.*

of its facilities.<sup>60</sup> Though New Jersey had over 20,000 people in custody during the periods preceding the hearings, it reported one substantiated incident of sexual abuse in years 2012, 2013, and 2015; zero substantiated incidents in 2014; eight substantiated incidents in 2016; and two substantiated incidents in 2017.<sup>61</sup> The Law and Public Safety Committee deemed the NJDOC's audit findings as simply "not credible."<sup>62</sup> The hearing generated significant media attention, highlighting the data reported to BJS on substantiated sexual abuse complaints.<sup>63</sup> The hearing included testimony from advocacy organizations,<sup>64</sup> the correctional officers' union,<sup>65</sup> and victims of sexual abuse in custody,<sup>66</sup> which further highlighted the incredulity of data reported by the NJDOC on sexual abuse. The hearing resulted in the New Jersey Commissioner of Corrections not being reappointed and the creation of a commission to study sexual abuse at New Jersey's correctional facilities.<sup>67</sup> The legislature required the New Jersey Office of Victim Advocacy to provide services to victims in custody and to consider adding a formerly incarcerated person to the newly-created commission.<sup>68</sup>

In a third representative example of the impact of PREA on discovery, *Fontano v. Godinez*, a small, white, non-violent offender, alleged that he was sexually assaulted on multiple occasions and forced to perform oral sex on his older, larger,

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60. See N.J. DEP'T. OF CORR., THE PRISON RAPE ELIMINATION ACT OF 2003, <https://www.state.nj.us/corrections/pages/PREA.html> (reporting on New Jersey's allegations of sexual victimization in custody from 2012 to 2018); see also 28 C.F.R. § 115.87(c) (2019) (requiring that state corrections agencies report the number of substantiated sexual abuse complaints to BJS in an annual Survey of Sexual Violence); 28 C.F.R. § 115.89(b) (requiring aggregated sexual abuse data to be reported on state agencies' websites).

61. N.J. DEP'T OF CORR., *supra* note 60.

62. COMMITTEE MEETING OF SENATE LAW AND PUBLIC SAFETY COMMITTEE, *supra* note 58, at 18.

63. See generally Nick Muscavage, *Another Edna Mahan Guard Charged with Official Misconduct, Sexual Contact*, MY CENTRAL JERSEY (Apr. 5, 2019), <https://www.mycentraljersey.com/story/news/crime/jersey-mayhem/2019/04/05/edna-mahan-guard-charged-official-misconduct-sexual-contact/3379612002/>; Mike Deak, *Former Edna Mahan Guard Found Not Guilty of Sexual Assault, Official Misconduct*, MY CENTRAL JERSEY (Nov. 13, 2018), <https://www.mycentraljersey.com/story/news/local/courts/2018/11/13/edna-mahan-guards-sexual-assault-misconduct/1987117002/>; Nick Muscavage, *Edna Mahan Inmates Testify about Sexual Assault Allegations before State Senate*, MY CENTRAL JERSEY (Feb. 22, 2018), <https://www.mycentraljersey.com/story/news/politics/new-jersey/2018/02/22/edna-mahan-inmates-testify-sexual-assault-allegations-before-state-senate/364409002/>.

64. See generally COMMITTEE MEETING OF SENATE LAW AND PUBLIC SAFETY COMMITTEE, *supra* note 58 (containing testimony from the American Friends Service Committee, New Jersey Association for Justice, New Jersey Coalition Against Sexual Assault, Freed Women Empowerment Network, and People's Organization for Progress).

65. *Id.* at 52.

66. *Id.* at 40, 76, 83.

67. Greenstein, *Cruz-Perez Resolution Establishing 'Commission to Protect Inmates in the Edna Mahan Correctional Facility from Sexual Assault and Sexual Misconduct' Passes Senate*, INSIDER NJ (June 25, 2018), <https://www.insidernj.com/press-release/greenstein-cruz-perez-resolution-establishing-commission-protect-inmates-edna-mahan-correctional-facility-sexual-assault-sexual-misconduct-passes-senate/>.

68. See N.J. J. Res., *Joint Resolution Creating a Commission to Study Sexual Assault, Misconduct, and Harassment in This State's Correctional [Facility For Women] Facilities*, 218th Cong. (2018) ("nine public members appointed by the Governor, who shall include the following: . . . former inmate of the Edna Mahan Correctional Facility for Women . . .").

African American male cellmate serving time for violent acts.<sup>69</sup> The Illinois Department of Corrections indicated its compliance with the proposed PREA standards on the form provided by the Association of State Correctional Administrators, which collected comments on proposed PREA standards in March 2011.<sup>70</sup> At issue were five sets of standards related to (1) reporting sexual abuse, (2) medical and mental health treatment of survivors, (3) investigating sexual abuse in custody, (4) the use of polygraphs, and (5) the use of segregation or protective custody.<sup>71</sup> The case went to trial and ultimately settled for a six-figure sum following Fontano's testimony.<sup>72</sup>

Thus, in each of these cases, the PREA standards created a map of where to look for persuasive evidence of correctional authorities' failure to comply with known standards and practices that increased safety for people in custody. In Michigan, it was the separation of youthful male inmates from adult male prisoners. In New Jersey, it was the continued practice of allowing male staff to supervise female inmates in its women's prison despite a long history of predatory sexual behavior by male staff. In Illinois, it was the failure to follow sexual assault medical, mental health, and investigative protocols.

### C. Notice and Comment as Admissions

The admissions that states made in the regulatory process are powerful evidence of the integrity and reasonableness of the PREA standards. These admissions and engagement with the regulatory process that formed the PREA standards establish a minimum standard of care that agencies must follow and that litigants will use to challenge agency action in preventing, addressing, and punishing sexual abuse in custodial settings. Moreover, the admissions in the regulatory process have contributed to the major goals of discovery: narrowing the areas of dispute between parties; providing parties with a foretaste of the strength of their case; providing the parties with information they can use to remedy harmful conditions and practices; encouraging resolution of disputes prior to trial; and, more fundamentally, helping achieve more just and humane processes, procedures, and conditions for people in custody.<sup>73</sup>

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69. *Fontano v. Godinez*, No. 12-CV-3042, 2012 U.S. Dist. LEXIS 89061, at \*4–5, (C.D. Ill. June 27, 2012); see also Complaint at 5, 9, *Fontano v. Godinez*, No. 12-CV-3042, 2012 U.S. Dist. LEXIS 89061 (C.D. Ill. June 27, 2012).

70. Association of State Correctional Administrators, *ASCA Response Template for Attorney General's Proposed PREA Standards: State Responding: Illinois Department of Corrections* (Mar. 11, 2011). These comments were collected by ASCA from each state and forwarded to the Department of Justice as it finalized the PREA standards.

71. Complaint at 2, 4, 11–12, *Fontano v. Godinez*, No. 12-CV-3042, 2012 U.S. Dist. LEXIS 89061 (C.D. Ill. June 27, 2012) (topics raised comport with PREA standards 28 C.F.R. §§ 115.51, 115.71, 115.81).

72. Josh McGhee, *State to Pay \$450K to Inmate Raped While in Prison*, DNA INFO (Sept. 2, 2016), <https://www.dnainfo.com/chicago/20160902/uptown/450000-settlement-prison-rape-case-reported/>.

73. See generally American Bar Association, *How Courts Work*, AMERICAN BAR ASSOCIATION (Sept. 9, 2019), [https://www.americanbar.org/groups/public\\_education/resources/law\\_related\\_education\\_network/how\\_courts\\_work/](https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/) (explaining the general purposes of discovery); see also Giovanna Shay, *Ad Law Incarcerated*, 14 BERKELEY J. CRIM. L. 329, 361–63 (2010) (discussing the value of notice-and-comment rulemaking).

There are legitimate critiques of using agencies' comments in this fashion.<sup>74</sup> If agencies become aware that the information they provide to influence the outcome of regulation in their industry might come back to haunt them in litigation, they may be less likely to provide needed feedback to regulators for the industry. This lack of feedback would deprive regulators of needed expertise in crafting reasonable standards and regulation.

The regulated actors in this process—the corrections industry—used their power to favorably impact the timing of the applicability of the standards,<sup>75</sup> the process by which they would be audited for compliance,<sup>76</sup> and the penalties for failure to comply with the standards.<sup>77</sup> For example, although the Commission finished writing the standards in 2009, the final rule was not issued for another three years.<sup>78</sup> Correctional agencies and actors even started receiving grants to come into compliance with the standards prior to their promulgation.<sup>79</sup> Notwithstanding the long period of consultation and input to the standards, the DOJ delayed the effective date of the standards for a year, until 2013.<sup>80</sup> The first required set of audits for one-third of an agency's facilities was not due until August 20, 2014.<sup>81</sup> There was a further delay in implementing the standards for restrictions on cross-gender pat-down searches of female inmates in prisons, jails, and community confinement facilities until 2015 or 2017 depending on the number of inmates.<sup>82</sup> The standard on minimum staffing ratios in secure juvenile facilities did not go into effect until October 2017.<sup>83</sup> Large swathes of the corrections industry—immigration, military facilities, and probation and parole—remain for all intents and purposes untouched by PREA although they continue to have obligations under its standards.<sup>84</sup> Overall,

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74. *Id.* at 369.

75. For instance, though final rulemaking for the PREA standards was in 2012, juvenile facilities had until October 2017 to become compliant with minimum juvenile staffing ratio standard (28 C.F.R. § 115.313) and facilities with capacity less than 50 had extensions until August 21, 2017 to become compliant with standard for cross-gender pat-down searches of female inmates (28 C.F.R. § 115.15). *See* 28 C.F.R. § 115 (2012).

76. *See* COMMITTEE MEETING OF SENATE LAW AND PUBLIC SAFETY COMMITTEE, *supra* note 58, at 50.

77. Arkles, *supra* note 6, at 806. (“If an agency’s facilities are not in full compliance with PREA, its qualifying federal grants may be reduced by five percent unless the Governor of the state certifies that those funds will only be used to come into compliance with PREA.” Citing 42 U.S.C. § 15607(c) (2012). However, “[f]ederal funding accounts for only 2.9% of state prison budgets.”).

78. Arkles, *supra* note 6, at 805.

79. *Implementation and Unresolved Issues*, *supra* note 5, at 11.

80. Arkles, *supra* note 6, at 805–06.

81. 28 C.F.R. § 115.401(a) (2020).

82. 28 C.F.R. § 115.15(b) (2019) (“As of August 20, 2015, or August 20, 2017 for a facility whose rated capacity does not exceed 50 inmates, the facility shall not permit cross-gender pat-down searches of female inmates, absent exigent circumstances.”).

83. *See also id.* § 115.313(c) (2019) (“Any facility that, as of the date of publication of this final rule, is not already obligated by law, regulation, or judicial consent decree to maintain the staffing ratios set forth in this paragraph shall have until October 1, 2017, to achieve compliance.”).

84. *See* Victoria López & Sandra Park, *ICE Detention Center Says It's Not Responsible for Staff's Sexual Abuse of Detainees*, ACLU (Nov. 6, 2018), <https://www.aclu.org/blog/immigrants-rights/immigrants-rights-and-detention/ice-detention-center-says-its-not-responsible> (criticizing the PREA standards for only applying to agencies that enter, renew, or modify contracts); *see also* Christy Carnegie Fujio, *No One Held In US Custody*

the Commission's recommendations to hold corrections agencies accountable for violating the standards is small compared to the power the corrections industry had in shaping the process and the standards.

## II. NEW ARTICULATIONS FOR THE STANDARD OF CARE IN PREVENTING, INVESTIGATING, AND PUNISHING SEXUAL ABUSE IN CUSTODY

The most important outcome of the PREA standards is the conversion of long-acknowledged best practices into “enforceable” standards. Five standards received the most attention before, during, and after their promulgation:<sup>85</sup> (1) youthful inmates;<sup>86</sup> (2) limits to cross-gender viewing and searches;<sup>87</sup> (3) evidence protocol and forensic medical examinations;<sup>88</sup> (4) inmate reporting;<sup>89</sup> and (5) inmate access to outside confidential support services.<sup>90</sup> This Part will examine the Youthful Inmate Standard, highlighting how the development and implementation of PREA standards have provided strength to the enforcement of standards of care in correctional settings.

The young, inexperienced prisoner, male, female, or non-binary, who enters adult prison or jail and is victimized or exploited is a well-known narrative of custodial settings.<sup>91</sup> As with most narratives, this comes from a place of truth.<sup>92</sup> Young people are vulnerable to abuse in any custodial setting, including in juvenile

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Should Be At Risk for Rape or Sexual Assault, PHYSICIANS FOR HUMAN RIGHTS (Dec. 9, 2011), <https://phr.org/resources/no-one-held-in-us-custody-should-be-at-risk-for-rape-or-sexual-assault/> (urging the DOJ to apply PREA standards to immigration centers). *But see* Derek Gilna, *Prison Rape Elimination Act Finally Extended to ICE Detention Facilities, But Not to Private or County Jails*, PRISON LEGAL NEWS (Apr. 13, 2017), <https://www.prisonlegalnews.org/news/2017/apr/13/prison-rape-elimination-act-finally-extended-ice-detention-facilities-not-private-or-county-jails/> (applauding, although with reservations, the extension of PREA standards to undocumented immigrants in ICE facilities); U.S. IMMIGRATION AND CUSTOMS ENF'T, PREA, <https://www.ice.gov/prea> (showing commitment to PREA compliance) (last updated Aug. 7, 2019).

