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# THE VIOLENCE AGAINST WOMEN ACT: DENYING NEEDED RESOURCES BASED ON CRIMINAL HISTORY

Jaime M. Yarussi\*

“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, he wrote a letter, ‘I have been sexually and physically assaulted several times by several inmates. I’m afraid to go to sleep, to shower or just about anything else. I am afraid that when I am doing these things, I might die at any time.’”

*Testimony of Ms. Linda Bruntmyer on behalf of her son Rodney before the National Prison Rape Elimination Commission on June 14, 2005.*<sup>1</sup>

## Introduction

In 1994, Congress passed the Violence Against Women Act (VAWA)<sup>2</sup> giving national attention to the issue of violence against women at the hands of both intimates and non-intimates.<sup>3</sup> VAWA has been reauthorized twice since its initial passage and currently addresses domestic violence, sexual assault and physical violence.<sup>4</sup> It has also become the largest funding source for victim<sup>5</sup> services such as mental health care and crisis intervention. More specifically, VAWA furthered the attention needed for services for sexual assault victims<sup>6</sup> and enhanced the financial means of non-governmental entities such as crisis centers to treat victims of abuse—both physical and sexual.<sup>7</sup> However, neither in its initial signing nor in either the 2000 or 2005 reauthorizations, has VAWA provided for services for violence perpetrated against incarcerated persons.

This article aims to discuss the Violence Against Women Act (VAWA) and the Victims of Crime Act (VOCA) in regards to funding for mental health treatment and crisis services for incarcerated survivors and victims of sexual violence. It will begin by illustrating the need for services because of inmates’ likely history of victimization and draws conclusions regarding the impact that denying VAWA/VOCA resources may have on the recovery of incarcerated victims.

## Sexual Assault Statistics

In America, someone is sexually assaulted every two minutes; one in six American women and one in thirty-three men are victims of sexual assault.<sup>8</sup> About eighty percent of rape victims are under the age of thirty.<sup>9</sup> In 2006, there were 272,350 cases of rape, attempted rape or sexual assault reported.<sup>10</sup> According to the 2005 Crime Victims Survey and the National Center for Policy Analysis, sixty percent of sexual assaults go unreported.<sup>11</sup> The same report stated that men were less likely to report a sexual assault even though it is estimated they make up to ten percent of all victims.<sup>12</sup> Of the rapes, attempted rapes and sexual assaults reported in 2005, seventy-three percent of

sexual violence was perpetrated by someone the victim *knew*—thirty-eight percent by a friend or acquaintance, twenty-eight percent by an intimate partner and seven percent by a family member.<sup>13</sup>

One out of four girls and one out of six boys are sexually abused before the age of eighteen.<sup>14</sup> Children who are survivors of sexual abuse can have trouble coping with life’s obstacles. They demonstrate delinquent behaviors such as drinking or drug addiction<sup>15</sup> and develop psychological problems<sup>16</sup> that are sometimes left untreated, causing them to act out their abusive experiences against others.<sup>17</sup> These children may also have disproportionate contact with the criminal justice system beginning, for some, in childhood and continuing into adulthood.<sup>18</sup>

## Victimization Histories of Offenders under Correctional Supervision

In 1997, the United States Census Bureau conducted a study to determine the national average of victimization of state prisoners.<sup>19</sup> They found that 72.8% of incarcerated women experienced physical abuse and thirty-nine percent experienced sexual abuse.<sup>20</sup> They also found that 73.5% of incarcerated men experienced physical abuse and six percent experienced sexual abuse.<sup>21</sup> In a study done in Bedford Hills Women’s Prison, participating women were asked overall about physical and/or sexual assault over their lifespan; eighty-two percent reported childhood victimization and ninety-two percent reported severe violence as an adult.<sup>22</sup> The picture for men is not much different. A study of incarcerated men found that forty percent experienced childhood sexual abuse.<sup>23</sup>

In 1999, the Bureau of Justice Statistics (BJS) studied the abuse histories of inmates and probationers.<sup>24</sup> This study revealed that nineteen percent of state prisoners, ten percent of federal prisoners, and sixteen percent of men and women in local jails or on active probation reported physical or sexual abuse.<sup>25</sup> Among state prisoners, sixty-one percent of abused men and thirty-four percent of abused women were serving time for a violent offense.<sup>26</sup> Nineteen percent of men who reported abuse before prison were serving sentences for sexual assault;<sup>27</sup> sixteen percent of male prisoners and fourteen percent of female prisoners who reported abuse had committed homicide.<sup>28</sup>

Illegal drug use and alcohol consumption were also among issues for abused prisoners in the 1999 BJS study. An estimated seventy-six percent of men and eighty percent of women who reported abuse used illegal drugs regularly.<sup>29</sup> Drug and alcohol use were more common among inmates that reported having been previously victimized; seventy-six percent of abused men and eighty percent of abused women reported using drugs regularly and many reported having used alcohol or illegal drugs at the time of their offense.<sup>30</sup> Of the abused women surveyed, forty-six percent committed their current offense under the influence of illegal drugs and thirty-three percent

were under the influence of alcohol.<sup>31</sup>

Based on this data, there are obvious links between victimization and criminality. Clearly, people under correctional supervision have higher rates of victimization in their past, higher propensities to use drugs and/or alcohol and less ability to recognize boundary violations—either perpetrated by or against them.

