

Prison Rape: An Endless Epidemic?

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Abstract

Congress passed the landmark Prison Rape Elimination Act (“PREA”) in 2003 with unanimous support from both the Senate and House of Representatives. After the rampant sexual violence occurring behind the closed doors of prisons and jails (much of which was perpetrated by the staff of these institutions) was brought to light by human rights organizations, news media, lawyers, and activists in the late 1990s, lawmakers crafted this unprecedented federal law to establish a zero-tolerance policy for what it described as an “invisible epidemic.” At the law’s twenty-year mark, justice-involved individuals are still being sexually victimized in carceral settings, day after day, frequently at the hands of state actors. As but one example, three women testified about how they were subject to repeated sexual abuse by the warden of a federal women’s prison in California. The warden also served as the facility’s PREA Coordinator, ironically meaning he trained prison staff on how to prevent sexual violence and educated inhabitants upon entry about how to report abuse they might endure. The abuse was so widely known that the prison was referred to as a “rape club.” This anecdote is supported by broader statistics that suggest prison rape has not abated, revealing serious shortcomings of

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PREA and providing persuasive fodder in support of the abolition of the carceral state.

Despite labeling prison rape an epidemic, Congress did not actually create a corresponding comprehensive public health response to address the crisis. Nor did it create a human rights response, despite much of the human rights work that went into revealing the atrocities that were occurring in the nation's carceral settings. So, what did PREA do? This Article offers a retrospective analysis of the past twenty years under the PREA-centered legislative regime and analyzes some of the law's most significant successes and failures in light of the public health context in which Congress situated it. If indeed an epidemic, prison rape is a seemingly endless one whose responses and remedies require retooling. We query whether a human rights framework, layered together with a true public health response, might offer a way forward. There is a rich history of marrying public health and human rights to address an array of social issues, and we advocate for such a union here. This shift—reframing and reconceptualizing the response by further merging public health and human rights—is a critical step toward ensuring the eradication of sexual violence in carceral settings in the most timely and effective way possible. While we laud the work to abolish the carceral state for all its flaws—systemic racism, sexism, abuse, and beyond—we cannot abandon the individuals who are incarcerated today, forced to endure sexual violence at the hands of the state.

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[T]he enactment of a law aimed at stopping prison rapes does not in and of itself put an end to sexual violence.¹

I. INTRODUCTION

Melissa and Maria testified before a grand jury in California in 2022 about how they had been first pursued—and later sexually abused—by the same man.² He played to their vulnerabilities, comforting them when they struggled, promising wine-tasting trips to Napa, and giving them gifts to secure their trust.³ His conduct turned abusive, and he used his position of power to force them to pose naked for photographs and engage in other sexual acts.⁴ The abuse these women endured is egregious and unlawful, no matter the context. Still, Melissa, Maria, and at least one other woman felt they were without recourse to report what happened to them because their assailant, a man named Ray Garcia, worked as the warden at Federal Correctional Institute, Dublin (“FCI Dublin”), a federal women’s low-security prison in California, where they were incarcerated.⁵

To add insult to injury, in 2019 and 2020, Garcia also served as the prison’s Prison Rape Elimination Act (“PREA”) Compliance Officer, meaning he was responsible for training staff and educating the incarcerated women about sexual violence and protocols for reporting including how to file complaints if they were subject to sexual

1. Slabey v. Dunn Cnty., 405 Wis. 2d 404, 436 (Wis. 2023) (Karofsky, J., dissenting).

2. Natalia Galicza, *The Women that “Me too” Left Behind*, DESERT NEWS (June 14, 2023, 9:00 PM), <https://www.deseret.com/indepth/2023/6/14/23728001/fci-dublin-warden-convicted-sexual-assault>.

3. *Id.*

4. *Id.*

5. Press Release, Dep’t Just., Jury Convicts Former Federal Prison Warden for Sexual Abuse of Three Female Inmates (Dec. 8, 2022), <https://www.justice.gov/opa/pr/jury-convicts-former-federal-prison-warden-sexual-abuse-three-female-inmates> [hereinafter Press Release].

violence.⁶ In addition, Garcia was the one who provided training on policies and procedures required by PREA⁷ for all new supervisors in his employ at FCI Dublin.⁸ To discourage his victims from reporting, Garcia was exceedingly manipulative, convincing them, as just one example, that he was “close friends” with the individual responsible for investigating allegations of misconduct by inmates and that he could not be fired.⁹ The abuse was so rampant that it was referred to by those living in the prison as a “rape club.”¹⁰ This subset of women finally found the courage to come forward; the criminal complaint included graphic details of the abuse they endured.¹¹ In 2022, Garcia was convicted of three counts of sexual abuse, four counts of abusive sexual contact, and one count of lying to federal agencies. As a result, Garcia will serve a seventy-month prison sentence of his own.¹² Ultimately, the Federal Bureau of Prisons deemed this prison beyond reform, shutting it down and relocating its residents in 2024, but not before the federal government agreed to pay a landmark \$116 million to more than 100 women—the largest amount ever paid by the federal government for misconduct in prisons.¹³

6. Criminal Complaint at 5, United States v. Garcia, No. 4:21-cr-00429-YGR (N.D. Cal. filed Sept. 24, 2021), <https://www.documentcloud.org/documents/21408685-warden-ray-j-garcia>.