85. 28 C.F.R. § 115 (2019) (containing 52 provisions that cover standards for prisons and jails, lockups, community confinement, and juvenile facilities, where each provision contains definitions and standards on prevention planning, responsive planning, training and education, screening, reporting, agency duties, investigations, discipline, medical and mental care, data collection and review, the auditing process, compliance, etc.).

86. *Id.* § 115.14.

87. *Id.* § 115.15.

88. *Id.* § 115.21.

89. *Id.* § 115.51.

90. *Id.* § 115.53.

91. Brenda V. Smith, *Boys, Rape, and Masculinity: Reclaiming Boys' Narratives of Sexual Violence in Custody*, 93 N.C. L. REV. 1559, 1565 (2015) [hereinafter *Boys, Rape, and Masculinity*] (stating that one assumption in the initial framing of PREA was that certain populations were more vulnerable to prison rape such as racial minorities, members of the LGBTQI community, and young people).

92. *See* Cindy Struckman-Johnson et al., *Sexual Coercion Reported by Men and Women in Prison*, 33 J. OF SEX RES. 67, 68 (1996) (concluding that few incarcerated youth are capable of escaping “the ‘epidemic’ of sexual assault in city jails”); Nancy Wolff et al., *Sexual Violence Inside Prisons: Rates of Victimization*, 83 J. OF URB. HEALTH: BULL. OF THE N.Y. ACAD. OF MED. 835, 836 (2006) (showing that, although there is a lot of variance on victimization rates across studies, there is a consensus that younger inmates face a greater risk of sexual victimization).

settings that are ostensibly designed for them.<sup>93</sup> The BJS has found that rates of victimization in juvenile settings are much higher than in any other setting.<sup>94</sup> There are a number of reasons for this. First, there is likely a stronger culture of reporting in juvenile settings as juvenile workers are mandatory reporters under state and federal law.<sup>95</sup> There is also ongoing oversight of juveniles in custody through periodic hearings before courts,<sup>96</sup> the involvement of social workers,<sup>97</sup> and oversight of juvenile agencies by legislators.<sup>98</sup> However, youth who were held in adult facilities, or youthful inmates, did not have access to the same types of protections as youth in the juvenile system prior to PREA.<sup>99</sup>

In fact, the Commission has stated that youthful inmates who are incarcerated with adults face the highest risk for sexual abuse.<sup>100</sup> Youthful inmates are caught

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93. See David Kaiser & Lovisa Stannow, *The Crisis of Juvenile Prison Rape: A New Report*, THE N.Y. REV. OF BOOKS (Jan. 7, 2010), <https://www.nybooks.com/daily/2010/01/07/the-crisis-of-juvenile-prison-rape-a-new-report/> (explaining that although youth tried as adults are probably more vulnerable to sexual assault, sexual victimization in juvenile facilities is so common that staff at a Juvenile Facility in Plainfield, Indiana created flowcharts to keep track of sexual assaults); Sara Medina, Comment, *Sexual Abuse of Juveniles in Correctional Facilities: A Violation of The Prison Rape Elimination Act*, 26 AM. U. J. GENDER, SOC. POL'Y & L. 947, 949–50 (2018) (asserting that, although juvenile detention rates decreased from 2007 to 2012, sexual abuse allegations against staff doubled in juvenile facilities and “the number of sexual assaults in correctional facilities continues to rise, especially in juvenile populations”); see RICHARD A MENDEL, MALTREATMENT OF YOUTH IN U.S. JUVENILE CORRECTIONS FACILITIES 3 (2015) (referring to sexual abuse in juvenile facilities as a “continuing national epidemic”); see also Chammah, *supra* note 48 (“There was an assumption from the beginning of PREA that we wanted to protect the vulnerable. . . [a]ge was a given. It’s the number one vulnerability.”).

94. Compare ALLEN J. BECK ET AL., U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN JUVENILE FACILITIES REPORTED BY YOUTH, 2012–9 (June 2013) (illustrating that about ten percent of youth in juvenile facilities reported one or more sexual victimization incidents in 2012), with RAMONA R. RANTALA, U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION REPORTED BY ADULT CORRECTIONAL AUTHORITIES, 2012–15 6 (2018) (concluding that only 4.49 adults per every 1,000 inmates (0.4%) alleged sexual victimization in 2012).

95. 28 C.F.R. § 115.361(a)–(b) (2019) (requiring all staff to report any knowledge, suspicion, or information about any sexual abuse or harassment incident that occurs in a facility, retaliation against those who reported an incident, and any neglect that may have contributed to an incident or retaliation, while juvenile facility staff must also comply with any applicable child abuse mandatory reporting laws); CHILDREN’S BUREAU, MANDATORY REPORTS OF CHILD ABUSE AND NEGLECT 2 (2015) (compiling a list of state mandatory reporting statutes that shows that, as of August 2015, 26 states either explicitly designated juvenile correctional staff as mandated reporters or required any person who has cause to believe sexual abuse occurred to report); see also Wis. Stat. § 48.981(2) (2018) (adding juvenile correctional officer to its list of mandatory reporters).

96. See Kathleen Michon, *Juvenile Delinquency: What Happens in a Juvenile Case?*, NOLO, <https://www.nolo.com/legal-encyclopedia/juvenile-delinquency-what-happens-typical-case-32223.html> (last visited Jan. 29, 2020) (“The judge may also order the juvenile to appear in court periodically (called post-disposition hearings) so that the judge can monitor the juvenile’s behavior and progress.”).

97. See generally Christina Reardon, *Juvenile Justice Journey – Social Work Role Returns in New Era of Reform*, 19(5) SOC. WORK TODAY 12 (Oct. 2019).

98. See generally Michele Deitch, *Independent Correctional Oversight Mechanisms Across the United States: A 50-State Inventory*, 30 PACE L. REV. 1754 (2010) (comparing the oversight of juvenile agencies by legislators across the 50 states).

99. See Chammah, *supra* note 48, at 14 (recounting youthful inmates’ stories of being housed and raped by adult cellmates and staff refusing to investigate the incidents, like when “John told the authorities about the assaults in late July, roughly three weeks before the standards took effect, so nobody was failing to abide by PREA when they did not investigate John’s allegations”).

100. NAT’L PRISON RAPE ELIMINATION COMM’N, *supra* note 4, at 18.



between the juvenile and adult systems. Up until 2007, it was commonplace for youth who had been waived for prosecution as adults to be housed in adult prisons and jails.<sup>101</sup> There are a hodgepodge of inconsistent practices among the states: offenses for which youth could be charged as adults; different ages at which youth could be waived for adult prosecution; different practices about where the youth were placed prior to achieving their majority; and the age of majority in each state.<sup>102</sup> Even prior to the passage of PREA, there was considerable advocacy at the state and federal level against the prosecution and imprisonment of youth as adults.<sup>103</sup> PREA's passage, however, elevated youth imprisonment as a target for reform.

Several witnesses testified in the hearings prior to PREA's passage about those who were imprisoned with adults as youth.<sup>104</sup> Linda Bruntmeyer, whose son died by suicide after being raped in custody, offered some of the most compelling testimony:

At sixteen, Rodney was a small guy, only 5'2 and about 125 pounds. And as a first-time offender, we knew he might be targeted by older, tougher, adult inmates. Then, our worst nightmares came true. Rodney wrote us a letter telling us he'd been raped . . . . But that was only the beginning. Rodney knew if he went back into the general population, he would be in danger. He wrote to the authorities requesting to be moved to a safer place. He went through all the proper channels, but he was denied.

After the first rape, he was returned to the general population. There, he was repeatedly beaten and forced to perform oral sex and raped. He wrote for help again. In his grievance letter he wrote, "I have been sexually and physically assaulted several times, by several inmates. I am afraid to go to sleep, to shower, and just about everything else. I am afraid that when I am doing these things, I might die at any minute. Please sir, help me."

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101. JUSTICE POL'Y INST., *RAISING THE AGE: SHIFTING TO A SAFER AND MORE EFFECTIVE JUVENILE JUSTICE SYSTEM* 4 (2017) (presenting statistics showing that since 2007, when many states began to raise the age limit, the number of youth excluded from juvenile court and facilities has been cut in half).

102. CARMEN E. DAUGHERTY, *CAMPAIGN FOR YOUTH JUSTICE, ZERO TOLERANCE: HOW STATES COMPLY WITH PREA'S YOUTHFUL INMATE STANDARD* 1 (2015) ("[S]tate laws vary widely as to the regulations and parameters for housing youth in adult prisons. In fact, some states have no regulations or parameters governing the treatment of youth sentenced as adults at all. While some states have fully removed youth from their prison systems—Hawaii, West Virginia, Maine, California, and Washington—the overwhelming majority of states allow youth to be housed in adult prisons. In fact, 37 states housed youth under 18 years of age in their state prisons in 2012.").

103. JULIE A. SCHUCK, *NAT'L RESEARCH COUNCIL, REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH* 41 (2013) ("Youth advocates persisted in promoting traditional policies, but in the 1990s researchers and major private foundations also began to challenge the wisdom of criminalizing juvenile justice. For example, the Annie E. Casey Foundation undertook a national program of alternatives to detention, and in the mid-1990s the John D. and Catherine T. MacArthur Foundation launched a 10-year research network to study differences between juveniles and adults relevant to justice policy.").

104. *NAT'L PRISON RAPE ELIMINATION COMM'N*, *supra* note 4, at 33–34 (describing the testimony of T.J. Parsell who was raped in an adult prison while he was seventeen).



Still, officials told him that he did not meet “emergency grievance criteria.” We all tried to get him to a safe place. I called the warden, trying to figure out what was going on. He said Rodney needed to grow up. He said, “This happens every day, learn to deal with it. It’s no big deal.”

We were desperate. Rodney started to violate rules so that he would be put in segregation. After he was finally put in segregation, we had about a ten-minute phone conversation. He was crying. He said, “Mom, I’m emotionally and mentally destroyed.”<sup>105</sup>

The Youthful Inmate Standard requires prisons and jails that detain youthful inmates to: (1) maintain sight, sound, and physical separation between adults and youth in housing units; (2) only permit contact between youth and adult inmates under direct staff supervision outside of the housing unit; and (3) make their best efforts to avoid isolating youth to achieve separation, and, absent exigent circumstances, provide youth with daily large muscle exercise, legally required special education services programming, and work opportunities.<sup>106</sup>

In addition to providing greater protection to youth already in adult settings, PREA decreased the number who were sent to adult prisons and jails in the first instance by giving valence to nationwide “Raise the Age” movements.<sup>107</sup> Facilities that failed to meet the sight, sound, and physical separation requirements as well as the restrictions on isolation have stopped housing youthful inmates or changed their laws to make the housing of youthful inmates more difficult.<sup>108</sup> For example, Oregon changed its laws to require the state’s Department of Corrections to transfer physical custody of youthful inmates to the Oregon Youth Authority if the youth could complete their sentence by age twenty-five or if the two agencies agreed that the youth should not be incarcerated in an adult facility.<sup>109</sup>

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105. See Linda Bruntmyer, Testimony before Senate Judiciary Committee (July 31, 2002), [https://www.judiciary.senate.gov/imo/media/doc/bruntmyer\\_testimony\\_07\\_31\\_02.pdf](https://www.judiciary.senate.gov/imo/media/doc/bruntmyer_testimony_07_31_02.pdf).

106. 28 C.F.R. § 115.14 (2019). The sight-sound separation requirement can first be found in the Juvenile Justice and Delinquency Prevention Act of 1974 (JJDP), which included the mandate that juveniles not be in any institutions where they would have sight or sound contact with adults convicted of criminal charges. See Pub. L. No. 93-415, 34 U.S.C. §§ 11101–11322 (2018); U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, OJJDP STATISTICAL BRIEFING BOOK: JJDP CORE REQUIREMENTS, [https://www.ojjdp.gov/ojstatbb/structure\\_process/qa04302.asp?qaDate=2013](https://www.ojjdp.gov/ojstatbb/structure_process/qa04302.asp?qaDate=2013) (last visited Jan. 29, 2020).