### **Sexual Abuse of Offenders while under Correctional Supervision: A Known Problem**

Sexual abuse while under correctional supervision, for some offenders, may simply be an extension of their past victimization.<sup>32</sup> Throughout the history of the correctional system, offenders, both male and female, have been subjected to sexual assault and abuse by staff members and other offenders;<sup>33</sup> government reports have also documented this abuse and misconduct.<sup>34</sup>

Each year this country's correctional system houses (prisons and jails) and monitors (community corrections) approximately 7,280,414 men and women;<sup>35</sup> once under correctional supervision,<sup>36</sup> these men and women can be subjected to sexual victimization. In 2003, Congress passed the Prison Rape Elimination Act (PREA).<sup>37</sup> PREA "provide[s] for the analysis of the incidence and effects of prison rape in Federal, State and local institutions and to provide information, resources, recommendations, and funding to protect individuals from prison rape."<sup>38</sup>

Among other things, PREA requires BJS to develop a reliable data collection method and to collect data on the incidence of prison rape in adult prisons, jails and community correctional facilities as well as corresponding juvenile facilities.<sup>39</sup> BJS began collecting data in 2004,<sup>40</sup> and by 2006, the survey of sexual violence reported by correctional authorities found that there were 6,528 reported allegations of sexual violence in state and local correctional facilities, a twenty-one percent rise since the 2004 collection.<sup>41</sup> In 2006, approximately thirty-six percent of all reported allegations involved staff while only slightly fewer allegations, thirty-four percent, involved inmate-on-inmate sexual violence.<sup>42</sup>

In 2007, the BJS completed the first national inmate survey.<sup>43</sup> This was the first self-administered survey that collected reports of sexual victimization directly from inmates.<sup>44</sup> BJS found that 4.5% or approximately 60,500 inmates in state and federal prisons reported sexual victimization; incidents of staff sexual misconduct were about one and half times greater than inmate-on-inmate sexual violence.<sup>45</sup> Among the 146 prison facilities in the BJS inmate survey of 2007, fourteen had incident rates of non-consensual sex that exceeded 300 incidents per 1,000 inmates.<sup>46</sup> PREA, when enacted, estimated that thirteen percent of inmates in the United States are sexually assaulted in prison.<sup>47</sup> The data collected by the BJS supports this estimate.

The effect of sexual victimization in prisons and jails can be more devastating than sexual assault in the community due to the unique nature of the correctional setting.<sup>48</sup> Being confined within prison or jail walls can increase the impact on victims. In situations of "captivity," perpetrators become the

most important people in the lives of their victims—in the most serious of cases, inmates may be coerced, threatened and/or intimidated into long-term sexual slavery in order to survive.<sup>49</sup> This means that offenders experience repeated trauma. The primary victimization issues in correctional settings when compared with the community include: (1) more likely to experience physical trauma; (2) systemic infliction of psychological trauma; (3) retaliation and/or retribution; (4) lack of autonomy and safety; and (5) general distrust in the reporting structure/investigative process.<sup>50</sup>

Unlike victims in the community, inmates who are sexually assaulted are not eligible for crime victim compensation or the mental health services ultimately funded by grants given to states under compensation funds.<sup>51</sup> Offenders who are sexually assaulted often face their abusers every day, much like victims of child abuse and domestic violence, but lack advocates and support services, such as crisis centers, which are largely funded by VAWA and VOCA and do not provide services for incarcerated persons.<sup>52</sup>

### **The Violence Against Women Act (VAWA) and Victims of Crime Act (VOCA)**

With the passage of PREA, sexual assault in correctional settings was acknowledged at the national level as a problem within our correctional system.<sup>53</sup> However, that is the very population left out of both VAWA and VOCA. The introductory quote to this article describes an incarcerated boy who was a non-violent offender, but was repeatedly victimized while incarcerated. The only difference between him and those generally classified as a "victim" of sexual abuse is that his victimization took place during his incarceration. Men and women in United States prisons are among the most disenfranchised members of our society and experience a number of collateral consequences of their imprisonment. Many are unable to vote, get welfare benefits for their children, or secure Section 8 housing.<sup>54</sup> More specific to our subject, prisoners are not allowed to seek crisis intervention in the community as survivors of sexual victimization if the program is funded under federal spending bills such as VAWA and VOCA.

### **The Violence Against Women Act (VAWA)**

In 1990, Congress passed VAWA, federal legislation that comprehensively addressed issues concerning violence against women. While violence against women had previously been discussed by the United States Senate, it did not gain traction until the involvement of advocacy groups such as the Family Violence Prevention Fund (FVPPF) and the National Task Force to End Sexual and Domestic Violence Against Women. President Clinton signed the Violence Against Women Act (known later as VAWA I) into law in August 1994 as part of the Violent Crime Control and Law Enforcement Act of 1994.<sup>55</sup>

VAWA provisions were set to expire in 2000, and in 1999, Congress began its reauthorization efforts. During the 1999 reauthorization,<sup>56</sup> the Prevention of Custodial Sexual Assault by Correctional Staff Act was introduced into legislation to address abuse of persons in custody. The Act pushed for

a registry of staff perpetrators and the withholding of Federal law enforcement funds for failure to enact legislation criminalizing staff sexual misconduct with inmates.<sup>57</sup> While the Violence Against Women Act of 2000 (known as VAWA II) passed, the Prevention of Custodial Sexual Assault by Correctional Staff Act was eliminated during the bill amendment process.

