

## NOTES

# NOT PART OF THE PENALTY\*: THE PRISON RAPE ELIMINATION ACT OF 2003

*Sarah K. Wake\*\**

"I think it's important that it be understood that those of us who are proponents of this issue who feel that we have a human rights obligation to address this problem are from all political elements. I'm sure I am perceived as a conservative. But that has nothing to do with my perspective on this issue because I believe that as a humane society we have an obligation to make sure that when we do incarcerate people, that they are protected from the abuse that often takes place."<sup>1</sup>

### I. INTRODUCTION

On September 4, 2003, President George W. Bush signed the Prison Rape Elimination Act ("PREA")<sup>2</sup> into law. The purposes of the PREA are to: (1) establish a zero-tolerance standard for the occurrence of prison rape in the United States; (2) make prevention of prison rape a top priority within each correctional facility; (3) develop and implement national standards that will enable authorities to detect, prevent, reduce, and punish prison rape; (4) increase available data and information regarding the incidence of prison rape, thereby improving the management and administration of correctional facilities; (5) promulgate standard definitions used in collecting data on the occurrence of prison rape; (6) increase the accountability of prison officials who fail to detect, prevent, reduce, and punish prison rape; (7) protect the Eighth Amendment rights of all prisoners in the corrections system; (8) increase the efficiency of federal expenditures; and (9) reduce the effects of prison rape on interstate commerce.<sup>3</sup> By enacting the PREA, many hope that prison rape, "a problem that has too long been quietly swept

---

\* This portion of the title comes from *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (citing *Rhodes v. Chapman*, 452 U.S. 337, 345 n.11 (1981)), where the Court explains that prison rape is not part of the punishment inmates should face while incarcerated for their crimes.

\*\* J.D. Candidate, University of Notre Dame Law School, 2007; B.A. Political Science & International Studies, Loyola University Chicago, 2004. The author would like to thank Professor Nicole Stelle Garnett, Mr. Charles J. Kehoe, Dwight King, and Maria Cruz-Melendez for their invaluable support and guidance in preparing this Note. She would also like to especially thank Ernest and Christina Wake for everything.

1. See NATIONAL PRISON RAPE ELIMINATION COMMISSION, PUBLIC MEETING: UNIVERSITY OF NOTRE DAME LAW SCHOOL (Mar. 31, 2005), [http://www.nprec.us/docs/OpeningRemarks\\_notredame.pdf](http://www.nprec.us/docs/OpeningRemarks_notredame.pdf) (statement by Chairman of the National Prison Rape Elimination Commission, the Hon. Reggie B. Walton, of the D.C. District Court).

2. 42 U.S.C. §§ 15601–15609 (West 2005).

3. *Id.* § 15602(1)–(9).

under the rug,”<sup>4</sup> will gain the attention it deserves.<sup>5</sup> Those behind the PREA believe that knowing who is causing the problem, identifying those most susceptible to victimization, and understanding the characteristics of our incarceration system that either lead to or deter prison rape will help the Bureau of Justice Statistics, prison officials, and other concerned organizations reduce the occurrence of prison rape in America.<sup>6</sup>

Although I do not intend to ignore the devastating effects of inmate-on-inmate rape, this Note will primarily focus on staff-on-inmate sexual misconduct. Part II of this Note will explore the causes and effects of prison rape generally, and then specifically address staff sexual misconduct. Part III will give an overview of the Prison Rape Elimination Act and then focus individually on each of the major provisions. Part IV will explore the duties of the National Prison Rape Elimination Commission,<sup>7</sup> created by the PREA, and offer suggestions to the Commission to help solve the problem of staff-on-inmate violence. Finally, in Part V, I will briefly suggest that the PREA is already meeting its goals with some success by briefly discussing the Sexual Abuse in Detention Elimination Act,<sup>8</sup> which was recently passed in California. However, there is still a long way to go before prison rape no longer threatens the safety of America’s incarcerated.

## II. WHAT IS CAUSING THE PRISON RAPE PROBLEM?

Prison rape is not about sex. It is about power, violence, business, and politics.<sup>9</sup> However, it is still torture, like all other forms of sexual assault.<sup>10</sup> What kind of behavior constitutes rape? One of the essential functions of the PREA is to promulgate a standard definition of rape. By making a standard definition, any questions regarding what kind of behavior will be tolerated in correctional facilities is eliminated. The PREA defines rape as:

(A) the carnal knowledge,<sup>11</sup> oral sodomy, sexual assault with an object, or sexual fondling of a person, forcibly or against that person’s will; (B) the carnal knowledge,

---

4. Congressman Frank Wolf, Prison Rape, <http://www.house.gov/wolf/issues/prisonrape.html> (last visited Oct. 18, 2005).

5. See Joanne Mariner, *Preventing Prison Rape*, FINDLAW’S WRIT, June 24, 2002, <http://writ.news.findlaw.com/mariner/20020624.html> (explaining the problem of prison rape and briefly introducing the provisions of the PREA); see also *PREA Update: Stop Prisoner Rape’s Report on the Prison Rape Elimination Act*, May 2005, at 6, <http://www.spr.org/pdf/PREAUpdate0505.pdf> (concluding that the passage of the PREA will allow many people “to address a problem that has been all but ignored for far too long”).

6. Carla I. Barrett, Note, *Does the Prison Rape Elimination Act Adequately Address the Problems Posed by Prison Overcrowding? If Not, What Will?*, 39 NEW ENG. L. REV. 391, 423–24 (2005).

7. 42 U.S.C. § 15606.

8. Sexual Abuse in Detention Elimination Act, 2005 Cal. Legis. Serv. 2310 (West) (codified at CAL. PENAL CODE §§ 2635–2643 (West Supp. 2006)).

9. Kim English & Peggy Heil, *Prison Rape: What We Know Today*, 30 CORRECTIONS COMPENDIUM 1, 1 (2005).

10. *The Prison Rape Reduction Act of 2002: Hearings on S. 2619 Before the S. Judiciary Comm.*, 107th Cong. 3 (2002), available at <http://www.access.gpo.gov/congress/senate/pdf/107hr/87677.pdf> (statement of Frank R. Wolf, Rep., Va.).

11. See 42 U.S.C. § 15609(1) (defining carnal knowledge as “contact between the penis and the vulva or the penis and the anus, including penetration of any sort, however slight”).

oral sodomy, sexual assault with an object, or sexual fondling of a person not forcibly or against the person's will, where the victim is incapable of giving consent because of his or her youth or his or her temporary or permanent mental or physical incapacity; or (C) the carnal knowledge, oral sodomy, sexual assault with an object, or sexual fondling of a person achieved through the exploitation of the fear or threat of physical violence or bodily injury.<sup>12</sup>

Congress estimates that more than 1,000,000 inmates have been sexually assaulted in the past twenty years.<sup>13</sup> Almost every state and the federal government criminalize sexual conduct between prisoners and correctional staff.<sup>14</sup> These statutes are based on the belief that truly consensual intercourse between a corrections officer and an inmate is impossible due to the power imbalance between the two groups.<sup>15</sup>

While it is difficult to define a specific group susceptible to prison rape, mentally ill inmates have an increased risk of becoming victims of sexual violence.<sup>16</sup> This is troubling because "America's jails and prisons house more mentally ill individuals than all of the Nation's psychiatric hospitals combined."<sup>17</sup> Furthermore, younger first-time offenders are at increased risk of victimization.<sup>18</sup> It is also believed that lesbian and transgender inmates are targeted by corrections staff because of their sexual preference.<sup>19</sup> Some people believe that being small, unassertive, non-aggressive, physically weak, a first time offender (of any age), shy, white, and intellectual can also lead to an inmate being targeted for sexual abuse.<sup>20</sup>

What attributes of our correctional facilities make the rape problem so seemingly prevalent? Surely the extraordinary numbers of people incarcerated in America is one aspect of the problem. The United States incarcerates the highest percentage of its people in the world.<sup>21</sup> The Bureau of Justice Statistics estimated on December 31, 2004, that "2,135,901 prisoners were held in Federal or State prisons or in local jails."<sup>22</sup> The prison rate has quadrupled since 1980 due to mandatory minimum sentencing laws, the increased use of prison sentences, and reductions in the availability of early release

12. *Id.* § 15609(9).