107. See JUSTICE POLICY INST., *supra* note 101, at 14 (“PREA has become a catalyst for raise the age initiatives by galvanizing stakeholder support for states to keep young people safer and avoid the increased taxpayer costs that would result from having to alter the physical structure of adult facilities to comply with federal law.”); MASS. DEP’T OF YOUTH SERVS., 2016 RAISE THE AGE REPORT (2016), <https://www.mass.gov/files/documents/2017/01/og/dys-raise-the-age-report-2016.pdf> (stating that raising the age has facilitated compliance with PREA and allowed Massachusetts to avoid costly construction and staffing changes).

108. JUSTICE POLICY INST., *supra* note 101, at 14 (listing states that have raised the age in recognition of PREA’s Youthful Inmate Standard such as Illinois, Louisiana, Massachusetts, and New Hampshire, as well as Texas, which has filed legislation to raise the age, “cit[ing] the need to keep young people safe and comply with PREA as reason to raise the age”).

109. DAUGHERTY, *supra* note 102, at 1. *But see*, OHIO REV. CODE ANN. §§ 2152.10, 2152.12 (West 2020).

Thus, the PREA standards were a victory for existing federal legislation, the Office of Juvenile Justice and Delinquency Prevention Act (“OJJDP”),<sup>110</sup> and for the efforts of the Juvenile Detention Alternatives Initiative (“JDAI”). Funded by the Annie E. Casey Foundation, JDAI had been pushing states to codify their standards and practices for protecting and improving the conditions of juvenile detention.<sup>111</sup> Having the OJJDP standards and JDAI recommendations codified as the PREA standards achieved the codification of important safety protections for youth in adult custody. Furthermore, the inability to meet the standards gave additional life and credibility to advocacy efforts to raise the age that youth could be prosecuted as adults.<sup>112</sup> These groups played a vital role in crafting the PREA standards by staffing the Commission’s efforts,<sup>113</sup> testifying at hearings,<sup>114</sup> and commenting at various stages of the standards development process,<sup>115</sup> thereby holding the Commission and the DOJ accountable for their decisions.

The standards also accelerated movements to remove youth from adult prisons and jails.<sup>116</sup> In 2006, the BJS conducted research showing that 8,500 youth were

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110. 34 U.S.C. §§ 11101–11322 (2017) (aiming to prevent delinquency and improve the juvenile justice system through four core requirements: deinstitutionalization of status offenders, separation of juveniles from adults in secure facilities, removal of juveniles from adult jails and lockups, and addressing disproportionate minority contact).

111. See ANNIE E. CASEY FOUNDATION, JUVENILE DETENTION ALTERNATIVES INITIATIVE, <https://www.aecf.org/work/juvenile-justice/jdai/>; ANNIE E. CASEY FOUNDATION, JDAI AT 25: INSIGHTS FROM THE ANNUAL RESULTS REPORTS 1 (2017); UNLOCKING THE FUTURE: DETENTION REFORM IN THE JUVENILE JUSTICE SYSTEM – THE 2003 ANNUAL REPORT FROM THE COALITION FOR JUVENILE JUSTICE, COALITION FOR JUVENILE JUSTICE 4 (2003). It is important to note, however, that JDAI only focused on juvenile detention facilities, most at the local or county level, and not on post-adjudication juvenile facilities where sexual abuse of juveniles is most rampant.

112. Lindsey Linder, Texas Criminal Justice Coalition, Testimony 2017: HB 122, (2017), [https://www.texasjc.org/system/files/publications/HB%20122%20Testimony%20\(Raise%20the%20Age\)\\_1.pdf](https://www.texasjc.org/system/files/publications/HB%20122%20Testimony%20(Raise%20the%20Age)_1.pdf) (urging House Juvenile Justice & Family Issues committee to raise the age of juvenile jurisdiction to 18 years old to “better comply with the Prison Rape Elimination Act” and avoid potential violations and litigation); Prison Rape Elimination Act National Standards, *supra* note 27, at §115.14.

113. NAT’L PRISON RAPE ELIMINATION COMM’N, STANDARDS FOR THE PREVENTION, DETECTION, RESPONSE, AND MONITORING OF SEXUAL ABUSE IN ADULT PRISONS AND JAILS 81–85 (revealing that NPREC convened expert committees to provide guidance during the standards development process, which included personnel from Just Detention International, Detention Watch Network, Prisoners’ Rights Project, ACLU, and Justice Policy Institute, among others).

114. *Id.* at 2 (“The Commission held eight public hearings, during which more than 100 witnesses testified, including corrections leaders, survivors of sexual abuse in confinement, researchers, investigators, prosecutors, and advocates for victims and the incarcerated.”).

115. See Letter from Campaign for Youth Justice et al. to Eric Holder, U.S. Attorney General, Dep’t of Justice (April 4, 2011).

116. See ACT 4 JUVENILE JUSTICE, CORE PROTECTIONS: JAIL REMOVAL/SIGHT AND SOUND SEPARATION (2019) (“A little over half of the states and Washington, D.C. already permit youth charged as adults to be housed in juvenile facilities. There has been considerable movement in advancing these reforms at the state and local level over the past decade . . . . On October 1, 2018, 25 youth were moved to New Beginnings, a youth facility run by the Department of Youth Rehabilitative Services (DYRS) in Washington, D.C. . . . Since these young people have been transferred to New Beginnings, there have been no outbreaks of violence and, in line with national standards, the facility does not use pepper spray or restraints as a method of discipline.”). *But see* Maddy Troilo, *Locking Up Youth with Adults: An Update*, PRISON POLICY INITIATIVE (Feb. 27, 2018), <https://www.prisonpolicy.org/blog/2018/02/27/youth/> (noting that jurisdictions move young people in custody after they age out).

confined with adults in prisons and jails on any given day.<sup>117</sup> By the end of 2013, that number had decreased to only 1,200 youths.<sup>118</sup> Admittedly, while PREA standards contributed to this decline, the decrease resulted from a variety of other factors, including efforts to raise the age of criminal responsibility that preceded the enactment of PREA,<sup>119</sup> more aggressive enforcement of OJJDP standards on sight and sound separation of youth from adults in jails,<sup>120</sup> the fiscal and logistical impacts of sight and sound separation from adults,<sup>121</sup> the prohibition on using solitary confinement to meet the sight and sound separation requirement,<sup>122</sup> and high profile litigation related to the abuse of youthful inmates in adult prisons and jails.<sup>123</sup>

### III. LOWERING BARRIERS AND GIVING NEW LIFE TO EXISTING CONSTITUTIONAL AND STATE LAW CLAIMS

Given the conditions of confinement that people in custody in the United States face, there was no shortage of prison litigation prior to the passage of the Prison Litigation Reform Act (the “PLRA”) in 1995.<sup>124</sup> Over the years, federal and state

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117. NAT’L PRISON RAPE ELIMINATION COMM’N, *supra* note 4, at 18.

118. E. ANN CARSON, U.S. DEPT’ OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2013 19 (2014), <https://www.bjs.gov/content/pub/pdf/p13.pdf>.

119. JUSTICE POLICY INST., *supra* note 101.

120. Compare 28 C.F.R. § 115.14 (2019) (covering any person under 18, supervised by the adult court and incarcerated or detained in a prison or jail), with COAL. FOR JUVENILE JUSTICE, HISTORY OF THE JJDP, <http://www.juvjustice.org/federal-policy/juvenile-justice-and-delinquency-prevention-act> (ensuring “that accused and adjudicated delinquent, status offenders, and non-offending juveniles are not detained or confined in any institution where they may have contact with adult inmates”).

121. Jeree Thomas, *Is It Enough? The Implementation of PREA’s Youthful Inmate Standard*, THE CAMPAIGN FOR YOUTH JUSTICE (Sept. 4, 2018), <http://www.campaignforyouthjustice.org/2018/item/is-it-enough-the-implementation-of-prea-s-youthful-inmate-standard> (“Compliance with the Youthful Inmate Standard, is costly for many states, especially as states struggle to retain qualified correctional officers to staff these facilities. As a result, a growing number of states and localities are finding alternatives to adult facilities for youth.”).

122. AWAD ET AL., *supra* note 1, at 26 (reporting that state legislators in Virginia introduced legislation that would require the Board of Corrections to approve adult facilities that house youth after seven boys were placed in solitary confinement at Hampton Roads Regional Jail to avoid putting 100 beds out of commission to house the boys separately).

123. See generally *Poore v. Glanz*, 724 F. App’x 635, 638 (10th Cir. 2018) (ruling in favor of a 17-year-old girl who was housed in an adult facility and raped by a corrections officer because the female youthful inmates were housed in an isolated and unmonitored section of the facility staffed by only one male guard, which showed that the administration was deliberately indifferent to the vulnerabilities youthful inmates face); see also Michael Kunzelman, *Louisiana Teen Prisoner Raped by Inmate and Infected With HIV, Lawsuit Alleges*, CHI. TRIB. (Jan. 30, 2018), <https://www.chicagotribune.com/nation-world/ct-louisiana-prison-rape-hiv-lawsuit-20180130-story.html> (detailing lawsuit that made national headlines involving a teenager who filed suit against the East Baton Rouge Parish Prison after being raped by another inmate and contracting HIV).

124. *Woodford v. Ngo*, 548 U.S. 81, 84 (2006) (asserting that Congress enacted the Prison Litigation Reform Act because of “a sharp rise in prisoner litigation in the federal courts”); *Alexander v. Hawk*, 159 F.3d 1321, 1324–25 (11th Cir. 1998) (noting that Congress found that “the number of prisoner lawsuits ‘has grown astronomically—from 6,600 in 1975 to more than 39,000 in 1994’”); *Rivera v. Allin*, 144 F.3d 719, 727–28 (11th Cir. 1998) (concluding that prisoners file more frivolous lawsuits than any other class of persons); *Roller v. Gunn*, 107 F.3d 227, 230 (4th Cir. 1997) (citing statistics that show “[i]n 1995, prisoners brought over 25% of the civil cases filed in the federal district courts”).

officials have created barriers to litigation for people in custody.<sup>125</sup> The primary barrier to conditions of confinement litigation has been the PLRA.<sup>126</sup> Data from the Administrative Office of U.S. Courts reflect the role that the PLRA has played in diminishing prison litigation.<sup>127</sup> In 2018, the amount of inmate petitions filed for civil rights violations was 18,842, compared to 41,679 petitions filed in 1995, prior to passage of the PLRA.<sup>128</sup>

An initial barrier to the passage of PREA was whether the statute itself would create a new cause of action, thereby increasing the number of filings pertaining to conditions of confinement.<sup>129</sup> The legislation makes clear that PREA did not create a new cause of action.<sup>130</sup> So, claims of prisoner abuse that cite PREA as a separate cause of action end with dismissal, while claims involving the same conduct proceed under other available federal and state law bases.<sup>131</sup>

The PLRA requires prisoners, among other hurdles,<sup>132</sup> to: (a) exhaust administrative remedies prior to filing suit;<sup>133</sup> (b) avoid filing “frivolous cases;”<sup>134</sup> and (c) show physical injury resulting from conditions of confinement.<sup>135</sup> While PREA

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125. Rachel Poser, *Why It's Nearly Impossible for Prisoners to Sue Prisons*, NEW YORKER (May 30, 2016), <https://www.newyorker.com/news/news-desk/why-its-nearly-impossible-for-prisoners-to-sue-prisons> (“[T]he P.L.R.A. makes it nearly impossible for inmates to get a fair hearing in court.”).

126. *Id.* (“[T]he number of federal lawsuits by inmates against prisons has fallen by sixty per cent [sic] in the twenty years since the P.L.R.A.’s passage.”).

127. See generally Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 UC IRVINE L. REV. 153, 172 (2015) (using data from the Administrative Office of the U.S. Courts to analyze case filing, termination, and outcome figures).

128. U.S. COURTS, TABLE 4.4 U.S. DISTRICT COURTS—CIVIL CASES FILED, BY NATURE OF SUIT (Sep. 30, 2018), [https://www.uscourts.gov/sites/default/files/data\\_tables/jff\\_4.4\\_0930.2018.pdf](https://www.uscourts.gov/sites/default/files/data_tables/jff_4.4_0930.2018.pdf) (noting that the 2018 statistics are slightly down from the 2016 and 2017 statistics, but are still an increase from the statistics in 2000, 2005, and 2010).

129. *Implementation and Unresolved Issues*, *supra* note 5, at 11 (stating that PREA garnered bi-partisan support and was quickly passed in part because organizations such as the Human Rights Watch and Stop Prisoner Rape conceded a “private right of action” and neutralized fears that the legislation would cause more prison litigation).

130. *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) (asserting that Congress must create a private right of action either explicitly or implicitly and the court cannot create a private right of action without that intent); *Collen v. Yamaoka*, No. 14-00577 SOM/KSC, 2015 U.S. Dist. LEXIS 22322, at \*5 (D. Haw. Feb. 24, 2015) (“Absent specific congressional intent, no private right of action exists.”).