Despite attempts to create a more comprehensive bill in 2000, the reauthorization generally continued existing programs, added some improvements and increased funding to programs already in existence.<sup>58</sup> When VAWA was reauthorized in 2005,<sup>59</sup> any mention of custodial sexual assault was again left out, even though it was well after the passage of PREA.<sup>60</sup> While VAWA was initially meant to prevent perpetrators of violence from gaining access to funds used for victim services, it also prohibits persons in custody who are victimized from using the funds, which means a significant number of people who are sexually assaulted during imprisonment are ineligible for crisis intervention.<sup>61</sup> The fact remains that whether a sexual assault happens inside or outside of prison walls, the needs of a victim/survivor remain the same—immediate medical attention and ongoing mental health/crisis intervention are imperative to surviving the assault in the long term.

If a violent act is perpetrated against someone, it should not matter the physical locality of that victimization. While theoretically VAWA is set up to ensure that batterers who are incarcerated for abusive conduct do not get access to funds needed to support their victims, it disregards the fact that even if an abuser is sent to jail or prison and is then victimized, he is a victim separate and apart from the crime they perpetrated and should have equal access to intervention resources.

By leaving incarcerated victims out of VAWA, the spirit of the act is not recognized. Purportedly, VAWA seeks to recognize marginalized people who have little access to appropriate legal, medical and mental health care when facing abuse.

While certainly some people who are incarcerated could have been abusive in the past or can be incarcerated for violent offenses, a person's past behavior should not supersede the fact that the same person could also become a victim once incarcerated. The fact remains that many people who are incarcerated were victims of some form of abuse; it stands to reason that they moved across the spectrum and completed the cycle—victim, victimizer, victim. At no point in time does being a victimizer preclude you from being victimized. Thus, the services provided to incarcerated victims need to be the same as services provided to victims in the community.

### **The Victims of Crime Act (VOCA)**

VOCA<sup>62</sup> was originally signed into law in 1984 to support victim compensation and victim assistance programs across the nation. Directly related to incarcerated victims, VOCA grantees cannot use grant funds to offer rehabilitative services to perpetrators of crime,<sup>63</sup> even if the perpetrator becomes a victim while incarcerated.

If an incarcerated victim were eligible, however, the requirements to receive compensation set forth under VOCA are directly at odds with a correctional environment. Eligibility requirements under VOCA, although varying slightly from state to state, are that victims<sup>64</sup> are generally required to:

1. Report the crime promptly to law enforcement.<sup>65</sup>
2. Cooperate in the investigation and prosecution of the crime.
3. Be innocent of any criminal activity or misconduct leading to the victim's injury or death.
4. File a timely application<sup>66</sup> with the compensation program in the state where the crime occurred and provide any information requested.

All of these things are severe barriers for people who are incarcerated because in order to cooperate in an investigation and file a timely application for compensation, a person needs to report the crime in the first place. Victims rarely report cases of sexual assault in the community,<sup>67</sup> and it is no different for people who are incarcerated.<sup>68</sup> This lack of reporting can be for a number of reasons, including lack of trust in the staff or investigative process, poor grievance procedures, fear of retaliation, fear of punishment, shame and/or not knowing they are being sexually violated or belief that they deserve the abuse.

The final requirement under VOCA is that a person be innocent of criminal activity leading up to the injury. These are simply standards that we freely accept in the community that we do not apply in correctional settings. In the community, if a woman was raped and she happened to be dressed provocatively, we do not blame her for her assault; if a teenager submits to sex with a family member because she needs new shoes, we do not place blame on her; if a foreign-born woman is sold into the sex trade, we do not label her a prostitute. In each of these cases, the victims would be eligible for VOCA funding to support them through their recovery.

However, when we apply those similar situations to a correctional setting, we get very different results. An inmate who dresses provocatively and is sexually assaulted is often blamed for the assault, a first-time offender who is sexually assaulted because he borrows a cigarette and owes a favor should have known better, and when a man is sold for sex from one gang to another for protective purposes, we wonder why he did not fight back. The scenarios are the same – rape, strategic sex and coerced sex.<sup>69</sup> In a community setting, we place no blame and freely give resources, yet, in a correctional setting, we wonder what a person did to deserve it and what they did to contribute to their victimization. The very essence of that blame directly relates to a measure of “involvement” in the victimization, which VOCA then relies on to decide if a person was innocent of criminal activity and allot funds accordingly.

### **Denial of Resources to Incarcerated Persons: A Real World Example**

In 2005, the state of New Hampshire prosecuted Douglas Tower for the sexual assault of twelve women housed in the Shea Farm Halfway House.<sup>70</sup> Tower used a pattern of coercion and threats to convince the women to submit to his demands. The first of twelve cases went to trial in January of 2007. During that trial, the victim testified for almost one full day.<sup>71</sup> Tower was ultimately found guilty of two counts of aggravated felonious sexual assault and four counts of felonious sexual assault.<sup>72</sup> He was sentenced to twenty to forty years in prison and is not eligible for parole until 2027.<sup>73</sup> While the sen-



tence was a victory, the lasting effects of the incident on the women he abused cannot be measured. One of the essential facts that surfaced during the case was that the victims did not want to talk with the New Hampshire Department of Corrections mental health staff. Instead, they wanted to see crisis counselors in the community because they had lost trust in the system to protect or advocate for them.<sup>74</sup> The victims filed a claim for services with the state's Crime Victim Compensation Program to pay for counseling, but because of the existing rule against funding to people who are incarcerated, their claims were denied.<sup>75</sup>

The question then remains, "Why should we care if incarcerated victims receive services funded under VAWA and/or VOCA?" The answer is simple. Just because someone is currently incarcerated does not mean he will always be. What happens during incarceration can be directly linked to an offender's success once back in the community. Having mental health care they can trust not only affects their ability to recover from a sexual assault, but it may also decrease the likelihood of their reoffending and the propensity for them to victimize another in the same way they may have been victimized. It is no secret that certain communities are adversely affected by the increased use of incarceration, with African-American communities and lower socio-economic groups being hit the hardest. If nothing else, services as provided for under VOCA when applied to an incarcerated person, may equate to increased safety and stability in these communities for the future.

