

**THE PRISON RAPE ELIMINATION ACT:  
IMPLEMENTATION AND UNRESOLVED ISSUES**

**BRENDA V. SMITH**, *Washington, DC*  
Professor and Project Director  
Washington College of Law / American University

State Bar of Texas  
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**CHAPTER 14**

## **Prof. Brenda V. Smith**

Brenda V. Smith is a professor at the Washington College of Law at American University where she teaches in the Community Economic Development Law Clinic. Professor Smith is also the Project Director for the United States Department of Justice, National Institute of Corrections Cooperative Agreement on Addressing Prison Rape. In November 2003, Professor Smith was appointed to the National Prison Rape Elimination Commission by the United States House of Representatives Minority Leader, Nancy Pelosi (D- Calif.). Prior to her faculty appointment at the Washington College of Law, Professor Smith was the Senior Counsel for Economic Security at the National Women's Law Center and Director of the Center's Women in Prison Project and Child and Family Support Project. Professor Smith is a 1984 graduate of Georgetown University Law Center and a magna cum laude graduate of Spelman College in 1980. Professor Smith is an expert on issues affecting women in prison, and has published and spoken widely on those issues. Professor Smith has received numerous honors, including the prestigious Kellogg National Fellowship in 1993. She was inducted into the D.C. Women's Hall of Fame in 1998 for her work on behalf of low-income women in the District of Columbia. Most recently, Professor Smith was awarded the Emalee C. Godsey Research Award for her article, *Battering, Forgiveness and Redemption*.

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# THE PRISON RAPE ELIMINATION ACT: IMPLEMENTATION AND UNRESOLVED ISSUES

Brenda V. Smith\*

In September 2003, the United States Congress unanimously passed the Prison Rape Elimination Act (PREA).<sup>1</sup> The Act was the culmination of a collaborative effort between human rights, faith-based, and prison rape advocacy.<sup>2</sup> The aim of the Act is to create “zero tolerance” for prison rape<sup>3</sup> by using a variety of tools or mechanisms including data collection;<sup>4</sup> grants to the states;<sup>5</sup> technical assistance to the states to improve their practices;<sup>6</sup> research;<sup>7</sup> the development of national standards;<sup>8</sup> and the diminution of federal criminal justice assistance to states who fail to comply with the standards.<sup>9</sup> This article aims to provide a brief background of the Act and the important political forces that shaped its passing, the current status on implementation of the Act, including progress made with each of the tools, and a prediction about issues that will arise in the enactment and implementation of the standards required by PREA.

## Genesis of the Act

While prison rape has been an abiding feature of U.S. prisons almost since their inception,<sup>10</sup> the event that contributed most to the passage of the Prison Rape Elimination Act was the 2001 publication of *No Escape: Male Prisoner Rape* by Human Rights Watch (HRW). Though HRW had published several reports on sexual violence in U.S. prisons dating back to its initial report on the rape of female prisoners, *All too Familiar: Sexual Abuse of Women in U.S. State Prisons*, in 1996,<sup>11</sup> there was little traction in Congress to pass legislation aimed at ending sexual violence in custody. In fact, an early effort to pass legislation introduced by Congressman John Conyers, Jr. (D. MI) to create a registry of staff involved in sexual abuse of inmates in custody failed to garner enough support even for consideration.<sup>12</sup> The legislation, “The Custodial Sexual Abuse Act of 1998,” was stripped from the reauthorization bill for the “Violence Against Women Act” and was never reintroduced.<sup>13</sup>

How is it then that a mere five years later, legislation passed which included provisions aimed at ending all sexual violence including sexual abuse of inmates by staff? Three important events created the conditions for passage of the Act: (1) the increase in persons under custodial supervision, in particular, white men;<sup>14</sup> (2) a focus on male-on-male prison rape as opposed to sexual abuse of women in custody; (3) and the concern among conservatives about the ramifications of sexual violence in custody.<sup>15</sup>

First, a little known fact about the increase of persons in custody over the past twenty years, is that an increasing number of white men are being imprisoned as well.<sup>16</sup> From 2000 to 2006, the number of white men in custody has increased from 398,000 to 478,000, an eighty-three percent increase.<sup>17</sup> The perception is that those men are first time offenders who are vulnerable to physical and sexual abuse in custody. Additionally, the disproportionate number of men of color in

custody has fed another perception that white offenders will be sexually assaulted by men of color, predominantly African American men. That perception was very evident in testimony before Congress in support of the Prison Rape Elimination Act<sup>18</sup> and is supported by research data which suggests that the male victims of sexual violence in prison are often white and that the perpetrators are African American.<sup>19</sup>

However, there are several reasons to view this data cautiously. First, there is significant underreporting of all sexual offenses, in general.<sup>20</sup> Second, this reluctance to report is magnified by cultural norms in African American communities about masculinity, which often prohibit African American inmates from admitting that they were victimized in custody by other male inmates. Third, people of color, especially men of color are disproportionately imprisoned<sup>21</sup> – one in thirty-three African American men is under custodial supervision, and one in seventy-nine Hispanic men is under custodial supervision.<sup>22</sup> In many large jurisdictions, white men make up a very small percentage of those in custody.<sup>23</sup> In a correctional environment, anyone who is different – racially, physically, or appearance – is vulnerable. Thus white men, who are in the minority, may be vulnerable, as would any minority in any prison system.<sup>24</sup> Finally, reporting sexual victimization in custody often exposes victims to additional victimization and retaliation.<sup>25</sup>

A second factor that contributed to the passage of the Act is frankly that sexual victimization of women in our society is entrenched. While society takes as a given that women will be victimized both in the free world and in custody, the image of male rape was much more disturbing to members of Congress. In fact, the initial version of PREA only sought to address male prison rape.<sup>26</sup> In the initial congressional hearing, most of the survivors were male.<sup>27</sup> One of the significant critiques of the initial legislation was its failure to include sexual violence against women in custody, which was more likely to be staff initiated.<sup>28</sup> In its second iteration, PREA included staff sexual misconduct against inmates, but continued to focus heavily on male-on-male inmate rape.<sup>29</sup> Thus, it seemed that the unacceptability or perceived greater harm attached to male rape was a significant factor in the passage of PREA.

The fear of male prisoner rape had its genesis in several factors. Certainly, one was the increase in the number of high profile white criminals sentenced to prison for their crimes.<sup>30</sup> One of the explicit fears was that these individuals with little experience of the justice system would be sentenced to prison and victimized sexually and financially by more criminally sophisticated inmates.<sup>31</sup> There were also significant concerns about homosexual sex – a key issue for conservative constituencies – and the spread of AIDS to “innocent” defendants.<sup>32</sup> In particular, Prison Fellowship Ministries, The Hudson Institute, and other Christian organizations were visible proponents of PREA and testified about these issues.<sup>33</sup> Thus, the act passed because while it sought to remedy a serious domes-

tic human rights problem, it also garnered the support of conservatives who could frame PREA to their constituencies as advancing interests that were core to their political ideology and politically salient for the Republican-dominated Congress.