131. *Bennett v. Parker*, No. 3:17-cv-1176, 2017 U.S. Dist. LEXIS 169876, at \*5–6 (M.D. Tenn. Oct. 13, 2017) (dismissing plaintiff’s PREA claims because other district courts have asserted that the statute does not create a private cause of action); *Longoria v. Cty. of Dallas*, No. 3:14-CV-3111-L, 2017 WL 958605, at \*16 (N.D. Tex. Mar. 13, 2017) (dismissing plaintiff’s rape claims alleging that an officer raped her because the “claim based on . . . PREA is fundamentally flawed, as it is based on the faulty assumption that the standards established by PREA are mandatory requirements”); *Miller v. Griffith*, No. 4:16CV539 JAR, 2016 U.S. Dist. LEXIS 56507, at \*4–5 (E.D. Miss. Apr. 28, 2016) (dismissing plaintiff’s PREA sexual assault claims as legally frivolous).

132. 28 U.S.C. § 1915(b) (2018) (requiring payment of court filing fees in order to file suit).

133. 42 U.S.C. § 1997e(a) (2013).

134. 28 U.S.C. § 1915(g) (containing an exception for circumstances in which the inmate is in “imminent danger of serious physical injury”).

135. 42 U.S.C. § 1997e(e) (“No federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of

does not provide a separate cause of action, litigants and courts are using it to determine whether the PLRA provisions are being met.

### A. *Exhaustion of Administrative Remedies*

Under the PLRA, the failure to exhaust administrative remedies is an affirmative defense, such that a prisoner stating a claim need not prove exhaustion of their administrative remedies.<sup>136</sup> And while case law prior to the enactment of PREA provided that agencies could, with few exceptions, define what constitutes exhaustion in order to comply with PREA,<sup>137</sup> agency exhaustion requirements must mirror those in the PREA standards.<sup>138</sup> PREA provides that there is no time limit for submitting a grievance for sexual abuse.<sup>139</sup> So, agencies may not, for example, set a thirty or ninety-day time limit for filing a complaint about sexual abuse, then later plead that the prisoner's claim is precluded, and still comply with PREA.<sup>140</sup> The PREA standard provides the possibility that filing a report of abuse—no matter how distant from the actual incident that gave rise to the complaint—is sufficient to exhaust administrative remedies.<sup>141</sup> Some courts, however, have interpreted PREA as not covering incidents that occurred prior to the effective date of the standards.<sup>142</sup> For instance, in *Does 1-12 v. Michigan Dep't of Corrections*, retroactivity was at the core of the litigation because some of the plaintiffs' claims involved incidents occurring prior to the effective date of the standards, prompting their dismissal.<sup>143</sup> The district court ruled that plaintiffs who were abused prior to when the PREA grievance policy was implemented in the Michigan Department of

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physical injury or the commission of a sexual act.”); see Eleanor M. Levine, *Compensatory Damages Are Not for Everyone: Section 1997e(e) of the Prison Litigation Reform Act and the Overlooked Amendment*, 92 NOTRE DAME L. REV. 2203, 2205 (2017) (“[S]ome courts had interpreted § 1997e(e) to bar rape claims when the prisoner could not prove a physical injury.”); Jamie Fellner, *Ensuring Progress: Accountability Standards Recommended by the National Prison Rape Elimination Commission*, 30 PACE L. REV. 1625, 1644 (2010) (“That requirement fails to take into account the very real emotional and psychological injuries that often follow sexual assault, and it has been perversely interpreted by at least a few courts that concluded sexual assault alone does not constitute a ‘physical injury.’”).

136. *Brown v. Croak*, 312 F.3d 109, 111 (3d Cir. 2002) (“Failure to exhaust administrative remedies is an affirmative defense that must be pled and proven by the defendant.”).

137. Karen M. Harkins Slocomb, Case Note, *How the Court Got It Wrong in Woodford v. Ngo by Saying No to Simple Administrative Exhaustion Under the PLRA*, 44 SAN DIEGO L. REV. 387, 390 n.10 (2007) (“The Court does not offer a brightline definition of ‘critical procedural rules,’ and its holding leaves administrative procedure to the discretion of the individual prisons.”).

138. 28 C.F.R. § 115.52 (2019).

139. *Id.* § 115.52(b)(1) (providing that “[t]he agency shall not impose a time limit on when an inmate may submit a grievance regarding an allegation of sexual abuse”).

140. *Id.*

141. *Id.*

142. See *Payton v. Thompson*, No. 2:13-cv-92-DPM-JJV, 2015 WL 252277, at \*4–5 (E.D. Ark. Jan 20, 2015) (rejecting PREA application to an assault that occurred on July 2, 2012); *Wakeley v. Giroux*, No. 1:12-CV-2610, 2014 WL 1515681, at \*4 (M.D. Pa. Apr. 15, 2014) (rejecting application of PREA to assault that occurred in March 2011).

143. *Does 1–12 v. Mich. Dep't of Corr.*, No. 13-14356, 2018 WL 5786199, at \*7 (E.D. Mich. Nov. 5, 2018).

Corrections (“MDOC”) did not timely exhaust administrative remedies and that the new PREA grievance policy was not retroactive.<sup>144</sup>

While the district court was deciding the motion for summary judgment with regard to plaintiffs Does 1-6, plaintiffs Does 8-10 separately appealed the district court’s grant of summary judgment in a separate action.<sup>145</sup> The Sixth Circuit Court of Appeals reversed the district court’s decision on December 18, 2019, stating that MDOC’s PREA administrative remedies process was so convoluted as to be unavailable to exhaust.<sup>146</sup> The appellate court based its decision on MDOC’s decision to route the plaintiff’s grievances under its convoluted PREA administrative remedies process, even though the sexual abuse allegations occurred before it adopted a PREA grievance procedure in April 2016.<sup>147</sup>

Courts are accepting that PREA standards provide multiple ways of reporting sexual abuse complaints beyond official grievance procedures, and these alternative methods of reporting may be considered exhaustion of administrative remedies under the PLRA. For example, in *Williams v. Phillips*, the plaintiff filed suit pursuant to 42 U.S.C. § 1983 alleging violation of his Eighth Amendment rights.<sup>148</sup> The plaintiff claimed that two police officers sexually assaulted and harassed him. The officers moved for dismissal for failure to exhaust all administrative remedies.<sup>149</sup> The court analyzed PREA and found that because the plaintiff alleged that he reported the allegations of abuse and harassment by one of the officers to a staff member—which is consistent with the available reporting options under PREA—the motion to dismiss should be denied.<sup>150</sup> Reaching this result would recognize that prisoners, even more than other victims, need multiple avenues to report abuse, and that the impact of trauma and fear of further victimization is as real for victims in prison as for those in the community.

### B. *Frivolous Claims*

The PLRA’s frivolous claim provision aims to deter incarcerated individuals from filing these claims by imposing a “three strike rule” for inmates bringing a

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144. *Id.* at \*9 (“MDOC did not adopt a set of PREA grievance procedures until April 2016. Before these policies were effective, then, MDOC’s formal grievance procedure applied.”). Summary judgment was granted as to plaintiffs Doe 1, 2, 5, and 6 for this reason. *Id.* CIVIL RIGHTS LITIGATION CLEARINGHOUSE, UNIV. OF MICH. L. SCHOOL, <https://www.clearinghouse.net/detail.php?id=14925>. At the time of this writing, other plaintiffs’ claims are still being litigated in district court.

145. *Does 8–10 v. Snyder*, 945 F.3d 951, 961 (6th Cir. 2019).

146. *Id.* at 965. Unavailability of administrative remedies applied to Does 8 and 10. Doe 9 feared retaliation, so they did not file for an administrative remedy that likely would not have been available as well. *Id.* at 966–67.

147. *Id.* at 962. While the court states that “an inmate’s *failure to exhaust* can no longer result from an untimely grievance if that grievance involved an allegation of sexual abuse,” it did not reach the issue of whether PREA’s prohibition on agency time limits for grieving allegations of sexual abuse applied to John Does 8–10’s complaints. *Id.* at 956.

148. *Williams v. Phillips*, No. 2:17-cv-04291, 2018 WL 1887462, at \*1 (E.D. Pa. Apr. 20, 2018).

149. *Id.* at \*1.

150. *Id.* at \*5.



civil suit action or an appeal in federal court.<sup>151</sup> Specifically, unless the inmate is under “imminent danger of serious physical injury,” they may not file a civil action or an appeal to a civil judgment if they have brought civil actions or appeals that were dismissed for being frivolous, malicious, or failing to state a claim for which relief could be granted on three or more prior occasions.<sup>152</sup> Although the PLRA intended to decrease the number of frivolous lawsuits brought by inmates, instead it has “greatly undermined the crucial oversight role played by courts in addressing sexual assault and other constitutional violations in corrections facilities” by removing the courts from the process.<sup>153</sup>

An inmate who has filed three or more lawsuits that have been dismissed for any of the aforementioned reasons will lose *in forma pauperis* status and have to pay the full filing fee, which can range from \$350 to \$450, if they wish to file a claim in the future.<sup>154</sup> This provision does not account for how much time has passed between the prior frivolous claims or the current claim’s merit.<sup>155</sup> Most importantly, the provision does not consider the significant hurdles that individuals alleging sexual assault of any kind face in being believed.<sup>156</sup> Undoubtedly, the filing fee imposes an additional barrier for many inmates and diminishes agency responsibility to address sexual violence that inmates experience.<sup>157</sup>

Courts often set a low hurdle for determining that a claim is frivolous. For example, in *Lumpkin v. Salt*, the court issued a strike to the plaintiff under the PLRA when the plaintiff filed suit after corrections officers cut off all of his clothing in the middle of booking him, exposing him to other inmates and female staff.<sup>158</sup> The court granted defendants’ request to issue a strike because there were no constitutional violations, and because video surveillance showed there were no other inmates in the area of the room at the time his clothes were cut off.<sup>159</sup> Similarly, in *Sublett v. McAlister*, the court ruled against a plaintiff who filed suit after he

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151. 28 U.S.C § 1915(g) (2018).

152. *Id.*

153. JUST DETENTION INT’L, THE PRISON LITIGATION REFORM ACT OBSTRUCTS JUSTICE FOR SURVIVORS OF SEXUAL ABUSE IN DETENTION 1 (2009), <https://justdetention.org/wp-content/uploads/2015/10/FS-The-Prison-Litigation-Reform-Act-Obstructs-Justice-for-Survivors-of-Sexual-Abuse-in-Detention.pdf>.

154. *Id.* at 1–2.

155. *Id.* at 2.

156. According to BJS data, “nearly half of prisoner rape survivors who did not report the abuse were afraid they would not be believed.” JUST DETENTION INT’L, HOPE BEHIND BARS: AN ADVOCATE’S GUIDE TO HELPING SURVIVORS OF SEXUAL ABUSE IN DETENTION 10 (2014). Also, nearly one half of those who reported staff-on-inmate sexual abuse and nearly one third reporting inmate-on-inmate sexual abuse were disciplined. *Id.* Those reporting sexual abuse are also likely moved to solitary confinement. *Id.*

157. Broc Gullett, *Eliminating Standard Pleading Forms that Require Prisoners to Allege Their Exhaustion of Administrative Remedies*, 2015 MICH. ST. L. REV. 1179, 1190 (2015) (“Therefore, if a prisoner has thrice had claims dismissed because they are frivolous, malicious, fail to state a claim, or seek monetary relief from someone who is immune from such relief, then a prisoner will be ineligible for IFP Status and will therefore have no access to the courts if he cannot afford to pay a filing fee.”).

158. See *Lumpkin v. Salt*, No. C18-330-RSM-JPD, 2019 WL 1522000, at \*1 (W.D. Wash. Jan. 16, 2019).

159. *Id.* at \*6. The court found no constitutional violations, as the court believed the officers acted reasonably to ensure the safety of the jail staff and prevent contraband from entering the institution. *Id.* at \*4–6.



observed a female prison guard staring into the men's showers because he was fully clothed when the action occurred and no other sexual misconduct occurred.<sup>160</sup> The court found this claim to be frivolous because the plaintiff was not engaged in constitutionally protected conduct.<sup>161</sup>

The strikes in such cases reflect the court's frustration with *pro se* prison litigation and its preference that lawyers curate more serious claims of abuse.<sup>162</sup> While this approach increases judicial efficiency, it has worsened the state of prisons. Thus, matters that come to the court's attention are often deeper and more serious problems that might have been remedied had the court intervened sooner at the behest of *pro se* litigants.<sup>163</sup>

### C. Physical Injury

While PREA is explicit that it does not create any new causes of action, it does give weight to prisoner claims that rape is a serious injury that violates the Eighth Amendment prohibition against cruel and unusual punishment.<sup>164</sup> The PLRA removed the ability of plaintiffs to file for damages for mental anguish without first showing physical injury or sexual assault.<sup>165</sup> Rape is, therefore, the kind of serious injury that is not precluded by the PLRA.<sup>166</sup> PREA has since provided standards that aid in the detection, reporting, and preservation of physical evidence in support of sexual assault claims.