### What Really Happens: Mental Health Care for Incarcerated Victims of Sexual Assault

To this point, we have outlined the victimization histories and correlation to criminality for incarcerated persons. We have laid out empirical evidence that sexual abuse during incarceration is a problem as addressed by PREA. We have outlined the history and flaws of both VAWA and VOCA, the major funding sources of affordable and reliable mental health care and crisis intervention for people who are victims of sexual abuse. So, taken together, it seems as though the bottom line is that incarcerated persons are in need of the very resources and funds they are prohibited from accessing. But do rape crisis providers take the same position? The short answer is no.

In an August 2006 survey of sexual assault offices,<sup>76</sup> states were asked to answer the following questions in regards to serving incarcerated populations:

1. Do/would your services extend to incarcerated victims of sexual assault?
2. Do/would you help victims who are now in the community (such as in halfway houses or on parole) who were sexually abused while incarcerated?
3. Are the services you provide to incarcerated per-

sons dependent on status (felony vs. misdemeanor offender) or facility (prison vs. halfway house)?

4. Is funding from the Violence Against Women Act used in any of your services for incarcerated or formerly incarcerated persons?

Thirty-five states responded to the questions, some from multiple local crisis centers. Thirty-three of those states had at least one crisis center in the state that would serve incarcerated victims of sexual assault,<sup>77</sup> and fifteen of those states received either VAWA or VOCA funding during that calendar year which could have been used to provide services to incarcerated victims.<sup>78</sup>

Some states that do not use their VAWA/VOCA funding for support of incarcerated victims, such as Iowa and Rhode Island, have reached agreements with the Department of Corrections to receive part of their PREA grant funding.<sup>79</sup> These states have built partnerships which allow rape crisis services to extend to incarcerated individuals who are sexually abused. Other crisis centers take the position that since the VAWA/VOCA funding they receive does not specifically go to incarcerated victims, but instead funds a staff position that may or may not serve incarcerated victims, there is no conflict with the rule.<sup>80</sup> Finally, since VOCA/VAWA are only small funding sources and must be met in-kind by state entities, crisis centers receiving additional state funding take the stance that they are not in a position to turn away victims based on where the victimization occurred.<sup>81</sup>

By and large, rape crisis centers reported that they would serve incarcerated persons under two conditions: (1) they were not incarcerated for sexual abuse of any nature; and (2) the safety of the crisis intervention staff was not in question. For crisis intervention providers, it seems as though a person's status as a victim far outweighs a person's status as an inmate.

### Conclusion

Where does this leave an incarcerated person who has been sexually assaulted? The answers are somewhat unclear, but what is obvious is this: (1) people who are under correctional supervision, by and large, have victimization histories of some kind; (2) incarcerated victims are in need of consistent mental health care; (3) incarcerated persons do not have the means or ability to seek private mental health care and do not always trust correctional mental health staff; and (4) as it stands, federally funded programs and non-profits that inmates could access for mental health care are not suppose to serve them if the program receives funding under VAWA and VOCA.

Among all the data and facts about sexual abuse and victimization, it remains constant that incarcerated victims are more in need of the services outlined under VAWA and VOCA than almost any other group. Both VAWA and VOCA are good pieces of legislation on the surface. They both established and funded treatment for sexual victimization

during a time when it was important for victims of these crimes to have advocates and compensation. However, there needs to be comparable funding for crisis services for incarcerated victims. There are two options: both bills, VAWA and VOCA could be amended to acknowledge the passage of PREA and fund services for incarcerated victims or, as an extension of PREA, a matching funding bill for incarcerated victims could be passed by Congress.

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<sup>1</sup> See NATIONAL PRISON RAPE ELIMINATION COMMISSION HEARING, THE COST OF VICTIMIZATION: WHY OUR NATION MUST CONFRONT PRISON RAPE (June 14, 2005) (testimony of Ms. Linda Bruntmyer), *available at* [http://www.nprec.us/docs/PersonalAccounts\\_Bruntmyer.pdf](http://www.nprec.us/docs/PersonalAccounts_Bruntmyer.pdf). Ms. Bruntmyer testified on behalf of her son as a personal account from a survivor at one of the first National Prison Rape Elimination Commission hearings. She testified regarding her son's sexual abuse while incarcerated in an adult prison at the age of 16; her son after suffering sexual abuse at the hands of other inmates committed suicide by hanging himself in his cell in 1996.

<sup>2</sup> Violence Against Women Act (VAWA) of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (2004) (codified as amended in scattered sections of 16 U.S.C., 18 U.S.C., and 42 U.S.C.).

<sup>3</sup> *Id.*

<sup>4</sup> See generally Violence Against Women Act Reauthorization of 2005, Pub. L. No. 109-162, 119 Stat. 2960 (2006) (codified as amended in scattered sections of 42 U.S.C.) (broadening the scope of VAWA to address stalking, dating violence, child maltreatment and elder abuse).