7. *Id.*

8. *Id.*

9. *Id.* at 11.

10. See Patrick Reilly, *Women’s Prison Warden Accused of Running “Rape Club” Found Guilty of Sexually Abusing Inmates*, N.Y. POST, Dec. 8, 2022, <https://nypost.com/2022/12/08/womens-prison-warden-accused-of-running-rape-club-found-guilty-of-sexually-abusing-inmates>.

11. Criminal Complaint, United States v. Garcia, No. 4:21-cr-00429-YGR (N.D. Cal. filed Sept. 24, 2021), <https://www.documentcloud.org/documents/21408685-warden-ray-j-garcia>. Garcia digitally penetrated the victim on multiple occasions. The complaint describes an occasion during which Garcia assaulted a victim and when the victim pushed Garcia’s hand away, Garcia put the victim’s hand on his genitals. Further, the complaint alleges that Garcia requested that the victim, and at least one other inmate, strip naked for him when he did his rounds at FCI Dublin. Garcia allegedly took photographs of the victim naked in a cell at FCI Dublin and showed the victim pictures on his cellphone of his own genitalia. The complaint alleges Garcia maintained several nude photographs of the victim on his personal computer. *Id.* at 6–7.

12. Press Release, *supra* note 5.

Garcia's crimes against women in his care occurred almost two decades after Congress vowed to eliminate the problem of prison rape in its passage of the landmark Prison Rape Elimination Act—PREA—which set a zero-tolerance standard for rape in U.S. prisons.¹⁴ Leveraging the very position that was created to ensure that PREA zero-tolerance mandates were met in order to perpetrate abuse against women in the prison is a chilling and exceedingly common example of the current state of rape in U.S. women's prisons. What occurred inside FCI Dublin illustrates how sexual violence manifests in carceral settings. Unfortunately, this was not an isolated incident at that particular prison¹⁵ or elsewhere.¹⁶

The U.S. imprisons more people per capita than any other nation.¹⁷ Perhaps surprisingly, women, particularly women of color,

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13. The beleaguered federal Bureau of Prisons said Monday it will close a women's prison in California known as the "rape club" despite attempts to reform the troubled facility after an Associated Press investigation exposed rampant staff-on-inmate sexual abuse The announcement of Dublin's closure represents an extraordinary acknowledgement by the Bureau of Prisons that its much-promised efforts to improve the culture and environment there have not worked.

Associated Press, *Bureau of Prisons to Shut Women's Prison Where Inmates Faced Sex Abuse*, FED. TIMES (Apr. 15, 2024), <https://www.federaltimes.com/fedlife/2024/04/15/bureau-of-prisons-to-shut-womens-prison-where-inmates-faced-sex-abuse>. Richard Winton, *Women Victimized in 'Rape Club' at California Prison Get Record \$116-million Settlement*, LA TIMES, (Dec. 17, 2014), <https://www.latimes.com/california/story/2024-12-17/feds-agree-to-pay-116-million-to-victims-of-sexual-assault-by-employees-at-shuttered-dublin-federal-prison>.

14. 34 U.S.C. § 30302.

15. Galicza, *supra* note 2.

16. As but one example, a California prison guard is awaiting trial on ninety-six sexual abuse charges alleging that he raped at least twenty-two women over the course of a decade. See Sam Levin, *One Prison Guard, 96 Abuse Charges: Women Say "Serial Rapist" Targeted Them Over a Decade*, THE GUARDIAN (Oct. 25, 2023, 6:00 AM), <https://www.theguardian.com/us-news/2023/oct/25/gregory-rodriguez-california-correctional-officer-accused-sexual-assault-womens-prison>.