Human rights organizations like HRW and Stop Prisoner Rape (SPR) were critical in defining the contours of PREA.<sup>34</sup> Essentially, they made political and strategic concessions, such as explicitly providing that PREA does “not create a private right of action”<sup>35</sup> and “protects the Eighth Amendment rights of prisoners” in order to secure PREA’s passage.<sup>36</sup> These concessions neutralized concerns raised by powerful unions and the corrections community in response to the earlier Custodial Sexual Abuse Act of 1998<sup>37</sup> – that the legislation would create a new avenue for prisoner litigation, resulting in damage awards and attorneys’ fees. In fact, correctional actors like the American Correctional Association and the Association of State Correctional Administrators were caught unaware by the passage of PREA and came in at the end of the process to ameliorate the impacts of PREA by testifying in support of grants to assist states and agencies to meet PREA’s requirements.<sup>38</sup>

Finally, PREA’s initial proponents did not involve established advocates and litigators who had primarily litigated and worked on issues of sexual abuse of women in custody.<sup>39</sup> Indeed, the HRW report that generated initial action on the litigation made little reference to the earlier report authored by the Women’s Rights Division of HRW.<sup>40</sup> This failure to address staff sexual abuse of inmates, which disproportionately affects women in custody, delayed initial passage of PREA. At the end of the day, however, PREA passed unanimously in both houses of Congress. In this way, regardless of the underlying political and strategic reasons behind its passage, PREA signaled an important shift toward more humane treatment of persons in custody.<sup>41</sup>

### Current Status of Implementation of PREA

PREA is an ambitious piece of legislation which fundamentally seeks to prohibit sexual violence in all custodial correctional settings – juvenile, adult, community corrections, and immigration – whether operated by the federal, state, or local government. At base, however, it established a set of tools – data collection, research, training, technical assistance, grants, and standards – to prevent, reduce, and sanction sexual violence in custody. In the event that these measures did not work, PREA leaves open the option of denying five percent of federal criminal justice assistance to states and agencies that do not meet the federal standards.<sup>42</sup>

#### Data Collection

One of the major features of PREA is the requirement of data collection. While seemingly uncontroversial, this is a very important tool for behavior change – whenever individuals or agencies collect data it changes behavior.<sup>43</sup> In this instance, Section four of PREA requires the Bureau of Justice Statistics (BJS) to collect statistics on the incidence of prison sexual vio-

lence in state, local, and federal custodial facilities. The simple requirement of data collection has created important changes that have the potential to reduce sexual violence in custody. First, BJS had to develop common definitions of sexual violence in custody.<sup>44</sup> Prior to enactment of PREA, there was tremendous variation in definitions between and within states about what constituted sexual violence against inmates.<sup>45</sup> Many states had no policies that articulated prohibited sexual contact between staff and inmates and between inmates and other inmates.<sup>46</sup> Still others only defined sexual intercourse as sexual violence,<sup>47</sup> failing to recognize that other behaviors such as verbal sexual harassment, voyeurism, fondling, oral and anal sex, and forcing inmates to masturbate or have sex with other inmates was also sexual violence. In part, this failure to identify these behaviors as prohibited was based in lack of knowledge about sexual behavior in general and about lack of knowledge of sexual behavior in custodial settings, in particular.

In order to create a data collection instrument, BJS had to collaborate with a different set of players, in particular the Centers for Disease Control (CDC).<sup>48</sup> This collaboration created a less security focused instrument and one that seemed much more public health focused. At the same time, these collaborations emboldened the CDC to combine its work on HIV and AIDS and sexual violence to draw important connections about prison as a vector for contracting HIV and AIDS.<sup>49</sup> This was a particularly important connection given new theories that one of the reasons for the increasing rates of HIV infection in communities of color was a result of men

of color who had been formerly imprisoned and contracted HIV/AIDS while engaged in unprotected voluntary or forced sex while incarcerated.<sup>50</sup>

The data collection has had a clear impact on the corrections community – both adult and juvenile. In structuring the data collection, BJS chose a three-pronged strategy: (1) creating a baseline by doing an administrative records data collection of sexual violence reported by correctional authorities; (2) collecting information directly from inmates; and (3) looking for independent indicators of sexual violence from medical and other records.<sup>51</sup> Thus far, BJS has deployed the first two strategies with some success.

The first baseline survey, “Sexual Violence Reported by Correctional Authorities,” was completed in July 2005.<sup>52</sup> This publication analyzed the incidents of sexual violence in calendar year 2004 that correctional officials reported *knowing*. This initial survey included data on both adult and juvenile facilities. The comparisons were stark and in many ways surprising. This survey made clear that juvenile agencies reported much higher rates of sexual violence—both staff sexual misconduct and youth-on-youth sexual abuse, three and seven times higher respectively—than adult facilities. This is due in large part to mandatory reporting statutes that require juvenile agencies to report all incidents of physical or sexual abuse and the continued oversight of outside agencies and actors in the juvenile justice system.<sup>53</sup>

In the initial study, adult facilities had exceedingly low rates of sexual violence—both inmate-on-inmate and staff sexual

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misconduct or violence in an entire year.<sup>55</sup> Several of the states reporting no complaints or low complaints were involved in ongoing public investigations of sexual violence in their facilities.<sup>56</sup> Other important findings included the high rates of sexual violence committed by female staff, both with regard to male inmates and with regard to youth of any gender. The report found that the most likely perpetrator of sexual violence in state prisons was a female staff member.<sup>57</sup> Certainly this is reasonable given that 93.1% of persons in custody are male.<sup>58</sup> It was surprising nonetheless. The study found that women were more likely to be victimized in jail than in prison and that girls were at higher risk for sexual violence than boys in custody.<sup>59</sup>

In 2007, the study was repeated but changed to include acts of sexual contact that “appeared to be willing.” The study found that agencies characterized the large majority of staff on inmate sexual abuse as “consensual” notwithstanding both policies and laws, which prohibit the conduct and in many instances specifically provide that inmates cannot “consent” to sex with staff.<sup>60</sup> Finally, the study found that fifty-five percent of staff sexual misconduct and forty-five percent of inmate-on-inmate sexual abuse complaints that correctional authorities received were closed as unsubstantiated, meaning that agencies could neither prove nor disprove that the conduct occurred—a measure of the efficacy of institutional investigations.<sup>61</sup>

In the fall of 2007, BJS published the findings of its first inmate survey. Not surprisingly, the sexual violence reported by inmates was much higher than that reported by correctional authorities. Inmates reported sexual violence rates of 4.5% per 1,000 inmates<sup>62</sup> compared to 2.91% reported by correctional authorities for 2006.<sup>63</sup> The survey was consistent with the report of the correctional authorities in several important respects. In both reports, the ratio of staff sexual misconduct and inmate-on-inmate sexual violence was approximately the same, the rates of sexual and non-sexual staff misconduct was nearly identical, and overall federal facilities had the lowest reported rates of sexual violence.<sup>64</sup> While it is not possible to directly compare the correctional authority survey and the inmate survey,<sup>65</sup> it is important to note correctional authorities reported 6,528 cases of sexual violence in 2006, whereas one year later, in 2007, inmates reported 189,400 cases.