<sup>5</sup> See DC Rape Crisis Center, New Volunteer Training (2002) (on file with author) (noting that most rape crisis counselors refer to a person as a "victim" only immediately after the assault; after that, they are referred to as a "survivor."). This is because they regained power by choosing how they deal with an assault. *Id.* This article will refer to people as survivors of sexual assault and victims of sexual assault interchangeably.

<sup>6</sup> See Violence Against Women Act Reauthorization of 2005 § 3(a) (defining sexual assault victims as either female or male). VAWA contains a non-exclusivity clause which states that nothing in the title of the Act should be construed to prohibit male victims of domestic violence, dating violence, sexual assault and stalking from receiving benefits and services under the title. *Id.*

<sup>7</sup> *Id.* §2 (recognizing that Title XI Department of Justice Reauthorization made appropriations for fiscal year 2006 to 2009).

<sup>8</sup> See Rape Abuse and Incest National Network, Statistics, <http://www.rainn.org/statistics/index.html> (last visited Mar. 30, 2008) (providing statistics about victims, rapists, sexual assault reporting, and sexual assault numbers).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> See Rape Abuse and Incest National Network, Reporting Rates, [http://www.rainn.org/get-information/statistics/reporting-](http://www.rainn.org/get-information/statistics/reporting-rates)

[rates](http://www.rainn.org/get-information/statistics/reporting-rates) (last visited Mar. 30, 2008) (providing statistics regarding the reporting and prosecution of sexual assaults).

<sup>12</sup> *Id.*

<sup>13</sup> See Rape Abuse and Incest National Network, The Offenders, <http://www.rainn.org/get-information/statistics/sexual-assault-offenders> (last visited Mar. 30, 2008) (explaining the difference in victim-offender relationships between females and males, with females reporting more assaults by a friend or acquaintance than victimized males).

<sup>14</sup> See Lois Timnick, 22% in Survey were Child Abuse Victims, L.A. TIMES, Aug. 25, 1985, at A1 (referencing nationwide L.A. Times poll on the extent of child molestation).

<sup>15</sup> See D.C. Rape Crisis Center, Sexual Assault Facts, <http://dcrcc.org/assault-facts.htm> (last visited on Mar. 30, 2008) (outlining the numbers and facts about drug and alcohol use by survivors of sexual assault noting that they have higher rates of drug and alcohol consumption and related problems than people who do not experience sexual assault).

<sup>16</sup> See *id.* (asserting that a survivor of sexual assault is nine times more likely to attempt suicide than a person not assaulted); see also DC Rape Crisis Center, Effects of Sexual Abuse: Internal, <http://dcrcc.org/effects.htm> (last visited Mar. 30, 2008) (discussing the internal effects of sexual abuse as including: depression, low self-esteem, anger or control issues, anxiety, shame, guilt).

<sup>17</sup> See CENTER FOR SEX OFFENDER MANAGEMENT: A PROJECT OF THE OFFICE OF JUSTICE PROGRAMS, MYTHS AND FACTS ABOUT SEX OFFENDERS (2000), *available at* <http://www.csom.org/pubs/mythsfacts.html> (finding that child molesters had a thirteen percent reconviction rate for sexual offenses and a thirty-seven percent reconviction rate for new, non-sex offenses over a five year period; rapists had a nineteen percent reconviction rate for sexual offenses and a forty-six percent reconviction rate for new, non-sexual offenses over a five year period). Additionally, among adult sex offenders, thirty percent have past histories of sexual victimization. *Id.*

<sup>18</sup> Because of the sensitive nature and consent and assent issues, national data regarding sexual abuse of youth and their contact with the criminal justice system is an area that lacks data. However, the Bureau of Justice Statistics (BJS) is expected to put out data on that very issue in mid-2008. Until then, we can only make generalized conclusions about the victimization histories of youth in custody based on what we know to be true about their adult counterparts. See NATIONAL INSTITUTE OF JUSTICE, CHILDHOOD VICTIMIZATION AND RISK FOR ALCOHOL AND DRUG ARRESTS 2 (1995) (observing that child maltreatment was a significant predictor of delinquency); see also NATIONAL INSTITUTE OF CORRECTIONS (NIC/WCL) PROJECT ON ADDRESSING PRISON RAPE AT THE WASHINGTON COLLEGE OF LAW, RESPONDING TO INMATE ON INMATE SEXUAL VIOLENCE TRAINING MATERIALS: IMPACT OF PAST VICTIMIZATION (2007) (illustrating the implications of childhood sexual abuse and victimization histories on people who are incarcerated).

<sup>19</sup> See ANGELA BROWNE & A.J. SABREE, NIC/WCL PROJECT ON ADDRESSING PRISON RAPE, RESPONDING TO INMATE ON INMATE SEXUAL VIOLENCE: PRESENTATION ON THE IMPACT OF VICTIMIZATION 1, 30 (Mar. 2007), *available at* [http://www.wcl.american.edu/nic/conference\\_march\\_07/modules/11\\_impact\\_of\\_past\\_victimization.pdf?rd=1](http://www.wcl.american.edu/nic/conference_march_07/modules/11_impact_of_past_victimization.pdf?rd=1) (analyzing data from 14, 285 inmates in state prisons).  
<sup>20</sup> *Id.* at 31.

<sup>21</sup> *Id.*

<sup>22</sup> See Angela Browne, Brenda A. Miller & Eugene Maguin, *Prevalence and Severity of Lifetime Physical and Sexual Victimization Among Incarcerated Women*, 22 INT'L. J.L. & PSYCHIATRY 301 (1999).