17. In 2023, the U.S. incarcerated 565 individuals per 100,000. Wendy Sawyer & Pete Wagner, *Mass Incarceration: The Whole Pie 2023*, PRISON POL'Y INITIATIVE (Mar. 14, 2023), <https://www.prisonpolicy.org/reports/pie2023.html>.

represent the fastest-growing segment of the incarcerated population.¹⁸ Between 1980 and 2020, the number of incarcerated women increased by more than 475%, rising from a total of 26,326 in 1980 to 152,854 in 2020.¹⁹ Racial disparities are also glaring for both Black men and women.²⁰ The problems that arise from mass incarceration are far-reaching and complex; indeed, there is an increasing call among scholars and activists who favor abolition of the prison system altogether.²¹

The individuals currently living in carceral settings are at significant risk of being sexually victimized by other justice-involved

18. Kim Shayo Buchanan, *Impunity: Sexual Abuse in Women's Prisons*, 42 HARV. C.R.-C.L. L. REV. 45, 51 (2007); Wendy Sawyer, *The Gender Divide: Tracking Women's State Prison Growth*, PRISON POL'Y INITIATIVE (Jan. 9, 2018), https://www.prisonpolicy.org/reports/women_overtime.html.

19. Kristen M. Budd, *Incarcerated Woman and Girls*, THE SENT'G PROJECT (July 24, 2023), <https://www.sentencingproject.org/fact-sheet/incarcerated-women-and-girls>. For a comprehensive discussion explaining reasons for the increased number of women in prison, see Spencer K. Beall, "Lock Her Up!" *How Women Have Become the Fastest-Growing Population in the American Carceral State*, 23 BERKELEY J. CRIM. L. 1, 5 (2018).

20. Nazgol Ghandnoosh, *One in Five: Ending Racial Inequity in Incarceration*, THE SENT'G PROJECT n.4 (Oct. 11, 2023), <https://www.sentencingproject.org/reports/one-in-five-ending-racial-inequity-in-incarceration/#footnote-4>.

21. See *infra* note 77.

individuals²² and/or prison staff.²³ Research shows that over 3,500 women are sexually abused in carceral settings by staff each year,²⁴ and federal employees have sexually abused women in two-thirds of the nation's federal women's prisons.²⁵

In an effort to address the prevalent problem of sexual violence in prison,²⁶ President Bush signed PREA into law on September 4,

22. Most of the existing research surrounding sexual assault in carceral settings, case law, and legislation uses language such as “inmate” or “prisoner” to describe individuals who are incarcerated, but we follow the recommendations of health experts from Europe, the U.S., and Australia, who recommend using humanizing and person-centered language. See Brendan L. Harney et al., *It Is Time for Us All to Embrace Person-Centered Language for People in Prison and People Who Were Formerly in Prison*, 99 INT’L J. DRUG POL’Y 1 (2022). The argument for refining our language is more than just an extension of political correctness. See also Nguyen Toan Tran et al., *Words Matter: A Call for Humanizing and Respectful Language to Describe People Who Experience Incarceration*, 18 BMC INT’L HEALTH AND HUM. RTS. 1 (2018). “The use of respectful and person-centered language (also called ‘person-first language’) to describe individuals who are incarcerated, their characteristics, and experiences is fundamental to improving access to medication and services and minimizing discrimination.” *Id.* at 2. Thus, unless referring directly to legislation or quoting directly from sources, we use terms such as “justice-involved individuals” to refer to those who have experienced or are currently experiencing incarceration.

23. ALLEN J. BECK ET AL., BUREAU OF JUST. STATS., U.S. DEP’T OF JUST., SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011–12: NATIONAL INMATE SURVEY, 2011–12 (2013), <https://bjs.ojp.gov/content/pub/pdf/svpjri1112.pdf>.

24. *Id.*

25. STAFF OF SUBCOMM. ON INVESTIGATIONS, 177TH CONG., REP. ON SEXUAL ABUSE OF FEMALE INMATES IN FED. PRISONS 1 (2022), <https://www.hsgac.senate.gov/wp-content/uploads/imo/media/doc/2022-12-13%20PSI%20Staff%20Report%20-%20Sexual%20Abuse%20of%20Female%20Inmates%20in%20Federal%20Prisons.pdf> [hereinafter REP. ON SEXUAL ABUSE OF FEMALE INMATES IN FED. PRISONS].

26. Although the word “prison” appears in the title of this legislation, Congress intended for PREA to apply to other carceral settings, including any federal, state, or local confinement facility, such as local jails, police lockups, juvenile facilities, and state and federal prisons. In this Article, we focus our discussion on the confinement settings of prisons and jails. We recognize, however, that many of the dynamics discussed herein are similarly relevant in other settings that are technically located *outside* the physical confinement of prison but retain similar dynamics of control (i.e., parole).