13. *Id.* § 15601(2).

14. 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, 39–40 (2004).

15. *See id.* at 40 ("Accordingly, we must assume sexual contact between staff and prisoners is improper, illegitimate, and, by its very nature, within the definition of rape."); *see also* Farmer v. Brennan, 511 U.S. 825, 833 (1994) (stating that since the government has taken almost every means of self-protection from the inmates, they must provide inmates with some kind of protection).

16. 42 U.S.C. § 15601(3).

17. *Id.* (explaining that up to sixteen percent of inmates in the state's correction systems and up to seven percent of those inmates in the federal system suffer from a mental illness).

18. *See id.* § 15601(4) (stating that juveniles are five times more likely to be assaulted while they are in adult facilities).

19. Delisa Springfield, Note, *Sisters in Misery: Utilizing International Law to Protect United States Female Prisoners from Sexual Abuse*, 10 IND. INT'L & COMP. L. REV. 457, 464–65 (2000).

20. *Human Rights News: Rape Crisis in U.S. Prisons*, HUMAN RIGHTS WATCH (Apr. 19, 2001), <http://hrw.org/english/docs/2001/04/19/usdom168.htm>.

21. HUMAN RIGHTS WATCH, INCARCERATED AMERICA: HUMAN RIGHTS WATCH BACKGROUNDER 1 (2003), <http://www.hrw.org/backgrounder/usa/incarceration/>.

22. PRISON STATISTICS, BUREAU OF JUSTICE STATISTICS (2004), <http://www.ojp.usdoj.gov/bjs/prisons.htm>.

or parole.<sup>23</sup> Although the PREA does not explicitly suggest any specific reason as to why prison rape is such a problem, prior court cases have made the connection between the risk of prison rape and overcrowding.<sup>24</sup> Furthermore, the PREA does implicate that the growing number of people in the prison population correlates with the dangers that inmates and society face.<sup>25</sup>

Critics of the PREA call it a “superficial gesture of little substance.”<sup>26</sup> One article concludes:

Inmates will attack inmates if enough of them live in sufficient proximity, with insufficient internal security, for long enough periods of time. That means that while Congress funds lots of studies, we already know that the key variables are really the sheer rates of incarceration in the United States, the density of prison housing, the number and quality of staff, and the abandonment of any meaningful attempts at rehabilitation.<sup>27</sup>

Therefore, it seems clear that various groups agree that the prison rape problem has something to do with the high number of people incarcerated in America. It seems clear that overcrowded facilities have a negative impact on what goes on inside prisons and jails. But what do these high numbers, and the related occurrence of prison rape, mean to society?

#### *A. The Dangers of Prison Rape to Inmates and Society*

Prison rape is something with which all members of society should be concerned. Not only is it inhumane, but prison rape has a clear physical and economic impact upon everyone, not just those who are victimized. The PREA outlines explicit findings as to the dangers of prison rape.<sup>28</sup> Congress believes that “[m]embers of the public and government officials are largely unaware of the epidemic character of prison rape and the day-to-day horror experienced by victimized inmates.”<sup>29</sup> Congress’ findings are

23. See HUMAN RIGHTS WATCH, *supra* note 21; see also Barrett, *supra* note 6, at 394–402 (exploring why American prisons are overcrowded, listing “harsh sentencing guidelines and mandatory minimum sentences coupled with longer sentences for certain crimes, an increase in the use of incarceration over other non-incarceration forms of punishment, and the elimination of parole and the creation of ‘truth-in-sentencing’ laws”).

24. See Barrett, *supra* note 6, at 393 (citing *Nami v. Fauver*, 82 F.3d 63, 67 (3d Cir. 1996)); see also *Farmer v. Brennan*, 511 U.S. 825, 853 (1994) (Blackmun, J., concurring) (claiming that the fact that our prisons are badly overcrowded and understaffed could explain many of the problems in America’s correctional facilities); *Johnson v. Levine*, 588 F.2d 1378, 1380 (4th Cir. 1978) (“The overcrowding limited opportunities for recreation, for instruction and rehabilitation, complicated the maintenance of sanitation, required meal service in three separate shifts and probably contributed to a high level of violence and psychological injury to some prisoners.”).

25. Barrett, *supra* note 6, at 425 (citing Prison Rape Elimination Act, 42 U.S.C. § 15605(b)(2)(A) (West 2005)).

26. Robert Weisberg & David Mills, *Violence Silence: Why No One Really Cares About Prison Rape*, SLATE, Oct. 1, 2003, <http://slate.msn.com/id/2089095> (“The reason you’ve never heard of the Prison Rape Elimination Act is probably that no one who knows our criminal justice system believes it will do much of anything to eliminate prison rape.”).

27. *Id.*

28. See generally 42 U.S.C. § 15601 (West 2005) (detailing Congress’ findings).

29. *Id.* § 15601(12).

summarized below.

Congress found that most prison staff members have not received adequate training on how to prevent, report, or treat sexual assault on inmates.<sup>30</sup> In addition, prison rape oftentimes goes unreported, and even when the incident is reported, the victim may not receive treatment.<sup>31</sup> If the inmate does receive treatment, it can be inadequate in addressing the psychological and physical impact of sexual assault.<sup>32</sup> Prison rape has also been found to increase the number of homicides and other types of violence against both staff and other inmates.<sup>33</sup> Furthermore, in some instances sexual assault in prisons involves violations of the United States Constitution, specifically the Eighth Amendment.<sup>34</sup> The inmate is often left to deal with the problem on his or her own, which can later lead to negative results while the inmate is still in a correctional facility, or once the prisoner is released.

How does society suffer from a problem that takes place behind the walls of the nation's prisons and jails? Perhaps most troubling is the finding that prison rape jeopardizes public safety because assaulted inmates are more likely to commit crimes after they are released.<sup>35</sup> Congress also found that prison rape, because it is often interracial, can fuel interracial tensions, both in prison and once the inmate is released into his or her community.<sup>36</sup> Victims are hindered in their ability to reintegrate into society and obtain steady employment upon their release, leading to homelessness or the need for government assistance.<sup>37</sup> Additionally, prison rape undermines the operation of the United States government.<sup>38</sup> Finally, prison rape has significant effects upon interstate commerce.<sup>39</sup>

30. *Id.* § 15601(5).