Based on the inmate survey, BJS was able to analyze facility level data.<sup>66</sup> BJS used both sets of reports to create a list of facilities with the three highest and two lowest rates of sexual violence. These facilities were required by statute to appear before a review panel created by PREA<sup>67</sup> to explain their incident rates.<sup>68</sup> The selected facilities included state adult correctional facilities from Nebraska, Indiana, Florida, Texas, and California Departments of Corrections and the Federal Bureau of Prisons.<sup>69</sup> While some facilities admitted that they had serious issues with sexual violence in custody, several argued that their high numbers reflected improved grievance and investigative processes. Interestingly, states with the lowest numbers made the same claims and pointed to leadership and healthy institutional culture as preventive features.

## Research

Thus far, reactions to funded research about sexual violence in custody have been mixed. While much research has been funded by the National Institute of Justice (NIJ) and the Bureau of Justice Assistance (BJA), little has been completed. For example, NIJ funded eight research projects including research on: policies and practices in male and female prison facilities; assessment tools and instruments and descriptive analysis of characteristics of perpetrators and victims; prison perceptions of sexual violence; classification and risk assessment for vulnerability and predation; impact of victimization; sexual violence in the context of other violent acts in female facilities and jails; jails and their design, safety and security as they implement interventions to sexual violence; and promising practices in juvenile institutions and jails. Once completed, this research has the potential to identify risk factors for both vulnerability and propensity to commit sexual violence. It also has the potential to identify effective strategies to prevent, reduce and respond to sexual violence—for both victims and staff and inmate perpetrators. Thus far, only one project by Mark Fleischer has been completed and disseminated and even that report has received significant critique as being inaccurate, methodologically flawed and unhelpful.<sup>70</sup>

## Training and Technical Assistance

One area where there has been tremendous progress has been in training and providing technical assistance to the states to address sexual violence in custody. Under Section five of PREA, NIC received funding to administer a national clearinghouse on sexual violence in custody and to provide training and technical assistance to the field.<sup>71</sup> NIC was well situated to accomplish this given its decade long work to address staff sexual abuse of inmates, prior to the enactment of PREA. In accomplishing its mandate, NIC awarded two cooperative agreements—one to American University, Washington College of Law, which it had funded since 2000 for its work on staff sexual abuse of persons in custody, and another to the Moss Group, led by Anadora Moss, a former NIC employee and long-time correctional leader in the area of sexual violence against women in custody. To date, the projects have collaborated to provide training or technical assistance, and often both, to every state, the District of Columbia, Puerto Rico, Guam, and facilities in Indian country.<sup>72</sup> Additionally, the projects have produced research, reports, curricula, web chats, videoconferences, and training films that have provided valuable resources for all of the various institutional actors involved in implementing PREA.<sup>73</sup>

## Grants to the States

Another important feature of PREA, strongly advocated by correctional authorities, was the authorization of funds to assist states to meet the PREA requirements.<sup>74</sup> PREA authorized \$60MM in funds to the states; Congress appropriated \$40MM. Thus far, BJA has made approximately fifty grants to thirty-three different states and several additional grants for research, technical assistance and the development of training in key areas. States have used the grants

to provide training for staff and offenders,<sup>75</sup> improve or create investigative structures,<sup>76</sup> develop data collection capacities,<sup>77</sup> enhance security by installing cameras or identifying institutional vulnerabilities,<sup>78</sup> develop classification and housing options for victims and perpetrators,<sup>79</sup> enhance medical and mental health treatment for victims,<sup>80</sup> community reintegration and services for victims and perpetrators,<sup>81</sup> and hiring staff to implement PREA.<sup>82</sup> These grants have been extremely helpful to corrections agencies and have both improved practice and created buy-in among agencies for implementing PREA. There has been significant critique, however, about poor coordination of the grants, the lack of readily available information about who has received grants and the aims and outcomes of the grants, and the lack of funding to Native American communities, jails, juvenile agencies and local governments.

In addition to grants to states, BJA has also funded several research and service delivery projects. For example, BJA provided funds to: the American Probation and Parole Association to develop a community corrections guide for compliance with PREA and develop PREA-related products for tribal jurisdictions; the American Prosecutor Research Institute to complete a publication on prosecuting sexual violence in institutional settings; Community Resource for Justice to develop a guidebook on residential community corrections; and the Center for Innovative Public Policy to develop curricula and technical assistance for law enforcement and jails.

### The Development of National Standards

One of the most concrete aims of PREA is the publication of a report on the causes and consequences of prison sexual violence and the development of national standards for the prevention, investigation and prosecution of prison rape. Section 7 creates the National Prison Rape Elimination Commission. The Commission, appointed by the President of the United States and the House and Senate leadership of both parties, has held hearings<sup>83</sup> and has begun the process of writing both its report and the national standards.<sup>84</sup> The draft report and standards will cover a range of topics including leadership and accountability, prevention, training, reporting, data collection, discipline, investigations, medical and mental health services and prosecution.<sup>85</sup> Initially, the standards were to be final by July 2006.<sup>86</sup> However, delays in appointing the Commission, securing appropriate resources and staff for the Commission's work, and the delay in the publication of surveys and research by other federal actors such as BJS and NIJ, have delayed the development and publication of the standards. For example, BJS has not published any data on the prevalence of sexual violence in youth facilities since 2005, nor has it done any data collection on facilities run by community corrections agencies. This lack of data collections means that these agencies are less ready to implement the national standards because they have not had to examine the issues of sexual violence in response to BJS data collection or ensuing oversight by media,

citizens and advocacy groups.

Currently, the Commission plans to publish draft standards for public comment in June 2008 and to end its work in June 2009.<sup>87</sup> The Commission will hold hearings in order to solicit public comment in June 2008. After the standards are finalized, the Commission will transmit them to the Attorney General of the United States, who will issue a final rule within a year of receiving the standards.<sup>88</sup> During that year, there will be another opportunity for public comment. Ninety days after the publication of the final standards by the Attorney General, they will be immediately applicable to the Federal Bureau of Prisons.<sup>89</sup>

The Commission anticipates significant comment and some opposition from the correctional and advocacy communities, particularly with regard to standards on supervision, training, oversight and discipline. The reality is that the standards will be perceived as going too far or not far enough, depending on the goals of the critic. However, the development of even these initial standards is an important first step and significant contribution to eliminating sexual violence in custody.