2003.²⁷ Congress created PREA to “establish a zero-tolerance standard for the incidence of prison rape in prisons in the United States”²⁸ PREA was considered a significant step forward in combating a widespread—and often hidden—problem that plagued the criminal justice system. It was widely thought that PREA was “[p]erhaps the most significant law reform project undertaken on U.S. prison issues in the twenty-first century.”²⁹ Indeed, even the name of the law was shifted from the Prison Rape *Reduction* Act to the Prison Rape *Elimination* Act,³⁰ signaling the seriousness with which Congress approached this problem and reflecting its goal of eradicating, not just reducing, the occurrence of sexual violence in carceral settings.

Although PREA is gender-neutral on its face,³¹ women in carceral settings face unique challenges; this reality pre-dates the passage of PREA and continues today.³² The dynamics of how sexual

27. *Statement on Prison Rape Elimination Act*, THE WHITE HOUSE (Sept. 4, 2003), <https://georgewbush-whitehouse.archives.gov/news/releases/2003/09/20030904-9.html>; Prison Rape Elimination Act, 34 U.S.C. § 301. For additional information, see *Prison Rape Elimination Act*, NAT’L PREA RES. CTR., <https://www.prearesourcecenter.org/about/prea-resource-centerprea> (last visited Feb. 6, 2024).

28. 42 U.S.C. § 15602(1) (2008) (current version at 34 U.S.C. § 30302).

29. Gabriel Arkles, *Prison Rape Elimination Act Litigation and the Perpetuation of Sexual Harm*, 17 N.Y.U. J. LEGIS. & PUB. POL’Y 801, 802 (2014). There was cause for optimism at the passage of PREA. See Julie Samia Mair et al., *New Hope for Victims of Prison Sexual Assault*, 31 J.L. MED & ETHICS 602 (2003).

30. David W. Frank, *Abandoned: Abolishing Female Prisons to Prevent Sexual Abuse and Herald an End to Incarceration*, 29 BERKELEY J. GENDER, L. & JUST. 1, 11 (2014).

31. The seriousness with which some came to see this issue, however, was initially motivated by a desire to end the rape of white men in prison. As Professor Brenda Smith notes, “The primary proponents of the legislation, Senators Edward Kennedy (D-MA) and Jeff Sessions (R-AL), and Representatives Bobby Scott (D-VA) and Frank Wolf (R-VA), garnered support from Human Rights Watch, Concerned Women of America, Stop Prisoner Rape, and conservative-leaning groups concerned about the victimization of *vulnerable white men in custody*” (emphasis added). Brenda V. Smith, *Promise Amid Peril: PREA’s Efforts to Regulate an End to Prison Rape*, 57 AM. CRIM. L. REV. 1599, 1601 (2020) [hereinafter *Promise Amid Peril*].

32. See *id.* Women are not the only group who experience victimization in carceral settings. Like in the broader community, transgender individuals are particularly vulnerable to sexual assault and violence within prison. *Id.* at 1632.

violence³³ is both perpetrated and addressed within the confines of prison are unique and gendered. A multitude of barriers impede the reporting of sexual violence: limited information about how or to whom to report, a dearth of resources to attend to physical and emotional health after an assault (i.e., sexual assault nurse examiners (“SANE”) and/or rape crisis counselors), and significant fears of retaliation or further harm.³⁴ In addition, rape myths³⁵ that pervade the broader community are ever-present, along with those explicitly tailored to the unique carceral context; these myths complicate and

Prisoners in general suffer from greater rates of poverty compared to the broader population of a country, and they are particularly likely to have been victims of violence, emotional abuse, or sexual abuse—or all three—at some point in their lives. Prisons do not alleviate these conditions; rather, they exacerbate them, forcing many prisoners to suffer routine incidents of physical, emotional, and sexual abuse, except now under the watchful eye (and, all too often, the participating hand) of prison officials.

Tom Butcher, *Human Rights, Trans Rights, Prisoners' Rights: An International Comparison*, 18 NW. J.L. & SOC. POL'Y 43, 52 (2023). This is an area that is understudied and deserving of attention but is outside the scope of this Article.

33. We use “sexual violence” as a universal term to refer to a range of sexual misconduct including rape, sexual assault, abuse, harassment, etc. We also use the term “prison rape” as a term of art/shorthand for all sexual violence perpetrated within prison.

34. Sheryl Pimlott Kubiak et al., *Reporting Sexual Victimization During Incarceration: Using Ecological Theory as a Framework to Inform and Guide Future Research*, 19 TRAUMA, VIOLENCE, & ABUSE 94 (2018).