31. *Id.* § 15601(6).

32. *Id.*

33. *Id.* § 15601(10).

34. See 42 U.S.C. § 15601(13) (citing *Farmer v. Brennan*, 511 U.S. 825 (1994) ("Deliberate indifference to the substantial risk of sexual assault violates prisoners' rights under the Cruel and Unusual Punishments Clause of the Eighth Amendment.")).

35. 42 U.S.C. § 15601(8) (stating that 600,000 inmates are released back into society each year).

36. *Id.* § 15601(9) (stating that because prison rape is frequently interracial, assaults "significantly exacerbate[] interracial tensions, both within prison and, upon release of perpetrators and victims from prison, in the community at large").

37. *Id.* § 15601(11).

38. *Id.* § 15601(14). This provision of the PREA states:

The effectiveness and efficiency of these federally funded grant programs are compromised by the failure of State officials to adopt policies and procedures that reduce the incidence of prison rape in that the high incidence of prison rape—(A) increases the costs incurred by Federal, State, and local jurisdictions to administer their prison systems; (B) increases the levels of violence, directed at inmates and at staff, within prisons; (C) increases health care expenditures, both inside and outside of prison systems, and reduces the effectiveness of disease prevention programs by substantially increasing the incidence and spread of HIV, AIDS, tuberculosis, hepatitis B and C, and other diseases; (D) increases mental health care expenditures, both inside and outside of prison systems, by substantially increasing the rate of post-traumatic stress disorder, depression, suicide, and the exacerbation of existing mental illnesses among current and former inmates; (E) increases the risks of recidivism, civil strife, and violent crime by individuals who have been brutalized by prison rape; and (F) increases the level of interracial tensions and strife within prisons and, upon release of perpetrators and victims, in the community at large.

*Id.*

39. *Id.* § 15601(15). This provision of the PREA claims:

The high incidence of prison rape has a significant effect on interstate commerce because it increases substantially—(A) the costs incurred by Federal, State, and local jurisdictions to

Especially troublesome is the number of inmates in America's correctional facilities suffering from AIDS. "In the year 2000, 25,088 inmates in state and federal prison were known to be infected with HIV or AIDS."<sup>40</sup> In that same year six percent of the deaths in federal and state prisons were caused by HIV/AIDS.<sup>41</sup> Congress has concluded that prison rape jeopardizes public health by contributing to the spread of various diseases, and by giving a potential death sentence to those who are victimized by prison rape.<sup>42</sup> Thus, prison rape leads to increased health care expenditures "both inside and outside of prison systems, and reduces the effectiveness of disease prevention programs by substantially increasing the incidence and spread of HIV, AIDS, tuberculosis, hepatitis B and C, and other diseases."<sup>43</sup> It is clear that prison rape has negative consequences both for those who are victims of the rape and for those who live outside the walls of the nation's corrections facilities.

### *B. Staff-on-Inmate Sexual Abuse*<sup>44</sup>

The primary focus of this Note is staff sexual misconduct. Staff sexual misconduct emerged as a problem early in the 1990s.<sup>45</sup> This form of misconduct with inmates accounts for around eighteen percent of the sexual crimes perpetrated in prisons.<sup>46</sup> To respond to staff sexual misconduct, the National Institute of Corrections instituted a training program called "Addressing Staff Sexual Misconduct" in 1996.<sup>47</sup> This program stemmed from several high-profile lawsuits by women incarcerated in women's facilities.<sup>48</sup> However, programs of this nature seem to be ineffective.

In order to be effective, the strategy should have allowed the culture and practices of each correctional institution to be evaluated, instead of dealing with rape accusations on a case-by-case basis.<sup>49</sup> Put another way, prison rape is about much more than sex. Staff sexual misconduct can result as symptoms of other problems in the facility.<sup>50</sup> Therefore, strategies designed to eliminate staff sexual misconduct require more than a

---

administer their prison systems; (B) the incidence and spread of HIV, AIDS, tuberculosis, hepatitis B and C, and other diseases, contributing to increased health and medical expenditures throughout the Nation; (C) the rate of post-traumatic stress disorder, depression, suicide, and the exacerbation of existing mental illnesses among current and former inmates, contributing to increased health and medical expenditures throughout the Nation; and (D) the risk of recidivism, civil strife, and violent crime by individuals who have been brutalized by prison rape.

*Id.*

40. *Id.* § 15601(7).

41. *Id.*

42. *Id.*

43. *Id.* § 15601(14)(C).

44. See Anadora Moss & Ashbel T. Wall II, *Addressing the Challenge of Inmate Rape*, 67 CORRECTIONS TODAY 74, 74 n.1 (2005) (explaining that the term "inmate" is appropriate when discussing those detained in a prison or jail, but that the PREA is more inclusive and impacts those detained in community corrections facilities, in which case the term "offender" is used).

45. *Id.* at 74.

46. Cindy Struckman-Johnson et al., *Sexual Coercion Reported by Men and Women in Prison*, 33 J. SEX RES. 67, 71 tbl.4 (1996).

47. Moss & Wall, *supra* note 44, at 74.

48. *Id.*

49. See *id.*

50. See *id.* (explaining, however, that well-run facilities can also have problems with staff sexual misconduct).

case-by-case response to be effective.<sup>51</sup> The PREA works toward this goal by facilitating the gathering of data which will hopefully lead those concerned to accurately identify where and why staff sexual misconduct occurs.

The interaction between female inmates and male corrections officers certainly contributes to staff sexual misconduct. Historically most women's prisons were built so that female staff and female inmates could interact in an environment away from the influence of men.<sup>52</sup> This is because many female offenders had only experienced negative relationships with men, having been manipulated or exploited by them.<sup>53</sup> However, when women began working in correctional facilities for men, male officers subsequently increased their presence in facilities for women.<sup>54</sup> This increased number of men working in women's prisons has meant continued allegations, investigations, indictments, and convictions of male staff-on-inmate sexual abuse.<sup>55</sup>

Sometimes female inmates are pressured into performing sexual acts by prison staff.<sup>56</sup> Corrections officers can do this by depriving women of feminine needs, withholding privileges, and granting extra favors, such as extra phone calls or visits with their children, to those who cooperate.<sup>57</sup> Obviously this places the inmate in a difficult position because she depends on the prison staff for her survival and well-being. Female inmates across the United States have been raped by medical staff, corrections officers, and male prisoners who pay the staff for access to female inmates.<sup>58</sup> Further complicating the situation is the fact that anywhere from forty to eighty-eight percent of incarcerated females have been the victims of sexual abuse before facing incarceration.<sup>59</sup>

51. *See id.*

52. JOCELYN M. POLLOCK, *WOMEN, PRISON & CRIME* 176 (Todd Clear ed., Wadsworth 2002) (1990).

53. *Id.*; *see also id.* at 190 (explaining that women in prison have oftentimes had "extremely dysfunctional relationships with men," such as being abused by their fathers).

54. *Id.* at 184; *see also id.* at 181 (explaining that in the 1980s and 1990s female corrections officers began to work in prisons for men, but that the female officers often had restricted tasks, such as working in the visiting room conducting searches of female visitors or working in the administrative building).

55. *Id.* at 187.