### Important Unresolved Issues Raised by PREA

Thus far the enactment and implementation of PREA have raised important issues which may or may not be resolved with the enactment of the standards.<sup>90</sup> While this article does not permit the space to identify and analyze each of those issues, I will "flag" a number of important unresolved issues. For example:

1. Has the Prison Litigation Reform Act (PLRA)<sup>91</sup> created a situation where serious problems remain concealed until they are too serious to deal with except through litigation?
2. Should claims of sexual violence be exempt from the exhaustion and physical injury requirements of PLRA?
3. Are fundamental challenges and changes to the institutional culture of prisons the best ways to address sexual violence?
4. How do we address the racial and gender implications of sexual violence in custody?
5. Can prisoners be victims too? If so, should we revisit the ban on the use of VAWA and VOCA<sup>92</sup> funding for persons in custody to address the needs of victimized men and women in custody?<sup>93</sup>
6. Should we prosecute women staff who abuse female and male inmates to the same degree and with the same vigor that we do with male staff or are women, regardless of their status as inmate or staff, always less powerful in sexual interactions in custodial settings?<sup>94</sup>
7. What are the legal and other implications of creating registries for those involved in sexual violence in custody, even in the absence of a crimi-

- nal conviction?
8. What is a permissible continuum of sexual behavior in institutional settings?<sup>95</sup> Can there be consensual sex between inmates; can there be consensual sex between staff and inmates?<sup>96</sup>
  9. Should the loss of sexual autonomy be a necessary corollary of imprisonment?<sup>97</sup>
  10. Could conjugal and family visiting programs like those established in other countries help prevent sexual violence in custody?<sup>98</sup>
  11. Given that we now know that prisoners engage both voluntarily and involuntarily in high-risk behaviors that affect the communities they return to, should we invest in preventive measures such as condom distribution in prisons?<sup>99</sup>
  12. Are credible grievance systems that have assurances of confidentiality and protection from retaliation sufficient to inform prison administrators of problems or is resorting to external accountability systems—inspector generals, ombudsmen, oversight committees—the most effective way to intervene in institutional abuse issues?

These are all questions that are being debated and are trying to be resolved in some fashion during this process of implementing PREA. The discourse, resolution or tabling of these issues has the potential to both advance and retrench the legal and societal response to sexual violence in custody.

## Conclusion

The enactment of the Prison Rape Elimination Act has already affected correctional and societal responses to sexual violence in custodial settings. The data collection has created important visibility for the issue and spurred media, advocacy and governmental oversight over agency responses to sexual violence in custody. The training and technical assistance efforts by NIC and BJA have increased the capacity of agencies to respond appropriately to sexual violence in custody. Federal grants have also seeded important state efforts to prevent sexual violence and improve agencies' response to sexual violence complaints and victims of sexual violence in custody. Pending research also has the potential to identify risk factors for vulnerability and propensity for sexual violence in custody. This research may engender the development of new tools to prevent sexual predation. It may also illuminate a more complete catalog of sexual behavior in institutional setting and identify modification to policies—conjugal and family visiting, abuse prevention, survivor services, and HIV/AIDS education—that may more accurately define and address sexual behavior in institutional settings.

Finally, the standards have the potential to create a floor for appropriate and constitutional responses to sexual violence in custody, leaving jurisdictions free to provide greater services and protection. These standards will make our domestic policies more congruent with international norms and treaties.<sup>100</sup> Perhaps most importantly, credible implementation of the act will send the message to prisoners, families and society that sexual predation of any kind is neither a collateral con-

sequence<sup>101</sup> nor part of the penalty<sup>102</sup> of imprisonment.

<sup>1</sup> Prison Rape Elimination Act of 2003 (PREA), 42 U.S.C. §§ 15601-15609 (2003).

<sup>2</sup> See *Prison Rape Reduction Act of 2003: Hearing on H.R. 1707 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 108th Cong. 4-5 (2003) (letter from Prison Fellowship Ministries (PFM) with coalition signatures from organizations such as Human Rights Watch, Stop Prisoner Rape, the Christian Coalition, and the Religious Action Center of Reform Judaism) [hereinafter *Hearing on Prison Rape Reduction Act of 2003*]; see also HUMAN RIGHTS WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISONS (2001) [hereinafter NO ESCAPE].

<sup>3</sup> See PREA § 15602(3)(1) (establishing a zero tolerance standard for the incidence of prison rape in prisons in the United States).

<sup>4</sup> *Id.* § 15602(4)(a).

<sup>5</sup> *Id.* § 15605(6)(a).

<sup>6</sup> *Id.* § 15604(5).

<sup>7</sup> *Id.* § 15605(6)(a).

<sup>8</sup> *Id.* § 15606(7).

<sup>9</sup> *Id.* § 15607(8)(c)(2).

<sup>10</sup> See NICOLE HAHN RAFTER, PARTIAL JUSTICE: WOMEN IN STATE PRISONS, 1800-1935, at 97-98 (Northeastern 1985). Rafter gives a first-person account of the especially poor situation of women prisoners in the South, detailing their living conditions, which includes the constant supervision by male corrections officers. *Id.* She details an account of Molly Forsha, who was convicted of murder in the mid - 1870s, and gave birth to twins while incarcerated at Nevada State Prison at Carson City - allegedly as a result of sexual activity with the prison warden. *Id.* at 98. Rafter also discusses the opening of the Indiana Women's Reformatory by Charles and Rhoda Coffin in 1873. *Id.* at 29-33. The Coffins had observed that the conditions endured by women prisoners when housed with male offenders were abhorrent, and often resulted in women being forced to engage in sexual activity at the whims of their jailers. This was due largely to the fact that the male corrections officers held the keys to the women's cells. The Coffins' Reformatory, as a result, was the first one to employ an entirely female staff. *Id.* at 29-31; see also ESTELLE B. FREEDMAN, THEIR SISTERS' KEEPERS: WOMEN'S PRISON REFORM IN AMERICAN, 1830-1930, at 59 (University of Michigan Press 1984).

<sup>11</sup> See generally WOMEN'S RIGHTS PROJECT, HUMAN RIGHTS WATCH, ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS (1996) [hereinafter ALL TOO FAMILIAR]; see also WOMEN'S RIGHTS PROJECT, HUMAN RIGHTS WATCH, NO WHERE TO HIDE: RETALIATION AGAINST WOMEN IN MICHIGAN STATE (1998), available at <http://www.hrw.org/reports98/women/>; NO ESCAPE, *supra* note 2, at 4-5; AMNESTY INT'L, "NOT PART OF MY SENTENCE:" VIOLATIONS OF THE HUMAN RIGHTS OF WOMEN IN CUSTODY 5 (1999); AMNESTY INT'L, USA: THE FINDINGS OF A VISIT TO VALLEY STATE PRISON FOR WOMEN, CALIFORNIA

(1999); AMNESTY INT'L, CHILDREN AND WOMEN ABUSED IN CORRECTIONAL FACILITIES (1998).

<sup>12</sup> See Violence Against Women Act of 1999 (VAWA II), H.R. 357, 106th Cong. (1999); see also Press Release, Rep. John Conyers, 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 the Violence Against Women Act of 1994 (VAWA I) (demonstrating that though introduced as part of VAWA I, legislation addressing sexual violence against incarcerated persons never gained enough support to be included in the legislation that ultimately passed).

<sup>13</sup> See generally VAWA II, H.R. 357, *supra* note 12; see also Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960 (2005).

<sup>14</sup> See WILLIAM SABOL, HEATHER COUTURE & PAIGE HARRISON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2006, at 6 (2007) (noting the increase of prisoners under state and federal custodial jurisdiction from 2000-2006).

<sup>15</sup> See, e.g., *Hearing on Prison Rape Reduction Act of 2003*, *supra* note 2, at 2-3, 6-8 (prepared statement of the Hon. Robert C. Scott, Rep. in Congress from Virginia, and ranking Member, Subcomm. on Crime, Terrorism and Homeland Security).

<sup>16</sup> See SABOL, COUTURE & HARRISON, *supra* note 14, at 6.