35. Martha R. Burt, *Cultural Myths and Supports for Rape*, 38(2) J. OF PERSONALITY AND SOC. PSYCH. 217 (1980). Rape myths refer to “prejudicial, stereotyped, or false beliefs about rape, rape victims, and rapists [contributing to] a climate hostile to rape victims.” *Id.* at 217. Burt’s conception of rape myths has been built upon by scholars, culminating in the rape myth acceptance scale. See Payne et al., *Rape Myth Acceptance: Exploration of Its Structure and Its Measurement Using the Illinois Rape Myth Acceptance Scale*, 33(1) J. OF RSCH. IN PERSONALITY 27 (1999). Research on rape myths has found that increased acceptance of rape myths has been tied to behaviors that perpetuate rape culture. For example, increased rape myth acceptance is tied to perpetration of sexual assault and coercion and impacts juror blame for rape victims and shapes verdict decisions. Dominique Trottier et al., *A Meta-Analysis on the Association Between Rape Myth Acceptance and Sexual Coercion Perpetration*, 58 J. OF SEX RSCH, 375–82 n.3 (2021); Fiona Leverick, *What Do We Know About Rape Myths and Juror Decision Making?*, 24 INT’L J. OF EVIDENCE & PROOF 255 (2020).

interfere with the process of finding justice for those who are victimized.³⁶

PREA's mandates are ambitious and far-reaching. Its key provisions include setting a zero-tolerance standard for sexual abuse and harassment (specifically identifying vulnerable populations such as juveniles),³⁷ improved responses like forensic medical examinations, access to outside confidential support and reporting options, timely investigations,³⁸ formalized training for both employees and incarcerated people,³⁹ and improved medical and mental health care.⁴⁰ Additionally, PREA requires national data collection and incentivizes compliance from states by threatening to withhold federal funding from those who eschew participation.⁴¹

In the second section of the PREA legislation, in which the compelling data on the prevalence of rape within prisons is laid forth, Congress describes the problem of prison rape in public health terms, describing it as an invisible “epidemic.”⁴² This reference is one in a long string of instances where leaders, policymakers, and politicians have used the public health language of “epidemic” for issues that are not infectious diseases to denote seriousness and signal priority for public policy change.⁴³ Beyond the use of this term, however, there is

36. Hannah Brenner et. al., *Bars to Justice: The Impact of Rape Myths on Women in Prison*, 17 GEO. J. GENDER & L. 521 (2016) [hereinafter *Bars to Justice*]; see also Alena Allen, *Rape Messaging*, 87 FORDHAM L. REV. 1033, 1053–62 (2018).

37. 34 U.S.C. § 30302.

38. 28 C.F.R. §§ 115.1–22 (2012).

39. *Id.* §§ 115.31–35.

40. *Id.* §§ 115.81–83.

41. *Id.* § 115.87; 34 U.S.C. § 30303.

42. “Members 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.” 42 U.S.C. § 15601(12) (2003) (current version at 34 U.S.C. § 30301). “Public health may be defined as what society does to assure that conditions exist in which people can be healthy. In the case of violence, health is defined as the prevention of deaths and injuries caused by violence.” Pamela M. McMahon, *The Public Health Approach to the Prevention of Sexual Violence*, 12 SEXUAL ABUSE: J. RSCH. & TREATMENT 27, 28 (2000).

43. See discussion *infra* Part II. For example, in 2024, the U.S. Surgeon General, Dr. Vivek Murthy declared gun violence a “public health crisis.” U.S. DEPT’ OF HEALTH & HUM. SERV., OFF. OF THE SURGEON GEN., FIREARM VIOLENCE: A PUBLIC HEALTH CRISIS IN AMERICA (2024), <https://www.hhs.gov/sites/default/files/firearm-violence-advisory.pdf>. A year prior, Dr. Murthy issued a report on loneliness and

no further development of the epidemic concept or significant discussion in Congress about situating the problem in a public health context.⁴⁴ The lack of additional references suggests that the term epidemic was perhaps selected to connote the seriousness of the problem but did not actually drive the creation of requirements and action items embedded in the legislation.⁴⁵ Even without this specific public health intention, Congress promulgated a multi-pronged approach that seems to incorporate at least some public health measures to eliminate prison rape.⁴⁶ An actual public health response seeks to identify the issue, monitor the spread, and assess “what works” to break transmission chains; coordination across systems and infrastructure is necessary for success in this approach.⁴⁷ Instead, the PREA response primarily sought to tackle prison rape from within the system itself.⁴⁸

isolation, also labeling this phenomenon an epidemic. U.S. DEPT’ OF HEALTH & HUM. SERV., OFF. OF THE SURGEON GEN., THE U.S. SURGEON GENERAL’S ADVISORY ON THE HEALING EFFECTS OF SOCIAL CONNECTION AND COMMUNITY, OUR EPIDEMIC OF LONELINESS AND ISOLATION (2023), <https://www.hhs.gov/sites/default/files/surgeon-general-social-connection-advisory.pdf>.