One of the most hotly contested issues is whether rape is a *per se* physical injury.<sup>167</sup> Although PREA seems to have laid that issue to rest, courts still require

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160. *Sublett v. McAlister*, No. 5:16-CV-00138-TBR, 2018 U.S. Dist. LEXIS 216714, at \*1 (W.D. Ky. Dec. 27, 2018).

161. *Id.* at \*6.

162. See Jonathan D. Rosenbloom, *Exploring Methods to Improve Management and Fairness in Pro Se Cases: A Study of the Pro Se Docket in the Southern District of New York*, 30 *FORDHAM URB. L.J.* 305, 306–307 (2002) (describing courts' and court staff's frustration in dealing with *pro se* litigants); *id.* at 314, n.38 (“[T]he PLRA ‘will help bring relief to a civil justice system overburdened by frivolous prisoner lawsuits . . . .’”) (quoting Sen. Hatch on PLRA, 141 *CONG. REC.* S14611-01, S14626-27 (daily ed. Sept. 29, 1995)).

163. *Id.* at 335. (“The percentage of granted/meritorious applications has decreased, implying that the PLRA has deterred not only frivolous cases, but also cases with enough merit to warrant the granting of counsel.”).

164. U.S. Const. amend. VIII.

165. Rosenbloom, *supra* note 162, at 314; 42 U.S.C. § 1997(e) (2018) (“No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act.”).

166. See *Alexander v. Sandoval*, 532 U.S. 275, 291 (2003) (holding that, in the absence of explicit authorization by Congress, no private right of action is created simply by statute); *Chao v. Ballista*, 772 F. Supp. 2d 337, 341 n.2 (D. Mass. 2011) (citing that every court that has dealt with the issue has decided that PREA does not create a private cause of action); see also 42 U.S.C. § 15602(3), (7) (describing the purposes of PREA to prevent and punish prison rape and protect the Eighth Amendment Rights of prisoners); Kate Walsh, *Inadequate Access: Reforming Reproductive Health Care Policies for Women Incarcerated in New York State Correctional Facilities*, 50 *COLUM. J.L. & SOC. PROBS.* 45, 70 (2016) (arguing that, despite PREA lacking a private right of action provision, litigants can use PREA noncompliance to argue that facilities are failing to meet constitutional obligations).

167. Deborah M. Golden, *It's Not All in My Head: The Harm of Rape and the Prison Litigation Reform Act*, 11 *CARDOZO WOMEN'S L.J.* 37, 45 (2004) (concluding that the question of whether rape in and of itself is a

plaintiffs, even in sexual assault cases, to allege actual physical injuries such as bruises and tearing.<sup>168</sup> Litigants receive resistance from the courts if they are not able to prove that their allegations resulted in a physical injury. Many courts have held that mere verbal harassment of a sexual nature does not violate the Eighth Amendment.<sup>169</sup> For example, in *Gipson v. West Valley Detention Risk Management*, the court ruled against the plaintiff after two officers “groped and made sexual comments about his buttocks.”<sup>170</sup> The court dismissed the plaintiff’s Eighth Amendment claims on the grounds that mere sexual commentary does not rise to a constitutional violation.<sup>171</sup> Likewise, many courts have held that a single isolated incident of sexual assault that does not result in physical injury also does not constitute cruel and unusual punishment.<sup>172</sup> Although PREA helps plaintiffs by emphasizing that rape is a serious injury, litigants must still show that they suffered from a physical injury as a result of the sexual assault.

In sum, while PREA did not create a new cause of action, it signaled to prisoners and their counsel that sexual victimization of people in custody were serious matters that the court would examine more carefully. PREA also put correctional agencies on notice that it would look more carefully at whether their practices, particularly those related to complaining about victimization, affected inmate safety. Finally, PREA seems to have settled the issue that courts should view sexual victimization as a serious physical injury that can give rise to a cause of action and a remedy.

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physical injury is one that remains open and describing how some courts have said that the rape in a respective case is a physical injury without providing when rape constitutes a physical injury).

168. See generally 28 C.F.R. § 115.6 (2019) (defining sexual abuse and harassment without requiring any physical injury).

169. See *Thomas v. Gore*, No. 3:18-CV-1929-GPC-MDD, 2019 U.S. Dist. LEXIS 30591, at \*4 (S.D. Cal. Feb. 26, 2019) (holding that the deputy calling plaintiff “baby” or “black king” did not violate the Eighth Amendment); *Brown v. Cronin*, No. 17-CV-74-FPG, 2019 WL 635578, at \*3 (W.D.N.Y. Feb. 14, 2019) (holding that an officer’s threatening remarks to penetrate the plaintiff on several occasions does not alone violate the Eighth Amendment); *Anderson v. Silva*, No. 1:18-cv-01612-BAM (PC), 2019 WL 484191, at \*3 (E.D. Cal. Feb. 7, 2019) (holding mere verbal harassment does not arise to an Eighth Amendment violation); *Collins v. Diocese of Sacramento*, No. 2:17-cv-2307 MCE CKD P, 2019 WL 95454, at \*3 (E.D. Cal. Jan. 3, 2019) (holding that priest who was placed within the prison system did not violate the constitution by using sexually abusive language towards the plaintiff).

170. *Gipson v. W. Valley Det. Risk Mgmt.*, No. EDCV 19-197-DDP (KK), 2019 U.S. Dist. LEXIS 23677, at \*1 (C.D. Cal. Feb. 13, 2019).

171. *Id.* at \*3–4.

172. See *Fletcher v. O’Bryan*, No. 5:17cv146-MCR-CJK, 2019 WL 573179, at \*5 (N.D. Fla. Jan. 25, 2019) (dismissing the plaintiff’s PREA claims that officer was observing him taking a shower through video surveillance because the isolated incident was not serious enough to give rise to a constitutional violation); see also *Booth v. Comm’r of Corr.*, No. 3:19-cv-100 (MPS), 2019 U.S. Dist. LEXIS 28942, at \*4 (D. Conn. Feb. 25, 2019) (finding no Eighth Amendment violation where an officer watched inmates in the shower area on only one occasion); *Sarvey v. Wetzel*, No. 1:16-cv-00157 (Erie), 2019 U.S. Dist. LEXIS 7595, at \*4 (W.D. Pa. Jan. 16, 2019) (granting summary judgment to defendants because female inmate who was groped, forcibly kissed, and digitally penetrated by an officer inside an elevator failed to provide evidence of a physical injury among other reasons).

#### IV. LITIGATION INTERPRETING PREA

Despite the litigation barriers imbedded at the core of the PLRA, litigants have attempted to use PREA as an additional source of relief for sexual abuse in custody. A review of 286 cases decided between March 2017 and June 2019 provide a snapshot of how the courts are interpreting PREA.<sup>173</sup> Of the 286 cases reviewed, 111 included claims of sexual abuse and harassment by other inmates or prisoner officials.<sup>174</sup> In almost a third of the cases, prisoners made specific claims related to violations of PREA.<sup>175</sup> Of these 286 cases, courts dismissed approximately twenty percent for failure to exhaust all administrative remedies.<sup>176</sup> Importantly, LGBTQI people in custody raised fifteen percent of these claims.<sup>177</sup>

While the courts have been clear that PREA does not create a separate cause of action that gives rise to relief,<sup>178</sup> courts are willing to use violations of the PREA standards to support Eighth Amendment and state and federal tort claims raised by incarcerated victims.<sup>179</sup>

##### A. *Cases Attempting to Use PREA as a Separate Cause of Action Have Not Succeeded*

After the standards became final, initial cases sought to use PREA as a separate cause of action, despite the fact that the Act did not create a new cause of action.<sup>180</sup> In *Longoria v. County of Dallas*, a female prisoner claimed that an officer violated PREA by escorting her out of her cell to a mattress room in the infirmary and raping her.<sup>181</sup> The defendant officer alleged that the sex was consensual.<sup>182</sup> The court dismissed the plaintiff's claims of inadequate training and deliberate indifference stating, "[t]he plaintiff's claims based on PREA are fundamentally flawed, as it is based on the faulty assumption that the standards established by PREA are mandatory requirements."<sup>183</sup> The court did, however, allow the plaintiff to proceed on a state tort claim and a 42 U.S.C. § 1983 claim, under which she ultimately prevailed.<sup>184</sup>

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173. This data was collected as part of an ongoing project to document how courts are interpreting the Prison Rape Elimination Act. The details of this research are detailed in a PowerPoint, *The Evolution of PREA: Case and Currents*, (June 19, 2019) (on file with author).

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Longoria v. Cty. of Dallas*, No. 3:14-CV-3111-L, 2017 WL 958605, at \*180 (N.D. Tex. Mar. 13, 2017).

179. *Id.*

180. See *Implementation and Unresolved Issues*, *supra* note 5, at 11, n.120 (stating that PREA garnered bipartisan support and was quickly passed in part because organizations such as the Human Rights Watch and Stop Prisoner Rape conceded a "private right of action" and neutralizing fears that the legislation would cause more prison litigation).

181. *Longoria*, 2017 WL 958605, at \*17.

182. *Id.* at 1.

183. *Id.*

184. *Id.*; see also *Longoria v. Cty. of Dallas, Texas*, No. 3:14-CV-3111-L, 2018 WL 339311 (N.D. Tex. Jan. 9, 2018).

In another case, *Bennett v. Parker*, the plaintiff alleged that the defendant warden raped him several times and made the plaintiff perform oral sex on him nine times.<sup>185</sup> While the court allowed the plaintiff's Eighth Amendment claims to proceed, it dismissed the PREA claims as "several district courts recognized that this statute does not create a private cause of action."<sup>186</sup>

In *Moore v. Jordan*, the plaintiff filed a 42 U.S.C. § 1983 action and pled a violation of PREA that the defendant and its employees violated the Eighth Amendment by failing to protect him from physical and sexual assault by another inmate.<sup>187</sup> The court ruled that the plaintiff's PREA claim was not cognizable, stating, "[n]othing in the PREA suggests that Congress intended to create a private right of action for prisoners to sue for non-compliance."<sup>188</sup>

In *Zollicoffer v. Livingston*, the plaintiff filed a 42 U.S.C. § 1983 complaint alleging that the defendants had violated her Eighth Amendment rights and PREA.<sup>189</sup> The plaintiff, a transgender woman, claimed that since being incarcerated twelve years ago, she had been repeatedly raped, forced into non-consensual sexual relationships, and assaulted by other inmates, with no action taken by staff after she repeatedly reported incidents.<sup>190</sup> The court announced that it would not address PREA in this case, as other courts have held that PREA does not establish a private right of action and is not relevant where the inmate has alleged Eighth Amendment violations.<sup>191</sup> Instead, the court allowed all Eighth Amendment claims to proceed, stating, "Plaintiff was sentenced to serve time in prison. She was not sentenced to be raped and assaulted by her fellow inmates."<sup>192</sup>

Thus, the case law is clear that PREA does not create a private right of action and that courts will dismiss claims directly pleading a violation of PREA. At the same time, courts will use the conduct claimed to be a violation of PREA to frame traditional constitutional claims of abuse in custody.

### B. PREA's Contribution to the Eighth Amendment Analysis

As exhibited in the above cases where PREA was rejected as a private cause of action, PREA seems to have made the most impact in buttressing prisoners' Eighth Amendment constitutional claims. In *Hayes v. Dahlke*, the court cited PREA as part of its articulation of "evolving standards of decency."<sup>193</sup> In *Hayes*, a transgender inmate filed suit under 42 U.S.C. § 1983 alleging violations of his First and Eighth Amendment rights, claiming that an officer sexually assaulted him during a

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185. *Bennett v. Parker*, No. 3:17-cv-1176, 2017 U.S. Dist. LEXIS 169876, at \*3 (M.D. Tenn. Oct. 13, 2017).

186. *Id.* at \*6.

187. *Moore v. Jordan*, No. TDC-16-1741, 2017 WL 3671167, at \*1 (D. Md. Aug. 23, 2017).

188. *Id.* at \*7.

189. *Zollicoffer v. Livingston*, 169 F. Supp. 3d 687, 689 (S.D. Tex. 2016).

190. *Id.*

191. *Id.* at 692, n.14.

192. *Id.* at 700.