<sup>23</sup> See Karen M. Fondacaro, John C. Holt & Thomas A. Powell, *Psychological Impact of Childhood Sexual Abuse on Male Inmates: The Importance of Perception*, 23 CHILD ABUSE & NEGLECT, 361, 361-69 (1999) (examining the link between childhood sexual abuse and adult criminality).

<sup>24</sup> See CAROLINE HARLOW, BUREAU OF JUSTICE STATISTICS, PRIOR ABUSE REPORTED BY INMATES AND PROBATIONERS (1999), *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/parip.pdf> (highlighting significant differences between male and female inmates in abuse history).

<sup>25</sup> *Id.* at 1.

<sup>26</sup> See *id.* at 3 (associating past abuse with current violent criminality—namely homicide and sexual assault).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> See Harlow, *supra* note 24 (finding higher incidences of prior abuse among inmates than the general population).

<sup>33</sup> See JEAN HARRIS, THEY ALWAYS CALL US LADIES: STORIES FROM PRISON 115-16 (Scribner ed. 1988); JOANNE BELKNAP, THE INVISIBLE WOMAN: GENDER, CRIME AND JUSTICE (Wadsworth Publishing Company 2001); Christopher Man & John Cronan, *Forecasting Sexual Abuse in Prison: The Prison Subculture of Masculinity as a Backdrop for Deliberate Indifference*, 92 J. CRIM. L. & CRIMINOLOGY 127 (2002); Richard Vetstein, *Rape and AIDS in Prison: A Collision Course to a New Death Penalty*, 30 SUFFOLK U. L. REV. 863 (1997); James E. Robertson, *Cruel and Unusual Punishment in United States Prisons: Sexual Harassment Among Male Inmates*, 36 AM. CRIM. L. REV. 1 (1999); Cheryl Bell et al., *Rape and Sexual Misconduct in the Prison System: Analyzing America's Most Open Secret*, 18 YALE L. & POL'Y REV. 195 (1999).

<sup>34</sup> See U.S. DEPARTMENT OF JUSTICE, NATIONAL INSTITUTE OF CORRECTIONS INFORMATION CENTER, SEXUAL MISCONDUCT IN PRISONS: LAW, AGENCY RESPONSE AND PREVENTION (1996), *available at* <http://www.nicic.org/pubs/1996/013508.pdf>; GOVERNMENT ACCOUNTABILITY OFFICE, WOMEN IN PRISON: SEXUAL MISCONDUCT BY CORRECTIONAL STAFF (1999), *avail-*

*able at* <http://www.gao.gov/archive/1999/gg99104.pdf>; GOVERNMENT ACCOUNTABILITY OFFICE, WOMEN IN PRISON: ISSUES AND CHALLENGES CONFRONTING U.S. CORRECTIONAL SYSTEMS (1999), *available at* <http://www.gao.gov/new.items/gg00022.pdf>; OFFICE OF THE INSPECTOR GENERAL, DETERRING STAFF SEXUAL ABUSE OF FEDERAL INMATES (2005), *available at* <http://www.usdoj.gov/oig/special/0504/final.pdf>; ALLEN BECK & TIMOTHY HUGHES, PRISON RAPE ELIMINATION ACT: SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES 2004 (2005), *available at* <http://www.ojp.gov/bjs/pub/pdf/svrca04.pdf>.

<sup>35</sup> See WILLIAM J. SABOL, TODD D. MINTON & PAIGE M. HARRISON, BUREAU OF JUSTICE STATISTICS, PRISON AND JAIL INMATES AT MIDYEAR 2006 (2007), *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim06.pdf> (citing that the number of inmates in the custody of State and Federal Prisons and local jails reached 2,245,189); LAUREN E. GLAZE & THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, PROBATION AND PAROLE IN THE UNITED STATES, 2006 (2007), *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/ppus06.pdf> (citing that the number of adults on probation or parole reached 5,035,225). These two statistics combine to equal the number cited in the text. Because it is possible that people were held in prisons or jails as well as paroled in the same year, there may be some overlap between the two statistics.

<sup>36</sup> See BRENDA V. SMITH & JAIME M. YARUSSI, NIC/WCL PROJECT ON ADDRESSING PRISON RAPE, BREAKING THE CODE OF SILENCE: A CORRECTION OFFICERS' HANDBOOK ON IDENTIFYING AND ADDRESSING SEXUAL MISCONDUCTS 4 (June 2007), *available at* <http://nicic.org/Downloads/PDF/Library/022473.pdf> (providing that correctional settings include but are not limited to: prisons, jails, lock-ups, juvenile facilities, immigration detention centers, court holding facilities, home/ electronic monitoring, halfway houses, parole and/or probation).

<sup>37</sup> Prison Rape Elimination Act (PREA) of 2003, 42 U.S.C. §§ 15601-15609 (2003).

<sup>38</sup> *Id.* § 15601.

<sup>39</sup> *Id.* § 15603.

<sup>40</sup> BUREAU OF JUSTICE STATISTICS, DATA COLLECTIONS FOR THE PRISON RAPE ELIMINATION ACT of 2003 (June 2004), *available at* June 2004, <http://ojp.usdoj.gov/bjs/pub/pdf/dcprea03.pdf>.