<sup>17</sup> *Id.*

<sup>18</sup> See *Hearing on Prison Rape Reduction Act of 2003*, *supra* note 2, at 115-17 (prepared statement of Pat Nolan, President, Justice Fellowship) (describing the sexual victimization of John William King, a white burglar also involved in the racially motivated death of James Byrd, who was gang-raped by African-American prisoners after being placed in the "black" section of the prison).

<sup>19</sup> See ALLEN BECK, PAIGE HARRISON AND DEVON ADAMS, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES, 2006, at 4 (2007) [hereinafter BECK, HARRISON & ADAMS 2006]. In 2006, whites made up 72% of the victims; blacks 16% and Hispanics 9%; among perpetrators, 49% were black, 39% were white and 10% were Hispanic. *Id.*

<sup>20</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). (determining that "sexual assault is one of the most underreported crimes, with 60% still being left unreported and males are the least likely to report a sexual assault, though they make up approximately 10% of all victims"); see also U.S. DEPT. OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL: DETERRING STAFF SEXUAL ABUSE OF FEDERAL INMATES 3 (2005) (noting that sexual abuse of female inmates is both underreported and alarmingly prevalent).

<sup>21</sup> See generally SABOL, COUTURE & HARRISON, *supra* note 14, at 7; see also MARC MAUER, RACE TO INCARCERATE 118-61 (2d ed. 2006) (discussing recent developments under the Bush Administration and updated statistics, graphs, and charts throughout, to illustrate the growth in the number of prisons and jails and the overreliance on imprisonment to stem problems of economic and social development); The Sentencing Project, <http://www.sentencingproject.org/IssueAreaHome.aspx?IssueId=3>

(last visited Mar. 17, 2008) "More than 60% of the people in prison are now racial and ethnic minorities. *Id.* For Black males in their twenties, 1 in every 8 is in prison or jail on any given day." *Id.*

<sup>22</sup> SABOL, COUTURE & HARRISON, *supra* note 14, at 8.

<sup>23</sup> See, e.g., STATE OF NEW YORK DEPARTMENT OF CORRECTIONAL SERVICES, HUB SYSTEM: PROFILE OF INMATE POPULATION UNDER CUSTODY ON JANUARY 1, 2007, at i (2007), available at [http://www.docs.state.ny.us/Research/Reports/Hub\\_Report\\_2007.pdf](http://www.docs.state.ny.us/Research/Reports/Hub_Report_2007.pdf) (finding that as of January 1, 2007, New York's inmate population was 20.5% white/non-Hispanic, 51.1% African American and 26.3% Hispanic); see also DATA ANALYSIS UNIT, ESTIMATES AND STATISTICAL ANALYSIS SECTION, OFFENDER INFORMATION SERVICES, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, CALIFORNIA PRISONERS AND PAROLEES 2006: SUMMARY STATISTICS ON ADULT FELON PRISONERS AND PAROLEES, CIVIL NARCOTIC ADDICTS AND OUTPATIENTS AND OTHER POPULATIONS 23 (2007), available at [http://www.cdcr.ca.gov/Reports\\_Research/Offender\\_Information\\_Services\\_Branch/Annual/CalPris/CALPRISd2006.pdf](http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/CalPris/CALPRISd2006.pdf) (observing that in 2006, California's inmate population was 27.6% white/non-Hispanic, 28.8% African American, and 37.8% Hispanic); FLORIDA DEPARTMENT OF CORRECTIONS, 2006-2007 ANNUAL REPORT: INMATE POPULATION AS OF JUNE 30, 2007, at 67 (2007), available at <http://www.dc.state.fl.us/pub/annual/0607/PDFs/imPop.pdf> (finding that as of June 30, 2007, Florida's inmate population was 46.2% white/non-Hispanic, 50.2% African American and 3.6% Hispanic).

<sup>24</sup> Robert W. Dumond, The Impact and Recovery of Prisoner Rape, Paper presented at the National Conference "Not Part of the Penalty:" Ending Prisoner Rape (Oct. 19, 2001); see also WILBERT RIDEAU, *The Sexual Jungle, in* LIFE SENTENCES: RAGE AND SURVIVAL BEHIND BARS 90-91 (Wilbert Rideau and Ron Wikberg eds. 1992).

<sup>25</sup> See ALL TOO FAMILIAR, *supra* note 11, at 4-5; see also U.S. GEN'L ACCOUNTING OFFICE: WOMEN IN PRISON, SEXUAL MISCONDUCT BY CORRECTIONAL STAFF: REPORT TO THE HONORABLE ELEANOR HOLMES NORTON, HOUSE OF REPRESENTATIVES 7-8 (1999) (reporting that the full extent of staff sexual misconduct is unknown and underreported nationally due to the fear of retaliation and vulnerability felt by female inmates, and that jurisdictions do not have readily available comprehensive data on the number, nature, and outcome of sexual misconduct allegations); see also *Hearing before the National Prison Rape Elimination Commission: "Reporting, Investigating and Prosecuting Prison Rape: What is Needed To Make The Process Work?"* (Aug. 3, 2006) (testimony of Necole Brown), available at [http://nprec.us/docs/detroit\\_survivor\\_brown.pdf](http://nprec.us/docs/detroit_survivor_brown.pdf).

<sup>26</sup> See *Prison Rape Reduction Act of 2002: Hearing on S. 2619 Before the Sub. Comm. on the Judiciary*, 107th Cong. 2-3 (2002) (statement of Wendy Patten, U.S. Advocacy Director, Human Rights Watch), available at <http://www.hrw.org/reports/2001/prison/rapebill-statement.pdf> (discussing the organization's report, NO ESCAPE: MALE RAPE IN U.S. PRISONS, and proposing several changes to the legislation, none of which included addressing sexual abuse of women prisoners).

<sup>27</sup> See, e.g., *id.* at 8-9 (testimony of Linda Bruntmyer) (describing the victimization of her son Rodney who was incarcerated at age 16, sentenced to eight years in adult prison for setting a

dumpster on fire, became a victim of prison rape and eventually hanged himself while in prison due to shame and hopelessness); *see also id.* at 46-52 (statement of Lara Stemple, Executive Director, Stop Prison Rape) (providing three victim survivor stories from three inmates, two of whom were men); *id.* at 14 (statement of Robert W. Dumond, Clinical Mental Health Counselor, and Member, Board of Advisors, Stop Prison Rape, Hudson, New Hampshire) (discussing two studies of Midwestern prisons conducted by Cindy Struckman-Johnson and her colleagues which found that some male prisoners experience 100 incidents of victimization a day, and also noting that of the 15 empirical studies available on the matter only 2 included women).

<sup>28</sup> *See* BECK, HARRISON & ADAMS 2006, *supra* note 19, at 7.

<sup>29</sup> *See generally* PREA, 42 U.S.C. §§ 15601-15609 (2003).