193. *Hayes v. Dahlke*, No. 9:16-CV-1368, 2017 WL 9511178, at \*5 (N.D.N.Y. Oct. 30, 2017).

pat-frisk and sexually harassed him saying, “[d]o you consider yourself a male or female” and other disparaging remarks on multiple occasions.<sup>194</sup> As a result of filing the PREA complaint, defendants placed the plaintiff in solitary confinement and reprimanded the plaintiff for “falsely report[ing] incidents of sexual abuse.”<sup>195</sup> The court examined the Eighth Amendment claims “by looking beyond historical conceptions to the evolving standards of decency that mark the progress of a maturing society,” and referenced PREA in its analysis.<sup>196</sup> The court allowed the plaintiff’s Eighth Amendment claims and First Amendment retaliation claims against the defendant officer to proceed.<sup>197</sup>

As the courts have struggled to find their footing in interpreting PREA, they have bootstrapped retaliatory conduct from corrections officials into proof of the valence of prisoners’ Eighth Amendment claims. In *Landau v. Lamas*, the court denied the correctional defendants’ motion for summary judgment because the plaintiff averred that a defendant correctional officer threatened to file a false report against him if he filed a PREA complaint that she sexually abused him.<sup>198</sup> The court dismissed the motion for summary judgment, as it was unclear what remedies were available to the plaintiff because of defendant’s convoluted grievance and PREA reporting procedures. Also, the allegation of retaliatory threats prevented plaintiff from making a PREA report.<sup>199</sup>

Thus, PREA has been interpreted by the court as reflecting “evolving standards of decency” which in turn support applying the Eighth Amendment prohibition against cruel and unusual punishment.<sup>200</sup> Courts recognize that sexual victimization in custody by either staff or other inmates violates the Eighth Amendment. Additionally, though not a separate cause of action, courts have used correctional agencies’ actions in suppressing plaintiffs’ reports as additional evidence to support the existence of a constitutional violation.

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194. *Id.* at \*1.

195. *Id.* at \*2.

196. *Id.* at \*5.

197. *Id.* at \*11.

198. *Landau v. Lamas*, No. 3:15-CV-1327, 2018 WL 8950127, at \*9 (M.D. Pa. Oct. 11, 2018). The plaintiff prisoner filed suit pursuant to 42 U.S.C. § 1983. *Id.* at \*22. The plaintiff claimed that a female defendant officer sexually abused him and that other defendant officers knew about her conduct and failed to prevent it. *Id.* at \*9. The plaintiff further alleged that the defendant officer deterred him from submitting a PREA report by threatening to make false reports to prison officials regarding his sexual conduct as disciplinary matters. *Id.*

199. *Id.* at \*22; see also *Fontano v. Godinez*, where the court denied a motion for summary judgment where an officer and warden allegedly retaliated against plaintiff for reporting rape by punishing him with solitary confinement. No. 3:12-CV-03042, 2012 U.S. Dist. LEXIS 89061 (C.D. Ill., Mar. 28, 2016). The Illinois Department of Corrections settled the case for \$450,000 six months after this motion was denied. Press Release, Roderick and Solange MacArthur Justice Center, Settlement Reached in Lawsuit Alleging Illinois Prison Officials Retaliated Against Victim of Prison Rape, (Sept. 2, 2016) (on file with Northwestern University Pritzker School of Law).

200. *Hayes*, 2017 WL 9511178, at \*5, (quoting *Graham v. Florida*, 560 U.S. 48, 58 (2010), which cites “evolving standards of decency” dicta in *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)).

## V. EXTENDING CIVIL RIGHTS AND SERVICES TO INCARCERATED PERSONS

Though sexual assault in custody is objectively serious enough to result in a constitutional violation, only recently have individuals who have been sexually assaulted in custody had access to the services that survivors in the community receive.<sup>201</sup> PREA advanced that movement by creating access to sexual assault services such as Sexual Assault Nurse Examiners' examinations for incarcerated victims of sexual assault.<sup>202</sup> PREA also waded into the contentious area of cross-gender supervision, prohibiting cross-gender viewing and searches of women in custody and limiting cross-gender viewing of male inmates while nude.<sup>203</sup> The PREA standards also took steps to address the vulnerability of LGBTQI people in custody by setting standards for searches, housing, and protection from abuse.<sup>204</sup>

### A. *Sexual Assault Services for People in Custody*

Another provision in PREA provides that upon a complaint of sexual assault, agencies must provide access to appropriate sexual assault services, including access to sexual assault nurse examiners and forensic examinations.<sup>205</sup> While

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201. See 28 C.F.R. § 115.21(d)–(e) (2019) (requiring access to rape crisis center or other community victim advocate).

202. See 24 C.F.R. § 115.21(c) (providing access to forensic medical examinations).

203. See *id.* § 115.15(d) (establishing limits to cross-gender viewing and searches).

204. See *id.* § 115.15(e) (prohibiting examinations to determine genital status); *id.* § 115.15(f) (requiring staff training to professionally and respectfully conduct pat-down searches); *id.* § 115.42 (allowing use of screening information to ensure inmates' health and safety).

205. See 28 C.F.R. § 115.21(c)–(e). This subsection provides that:

(c) The agency shall offer all victims of sexual abuse access to forensic medical examinations, whether on-site or at an outside facility, without financial cost, where evidentiarily or medically appropriate. Such examinations shall be performed by Sexual Assault Forensic Examiners (SAFEs) or Sexual Assault Nurse Examiners (SANEs) where possible. If SAFEs or SANEs cannot be made available, the examination can be performed by other qualified medical practitioners. The agency shall document its efforts to provide SAFEs or SANEs.

(d) The agency shall attempt to make available to the victim a victim advocate from a rape crisis center. If a rape crisis center is not available to provide victim advocate services, the agency shall make available to provide these services a qualified staff member from a community-based organization, or a qualified agency staff member. Agencies shall document efforts to secure services from rape crisis centers. For the purpose of this standard, a rape crisis center refers to an entity that provides intervention and related assistance, such as the services specified in 42 U.S.C. 14043g(b)(2)(C), to victims of sexual assault of all ages. The agency may utilize a rape crisis center that is part of a governmental unit as long as the center is not part of the criminal justice system (such as a law enforcement agency) and offers a comparable level of confidentiality as a nongovernmental entity that provides similar victim services.

(e) As requested by the victim, the victim advocate, qualified agency staff member, or qualified community-based organization staff member shall accompany and support the victim through the forensic medical examination process and investigatory interviews and shall provide emotional support, crisis intervention, information, and referrals.



seemingly non-controversial, in the context of the history of the Violence Against Women Act (“VAWA”), this provision pushes a long debate about the provision of sexual assault services to men and to people in custody. When VAWA initially passed in 1994, it specifically excluded men and people in custody from receiving services.<sup>206</sup> The name of the Act itself refers to women only, and the Act addresses crimes for which women are the highest at risk of victimization, including domestic violence, sexual assault, and stalking.<sup>207</sup> VAWA provides programs and grants to coordinate criminal justice and community services for victims of crime and for prevention.<sup>208</sup> The Office on Violence Against Women administers most of VAWA’s programs and grants.<sup>209</sup>

When VAWA and the Victims of Crime Act (“VOCA”)<sup>210</sup> were passed in 1994 and 1984, respectively, individuals who were victimized while in custody could not utilize services funded under the acts.<sup>211</sup> While the incidence of sexual victimization while in custody was a well-known problem,<sup>212</sup> victims in custody were precluded from some of the largest funding sources for victim services. This exclusion was premised on the view that the most pressing problem was violence against women.<sup>213</sup> VAWA did not include services for incarcerated persons, and VOCA specifically precluded funding for anyone in custody because of the fear that funds for services for women would be diverted to programs for imprisoned batterers.<sup>214</sup> This exclusion had the effect of also limiting services for battered women in custody.<sup>215</sup>

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206. See generally, Violence Against Women Act of 1994, Pub. L. No. 103-322, §§ 40001–40703, 108 Stat. 1796 (1994).

207. See CONG. RESEARCH SERV., R45410, THE VIOLENCE AGAINST WOMEN ACT (VAWA): HISTORICAL OVERVIEW, FUNDING, AND REAUTHORIZATION 5 (Apr. 23, 2019).

208. *Id.* at 12.

209. *Id.* at 4.

210. See CONG. RESEARCH SERV., THE CRIME VICTIMS FUND: FEDERAL SUPPORT FOR VICTIMS OF CRIME 1 (June 1, 2017). The Victims of Crime Act of 1984 provides funding to states for victim compensation and assistance through the Crime Victims Fund. *Id.*

211. See generally §§ 40001–40703 (omitting incarcerated persons in the Act); see also Victims of Crime Act (VOCA) Victim Assistance Grant Program, 67 Fed. Reg. 56,457 (Sept. 3, 2002) (“VOCA funds cannot support services to incarcerated individuals, even when the service pertains to the victimization of that individual.”).

212. See *Farmer v. Brennan*, 511 U.S. 825, 833–34 (1994), which was decided in the same year that VAWA was passed. Senator Edward Kennedy, in the 2002 Hearing on the Prison Rape Reduction Act, even quoted the *Farmer* decision, stating, “In 1994, the Supreme Court ruled that, ‘Being violently assaulted in prison is simply not part of the penalty that criminal offenders pay for their offenses against society.’” *Prison Rape Reduction Act of 2002: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 1 (2002) (“Nevertheless, we know that hundreds of thousands of inmates across the nation, not only convicted prisoners, but pre-trial detainees and immigration detainees, as well, are victims of sexual assault each year.”).

213. See HISTORICAL OVERVIEW, FUNDING, AND REAUTHORIZATION, *supra* note 207, at 2 (“The shortfalls of legal responses and the need for a change in attitudes toward violence against women were primary reasons cited for the passage of VAWA.”).

214. See Jaime M. Yarussi, *The Violence Against Women Act: Denying Needed Resources Based on Criminal History*, 3 CRIM. L. BRIEF 29, 31 (2008).

215. *Id.* The failure to include battered women in custody led several prominent organizations, including the National Women’s Law Center, to initially oppose the VAWA.



During the period before the 1999 to 2000 reauthorization of VAWA, Congress introduced a separate bill that would have covered individuals in custody, but which ultimately did not pass: The Prevention of Custodial Sexual Assault by Correction Staff Act of 1998.<sup>216</sup> Subsequently, Congress reauthorized VAWA without extending coverage to individuals in custody in 2000.<sup>217</sup> Similarly, Congress passed the 2005 VAWA reauthorization with no provision applying to individuals in custody, albeit adding a non-exclusivity provision, indicating that nothing in the Act should be construed as to exclude men from receiving any services related to domestic violence, dating violence, sexual assault, and stalking.<sup>218</sup>

In 2013, Congress replaced the non-exclusivity provision with a nondiscrimination provision stating that:

No person in the United States shall, on the basis of actual or perceived race, color, religion, national origin, sex, gender identity . . . , sexual orientation, or disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded . . . by [VAWA].<sup>219</sup>

Congress finally extended the application of VAWA to individuals victimized while in custody when it was reauthorized in 2013,<sup>220</sup> which was soon after the effective date of the PREA standards for the states.<sup>221</sup> Congress amended VAWA and allowed “the commission of a sexual act” as a ground for a federal prisoner to file a civil action against the federal government.<sup>222</sup> Additionally, to ensure funding under STOP grants, a provision was included for the purpose of “developing, enlarging, or strengthening programs addressing sexual assault against men, women, and youth in correctional and detention settings.”<sup>223</sup>

Previously, a restricted provision for VOCA funding implicitly precluded most individuals in custody from ever receiving services funded by VOCA.<sup>224</sup> However, in 2016, the restrictive provisions were changed to allow victim services agencies

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216. Yarussi, *supra* note 214, at 30–31.

217. *Id.* at 29.

218. Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960 (2005) (codified as amended at 42 U.S.C. § 40002(b)(8) (2018)).

219. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (2013) (codified as amended at 42 U.S.C. § 13925(13)(A) (2018)). In 2019, the House added a provision that governs reviews for compliance with the nondiscrimination requirements for Services, Training, Officers, and Prosecutors (STOP) Grants under the VAWA. H.R. 1585, 116th Cong. (2019). The various amendments to the VAWA ensure that all genders may receive services from programs funded under the Act. *Id.*

220. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54, 82 (2013).

221. See 28 C.F.R. § 115.5 (2019); National Standards to Prevent, Detect, and Respond to Prison Rape, 77 Fed. Reg. 37106 (June 20, 2010) (rule containing PREA standards becoming effective August 20, 2012).

222. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (2013) (codified as amended at 42 U.S.C. § 1997e(a) (2018)).

223. *Id.* at 14.

224. Yarussi, *supra* note 214, at 31.

to use their VOCA funding to serve individuals who are in custody.<sup>225</sup> The PREA standards, in combination with the changes in VAWA and VOCA, more widely opened facilities' doors to community-based sexual assault advocates while funding their work.<sup>226</sup>

Though VAWA initially did not allow these agencies to use their funds for people in custody, those provisions have been relaxed and agencies now provide confidential support services to prisoners<sup>227</sup> and support for inmate victims when they are transported for forensic exams.<sup>228</sup> This inclusion of victim services providers has yielded important credibility to inmate victims.<sup>229</sup> It has also caused an important shift in thinking about the nature of victimization among victim services providers and created opportunities for them to expand their services to a vulnerable and underserved population.<sup>230</sup>

### B. *Limits on Cross-Gender Supervision*

Another place where PREA has made a tremendous difference has been in limiting cross-gender supervision (supervision of prisoners by staff of the opposite gender).<sup>231</sup> The U.S. is among the few countries that continue to permit cross-gender

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225. 28 C.F.R. § 94.119; Victims of Crime Act Victim Assistance Program, 81 Fed. Reg. 44524 (July 8, 2016) (“In this final rule, OVC simply removes the prohibition on perpetrator rehabilitation and counseling, as the prohibition unnecessarily prevents States and communities from fully leveraging all available resources to provide services to these victims, who have been shown to have a great need for such services.”).