44. There were just a few outlier comments made by those testifying at the Congressional hearings. As one consultant noted, “[i]t is not only a problem of public safety and safety in our institutions for both staff and inmates, but I think it is, very frankly, a public safety issue and a public health issue.” *Prison Rape Reduction Act of 2003: Hearing on H.R. 1707 Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the Comm. on the Judiciary*, 108th Cong. (2003) (statement of Frank Hall, Director, Eagle Group).

45. Outside of the legislation, prison rape has been referred to in a similar way to connote the seriousness of the problem. See, e.g., Natasha Lennard, *Will the Prison Rape Epidemic Ever Have Its Weinstein Moment?*, INTERCEPT (Nov. 21, 2017, 4:08 PM), <https://theintercept.com/2017/11/21/prison-rape-sexual-assault-violence/>; see also Vicky Nguyen et al., *Inmate Tells Her Story of Sexual Abuse by San Joaquin Deputy*, NBC BAY AREA (Oct. 26, 2018, 2:07 PM), <https://www.nbcbayarea.com/news/local/inmate-tells-her-story-of-sexual-abuse-by-san-joaquin-deputy/205008> (“As sex abuse charges spread across the country, a quiet epidemic has been surging in U.S. prisons and jails for years.”).

46. See discussion *infra* Section II.C.1. (discussing the Prison Rape Elimination Act and its fight against the “code of silence” generally allowing prison rape to proceed).

47. Victoria Haldane et al., *Strengthening the Basics: Public Health Responses to Prevent the Next Pandemic*, NAT’L LIBR. OF MED. (Nov. 29, 2021), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8624065>.

48. For some exceptions, see the options for external reporting mechanisms, PREA Standards § 115.51(b); outside confidential support services, PREA Standards

The landmark PREA legislation has just passed its twentieth anniversary, creating a natural opportunity to reflect on its impact and evaluate its effectiveness. The timing of this retrospective review is particularly critical given evidence revealed in a recent Senate report, *Sexual Abuse of Female Inmates in Federal Prisons*, which concludes that PREA has not been effectively implemented by the Bureau of Prisons and documents how staff-perpetrated prison rape rages unabated across federal prisons.⁴⁹ The stories of sexual violence revealed in this report are voluminous and exceed the bounds of what should be present in and tolerated by a civilized society.⁵⁰ This Senate report was released in late 2022, about the same time that the Biden administration made a renewed commitment to address gender-based violence on a national level, laying out a strategy in the *U.S. National Plan to End Gender-Based Violence*.⁵¹ While the *Plan* is not prison-specific, it does explicitly note that individuals in prison still face barriers to reporting sexual victimization.⁵² Tellingly, news coverage of the report in 2022 again used the term “epidemic” to describe the ripple effects of this rampant issue of sexual assault in women’s prisons,⁵³ the same terminology used twenty years prior in the text of

§ 115.53; and third-party reporting mechanisms, PREA Standards § 115.54. *See also* *Untangling the PREA Standards: Outside Reporting, Confidential Support, and Third-Party Reporting Fact Sheet*, NAT’L PREA RES. CTR. (2015), https://www.prearesourcecenter.org/sites/default/files/content/factsheet_without_case_studies.pdf (“This standard ensures that inmates can report sexual abuse or sexual harassment to an entity other than the one that has custody over them.”).

49. REP. ON SEXUAL ABUSE OF FEMALE INMATES IN FED. PRISONS, *supra* note 25.

50. *Id.*

51. THE WHITE HOUSE, U.S. NATIONAL PLAN TO END GENDER-BASED VIOLENCE: STRATEGIES FOR ACTION (2023), <https://www.whitehouse.gov/wp-content/uploads/2023/05/National-Plan-to-End-GBV.pdf>.

52. In particular, the plan highlights the reality that girls in the juvenile justice system are sexually victimized at significant rates, a factor contributing to the “sexual abuse to prison pipeline.” *Id.* at 19. The plan “[e]nsure[s] opportunities for incarcerated survivors in prisons, jails, juvenile justice facilities, and detention centers to anonymously report sexual abuse and harassment, pursuant to standards issued under the Prison Rape Elimination Act (PREA).” *Id.* at 58.

53. “The *epidemic* of sexual assaults against female prisoners in federal custody has prompted the Justice Department to expand the use of a program to provide early releases to women abused behind bars, according to people familiar with the situation.” Glen Thrush, *Justice Dept. Considers Early Release for Female*

the statute and surrounding conversations. At this twenty-year mark, evidence reveals that the zero-tolerance approach effectively failed. This reality, taken together with the President's new ambitious strategic plan to address gender-based violence, set the stage for the analysis proffered by this Article.