<sup>30</sup> *See, e.g.,* Alexei Barrionuevo, *Enron's Skilling is Sentenced to 24 Years*, N.Y. TIMES, Oct. 24, 2006, available at <http://www.nytimes.com/2006/10/24/business/24enron.html?th&emc=th>; Brooke A. Masters, *Martha Stewart Sentenced to 5 Months in Prison*, WASH. POST, July 16, 2004, available at <http://www.washingtonpost.com/wp-dyn/articles/A54591-2004Jul16.html>; *Priest Found Guilty of Molestation*, CNN.com, Jan. 18, 2002, available at <http://archives.cnn.com/2002/LAW/01/18/priest.verdict/index.html>; *Inmate Testifies Why He Killed Molester Priest*, N.Y. TIMES, Jan. 24, 2006, available at [http://www.nytimes.com/2006/01/24/national/24priest.html?\\_r=1&oref=slogin](http://www.nytimes.com/2006/01/24/national/24priest.html?_r=1&oref=slogin).

<sup>31</sup> *See* NO ESCAPE, *supra* note 2, at 63-67; *see also* STOP PRISONER RAPE, THE PROBLEM OF PRISON RAPE 1 (October 2007), available at <http://www.spr.org/en/factsheets/Problem%20of%20Prisoner%20Rape.pdf> (finding that the criminally inexperienced, women, the mentally ill, and first time offenders are at greater risk for exploitation).

<sup>32</sup> *See* *Hearing on Prison Rape Reduction Act of 2003*, *supra* note 2, at 44 (prepared statement of Pat Nolan, President, Justice Fellowship) (discussing the harms of prison rape both in and outside of prison and supporting the passage of H.R. 1707, the Prison Rape Reduction Act).

<sup>33</sup> *See, e.g., id.* at 51-52 (prepared statement of Michael J. Horowitz, Senior Fellow, Hudson Institute); *id.* at 4-5 (letter from Prison Fellowship Ministries (PFM) with coalition signatures).

<sup>34</sup> *See id.* at 144-46 (letter from Prison Fellowship Ministries (PFM) with Coalition signatures including those of Human Rights Watch and Stop Prisoner Rape).

<sup>35</sup> *See* *Alexander v. Sandoval*, 532 U.S. 275, 291 (2003) (holding that, in the absence of explicit authorization by Congress, no private right of action is created simply by statute).

<sup>36</sup> PREA, 42 U.S.C. § 15602(3)(7) (2003).

<sup>37</sup> *See* 149 CONG. REC. S9659 (daily ed. July 21, 2003); 149 CONG. REC. H7764 (daily ed. July 25, 2003). The speed of passage and the bi-partisan support for the Prison Rape Elimination Act, when compared to the lack of support for the Custodial Sexual Abuse Act of 1998—which sought to address staff sexual abuse against primarily women inmates—supports and reinforces gendered notions of the acceptability of violence against women.

<sup>38</sup> *See* *Hearing on Prison Rape Reduction Act of 2003*, *supra* note 2, at 21-24 (testimony of Mr. Charles J. Kehoe, President, American Correctional Association); *id.* at 144-46 (letter from

Reginald A. Wilkinson, Ed.D., President, Association of State Correctional Administrators and Director, Ohio Department of Rehabilitation and Correction).

<sup>39</sup> *See, e.g.,* *Women Prisoners of the Dist. of Columbia Dep't of Corrections v. Dist. of Columbia*, 968 F. Supp. 744 (D.D.C. 1997) (Brenda V. Smith was a litigator in this case); *Everson v. Michigan Dep't of Corrections*, 391 F.3d 737 (6th Cir. 2005) (Deborah LaBelle was a litigator in this case); HUMAN RIGHTS WATCH, MODERN CAPITAL OF HUMAN RIGHTS?: ABUSES IN THE STATE OF GEORGIA 99-119 (1996) (discussing the problem of sexual abuse in Georgia's women's prisons authored by The Women's Right Division of Human Rights Watch which at the time was directed by Dorothy Thomas); *Darbyshire v. Extraditions Int'l, Inc.*, 02-N-718 (D. Colo. 2002). This case was filed by the American Civil Liberties Union, National Prison Project while litigator Elizabeth Alexander was the Director of the Program. The case settled in 2003.

<sup>40</sup> *See* NO ESCAPE, *supra* note 2, at 4, n.2 (noting that the focus of the report is on male victims rather than female victims of prison rape while citing two Human Rights Watch reports on sexual misconduct in U.S. women's prisons).

<sup>41</sup> In fact, PREA came around the same time as landmark cases such as *Roper v. Simmons*, 543 U.S. 551 (2005), which held that it is unconstitutional to impose the death penalty as a punishment for crimes committed while under the age of 18, and *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that the execution of mentally retarded persons violates the Eight Amendment prohibition against cruel and unusual punishment); *see also* Second Chance Act of 2007: Community Safety Through Recidivism Prevention, Pub. L. No. 110-199, 122 Stat. 657 (2008) (passed in both houses of Congress on March 11, 2008 and signed by President Bush on April 8, 2008).

<sup>42</sup> PREA, 42 U.S.C. § 15607(c)(2) (2003).

<sup>43</sup> *See* *Hearing on Prison Rape Reduction Act of 2003*, *supra* note 2, at 30-31 (letter from Frank A. Hall, Director, The Eagle Group).

<sup>44</sup> *See generally* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, DATA COLLECTIONS FOR THE PRISON RAPE ELIMINATION ACT OF 2003 (2005) [hereinafter DATA COLLECTIONS FOR THE PRISON RAPE ELIMINATION ACT OF 2003]; *see also* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, IMPLEMENTING THE PRISON RAPE ELIMINATION ACT OF 2003, at 2 (2004).

<sup>45</sup> *See* DATA COLLECTIONS FOR THE PRISON RAPE ELIMINATION ACT OF 2003, *supra* note 44, at 1-2 (stating that the credibility of the self-administered questionnaires are suspicious due to the broad definition of sexual assault and underreporting).

<sup>46</sup> *Id.* at 2 (quoting that, "BJS intends to operationalize this definition by disaggregating sexual assault into three categories of inmate-on-inmate sexual violence and all incidents of staff sexual misconduct").

<sup>47</sup> *Id.* (focusing on defining sexual violence as: ". . . 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>48</sup> *See generally* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, WORKSHOP ON IMPLEMENTATION OF THE PRISON RAPE ELIMINATION ACT OF 2003 (2003); *see also* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, WORKSHOP ON INMATE SELF-REPORT OF SEXUAL ASSAULT VICTIMIZATION (2005); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, WORKSHOP ON

PRISON RAPE ELIMINATION ACT OF 2003: PRESENTING THE NATIONAL INMATE (2006).

<sup>49</sup> See generally CENTERS FOR DISEASE CONTROL AND PREVENTION, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, MORBIDITY AND MORTALITY WEEKLY REPORT 55:15, HIV TRANSMISSION AMONG MALE INMATES IN A STATE PRISON SYSTEM - GEORGIA, 1992-2005, at 421-28 (2006); see also Theodore M. Hammett, *HIV/AIDS and Other Infectious Diseases among Correctional Inmates*, 96 AM. J. OF PUB. HEALTH 974 (June 2006); Steven D. Pinkerton et. al, *Model Based Estimates of HIV Acquisition due to Prison Rape*, 87 THE PRISON JOURNAL 295, 295-310 (2007); THEODORE M. HAMMETT ET. AL., U.S. DEP'T OF JUSTICE, NATIONAL INSTITUTE OF JUSTICE, NATIONAL SURVEY OF INFECTIOUS DISEASES IN CORRECTIONAL FACILITIES: HIV AND SEXUALLY TRANSMITTED DISEASES 1 (2007).