226. Joye Frost & Bea Hanson, *New VOCA Assistance Rule Means More Services, More Funds for Victims*, THE UNITED STATES DEPARTMENT OF JUSTICE OFFICE OF PUBLIC AFFAIRS (Dec. 31, 2016), <https://www.justice.gov/archives/opa/blog/new-voca-assistance-rule-means-more-services-more-funds-victims>; Office on Violence Against Women, *Building Partnerships Between Rape Crisis Centers and Correctional Facilities to Implement the PREA Victim Services Standards*, NATIONAL PREA RESOURCE CENTER 1, 18, 19, 37 (Sept. 27, 2013).

227. See MISSISSIPPI COALITION AGAINST SEXUAL ASSAULT, PREA: PRISON RAPE ELIMINATION ACT, <http://www.msCasa.org/prea/> (providing victims access to medical and mental health care, forensic evidence collection, crisis intervention services, crisis counseling, etc.).

228. *Id.*

229. NATIONAL PREA RESOURCE CENTER, 2016–2017 ANNUAL REPORT 1, 18 (2018), <https://www.prearesourcecenter.org/sites/default/files/library/PRC%20Annual%20Report%202016-2017%20-%20Final%20.pdf>.

230. *Id.* at 18. The report notes that:

The Victim Rights Law Center (VRLC) proposes to convene two focus groups of community-based advocates (advocates) to gather input, educate advocates, and increase awareness among advocates not sufficiently engaged about how to best to implement PREA standards establishing incarcerated sexual assault (SA) survivors' (survivors') right to access community-based advocacy “in as confidential a manner as possible.” Focus groups will identify how advocates' work with survivors has changed since the March 2013 Office for Victims of Crime (OVC) and Office on Violence Against Women (OVW) forum on partnerships between rape crisis centers and correctional facilities. Focus group results will be published and will inform technical assistance and training that VRLC will provide to help meet incarcerated survivors' advocacy and privacy needs through an existing project.

*Id.*; see Carol L. Shrader et al., *Access to Confidential Support Services for Sexual Assault Survivors Who Are Confined: National Focus Group Findings*, VICTIM RIGHTS LAW CENTER 1 (June 2019).

231. 28 C.F.R. § 115.15 (2019).

viewing and supervision of prisoners.<sup>232</sup> In custodial settings, there are many places where staff come into visual and physical contact with prisoners, detainees, and youths.<sup>233</sup> There has been ongoing debate and litigation for decades about whether correctional staff may supervise inmates, detainees, and youths of the opposite gender.<sup>234</sup>

In general, the law permits women to supervise men in all but the most intimate of spaces: bathrooms, showers, and medical exams.<sup>235</sup> The idea that women are more professional, less predatory, and less likely to initiate or engage in sexual contact is hardwired into notions of femininity and masculinity.<sup>236</sup> However, the data collected pursuant to PREA suggest a more complicated view.<sup>237</sup> BJS data suggest that relative to their numbers in the correctional workforce, women are overrepresented as perpetrators in staff sexual abuse claims involving men and boys.<sup>238</sup> There are many explanations for this overrepresentation, including the overwhelming numbers of men and boys in custody, female staff's vulnerability to sexual harassment by staff and prisoners, and women's relative lack of institutional

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232. Alysia Santo, *Peeping Toms: Do Prison Inmates Have a Right to Privacy?*, THE MARSHALL PROJECT (Dec. 17, 2014), <https://www.themarshallproject.org/2014/12/17/peeping-toms>.

233. *Id.* (noting that, before PREA standards took effect, staff often conducted cross-gender pat down searches at Muskegon County Jail in Michigan where male correctional officers and inmates could see naked women from the hallway because of the location of the showers and toilets).

234. Flynn L. Flesher, *Cross-Gender Supervision in Prison and the Constitutional Right of Prisoners to Remain Free from Rape*, 13 WM. & MARY J. WOMEN & L. 841, 846 (2007). Flesher notes that:

Some prisons, recognizing that cross-gender supervision violates prisoners' rights and poses a danger to those prisoners' mental and physical health, have unilaterally decided to restrict access of prison guards to opposite sex prisoners. Other prisons have reached the same result but out of concern for the safety of female guards and not out of concern for the rights of prisoners. Both situations have generated much litigation from prison guards under Title VII of the Civil Rights Act of 1964.

*Id.*

235. 28 C.F.R. § 115.15(d) (2019) (implementing policies to allow inmates to shower, use the bathroom, and change without nonmedical staff of the opposite gender viewing them). *But see* Flesher, *supra* note 234, at 851–53 (noting that cross-gender viewing is allowed in exigent circumstances or if it is incidental to routine cell checks).

236. *See Boys, Rape, and Masculinity*, *supra* note 91, at 1572 (asserting that narratives of sexual abuse among boys are often shaped by popular culture and fail to reflect, because of stereotypical gender roles, that boys, and not just women, are often the victims of sexual abuse); *see also* Anne K. Peters, 9 CRIME & SOC. JUST. 86, 86 (1978) (reviewing CAROL SMART, WOMEN, CRIME & CRIMINOLOGY: A FEMINIST CRITIQUE (1976)) (arguing that women have been excluded in studies about deviance).

237. *See generally* ALLEN J. BECK ET AL., BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN JUVENILE FACILITIES REPORTED BY YOUTH, 2008–09 1 (2010), <https://www.bjs.gov/content/pub/pdf/svjfry09.pdf>.

238. *Id.* (reporting that ninety-five percent of youth who reported staff sexual misconduct were victimized by female staff even though only forty-two percent of staff in state juvenile facilities were female); *see also* ALLEN J. BECK ET AL., BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN JUVENILE FACILITIES REPORTED BY YOUTH, 2012 5 (2013), <http://www.bjs.gov/content/pub/pdf/svjfry12.pdf> (revealing that 89.1% of 1,300 youth reporting victimization by staff were boys victimized by female staff).

power.<sup>239</sup> Nonetheless, while limits on cross-gender supervision of both men and women were proposed in the initial standards, only those limited to cross-gender viewing of men and women while unclothed by staff survived, along with limits on cross-gender supervision for women and youth.<sup>240</sup> Female staff can pat-down search both male and female adult prisoners and detainees largely because of gendered notions about men's predatory nature and women's more "professional" demeanor.<sup>241</sup>

Depending on the gender and age of the officer and prisoner and the particulars of the search, the search and viewing can violate the Fourth, Eighth, or Fourteenth Amendment rights of prisoners.<sup>242</sup> Also, on the state level, plaintiffs can plead common law or state tort claims such as assault, battery, and intentional infliction of emotional distress in order to address emotional or psychological trauma that arise from sexual assault.<sup>243</sup>

The DOJ provided guidance on the cross-gender standards limiting cross-gender viewing and physical searches of prisoners to address the significant opposition it faced from the corrections community.<sup>244</sup> PREA standards have strengthened existing prohibitions about cross-gender supervision of women and girls in juvenile settings<sup>245</sup> and for women in custody.<sup>246</sup> Unfortunately, PREA has not changed the trajectory of abuse related to men and boys in custody, especially when the perpetrator is female.<sup>247</sup>

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239. See generally *Boys, Rape, and Masculinity*, *supra* note 91, at 1569–70 (including other reasons, namely that women correctional staff are often closer in age to boys in detention, women are more fit for correctional positions because of education and lack of a criminal record, and women correctional officers are less likely to be married than their male counterparts).

240. See 28 C.F.R. § 115.15 (2019); 28 C.F.R. § 115.315 (2019).

241. See *Boys, Rape, and Masculinity*, *supra* note 91, at 1589–90 (noting the tension between the "maternal, sisterly, friendly, appropriate correctional staff person" and the "unprofessional, predatory, 'turnt up,' 'turnt out' female correctional worker who we see in the media narratives"); see also Brenda V. Smith, *Watching You, Watching Me*, 15 YALE J.L. & FEMINISM 225 (2003).

242. See Robyn Gallagher, Note, *Constitutional Law—Cross-Gender Pat Searches: The Battle Between Inmates and Corrections Officers Enters the Courtroom*, 33 W. NEW ENG. L. REV. 567 (2011).

243. Hannah Brenner et al., *Sexual Violence as an Occupational Hazard & Condition of Confinement in the Closed Institutional Systems of the Military and Detention*, 44 PEPP. L. REV. 881 (2017). Brenner et al. note that:

On the state level, there are many common law tort causes of actions that individual victims of sexual violence may initiate against individuals or entities, including intentional torts like battery, assault, false imprisonment, intentional infliction of emotional distress; and in the case of systemic abuse that occurs in an institutional setting, negligence.

*Id.* at 931 n.392.

244. NATIONAL PREA RESOURCE CENTER, PLEASE EXPLAIN THE ADULT CROSS-GENDER VIEWING AND SEARCHES STANDARD (Feb. 7, 2013), <https://www.prearesourcecenter.org/node/3256>; see COMMITTEE MEETING OF SENATE LAW AND PUBLIC SAFETY COMMITTEE, *supra* note 58 (expressing concern over the limitations to cross-gender viewing and searches).

245. See *Boys, Rape, and Masculinity*, *supra* note 91, at 253–68.

246. *Id.*

247. See Gallagher, *supra* note 242. Gallagher notes that:

Female inmates' privacy rights have been viewed by a number of courts as being "qualitatively different than the same rights asserted by male inmates." . . . Many states have already decided not

### C. Providing Protections for LGBTQI Persons in Custody

The PREA standards contain provisions to address the vulnerability of LGBTQI individuals in custody.<sup>248</sup> However, corrections agencies still do not provide the privacy and dignity protections that would reduce the vulnerability of these youth and inmates.<sup>249</sup>

Though PREA enjoyed bipartisan support and passed in both houses of Congress unanimously, the Trump Administration has diminished the protection of LGBTQI prisoners in federal facilities,<sup>250</sup> thereby weakening protections provided by the PREA standards. The Transgender Executive Council (“TEC”) is the body that determines the appropriate housing of transgender inmates housed in federal prisons.<sup>251</sup> Under guidance released in 2019, the TEC now uses an inmate’s biological sex to initially determine where they will be housed.<sup>252</sup> Although the TEC can consider other factors in determining where to house transgender inmates, the guidance indicates that only in rare cases will an inmate be placed in a facility that aligns with their gender identity if it differs from biological sex at birth.<sup>253</sup> The revised guidance provides that the TEC must first consider whether the inmate’s placement in a certain facility would threaten the facility’s management, security, or pose a risk to other inmates.<sup>254</sup> Likewise, the TEC must also determine whether the transgender individual has taken significant progress towards transition before assigning them to a facility based on their gender identity.<sup>255</sup> These guidelines significantly differ from initial regulations promulgated in 2012, which provided that

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to use cross-gender pat searches in female institutions. Part of the rationale behind this decision may be the perception that men and women experience unwanted touching differently.

*Id.* at 578.

248. 28 C.F.R. § 115.15(e)–(f) (2019); 28 C.F.R. § 115.42 (c)–(g).

249. NATIONAL CENTER FOR TRANSGENDER EQUALITY, LGBTQ PEOPLE BEHIND BARS: A GUIDE TO UNDERSTANDING THE ISSUES FACING TRANSGENDER PRISONERS AND THEIR LEGAL RIGHTS (2018), <https://transequality.org/sites/default/files/docs/resources/TransgenderPeopleBehindBars.pdf>. The report notes that:

While PREA is often a useful tool, it is also important to keep in mind that it is not a perfect one: some of its provisions are limited or unclear, and PREA has even been used as an excuse to justify mistreatment of LGBTQ people, such as by penalizing LGBTQ prisoners for consensual physical contact.

*Id.* at 10.

250. Katelyn Burns, *Members of Congress: Trump Administration’s Prison Policy Could Lead to ‘Significant Discrimination’ for Trans People*, REWIRE NEWS (Aug. 2, 2018), <https://rewire.news/article/2018/08/02/members-of-congress-trump-administrations-prison-policy-could-lead-to-significant-discrimination-for-trans-people/>.

251. See U.S. DEP’T OF JUSTICE, FEDERAL BUREAU OF PRISONS, TRANSGENDER OFFENDER MANUAL (2018), <https://www.documentcloud.org/documents/4459297-BOP-Change-Order-Transgender-Offender-Manual-5.html>.