56. *See id.* at 187 ("Nearly every inmate we interviewed reported various sexually aggressive acts of guards. . . . [O]fficers routinely 'corner' women in their cells . . . and press their bodies against them, mocking sexual intercourse. Women described incidents where guards exposed their genitals while making sexually suggestive remarks.") (quoting Amnesty International, "NOT PART OF MY SENTENCE": VIOLATIONS OF THE HUMAN RIGHTS OF WOMEN IN CUSTODY 38 (1999)); *see also* HUMAN RIGHTS WATCH, *supra* note 20, at 1-2 (explaining this sexual slavery phenomenon as it relates to inmate-on-inmate violence); Springfield, *supra* note 19, at 465 (stating that since female inmates depend upon correction officers for basic items, they are often coerced into engaging in sexual activities with the officers that threaten to withhold those items unless the inmate cooperates).

57. *See* Springfield, *supra* note 19, at 465.

58. *Id.* at 465-66.

59. DOROTHY Q. THOMAS ET AL., *ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS* 19 (Human Rights Watch 1996), <http://hrw.org/reports/1996/Us1.htm>. This report explains the conclusions of Christine Kampfner, a clinical psychologist who is experienced in dealing with women who kill their abusers. Kampfner concluded that:

The abuse had an enormous impact on how the women responded to incarceration, particularly their relationships with male guards. Kampfner asserted that the women often relive the trauma and suffer flashbacks, particularly when the corrections officers search them and conduct pat-frisks. Many women with a prior history of sexual abuse are particularly vulnerable to sexual abuse in prison. According to Kampfner, women prisoners respond to abusive authority figures in prison much as they have prior to incarceration. She continued, "The women are so needy and in need of love, they are set up for oppression. The only way they know is to exchange their bodies

The problem is that once a female inmate reports an incident of sexual assault, she is potentially left at the hands of her abuser.<sup>60</sup> This is because “[g]rievance or investigatory procedures, where they exist, are often ineffectual, and correctional employees continue to engage in abuse because they believe they will rarely be held accountable, either administratively or criminally.”<sup>61</sup> In one report almost every female inmate who filed a sexual misconduct complaint encountered retaliation by other prisoners or corrections staff.<sup>62</sup> Lack of support for the victims of prison rape also causes inmates to let incidents of sexual assault go unreported.<sup>63</sup> Assaulted inmates can become so riddled with shame that they end up believing that the rape was their fault and never tell anyone what happened.<sup>64</sup> Further complicating the problem is the fact that officers are often hesitant to testify against their co-workers and, given the secluded nature of prisons and jails, evidence supporting allegations of sexual misconduct by staff is often very difficult to obtain.<sup>65</sup> Therefore it is unlikely that a female inmate will report abuse by a staff member.

### III. THE PRISON RAPE ELIMINATION ACT OF 2003

Before the passage of the PREA, research on prison rape was limited.<sup>66</sup> From around the mid-1970s until the early 1980s there were several researchers who investigated prison rape.<sup>67</sup> For the most part, this research was ignored.<sup>68</sup>

---

[to meet this need].”

*Id.* at 19–20; *see also* *Jordan v. Gardner*, 986 F.2d 1521, 1523 (9th Cir. 1993) (explaining the story of a female inmate who had a long history of sexual abuse by men and submitted to a body search by a male staff member, causing her severe distress).

60. *Springfield*, *supra* note 19, at 466.

61. THOMAS, *supra* note 59, at 1. This information comes from the results of a two-year study conducted over sixty present and former inmates in California, Georgia, Illinois, Michigan, New York, and Washington D.C. *See generally id.* (detailing the results of the entire study).

62. *Id.* at 6. The report states:

In some cases, they also faced punishment by correctional officials. These punishments took the form of write-ups for sexual misconduct, the loss of “good time” accrued toward an early parole, or prolonged periods of disciplinary segregation. In other cases, officials did not overtly discipline prisoners but made use of administrative segregation, ostensibly a protective mechanism, effectively to punish them. Thus, prisoners who had committed no disciplinary infraction whatsoever were subjected to the same treatment as prisoners serving disciplinary sentences.

*Id.*

63. *See* English & Heil, *supra* note 9, at 3.

64. *Id.*

65. *See* THOMAS, *supra* note 59, at 5. The report states:

Even if a prisoner succeeded in pursuing a complaint of sexual misconduct, we found that internal investigatory procedures, while they exist in all fifty states and the District of Columbia, were often fraught with conflicts of interest and a bias against prisoner testimony. At times, officers accused of sexual misconduct were assigned to investigate themselves. We also found that in almost every case of custodial sexual misconduct, correctional officers assumed that the prisoner lied and thus refused, absent medical reports or witnesses who were not prisoners, to credit prisoner testimony.

*Id.*

66. *See* English & Heil, *supra* note 9, at 1.

67. *See id.* (listing several researchers who investigated the prison rape epidemic during this time period).

68. *See id.* (quoting R.W. Dumond, who explains that, even though prison rape has been known and investigated for about thirty years, the research has failed to produce an effective remedy to prevent prison rape or to improve conditions in correctional facilities).



Furthermore, the limited research that has been conducted over the last thirty years has produced disparate results.<sup>69</sup> Hopefully, these problems will be eliminated with the passage of the PREA.

The PREA has several provisions designed to end prison rape in America, each of which will be explained generally, and then more specifically. First, it authorizes the Bureau of Justice Statistics to conduct a yearly “review and analysis of the incidence and effects of prison rape.”<sup>70</sup> Second, the PREA also establishes a national clearinghouse “for the provision of information and assistance to Federal, State, and local authorities responsible for the prevention, investigation, and punishment of instances of prison rape.”<sup>71</sup> Third, the PREA authorizes the Attorney General to “make grants to States to assist those States in ensuring that budgetary circumstances . . . do not compromise efforts to protect inmates (particularly from prison rape) and to safeguard the communities to which inmates return.”<sup>72</sup> Finally, the PREA establishes the National Prison Rape Elimination Commission, charged with conducting an in-depth study of the causes and impacts of prison rape and promulgating standards to end the problem.<sup>73</sup> Below, each of the major provisions of the PREA is explained in greater detail.

#### A. The Bureau of Justice Statistics

Quantifying the frequency of rape behind bars is very difficult.<sup>74</sup> Before the passage of the PREA, “[i]nsufficient research ha[d] been conducted and insufficient data reported on the extent of prison rape.”<sup>75</sup> To help remedy this problem, in accordance with its duties mandated in the PREA, the Bureau of Justice Statistics (“BJS”) conducted a comprehensive survey of the nation’s prisons and jails in order to assess the prevalence of prison rape in America’s correctional facilities.<sup>76</sup>

In addition to collecting, reviewing, and analyzing the number of times prison rape occurs and its effects, the BJS’s analysis will also explain the characteristics of victims and perpetrators, as well as the characteristics of correctional facilities that report a high

---

69. *See id.* at 2.

70. Prison Rape Elimination Act, 42 U.S.C. § 15603(a)(1) (West 2005) (setting forth the duties of the Bureau of Justice Statistics).

71. *Id.* § 15604(a)(1).