<sup>41</sup> See ALLEN BECK & TIMOTHY HUGHES, BUREAU OF JUSTICE STATISTICS, SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES, 2004, at 1 (2005), *available at* [www.ojp.usdoj.gov/bjs/pub/pdf/svrca04.pdf](http://www.ojp.usdoj.gov/bjs/pub/pdf/svrca04.pdf) [hereinafter BECK & HUGHES 2004] (reporting that in 2004, there were 5,386 cases of sexual abuse reported by correctional authorities); ALLEN BECK AND PAIGE HARRISON, BUREAU OF JUSTICE STATISTICS, SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES, 2005, at 1 (2006), *available at* [www.ojp.usdoj.gov/bjs/pub/press/svrca05pr.pdf](http://www.ojp.usdoj.gov/bjs/pub/press/svrca05pr.pdf) [hereinafter BECK & HARRISON 2005] (reporting that in 2005, there were 6,241 cases of sexual abuse reported by correctional authori-



ties); ALLEN BECK, PAIGE HARRISON AND DEVON ADAMS, BUREAU OF JUSTICE STATISTICS, SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES, 2006, at 2 (2007) *available at* [www.ojp.usdoj.gov/bjs/pub/pdf/svrca06.pdf](http://www.ojp.usdoj.gov/bjs/pub/pdf/svrca06.pdf) [hereinafter BECK, HARRISON & ADAMS 2006] (reporting that in 2006, there were 6,528 cases of sexual abuse reported by correctional authorities).

<sup>42</sup> BECK, HARRISON & ADAMS 2006, *supra* note 41, at 2. This increase could be due to adoption of uniform definitions, better data collection and/or better and more trusted reporting structures.

<sup>43</sup> See ALLEN BECK AND PAIGE HARRISON, BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN STATE AND FEDERAL PRISONS REPORTED BY INMATES, 2007 (2007) (noting that this survey was not administered in jails or community facilities such as halfway houses, group homes, and/or work release centers).

<sup>44</sup> *Id.* (noting that past surveys of administrative records were not thought to provide reliable data on sexual violence because they were limited to incidents reported specifically to correctional authorities).

<sup>45</sup> *Id.* at 1.

<sup>46</sup> *Id.* at 5 (finding that states with rates above 300 incidents/1000 inmates were: Nebraska, Florida, New York, Utah, Indiana, Louisiana, Alabama, Wisconsin, California (2 facilities) and Texas (4 facilities)).

<sup>47</sup> PREA, 42 U.S.C. § 15602 (2003).

<sup>48</sup> See Robert W. Dumond, *The Impact and Recovery of Prisoner Rape*, Paper Presented at the "Not Part of the Penalty": Ending Prisoner Rape Conference 10 (2001) (explaining the effect of sexual victimization in correctional settings).

<sup>49</sup> See *id.* at 11 (describing the impact that incarcerations have on victims of sexual abuse).

<sup>50</sup> *Id.* at 11-12 (illustrating the differences between recovering from sexual assault in the community versus while incarcerated).

<sup>51</sup> See generally Victims of Crime Act, Pub. L. No. 98-473, 98 Stat. 2170 (1984) (codified as amended in scattered sections of 18 U.S.C. and 42 U.S.C.) (providing funding for physical injuries, lost wages and funeral expenses to crime victims).

<sup>52</sup> *Id.*

<sup>53</sup> PREA, 42 U.S.C. § 15601 (2003).

<sup>54</sup> See INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 18-19 (Marc Mauer & Meda Chesney-Lind eds., 2002) (likening the nature of inmate disenfranchisement to "internal exile" and "the mark of Cain" (citation omitted)).

<sup>55</sup> See FAMILY VIOLENCE PREVENTION FUND, HISTORY OF THE VIOLENCE AGAINST WOMEN ACT (2008), *available at*

<http://www.endabuse.org/vawa/display.php?DocID=34005> (summarizing the history of VAWA).

<sup>56</sup> See Violence Against Women Act (VAWA II) of 1999, H.R. 357, 106th Cong. (1999); *see also* Press Release, Rep. John Conyers, Jr., Conyers Introduces Omnibus Bill to Stop Violence Against Women and Their Children (May 12, 1999), *available at* <http://www.house.gov/conyers/pr051299.htm>. The Custodial Sexual Assault Act is found at §§ 341-346 of VAWA I.

<sup>57</sup> VAWA II, H.R. 357.

<sup>58</sup> See *id.* (describing the main components of the Act and the modifications that were made in 2000 Changes in VAWA II including: a reauthorization of 3.3 million dollars in funding and providing STOP grants and funding for shelter services for victims). Additionally, the Act created seven new programs including programs for: civil legal assistance, transitional housing, supervised visitation centers, full faith and credit programs between states, battered immigrant women, victims of dating violence and services for disabled or older women. *Id.*

<sup>59</sup> Violence Against Women Act Reauthorization of 2005, Pub. L. No. 109-162, 119 Stat. 2960 (2005).

<sup>60</sup> See PREA, 42 U.S.C. § 15601 (2003) (indicating that at least thirteen percent of inmates in the United States were victims of sexual assault).

<sup>61</sup> See VAWA I, Pub. L. No. 103-322, 108 Stat. 1796 (1994) (codified as amended in scattered sections of 16 U.S.C., 18 U.S.C., and 42 U.S.C.) (failing to recognize incarcerated individuals as potential victims of sexual assault).

<sup>62</sup> Victims of Crime Act (VOCA) of 1984, Pub. L. No. 98-473, 98 Stat. 2170 (1984) (codified in scattered sections of 18 U.S.C. and 42 U.S.C.).