<sup>50</sup> See NATIONAL RATE OF STATE AND TERRITORIAL AIDS DIRECTORS, STAGGERING RATES AMONG AFRICAN AMERICAN WOMEN, MSM AND THE INCARCERATED (Nov. 2005), available at <http://www.thebody.com/content/art6867.html>.2008 (discussing the increasing and disproportionate impact of HIV/AIDS on African-American women, men who have sex with men, and the incarcerated).

<sup>51</sup> DATA COLLECTIONS FOR THE PRISON RAPE ELIMINATION ACT OF 2003, *supra* note 44, at 3.

<sup>52</sup> See ALLEN BECK & TIMOTHY HUGHES, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISON RAPE ELIMINATION ACT: SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES 2004, at 1-11 (2005) [hereinafter BECK & HUGHES 2004].

<sup>53</sup> See *id.* at 5. Staff sexual misconduct rates were as follows: 11.34/1000 in state and federal facilities, 3.22/1000 in private and local facilities. *Id.* This is three times the adult rate. Youth-on-youth sexual violence rates were as follows: 7.31/1000 in local private facilities, 6.75/1000 in state facilities. *Id.* This is six times the rate at state adult facilities and seven times the rate of local jails. *Id.*

<sup>54</sup> *Id.* (breaking down allegations by place and incident; 42% of allegations occurred in prison, 23% in local and private facilities, 21% were in jails and 11% in juvenile facilities; 42% of the cases were staff sexual misconduct, 37% were inmate-on-inmate, 11% staff harassment and 10% abusive inmate-on-inmate sexual contact).

<sup>55</sup> *Id.* at 13 (citing that Alaska, Maine, New Hampshire and North Dakota reported zero allegations of sexual violence).

<sup>56</sup> See Justice for All: *Male Prisoner Rape* (KMOX Radio, St. Louis, Apr. 1, 2007); see also *Captive Victims* (KMOV- News 4 St. Louis); *Hearing before the Prisoner Rape Elimination Commission* (Dec. 5, 2007) (testimony of Sandra Matheson, Director of the State Office of Victim/Witness Assistance), available at <http://nprec.us/docs3/TestimonyMatheson.pdf> (discussing an ongoing case involving a correctional office indicted on 54 charges of sexually assaulting 14 inmates in a New Hampshire correctional facility).

<sup>57</sup> See BECK & HUGHES 2004, *supra* note 52, at 8 (reporting that in State prisons, 69% of victims of staff sexual misconduct were male, while 67% of perpetrators were female).

<sup>58</sup> SABOL, COUTURE & HARRISON, *supra* note 14, at 6.

<sup>59</sup> See BECK & HUGHES 2004, *supra* note 52, at 8 (finding that in local jails 70% of victims were female; 65% of perpetrators, male; in State-operated juvenile facilities, 69% of victims were

male; 47% of perpetrators, female; in local/private operated juvenile facilities, 63% of the victims and 64% of the perpetrators were male).

<sup>60</sup> See BECK, HARRISON & ADAMS 2006, *supra* note 19, at 6 (noting that the sexual relationship “appeared to be willing” in 57% of incidents of staff sexual misconduct and harassment). To address concerns about the reporting and interpretation of data in the 2005 survey, BJS changed the item related to the nature of the incidents in 2006. *Id.* The option “Romantic” was replaced by “Sexual relationship between inmate and staff appeared to be willing.”

<sup>61</sup> *Id.* at 3-4.

<sup>62</sup> ALLEN BECK, PAIGE HARRISON AND DEVON ADAMS, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES 2007, at 2 (2007) [hereinafter BECK, HARRISON & ADAMS 2007].

<sup>63</sup> See BECKS, HARRISON & ADAMS 2006, *supra* note 19, at 3 (analyzing allegations of sexual violence and rates per thousand inmates by type of facility).

<sup>64</sup> See BECKS, HARRISON & ADAMS 2007, *supra* note 63, at 2.

<sup>65</sup> The report of inmates only included state and federal inmates and the correctional report included state and federal as well as local jail reports.

<sup>66</sup> See BECK, HARRISON & ADAMS 2007, *supra* note 63, at 1-2.

<sup>67</sup> PREA, 42 U.S.C. § 15604(b) (2003).

<sup>68</sup> See generally *Hearing before the Review Panel on Prison Rape* (2006), available at [http://www.ojp.usdoj.gov/fedregister/fr\\_2006-10-25.pdf](http://www.ojp.usdoj.gov/fedregister/fr_2006-10-25.pdf); see also *Hearing of the Review Panel on Prison Rape* (2008), available at [http://www.ojp.usdoj.gov/fedregister/fr\\_2008-02-19.pdf](http://www.ojp.usdoj.gov/fedregister/fr_2008-02-19.pdf).

<sup>69</sup> See BECK, HARRISON & ADAMS 2007, *supra* note 63, at 2 (determining that Texas, Indiana, Nebraska and Florida had the highest rates while California and the Federal Bureau of Prisons had the lowest).

<sup>70</sup> See generally STOP PRISONER RAPE, PREA UPDATE, STOP PRISONER RAPE'S PERIODIC REPORT ON THE PRISON RAPE ELIMINATION ACT, SPECIAL REPORT ON NIJ RESEARCH TRAVESTY (2006) (criticizing the Fleischer report as “flawed, sloppy, and irresponsible”).

<sup>71</sup> PREA § 15604(a).

<sup>72</sup> See The National Institute of Corrections/Washington College of Law Project on Addressing Prison Rape (NIC/WCL Project), Participant Database, under NIC cooperative agreements 01P18G108 through 07S24GJQ1 (on file with author). This database is representative of the project training groups which are representative of almost all 50 states.

<sup>73</sup> *Id.*

<sup>74</sup> See PREA § 15605(a) (stating that the purpose of the grants is to ensure that “budgetary circumstances. . . do not compromise efforts to protect inmates” and “to provide funds for personnel, training, technical assistance, data collection, and equipment to prevent and prosecute prisoner rape).

<sup>75</sup> See Email from Julius Dupree, BJA Policy Advisor, to Brenda V. Smith, Program Director for the National Institute of Corrections Project on Addressing Prison Rape (June 25, 2007, 1:25p EST) (on file with author) (Alabama, Delaware, Florida, Kansas, California, Kentucky, Montana, Texas, Pennsylvania, Ohio, Oregon, Michigan, New Jersey, Rhode Island, Iowa, Wyoming, Virginia, Vermont and Wisconsin).

<sup>76</sup> See *id.* (Colorado, Delaware, Florida, Idaho, Iowa, Ohio

DYS, Pennsylvania, Tennessee, Vermont, Wisconsin, California, Kentucky, Maryland, Missouri, Montana, North Carolina and New Hampshire).

<sup>77</sup> See *id.* (Alabama, Colorado, Idaho, Maryland, Pennsylvania, and Wyoming).