Following this Introduction, Part Two includes a brief history of the problem of prison rape before the passage of PREA, as well as a retrospective analysis of the past twenty years under the current PREA-centered legislative regime. Part Two also analyzes some of PREA's most significant successes and failures and explores and critiques existing legal options. Part Three builds on the Congressional identification of prison rape as an "epidemic" by considering the public health framework and how it functions. This section explores definitions of public health considers both medical and nonmedical epidemics and analyzes how PREA has fared in mounting a public health response to the problem of prison rape. If indeed an epidemic, as initially described by Congress in 2003, we conclude that it is a seemingly endless one to which responses and remedies alike need retooling.

Part Four may raise more questions than answers, considering whether a human rights framework, layered on top of a true public health response, might provide a productive way forward. There is a rich history of marrying public health and human rights to address an array of social issues, and we advocate for such a marriage here.⁵⁴ We are persuaded by this approach as "[i]t provides a critical framework for governments, civil society, and other stakeholders to prioritize human rights considerations in the prevention of, preparedness for, and response to public health emergencies, and in the recovery of health systems in the aftermath of public health emergencies."⁵⁵ We believe this shift in conceptualization and reframing of a response by further merging public health and human rights is a critical step toward

Inmates Sexually Abused Behind Bars, N.Y. TIMES (Dec. 13, 2022), <https://www.nytimes.com/2022/12/13/us/politics/federal-prison-sexual-abuse.html> (emphasis added).

54. See *infra* Part IV.

55. Roojin Habibi et al., *Principles and Guidelines on Human Rights & Public Health Emergencies* (May 27, 2023) (unpublished research paper no. 14) (on file with SSRN), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4454622.

ensuring the eradication of sexual violence in carceral settings in the most timely and effective way possible.

II. PRISON RAPE RETROSPECTIVE

Historically, there was a lack of transparency about the conditions inside U.S. prisons, stemming in large part from the nature of prisons themselves, which exist as closed institutional systems.

The unique structure of a closed system means that it lacks the influence and oversight of external actors [I]ts internal processes and procedures are separate, nontransparent, and hidden from those on the outside. The public often has no idea about the inner workings of such a system.⁵⁶

A turning point occurred when human rights organizations like Human Rights Watch were able to pierce through the prison walls and bring to light examples of horrific prison conditions and treatment of prisoners over the past several decades.⁵⁷ These organizations began documenting the conditions in U.S. prisons in the 1980s⁵⁸ and issued reports throughout the 1990s and beyond.⁵⁹

Several of the reports specifically focused on incidences and dynamics of sexual assault being perpetrated against those who were incarcerated in U.S. prisons.⁶⁰ Human rights watchdog groups also

56. Hannah Brenner et. al., *Sexual Violence as an Occupational Hazard & Condition of Confinement in the Closed Institutional Systems of the Military and Detention*, 44 PEPP. L. REV. 881, 890 (2017) [hereinafter *Sexual Violence as an Occupational Hazard*].

57. For a discussion of the history of human rights groups in identifying problematic prison conditions in the U.S., see Deborah Labelle, *Bringing Human Rights Home to the World of Detention*, 40 COLUM. HUM. RTS. L. REV. 79, 94 (2008).

58. *Id.* at 41.

59. HUMAN RIGHTS WATCH, PRISON CONDITIONS IN THE UNITED STATES (1991), <http://hrw.org/reports/pdfs/u/us/us.91n/us91nfull.pdf>; AMNESTY INT'L, U.S.A.: RIGHTS FOR ALL (1998), <https://www.amnesty.org/en/documents/amr51/035/1998/en>.

60. See HUMAN RIGHTS WATCH, ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN U.S. STATE PRISONS (1996), <http://www.hrw.org/reports/1996/Us1.htm>; A. Widney Brown, *United States—Nowhere to Hide: Retaliation Against Women in*

brought to light the varied ways that both men and women experienced rape inside prisons,⁶¹ but ultimately political concessions meant that PREA was not framed in a human rights context.⁶² Further complexity about the gendered nature of incarceration arises when contemplating the fact that PREA found support in Congress only after the 1998 report about *male* sexual assault in prisons.⁶³ The following section considers some of these gendered issues, provides a brief history of PREA including some of the ways PREA has made a positive difference, and explores the current context of prison rape.

Michigan State Prisons, 10 HUM. RTS. WATCH 2 (1998), <http://www.hrw.org/reports98/women>; JOANN MARINER, NO ESCAPE: MALE RAPE IN U.S. PRISONS (1998), <https://www.hrw.org/reports/2001/prison/report1.html>.