72. *Id.* § 15605(a); *see also id.* §§ 15605(c)(1)–(3), (d)(2)(A)(i)–(ii); NATIONAL INSTITUTE OF CORRECTIONS, DEPARTMENT OF JUSTICE, PRISON RAPE ELIMINATION ACT: ANNUAL REPORT TO CONGRESS 10 (2004), <http://www.nicic.org/Library/020229>. The report to Congress explains that the PREA requires:

(1)[G]rant awards were to be made for a period of not more than two years; (2) awards must include a [fifty] percent match by the applicant; and (3) awards must not exceed \$1,000,000. The PREA stipulated that the application is to include: (1) a certification that the state has adopted, or depending on the date of the application, will consider adopting all national prison rape standards promulgated under the Act; and (2) a description of the preventive, prosecutorial, or administrative activities to be undertaken using the grant funds. In addition, the PREA prescribed requirements for reports to be submitted and disseminated at the conclusion of the grant period.

*Id.*

73. *See infra* Part IV (exploring the duties of the Commission at greater length).

74. Golden, *supra* note 14, at 42.

75. 42 U.S.C. § 15601(2).

76. *See id.* § 15603(a)(1) (requiring the Bureau of Justice Statistics to “carry out, for each calendar year, a comprehensive statistical review and analysis of the incidence and effects of prison rape”).

incidence of rape.<sup>77</sup> The BJS is responsible for “[d]efining rape for purposes of the study, [d]etermining how data will be collected[,] [d]etermining how facilities will be categorized[,] [and] [d]etermining how the data will be adjusted to account for differences in the facilities from which the data is collected.”<sup>78</sup> By including this provision in the PREA, the available data and information on the occurrence of prison rape will increase; thus hopefully improving the management of correctional facilities and causing an overall drop in the incidence of prison rape.<sup>79</sup>

The BJS reported that nearly 2,100 substantiated incidents of sexual violence took place in the nation’s correctional facilities during 2004.<sup>80</sup> Around 8,210 incidents of sexual violence were reported, with forty-two percent of those allegations involving staff-on-inmate misconduct.<sup>81</sup> However, in nearly fifty-five percent of the staff-on-inmate allegations, the evidence was not sufficient to determine if the incident had actually occurred.<sup>82</sup>

### B. The National Institute of Corrections

In order to assist in the prevention and prosecution of prison rape, the PREA mandates that the National Institute of Corrections (“NIC”) must submit a report to Congress and the Secretary of Health and Human Services no later than September 30 of each year.<sup>83</sup> The report must contain a summary of the activities of the Department

77. NATIONAL INSTITUTE OF CORRECTIONS, *supra* note 72, at 3.

78. *Id.* at 7. Within the National Institute of Corrections Annual Report to Congress, the NIC explains at length the activities undertaken by the BJS in order to comply with the PREA. *Id.* at 7–10; *see also* BUREAU OF JUSTICE STATISTICS, DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS STATUS REPORT: DATA COLLECTIONS FOR THE PRISON RAPE ELIMINATION ACT OF 2003, at 2 (2004), <http://www.nicic.org/Library/serial883> (explaining how the BJS will define “rape” for purposes of their research). The BJS concluded that:

All sexual acts involving staff are considered misconduct and are covered under the Act, including: any behavior of a sexual nature directed toward an inmate by an employee, volunteer, official visitor, or agency representative; all completed, attempted, threatened, or requested sexual acts between staff and inmates; any incident of intentional touching of the genitalia, anus, groin, breast, inner thigh, or buttocks with the intent to abuse, arouse, or gratify sexual desire; incidents of indecent exposure, invasion of privacy for sexual gratification, or staff voyeurism.

*Id.*

79. NATIONAL INSTITUTE OF CORRECTIONS, *supra* note 72, at 4; *see also* BUREAU OF JUSTICE STATISTICS, *supra* note 78, at 1. The BJS reports that in order to meet the requirements of the PREA they will have various methods for surveying former and present inmates implemented by 2006 and asserts that with the cooperation of correctional administrators it can gather information that will inform and help policy-makers to tailor legislation to eliminate prison rape across America. BUREAU OF JUSTICE STATISTICS, *supra* note 78, at 3–5.

80. Press Release, Bureau of Justice Statistics, Almost 2,100 Sexual Violence Incidents Took Place in the Nation’s Correctional Facilities During 2004 (July 31, 2005), <http://www.ojp.usdoj.gov/bjs/pub/press/svrca04pr.htm> (summarizing the work of the Bureau of Justice Statistics in accordance with the PREA).

81. *Id.* (“State and federal prison systems reported 42 percent of all allegations, local or private juvenile facilities 23 percent, local jails 21 percent and state juvenile systems 11 percent. Almost 42 percent of the reported allegations of sexual violence involved staff-on-inmate sexual misconduct, 37 percent were inmate-on-inmate nonconsensual sexual acts, 11 percent were staff sexual harassment of inmates, and 10 percent were inmate-on-inmate abusive sexual contacts.”).

82. *Id.*

83. Prison Rape Elimination Act, 42 U.S.C. § 15604(b)(1) (West 2006); *see also* NATIONAL INSTITUTE OF CORRECTIONS, *supra* note 72, at 15 (mandating the establishment of a national clearinghouse within the National Institute of Corrections in order to provide information to assist in the investigation, prevention, and punishment of prison rape).

of Justice regarding prison rape prevention for the previous calendar year.<sup>84</sup> The NIC plays an important role in the success of the PREA by providing correctional agencies across the country with a resource for both their questions about the PREA and suggestions for successfully eliminating prison rape in their individual institutions.

Since the passage of the PREA, the NIC has actively met its mandate to provide information to those in the corrections field.<sup>85</sup> After awarding two cooperative agreements to The Moss Group, Inc., the group developed a strategic plan for the 2004 and 2005 fiscal years and further developed, expanded, and enhanced PREA-related activities.<sup>86</sup> One of the NIC's primary responsibilities is to provide information to those in the corrections field.<sup>87</sup> In order to do this, the NIC must inform corrections field members of the passage of the PREA and acquaint correctional practitioners, criminal justice officials, and those from related fields with the essential provisions of the PREA.<sup>88</sup>

To facilitate this goal, the NIC utilized America's major professional correctional groups' yearly conferences.<sup>89</sup> The NIC gained permission from the American Correctional Association, American Jail Association, National Sheriff's Association, and American Probation and Parole Association, to conduct focus group meetings at each of their conferences.<sup>90</sup> NIC representatives presented each focus group with a synopsis of the PREA as well as the role of the NIC.<sup>91</sup> Participants then discussed the PREA at length, including their attitudes about the law and recommendations for its successful implementation.<sup>92</sup> Sixty-seven practitioners attended the focus groups<sup>93</sup>; fifty-five percent of the participants estimated that the prison rape problem was underestimated, while forty-five percent believed the problem was overestimated.<sup>94</sup>

84. 42 U.S.C. § 15604(b)(2).

85. See NATIONAL INSTITUTE OF CORRECTIONS, *supra* note 72, at 15–24 (explaining how the NIC has facilitated the implementation of the PREA, including, but not limited to, the creation of a video explaining the PREA and the maintenance of a website specifically devoted to the PREA).

86. *Id.* at 15.

87. *Id.*

88. *Id.* The NIC Report explains that in order to do this, the NIC “began to: (1) assess the field’s understanding and perspective on the law and the issues which drove its passage; and (2) collect information about current practices and responses to the issue of prison and sexual assault.” *Id.*

89. *Id.*

90. NATIONAL INSTITUTE OF CORRECTIONS, *supra* note 72, at 15–16.

91. *Id.* at 16.