<sup>78</sup> See *id.* (Arkansas, California, Florida, Kansas, Minnesota, Montana, North Carolina, Puerto Rico, Virginia, Wyoming, and Ohio).

<sup>79</sup> See *id.* (Kansas, Kentucky, Minnesota, Nebraska, New Hampshire, Ohio, Vermont, California, Michigan, and Rhode Island).

<sup>80</sup> See *id.* (Virginia, Colorado, Vermont, Delaware, Pennsylvania, Tennessee, Nebraska, New Hampshire, Ohio, Oklahoma, and Wisconsin).

<sup>81</sup> See *id.* (Louisiana, Kentucky, Ohio, Oregon, Rhode Island, and Wyoming).

<sup>82</sup> See *id.* (New Jersey, North Carolina, Michigan, and Rhode Island).

<sup>83</sup> See PREA, 42 U.S.C. § 15606(g)(1) (2003) (delineating the Commission's powers to hold hearings, call witnesses, and receive such evidence as it considers necessary to carry out its duties).

<sup>84</sup> See generally NATIONAL ASSOCIATION OF PUBLICATION ADMINISTRATION, HIGH-LEVEL WORK PLAN: STUDIES IN SUPPORT OF THE PRISON RAPE ELIMINATION ACT OF 2003 (2006) (on file with author).

<sup>85</sup> See National Prison Rape Elimination Commission, Standard Development Process (November 2007), available at <http://nprec.us/Press/media%20kit/NPREC%20Standards%20Process.pdf> (draft of standards to date are on file with author).

<sup>86</sup> See PREA § 15606(7)(c)(3)(A) (providing that the standards should be issued no later than 2 years after the date of the initial meeting of the commission).

<sup>87</sup> See Second Chance Act of 2007: Community Safety Through Recidivism Prevention, Pub. L. No. 110-199, 122 Stat. 657 (2008) ("Section 7(d)(3)(A) of the Prison Rape Elimination Act of 2003 (42 U.S.C. 15606(d)(3)(A)) is amended by striking '3 years' and inserting '5 years.'").

<sup>88</sup> See PREA § 15607(a)(1).

<sup>89</sup> See *id.* § 15607(a)(4).

<sup>90</sup> See Brenda V. Smith, *Behind Bars: The Impact of Incarceration on Women and Their Families*, 29 WOMEN'S RTS. L. REP. (forthcoming 2008).

<sup>91</sup> See Prison Litigation Reform Act, 42 U.S.C. § 1997e (2000) (aiming at deterring frivolous prisoner lawsuits and requiring the exhaustion of administrative remedies and physical injuries).

<sup>92</sup> See Violence Against Women Act of 1994 (VAWA I), Pub. L. No. 103-322, 108 Stat. 1902 (1994) (codified as amended in scattered sections of 42 U.S.C. and 18 U.S.C.), *reauthorized in* Victims of Trafficking and Violence Protection Act of 2000 (Victims Protection Act), Pub. L. No. 106-386, 114 Stat. 1462 (2000) (codified as amended in scattered sections of 42 U.S.C., 22 U.S.C. §§ 7101-7710); see also Susan Tiefenbrun, *The Saga of Susannah: A U.S. Remedy for Sex Trafficking in Women The Victims of Trafficking and Violence Protection Act of 2000*, 2002 UTAH L. REV. 107, 113 n.14 (2002) ("The Victims Protection Act is divided into three main sections: A) The Trafficking Victims Protection Act of 2000; B) VAWA II; and C) Miscellaneous Provisions."); Victims of Crime Act of 2002, Pub. L. No. 98-473, 98 Stat. 1837 (1984) (codified in scattered sections of 18 U.S.C. and 42 U.S.C.).

<sup>93</sup> See Brenda V. Smith, *Sexual Abuse of Women in Prison: A Modern Corollary of Slavery*, 33 FORDHAM URB. L.J. 571, 592

(discussing VAWA I and VAWA II laws that prohibited the use of funds for any persons in custody, meaning that "the significant number of women in prison with histories of physical and sexual abuse both prior and during imprisonment are ineligible for services funded by VAWA II").

<sup>94</sup> See generally Lauren A. Teichner, *Unusual Suspects: Recognizing and Responding to Female Staff Perpetrators of Sexual Violence in U.S. Prisons*, 14 MICH. J. GENDER & L. 259, 276-90 (2008) (describing the differential treatment of female staff perpetrators of sexual violence in custody).

<sup>95</sup> See Brenda V. Smith, *Rethinking Prison Sex: Self-Expression and Safety*, 15 COLUM. J. GENDER & L. 185, 225 (2006) [hereinafter Smith, *Rethinking Prison Sex*] (discussing the continuum of sexual expression in correctional environments the main concern of which is whether the state has an ability to regulate that expression); see also 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>96</sup> See Smith, *Rethinking Prison Sex*, *supra* note 96, at 201 (noting that there "is an inherent imbalance of power between staff and inmates [where] [c]orrectional staff control every aspect of the prisoner and the prison experience: housing, recreation, discipline, communication with the outside, and even the length of an inmate's sentence").

<sup>97</sup> See *id.* at 225 (indicating that one loses control over one's personhood in prison, including sexual autonomy as part of the punishment).

<sup>98</sup> See *id.* at 231 (arguing that conjugal and family visits give greater opportunities for prisoners' sexual expression).

<sup>99</sup> See *id.* at 229 (noting that "the rate of infection for hepatitis and HIV . . . among the prison population is three times that of the general population, and affects female inmates at a higher rate than males").

<sup>100</sup> See *Basic Principles for the Treatment of Prisoners*, U.N. Doc. A/RES/45/111, adopted Dec. 14, 1990, available at <http://www.un.org/documents/ga/res/45/a45r111.htm>; see also International Covenant on Civil and Political Rights, G.A. Res. 2200, U.N. GAOR Res. (No. 2200A), entered into force Mar. 23, 1976, available at [http://www.unhchr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhchr.ch/html/menu3/b/a_ccpr.htm); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, entered into force June 26, 1987, available at [http://www.unhchr.ch/html/menu3/b/h\\_cat39.htm](http://www.unhchr.ch/html/menu3/b/h_cat39.htm).

<sup>101</sup> See generally Donald Braman, *Families and Incarceration*, in *INVISIBLE PUNISHMENT, THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* (Marc Mauer & Meda Chesney Lind eds. 2003) (discussing some of the collateral consequences of imprisonment and the effect of these consequences on individuals and families).

<sup>102</sup> See *Farmer v Brennan*, 511 U.S. 825, 834 (1994) (stating that "[b]eing violently assaulted in prison is simply not 'part of the penalty that criminal offenders pay for their offenses against society.'" (citing *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981))).

\* Brenda V. Smith is a Professor of Law at American University's Washington College of Law and is the Program Director for the National Institute of Corrections Project on Addressing Prison Rape ([www.wcl.american.edu/nic](http://www.wcl.american.edu/nic)) at the Washington College of Law. Professor Smith is also a commissioner on the National Prison Rape Elimination Commission ([www.nprec.us](http://www.nprec.us)).