<sup>63</sup> See VOCA Victim Assistance Grant Program, 67 Fed. Reg. 56,444 (Sept. 3, 2002) (authorizing the Department of Justice to pass regulations to set up a grant program to compensate victims of violence). The Attorney General makes funds available to assist victims of abuse pursuant to the Victims of Crime Act Victims Assistant Grant Program, which states that "[s]ubgrantees cannot use VOCA funds to offer rehabilitative services to perpetrators or offenders. Likewise VOCA funds cannot support services to incarcerated individuals, even when the services pertain to the victimization of that individual." *Id.* at 56, 546.

<sup>64</sup> See National Association of Crime Survivors' Compensation Boards, FAQ: Eligibility Requirements, <http://www.nacvcb.org/faq/1.html> (last visited Mar. 30, 2008) (noting that, in general, innocent survivors of most violent crimes, including survivors of assault, rape, domestic violence, child abuse, drunk driving and other crimes involving personal injury, are eligible to apply for crime survivor compensation benefits).



<sup>65</sup> See *id.* (commenting that most states have a seventy-two hour reporting requirement).

<sup>66</sup> See *id.* (observing that most states require that the application be filed within one year from the date of the crime, but a few states have shorter or longer periods).

<sup>67</sup> See RAPE, ABUSE AND INCEST NATIONAL NETWORK, REPORTING RATES, available at <http://www.rainn.org/get-information/statistics/reporting-rates> (last visited Mar. 26, 2008). Sexual assault is one of the most underreported crimes, with 60% still being left unreported. Males are the least likely to report a sexual assault, though they make up approximately 10% of all victims.

<sup>68</sup> See BECK AND HARRISON 2007, *supra* note 43, at 1 (reporting inmates sexual violence rates of 4.5% in 2007); BECK, HARRISON & ADAMS 2006, *supra* note 41, at 3 (reporting correctional authorities reported sexual violence rates of 2.91% in 2006). Differences in the numbers between inmate reports and correctional authorities reporting illustrates that inmates are not reporting to staff that sexual abuse is happening.

<sup>69</sup> See Brenda V. Smith, *Continuum of Sexual Behavior in Institutional Settings*, Developed under NIC Cooperative Agreement 06S20GJJ1 (PowerPoint presentation on file with author) (outlining the continuum of sexual behavior in prisons).

<sup>70</sup> See *Ex-prison Officer Faces Rape Charges*, PORTSMOUTH HERALD, Jan. 26, 2007, available at <http://archive.seacoastonline.com/news/01262007/nhnews-ph-nh-prison.trial.html>; Beverly Wang, *Guards Accuser Cross Examined*, THE UNION LEADER, Jan. 27, 2007, at A3; *Former Corrections Officer Says He Didn't Rape Inmate*, WCAX NEWS, Jan. 31, 2007; *Former Halfway House Guard Guilty of Inmate Rape*, THE BOSTON HERALD, Feb. 2, 2008; Annmarie Timmons, *Ex-guard Gets 20-40 in Rape*, CONCORD MONITOR, Apr. 19, 2007, available at <http://www.concordmonitor.com/apps/pbcs.dll/article?AID=/20070419/REPOSITORY/704190372/1043/NEWS01>.

<sup>71</sup> See *Medical and Mental Health Care, Community Corrections Settings and Oversight: Hearing on Special Topics in Preventing and Responding to Prison Rape Before the Nat'l Prison Rape Elimination Comm'n* (Dec. 5, 2007) (testimony of Sandra Matheson, Dir. of State Office of Victim/Witness Assistance); see also Letter from Sandra Matheson, Director of State Office of Victim/Witness Assistance to Chairman and Commission Members of the National Prison Rape Elimination Commission (Dec. 5, 2007), available at <http://nprec.us/docs3/TestimonyMatheson.pdf> (providing a full analysis of the testimony given regarding the acts taken by Tower to coerce and manipulate his survivors).

<sup>72</sup> See Timmons, *supra* note 70 (noting that, at the time of his conviction, Tower was still facing trials for accusations of

sexual assault on twelve more female inmates).

<sup>73</sup> See Letter from Sandra Matheson, *supra* note 71, at 3 (explaining the flow of the Tower trial in New Hampshire).

<sup>74</sup> See *id.* at 4 (explaining how Matheson worked with prisoners to provide them with crisis counseling).

<sup>75</sup> *Id.*

<sup>76</sup> See NIC/WCL PROJECT ON ADDRESSING PRISON RAPE, *Survey of Sexual Assault Services for Individuals under Correctional Supervision* (2006) Developed under NIC Cooperation Agreement 06S20GJJ1 (on file with the author) [hereinafter *Survey on Sexual Assault*] (noting that some of these states have state run coalitions that were able to answer our questions, however, some agencies were not direct service providers and forwarded our request to their local agencies for response). A list of all state sexual assault offices was obtained by Rape, Assault and Incest National Network (RAINN) as the most comprehensive list of sexual assault service centers throughout the country.

<sup>77</sup> See *id.* (stating that the two states responding to the survey that noted they would not serve incarcerated victims of sexual assault were Arizona and Texas).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*; PREA, 42 U.S.C. § 15605 (2003). Many of these grants were given as part of the grant programs to Protect Inmates and Safeguard Communities under the US Department of Justice Bureau of Justice Assistance.

<sup>80</sup> *Survey of Sexual Assault*, *supra* note 76.

<sup>81</sup> *Id.*

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