92. *Id.* at 16–17; see also *id.* at 17. For example, participants in the focus groups made suggestions to the NIC for immediate changes to ensure PREA’s successful implementation. The participants concluded that:

NIC could assist them in getting “buy-in” from other divisions of government, clarify what they must do to comply with the PREA, clarify the PREA itself, and continue to conduct conference workshops with more in-depth coverage. The suggested incentives ranged from negative to positive, including ensuring that administrators are held accountable, reminding state officials of the grant restrictions and incentives, and helping staff realize the benefits of eliminating prison rape. Participants also suggested that many of the staff who are in a position to help prison rape victims (counselors, chaplains, etc.) are often in positions that are eliminated when budgets are cut.

*Id.*

93. *Id.* at 16.

94. *Id.* However, the Report notes that:

More participants at the earliest conference thought that the problem was overestimated compared to later conferences, suggesting that more information about the issue had been communicated to conference attendees later in the year. This same phenomenon was seen in participant comments pertaining to attitude[s] about the PREA. Forty percent of all comments from all four conferences

The NIC plans to enhance technical assistance to institutions over the next few years as well as to continue to develop new training programs and products.<sup>95</sup>

#### IV. THE PRISON RAPE ELIMINATION COMMISSION

To help implement its goals, the PREA established the National Prison Rape Elimination Commission.<sup>96</sup> The nine member, bipartisan Commission is charged with, *inter alia*,<sup>97</sup> recommending “national standards for reducing prison rape”<sup>98</sup> and carrying out a “comprehensive legal and factual study of the penalogical, physical, mental, medical, social, and economic impacts of prison rape in the United States”<sup>99</sup> on various social and governmental bodies.<sup>100</sup> Eventually, the Commission will submit a report of its findings and recommendations.<sup>101</sup> No later than one year after receiving this report, the Attorney General must “publish a final rule adopting national standards for the detection, prevention, reduction, and punishment of prison rape.”<sup>102</sup> All of the detention facilities in the United States must comply with these standards or run the risk of losing federal funding.<sup>103</sup>

##### A. Recommendations To The Commission

I in no way intend to suggest that staff-on-inmate violence is prevalent in every prison or jail across America. I agree with the sentiment that “the majority of people who are administrators in correctional agencies want to do the right thing.”<sup>104</sup> However, in some facilities, there is a problem that needs to be solved. Developing

---

favored the legislation, compared with [sixty] percent that did not. Half of the unfavorable comments were noted at the first conference.

*Id.*

95. NATIONAL INSTITUTE OF CORRECTIONS, *supra* note 72, at 23 (explaining that the NIC is planning, among other activities, a second video production based on the PREA, regional workshops for corrections administrators, expert conferences based on various subjects, and an investigation and prosecution meeting).

96. See Prison Rape Elimination Act, 42 U.S.C. § 15606(a) (West 2006).

97. See generally *id.* § 15606(d) (detailing the duties of the commission).

98. *Id.* § 15606(d)(3)(B)(ii).

99. *Id.* § 15606(d)(1).

100. *Id.* § 15606(d).

101. See *id.* § 15606(d)(3)(A) (mandating that the Commission provide the results of its study to the President, Congress, the Attorney General, the Secretary of Health and Human Services, the Director of the Federal Bureau of Prisons, the chief executive of each state, and the head of the department of corrections of each state).

102. 42 U.S.C. § 15607(a)(1) (West 2006).

103. See *id.* § 15607(c)(2) (explaining that any amount a State would receive for “prison purposes for that fiscal year under a grant program covered by this subsection” will be reduced by five percent unless the State shows the Attorney General that they are in compliance with the standards or that the State will use no less than five percent of the amount to work towards compliance with the standards); see also *id.* § 15607(b) (explaining that the national standards will apply to the Federal Bureau of Prisons “immediately upon adoption of the final rule”).

104. See Nancy Zang, Administrator with the Michigan Department of Corrections, Statement at the NATIONAL PRISON RAPE COMMISSION, PUBLIC MEETING: UNIVERSITY OF NOTRE DAME LAW SCHOOL (Mar. 31, 2005), [https://www.nprec.us/docs/ZangRemarks\\_notredame.pdf](https://www.nprec.us/docs/ZangRemarks_notredame.pdf) (“I personally, along with my assistant, trained every warden, deputy warden, assistant deputy warden, [and] executive policy team member in the Michigan Department of Corrections relative to the requirements of the PRIA [sic] . . . . How grateful they were that they received the information . . . .”).

legal rules that will end the problem of prison rape is perhaps the most challenging question facing the Commission. One article concludes:

If it is honest, the new DOJ commission created by the law will suggest what we already know is necessary: that we lower incarceration rates, reduce the prisoner-to-space ratio, train huge numbers of new guards to protect prisoners, and abandon the purely retributive and incapacitative function of prisons. But there is no political will for such changes, which is perhaps why we fund studies of the obvious in the first place.<sup>105</sup>

Another article suggests that “[i]f Congress takes steps to reduce the number of persons entering the prisons or alters the system so that inmates do not stay in as long, then the government will not have to spend as much money on building new facilities.”<sup>106</sup> Therefore, it seems that several groups favor altering the entire criminal justice system by changing the sentencing guidelines, truth-in-sentencing laws, and mandatory minimum sentencing laws in order to get inmates back into the community faster. While these suggestions certainly have merit, are there other ways to reduce prison rape without engaging in a complete overhaul of the justice system?

Perhaps one of the most effective and cost-friendly ways to combat prison rape is to bring in outside organizations once a complaint has been filed against a corrections officer. This will potentially eliminate the problem of biased internal investigation procedures.<sup>107</sup> Without the assistance of outside organizations, prisoners’ complaints of abuse by staff members are likely to be handled internally—from within the departments of corrections themselves, or even from within the given facility where the alleged abuse occurred.<sup>108</sup> By bringing in an outside agency to investigate a complaint, it seems that, at the very least, the problem of biased investigations will lessen.<sup>109</sup> Once inmates understand that investigations will be unbiased, hopefully more people will be willing to come forward with legitimate accusations.

It is also important to address which staff members have contact with the inmates. At the very least, to prevent staff-on-inmate sexual abuse, the law should prohibit departments of corrections from hiring personnel who have been convicted of sexual

105. Weisberg & Mills, *supra* note 26.

106. Barrett, *supra* note 6, at 429.

107. See THOMAS, *supra* note 59, at 1–9.

108. *Id.* at 6. The report concluded:

While most correctional systems that we investigated did sometimes refer suspected criminal sexual misconduct to the state police, these referrals did not always occur, nor were they necessarily carried out promptly, with the result that crucial medical evidence may have been compromised. Moreover, once correctional officials referred such charges to the state police, this often had the unconscionable side effect of ending the departments’ own internal investigations into the alleged misconduct. It is at this point in the investigatory process that serious allegations of sexual misconduct can escape the grasp of the prison administration. Often, prison administrators fail to deal appropriately with cases that are returned to them because the allegations do not meet prosecution standards. An employee who may not have been found to commit a crime, but who may nonetheless have violated prison rules, can thus escape punishment altogether.