252. *Id.* at 2 (stating that other factors the TEC will take into consideration are the inmate’s health, safety, behavioral history, overall demeanor, and likely interaction with other inmates in the facility); Burns, *supra* note 250 (reporting on guidelines announced in May 2018).

253. See TRANSGENDER OFFENDER MANUAL, *supra* note 251, at 2.

254. *Id.*

255. *Id.*

housing for transgender prisoners should be determined on an individual basis, taking into account the individual's wishes and not basing the decision on genital status.<sup>256</sup>

The Trump Administration's revisions raised several concerns among advocates for prison reform.<sup>257</sup> In particular, reformers expressed concern about the disproportionate impact on transgender women of color, as they are more likely to be incarcerated<sup>258</sup> and are more susceptible to sexual violence in custodial settings.<sup>259</sup> Another issue under the new changes is that "biological sex" is not defined in the Transgender Offender Manual ("Manual") where the administration has made these changes.<sup>260</sup> Furthermore, officials have declined to clarify what the term means.<sup>261</sup> It remains unclear whether transgender inmates who were already housed would be subject to transfer because of the administration's changes to the policy.<sup>262</sup> The ambiguity in the new rules allows for discretion and inconsistency in who will be defined as transgender, and therefore where these individuals will be housed, which increases their vulnerability and susceptibility to sexual violence.<sup>263</sup> The Commission expressed its concerns over these new changes and other organizations filed lawsuits against the DOJ and Bureau of Prisons.<sup>264</sup> The new rollbacks under President Trump undo some of the protections afforded to an already vulnerable population, and many, including several members of Congress, argue it contradicts PREA's purpose in eliminating prison rape.<sup>265</sup>

Another noticeable change in the Manual was the addition of the word "necessary" in order for transgender inmates to receive medical treatment.<sup>266</sup> The Manual now provides that "hormones or other necessary medical treatment may be

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256. Burns, *supra* note 250 (describing new guidelines announced in May 2018).

257. *Id.*

258. *Id.* (comparing the twenty-one percent of transgender women of color who have been incarcerated at some point to the less than three percent incarceration rate among the general population).

259. *Id.* (citing the 2012 Department of Justice survey that presented data demonstrating that almost thirty-five percent of transgender inmates reported themselves to be victims of sexual violence within the previous twelve months of when the survey was taken).

260. Dominic Holden, *Which Prisoners Are Considered Transgender? The Trump Administration Won't Explain Its New Rules*, BUZZFEED NEWS (May 16, 2018), <https://www.buzzfeednews.com/article/dominic-holden/which-prisoners-are-considered-transgender-the-trump#.us3Av8dpwy> (revealing that officials have declined to comment further when emailed for clarifications).

261. Burns, *supra* note 250.

262. Holden, *supra* note 260.

263. *Id.*

264. See Nat'l Prison Rape Elimination Comm'n, Letter to Ken Hyle, Assistant Director, BOP (2018), <https://www.wcl.american.edu/impact/lawwire/open-letter-to-federal-bureau-of-prisoners-on-changes-to-transgender-offender-manual/11-13-18-letter-to-assistant-director-hyle-bop/>; see also John Riley, *Justice Department and Bureau of Prisons Sued Over Rollback of Protections for Transgender Inmates*, METRO WEEKLY (Nov. 20, 2018), <https://www.metroweekly.com/2018/11/justice-department-bureau-of-prisons-sued-rollback-protections-transgender-inmates/> (discussing the lawsuit that the Southern Poverty Law Center and Lambda Legal have filed against the Department of Justice and Bureau of Prisons over their rollbacks of the protections afforded to transgender inmates).

265. Burns, *supra* note 250.

266. TRANSGENDER OFFENDER MANUAL, *supra* note 251, at 1, 3.



provided after an individualized assessment of the inmate by institution medical staff.”<sup>267</sup> This new “necessary” standard gives additional discretion to prison officials in deciding whether incarcerated transgender individuals need to receive medical treatment,<sup>268</sup> and indeed harkens back to the early struggles of Dee Farmer, a transgender woman and plaintiff in the seminal *Farmer v. Brennan* case of 1994.<sup>269</sup>

Despite changes at the federal level affecting transgender inmates in federal prisons, some states have changed their legislation and operations regarding the housing and treatment of transgender inmates in their correctional systems. In 2018, Connecticut and Massachusetts passed laws requiring their departments of corrections to house, provide clothing and personal items to, choose staff for searches of, and address transgender inmates based on their gender identity.<sup>270</sup> The state of Maryland changed its correctional practices after a transgender inmate sued its Department of Corrections in 2015 for violations of PREA standards designed for the protection of transgender inmates.<sup>271</sup> In other states such as Illinois, litigation is ongoing in pursuit of protection for transgender inmates.<sup>272</sup> The development and enforcement of the PREA standards for the protection of transgender inmates are changing the landscape of corrections through legislation and litigation, despite current federal efforts to stem the tide of this progression.

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267. *Id.* at 3 (defining an “individualized assessment” to include requesting consultation from Psychology Services regarding the mental health benefits of hormone or other necessary medical treatment).

268. See Ryan Koronowski, *Trump Administration Rolls Back Transgender Prison Protections*, THINKPROGRESS (May 12, 2018), <https://thinkprogress.org/trans-prison-rollback-trump-administration-87e01cb6805c/> (citing survey that shows that forty four percent of transgender inmates were denied hormone treatment).

269. *Farmer v. Brennan*, 511 U.S. 825, 829 (1994). Dee Farmer was a transgender woman in the Federal Bureau of Prisons who had obtained breast implants, removal of testicles, and estrogen therapy while in the community; she had hormonal therapy smuggled into the prison while incarcerated, as the BOP did not medically provide such treatment. *Id.*

270. An Act Concerning the Fair Treatment of Incarcerated Persons, 2018 Conn. Pub. Acts No. 18-4 (2018), <https://www.cga.ct.gov/2018/ACT/pa/pdf/2018PA-00004-R00SB-00013-PA.pdf>. Note, however, that this applies only to transgender inmates who have diagnoses of gender dysphoria or have legally changed their gender identity. The Massachusetts statute allows for use of pronouns, personal items and programming, and housing consistent with one’s gender identity, with or without gender dysphoria diagnosis. Housing will ultimately be determined by the department’s evaluation of inmate safety and corrections management. MASS. GEN. LAWS ch.127, § 32A (2018), <https://www.mass.gov/info-details/mass-general-laws-c127-ss-32a>.

271. *Brown v. Patuxent Inst.*, OAH No. DPSC-IGO-002V-14-33232 (Md. Dep’t of Pub. Safety & Corr. Servs. Apr. 1, 2015) (affirmed Aug. 17, 2015). Plaintiff was in solitary confinement for 66 days and was taunted by corrections officers, who watched her shower. The administrative law judge found that the corrections staff violated the PREA standards that were designed to protect her and other transgender inmates. See Rebecca Earlbeck, *FreeState Legal Wins Groundbreaking Victory on Protections for Transgender People in Prison* (Sept. 24, 2015), <https://freestatelegal.org/wp-content/uploads/2015/09/Brown-Case-Press-Release-.pdf>.

272. See *Hampton v. Baldwin*, in which plaintiff, a transgender woman, stated she was placed in male prison facilities where she was abused, placed in solitary confinement, and afforded no protection from corrections staff. No. 3:18-cv-00550, 2018 WL 5830730, at \*1–3 (S.D. Ill. Nov. 7, 2018). Although there has been a report that plaintiff has been moved to a female facility, the case is ongoing. See also CIVIL RIGHTS LITIGATION CLEARINGHOUSE, CASE PROFILE: HAMPTON V. BALDWIN (2018), <https://www.clearinghouse.net/detail.php?id=16859>.

## CONCLUSION

PREA initially intended to address what Congress perceived as a narrow problem: the sexual abuse of men in custody. In the course of conducting its study of the causes and consequences of sexual abuse in custody, the PREA Commission learned that sexual abuse affects all people in custody, regardless of age, gender, or sexual identity. The Commission learned that sexual abuse in custody is the end result of a series of custodial practices that create vulnerability for people in custody, for custodial facilities, and for society. These practices include the failure to identify vulnerable prisoners such as youthful inmates and LGBTQI people, improper classification of prisoners, inadequate and inappropriate supervision, poor investigations, inadequate oversight of facilities by correctional authorities and by the federal government, and few services for incarcerated survivors of custodial sexual abuse. PREA created opportunities for custodial authorities to address sexual assault in their facilities. This practice has yielded unanticipated and useful opportunities for oversight by legislatures, courts, and the public, and has expanded the Eighth Amendment by incorporating the PREA standards as part of its evolving standards of decency.

Yet, much work that PREA could address remains. Three areas in particular bear mentioning. First, while PREA has made inroads in addressing sexual abuse in prisons, jails, and juvenile facilities, much work remains to address sexual vulnerability of adults and children in immigration detention facilities.<sup>273</sup> Though there have been many accounts of these abuses in immigration, little has been done to address these reports.<sup>274</sup>

Second, while most states have passed laws that eliminate consent as a defense in cases involving correctional officers,<sup>275</sup> gaps in the law still exist with regard to police officers, parole, and probation officers.<sup>276</sup> In 2019, Senator Jodi Ernst

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273. See Victoria López & Sandra Park, *ICE Detention Center Says It's Not Responsible for Staff's Sexual Abuse of Detainees*, AMERICAN CIVIL LIBERTIES UNION BLOG (Nov. 6, 2018), <https://www.aclu.org/blog/immigrants-rights/immigrants-rights-and-detention/ice-detention-center-says-its-not-responsible>.

274. Immigration, Customs and Enforcement (ICE) reportedly received 1345 allegations of sexual abuse between 2012 and 2017, and only 160, or 12 percent, of cases were substantiated. See Alice Speri, *Detained, Then Violated*, THE INTERCEPT (Apr. 11, 2018), <https://theintercept.com/2018/04/11/immigration-detention-sexual-abuse-ice-dhs/>; see also Matthew Haag, *Thousands of Immigrant Children Said They Were Sexually Abused in U.S. Detention Centers, Report Says*, N.Y. TIMES (Feb. 27, 2019), <https://www.nytimes.com/2019/02/27/us/immigrant-children-sexual-abuse.html>.

275. See NIC/WCL Project on Addressing Prison Rape, *Fifty-State Survey of Criminal Laws Prohibiting Sexual Abuse of Individuals in Custody* (Aug. 1, 2009), <https://www.prearesourcecenter.org/file/556/fifty-state-survey-criminal-laws-prohibiting-sexual-abuse-individuals-custody>.

276. Cody Carlson, *PA Lawmakers Push For 'No Consent in Custody' Bill*, WENY NEWS (Dec. 26, 2019), <https://www.weny.com/story/41495973/pa-lawmakers-push-for-no-consent-in-custody-bill> (“Currently, Pennsylvania bars sexual contact between prison guards and inmates, as well as mental health professionals and patients. But there is no such law in place for police officers and individuals in custody.”); see also Deanna Paul, *Police in Many States Could Legally Have Sex with a Person in Custody — until a N.Y. Rape Allegation*, WASH. POST (Oct. 8, 2018), <https://www.washingtonpost.com/nation/2018/10/08/should-police-be-able-have-sex-with-person-custody-rape-allegation-raises-issue/>; Press Release, U.S. Senator Joni Ernst, Ernst Works to Reduce

introduced legislation to close the loophole for federal law enforcement officials.<sup>277</sup>

Third, accountability through human resources processes is complicated by their opacity and the lack of engagement of such mechanisms in addressing custodial sexual abuse.<sup>278</sup> A deeper dive needs to be made in examining agency anti-fraternization policies and how—or if—they are implemented to protect vulnerable incarcerated persons from sexual abuse.

Notwithstanding these substantial hurdles, PREA's promise has encouraged people in custody, advocates, and many correctional authorities to reach beyond the ever-present perils of litigation, inconsistent oversight, and insufficient legislation to create safer environments for children and adults in custodial settings. Ultimately, this accountability and expansion of the Eighth Amendment benefits people in custody and society more broadly and reinforces the principle that no person is above the law or unworthy of the law's protection.

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Sexual Abuse of Females in Custody (Mar. 27, 2019), <https://www.ernst.senate.gov/public/index.cfm/2019/3/ernst-works-to-reduce-sexual-abuse-of-females-in-custody>; Justin Rohrlich, *US Parole System Fraught with Allegations of Sexual Abuse*, QUARTZ (Feb. 21, 2020), <https://qz.com/1805184/us-parole-system-fraught-with-allegations-of-sexual-abuse/>.

<sup>277</sup>. See Ernst Works to Reduce Sexual Abuse of Females in Custody, *supra* note 276.

<sup>278</sup>. WCL PROJECT ON ADDRESSING PRISON RAPE, FIFTY-STATE ANTI-FRATERNIZATION SURVEY, <https://www.wcl.american.edu/impact/initiatives-programs/endsilence/research-guidance/anti-fraternization-laws/> (last visited Mar. 25, 2020).