*Id.*

109. See discussion *infra* Part V (discussing a new law in California which establishes an external agency to deal with sexual abuse complaints from within California’s correctional facilities).

misconduct.<sup>110</sup> In addition, while it is not feasible to require that only women corrections officers have contact with female inmates, it does seem feasible to require that there are certain areas where only women staff members should interact with the female inmates. This is not to say that men should be banned from women's correctional facilities, just that there are some moments during the day where male officers should not be alone with female inmates. For example, when the female inmates are undressing or using the restroom, male officers should not be permitted to watch. If this is impossible, a former inmate suggested to the Commission that guards visit inmates in pairs to lessen the likelihood of sexual misconduct.<sup>111</sup> To discourage staff-on-inmate sexual misconduct, management should also limit who has access to the institution's keys.<sup>112</sup> By keeping track of who has the keys at any given time, it promotes accountability. If it is impossible to hire more officers in an overcrowded facility, it is at least important to increase the efficiency of the current staff members.

Furthermore, it seems logical and beneficial to establish some kind of telephone hotline or anonymous complaint system<sup>113</sup> for inmates to use when they want to complain of sexual misconduct so that the inmate does not have to choose between complaining to their abuser or remaining silent. As previously explained, the hotline or complaint system would need to reach an outside agency in order to avoid problems with biased internal investigations and would need to keep the inmate's name absolutely confidential to prevent retaliation problems. While many believe that the only way to end prison rape is to engage in expensive reforms, these are all relatively simple and inexpensive changes that could make a substantial difference in preventing staff-on-inmate abuse.

Most importantly, there needs to be a change in the way *some* prisons and jails are managed. Experts believe that rape does not occur with any frequency in a well-run

---

110. THOMAS, *supra* note 59, at 10. The Human Rights Watch recommends:

The U.S. Congress should pass legislation that requires states to prohibit departments of corrections from hiring staff who have been convicted on criminal charges, or found liable in civil suits, for custodial sexual misconduct. The names and identifying information of such individuals should be maintained by each department of corrections, in a database that must be checked prior to hiring any correctional staff.

*Id.*

111. See Marilyn Shirley, Survivor of Prison Sexual Assault, Statement at the NATIONAL PRISON RAPE ELIMINATION COMMISSION, PUBLIC HEARING: THE COST OF VICTIMIZATION, WHY OUR NATION MUST CONFRONT PRISON RAPE (June 14, 2005), [http://www.nprec.us/docs/PersonalAccounts\\_QA\\_V1\\_2.pdf](http://www.nprec.us/docs/PersonalAccounts_QA_V1_2.pdf) (telling her story of how she was raped by a corrections officer and believes that you must ensure that only female guards will interact with female inmates, at least at night, and that there should always be two guards present).

112. See Zang, *supra* note 104 (explaining what she has done to ensure inmate safety at her facility). Ms. Zang explains:

So one of the things that we have done is restrict keys for basement areas as an example. Yes, there need to be rounds, but if that key is checked out at the control center, and security staff [and] custody staff know when it was checked out and then the rover also follows along behind at some point to do the rounds. And if that key is gone longer than a certain period of time, th[en] there is action about that. And likewise, we've also restricted some keys where the only person that can allow the seal to be broken and the key to be given is with the Warden's permission.

*Id.*

113. *Id.* at 12 (explaining the techniques used by the Michigan Department of Corrections to reduce prison rape, including using a "kite box" system which allows inmates to write confidential letters to the warden, complaining of sexual misconduct).

institution.<sup>114</sup> Others echo this sentiment by emphasizing the importance of visibility in prisons and jails.<sup>115</sup> The idea is that staff members cannot engage in inappropriate conduct if they are always held accountable for their actions and always doing business out in the open.

By properly training and educating staff members to ensure that they are both responsible for their actions and aware that the safety and security of everyone at the facility is their primary concern, some believe that rape will be much less likely.<sup>116</sup> Although there are already well-respected organizations, such as the American Corrections Association, that promote professional standards for corrections officers, this kind of training needs to be greatly enhanced.<sup>117</sup> By making standards of professional conduct a tool that is used daily, instead of being “merely a process,”<sup>118</sup> staff attitudes will change. Furthermore, these standards need to be clear and communicated to the institution’s staff.<sup>119</sup> There must be a zero-tolerance policy, with clear definitions and descriptions about what kind of behavior will not be tolerated.<sup>120</sup> Those responsible for the operation of correctional facilities must make reporting staff sexual misconduct mandatory, and there must be clear repercussions for failure to comply with the institution’s policies.<sup>121</sup>

After an incident is reported and effectively investigated, prison officials need to look at the case as a learning opportunity.<sup>122</sup> By looking at individual incidents of staff sexual misconduct, prison officials can try to identify patterns and shape policy to address their concerns.<sup>123</sup> Each incident can serve as a stepping stone to prevent future occurrences of staff misconduct. The learning process does not end once an institution promulgates standards designed to eliminate prison rape. Eliminating prison rape seems to be an ongoing process that should be of continuing importance to those in charge of America’s prisons and jails.

In addition to effectively communicating standards to staff members, it is essential that they also be communicated to inmates.<sup>124</sup> Inmates must understand that they are not subject to sexual exploitation at the hands of staff members just because they have

114. See NATIONAL PRISON RAPE ELIMINATION COMMISSION, PUBLIC MEETING: UNIVERSITY OF NOTRE DAME LAW SCHOOL (Mar. 31, 2005), [http://www.nprec.us/docs/SchwartzRemarks\\_notredame.pdf](http://www.nprec.us/docs/SchwartzRemarks_notredame.pdf) (statement by Jeffrey Schwartz, Founder and CEO of LETRA, Inc.) (explaining his thoughts that the solution to prison rape lies in changing the way our institutions are run).

115. See Zang, *supra* note 104 (noting the importance of eliminating secluded areas where rapes have been known to occur, such as broom closets, by requiring them to be open and visible to everyone at the facility, thus reducing the chance that staff-on-inmate sexual assault will occur).

116. See NATIONAL PRISON RAPE ELIMINATION COMMISSION, PUBLIC MEETING: UNIVERSITY OF NOTRE DAME LAW SCHOOL (Mar. 31, 2005), [http://www.nprec.us/docs/DonahueRemarks\\_notredame.pdf](http://www.nprec.us/docs/DonahueRemarks_notredame.pdf) (statement by David Donahue, Commissioner of the Indiana Department of Corrections) (“[Staff members] have to have the moral fiber and credibility as staff to understand that it’s not acceptable for human beings to be threatened.”).

117. See *id.* at 4 (explaining that staff members need to be adequately trained in communication skills and observation techniques, as well as understanding populations and shifts in inmate behavior).

118. *Id.*

119. Moss & Wall, *supra* note 44, at 75.

120. See *id.*

121. See *id.*

122. See *id.* at 76.

123. See *id.*

124. Moss & Wall, *supra* note 44, at 76.

been found guilty of a crime and incarcerated.<sup>125</sup> Inmates need to believe that they are truly being protected while incarcerated. They need to believe that an allegation of sexual misconduct that is credible and supported by evidence will not be ignored.<sup>126</sup> At the same time, they need to understand that there will be consequences for bringing false allegations of prison rape, and they need to understand that action against a staff member will be taken only if the inmate's allegations can be proven.<sup>127</sup> Hopefully this will not only lessen false accusations, but encourage assaulted inmates to immediately report the occurrence of staff sexual misconduct in order to preserve physical evidence and immediately start an investigation into the inmate's claims.

To be truly successful, we do not simply need standards. We need those standards to be implemented and we need positive leadership from within the institutions.<sup>128</sup> With a commitment to enhancing the way that some of our corrections institutions are run, and to changing the attitudes of some staff members, many believe the rape problem will begin to vanish. Hopefully the passage of the PREA is an avenue for beginning that change by getting people to talk about the problem and how to solve it.

#### V. WILL THE PREA BE EFFECTIVE?

For now the answer is uncertain, but it 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. This is illustrated by the recent passage of the Sexual Abuse in Detention Elimination Act ("the Act")<sup>129</sup> in California.<sup>130</sup> Proponents of the legislation state that it "lays the foundation for California, which runs the largest prison system in the country, to be a national leader in the fight to end prisoner rape."<sup>131</sup> Drafted specifically to comply with the PREA, the Sexual Abuse in Detention Elimination Act was designed to help prevent, reduce, and enable corrections officials to effectively respond to prison rape.<sup>132</sup> More specifically, the Act will:

Provide inmates and wards with informational handbooks regarding sexual abuse in detention; [a]dopt specified policies, practices, and protocols related to the placement of inmates, physical and mental health care of inmate victims, and investigation of sexual abuse; [e]nsure accurate data collection concerning sexual abuse across all institutions which is accessible to the public; and [d]evelop guidelines for the

---

125. *See id.*

126. *See id.*

127. *Id.*

128. *See* NATIONAL PRISON RAPE ELIMINATION COMMISSION, PUBLIC HEARING: THE COST OF VICTIMIZATION, WHY OUR NATION MUST CONFRONT PRISON RAPE, (June 14, 2005), [http://www.nprec.us/docs/MoralandEthicalQuestions\\_V1\\_Q6.pdf](http://www.nprec.us/docs/MoralandEthicalQuestions_V1_Q6.pdf) (statement by Jamie Fellner, National Prison Rape Elimination Commissioner and Director of the United States Program of Human Rights Watch) (explaining that the commission can come up with an infinite number of policies in addition to the policies that are already in place, but these policies will not mean anything unless people use them).

129. Sexual Abuse in Detention Elimination Act, 2005 Cal. Legis. Serv. 2310 (West) (codified at CAL. PENAL CODE §§ 2635–2643 (West Supp. 2006)).

130. Press Release, Stop Prisoner Rape, Stop Prisoner Rape Hails Governor's Signing of Historic Law in California (Sept. 22, 2005), <http://www.spr.org/en/pressreleases/2005/0922.html>.

131. *Id.*

132. *Id.*



provision of resources and counseling from outside organizations to inmates and wards.<sup>133</sup>

Perhaps most significantly, the Act also creates the Office of the Sexual Abuse in Detention Ombudsperson, responsible for ensuring both the confidential reporting and the impartial resolution of complaints within California's correctional facilities.<sup>134</sup> Proponents of the new legislation believe it will "pierce the veil of silence" that tends to accompany prisoner rape, thus leading to its reduction in California.<sup>135</sup>

However, other evidence suggests that we still have a long way to go before the PREA makes a lasting impact. On October 18, 2005, a jury in Texas ruled that prison officials were not liable for the sexual abuse of former inmate Roderick Johnson.<sup>136</sup> According to a report issued in 2005 by the U.S. Bureau of Justice Statistics, nearly forty percent of the reported inmate-on-inmate instances of sexual abuse came from Texas.<sup>137</sup> When reporting about the verdict, an Associated Press article stated: "The defendants and other prison employees testified that they could not substantiate Johnson's half a dozen or so rape claims because he changed his stories or there was no medical evidence. They said Johnson usually seemed upbeat in prison, wearing tight pants and flirting with a corrections officer."<sup>138</sup> This statement suggests that there is still a definite stigma surrounding rape victims. Just because Johnson appeared upbeat and flirtatious in prison does not mean that he was not raped. In fact, other reports suggest that Johnson was severely depressed and suffering from post-traumatic stress disorder as a result of the brutal treatment he received in prison.<sup>139</sup>

Some believe that this verdict will discourage others from bringing prison rape suits.<sup>140</sup> While disappointed by the verdict, Johnson was grateful for the opportunity to present his case and call attention to prison rape.<sup>141</sup> So while this case did bring prison rape to the headlines, another source estimates that since the passage of the PREA, the occurrence of prison rape in America's correctional facilities has not decreased.<sup>142</sup> While this may be the case, it seems unfair to judge the success or failure of the PREA until all the data has been collected and the Commission has made recommendations, and those recommendations have been implemented in correctional facilities.

---

133. *Id.*

134. *Id.*

135. *Id.*

136. Press Release, Stop Prisoner Rape, Texas Jury Denies Justice to Prisoner Rape Survivor (Oct. 18, 2005), <http://www.spr.org/en/pressreleases/2005/1018.html> (explaining that Johnson was allegedly bought and sold by gang members within the prison, who in turn sold him to other inmates for sex).

137. *Id.*

138. Posting to TalkLeft, The Politics of Crime, [http://talkleft.com/new\\_archives/012789.html](http://talkleft.com/new_archives/012789.html) (Oct. 19, 2005) (last visited Apr. 18, 2006).

139. Bruce Shenitz, *Prison Sex Slave*, OUT MAGAZINE, Sept. 2004, available at <http://www.spr.org/en/sprnews/2004/0901.htm> (last visited Nov. 2, 2005).

140. Posting to TalkLeft, *supra* note 138.

141. Press Release, American Civil Liberties Union, Roderick Keith Johnson Speaks Out About Verdict in Prison Rape Case (Oct. 19, 2005), available at <http://www.aclu.org/prison/conditions/21159prs20051019.html>.

142. STOP PRISONER RAPE & ACLU NATIONAL PRISON PROJECT, STILL IN DANGER: THE ONGOING THREAT OF SEXUAL VIOLENCE AGAINST TRANSGENDER PRISONERS 4 (2005), <http://www.spr.org/pdf/stillindanger.pdf>.

## VI. CONCLUSION

The Prison Rape Elimination Act of 2003 was designed to make people aware of prison rape and to make strides toward eliminating its occurrence in America's prisons and jails. With the passage of the PREA, those in charge of the nation's correctional systems are re-evaluating how they handle prison rape claims and attempting to implement procedures which will prevent rape from happening in the first place. Perhaps the most important contribution the PREA has made thus far is bringing the topic of prison rape out in the open. Denying that prison rape occurs has certainly facilitated its recurrence. However, by acknowledging that it exists and actively trying to find a solution, the PREA has set the stage for ending both inmate-on-inmate violence and staff-on-inmate violence. That being said, there is still a long way to go. The Commission faces the daunting task of promulgating legal standards to prevent prison rape. Hopefully this article has provided some helpful suggestions towards accomplishing that goal. Fulfilling the goals of the PREA is "not a sprint, but a marathon."<sup>143</sup> Ideally, the PREA continues to provide a meaningful roadmap towards eliminating prison rape in America's correctional facilities.

---

143. Moss & Wall, *supra* note 44, at 78.