61. See HUMAN RIGHTS WATCH, *supra* note 60; Brown, *supra* note 60; MARINER, *supra* note 60.

62. See Lenny Gallo, *Human Rights and Prison Rape*, 2 21ST CENTURY SOC. JUST. 1 (2015).

Although the law originally had good intentions, the fact that PREA was passed to serve special interest groups and because of public and health safety concerns, the human rights spirit of the law was devalued. PREA missed the mark on what could have been a human rights milestone and continues to struggle with its mission.

Id. at 2.

63. 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. In the initial congressional hearing, most of the survivors were male. One of the significant critiques of the initial legislation was its failure to include sexual violence against women in custody, which was more likely to be staff initiated. In its second iteration, PREA included staff sexual misconduct against inmates, but continued to focus heavily on male-on-male inmate rape. Thus, it seemed that the unacceptability or perceived greater harm attached to male rape was a significant factor in the passage of PREA.

Brenda Smith, *The Prison Rape Elimination Act: Implementation and Unresolved Issues*, 3 CRIM. L. BRIEF, 10, 20 (2007) [hereinafter *PREA Implementation and Issues*].

A. The Gendered Nature of Prison Rape

Long have legal scholars, policymakers, and activists grappled with dynamics within prison that differ on the basis of gender.⁶⁴ Men and women enter prison for different types of crimes; women are usually imprisoned for non-violent drug and economic offenses and require different programming during incarceration.⁶⁵ Women experience significantly higher levels of trauma when entering prison than their male counterparts;⁶⁶ they also appear to have higher rates of pre-existing trauma (experienced both as children and adults) than non-justice-involved individuals from the community.⁶⁷ Women's existing trauma histories predict subsequent victimization, shape prison experiences, and contribute to ongoing mental health symptoms.⁶⁸

64. See, e.g., Kim Shayo Buchanan, *supra* note 18, at 55; Jenny-Brooke Condon, *#metoo in Prison*, 98 WASH. L. REV. 363 (2023).

65. See U.S. COMM'N CIV. RTS, WOMEN IN PRISON: SEEKING JUSTICE BEHIND BARS (2020), <https://www.usccr.gov/files/pubs/2020/02-26-Women-in-Prison.pdf>; Marc Mauer et al., *Gender and Justice: Women, Drugs, and Sentencing Policy*, SENT'G PROJECT 1, 3 (Nov. 1999), <https://static.prisonpolicy.org/scans/sp/genderandjustice.pdf>. For a discussion on gender-responsive programs and gendered needs relating to violence in prison, see BARBARA OWEN, ET AL., GENDERED VIOLENCE AND SAFETY: A CONTEXTUAL APPROACH TO IMPROVING SECURITY IN WOMEN'S FACILITIES (2008), <https://www.ojp.gov/pdffiles1/nij/grants/225338.pdf>.

66. Nancy Wolff et al., *Childhood Abuse Classes for Incarcerated Men and Women: Are There Unique Gender Patterns in Abuse Classes?*, 37 J. INTERPERSONAL VIOLENCE 9, 10 (2022); Caroline Harlow, *Prior Abuse Reported by Inmates and Probationers*, U.S. DEP'T JUST., OFF. JUST. PROGRAMS, BUREAU JUST. STAT., 1999.

67. Robert H. Stensrud et al., *The Childhood to Prison Pipeline: Early Childhood Trauma as Reported by a Prison Population*, 62 REHAB. COUNSELING BULL. 195 (2019); Andia Azimi et al., *Identifying Poly-Victimization Among Prisoners: An Application of Latent Class Analysis*, 36 J. INTERPERSONAL VIOLENCE NP10645 (2021).

68. For example, women who experience what the Centers for Disease Control call "adverse childhood experiences" (for example, sexual abuse, emotional abuse, physical abuse, or an incarcerated household member) are significantly more likely to experience sexual victimization later in life." Katie A. Ports et al., *Adverse Childhood Experiences and Sexual Victimization in Adulthood*, 51 CHILD ABUSE & NEGLECT 313–22 (2016). Additionally, these trauma histories shape abuse they experience in prison, where women who experienced childhood sexual, physical, and emotional harm were significantly more likely to experience sexual victimization while they were in prison. Nancy Wolff et al., *Violence Against Incarcerated Women: Predicting*

Women also experience sexual violence in prison through a “continuum of coercion”⁶⁹ and rape myths,⁷⁰ and may differ significantly from one another based on their intersectional identity.⁷¹ Therefore, there is no monolithic experience for all justice-involved women.

While both men and women experience sexual violence in carceral settings, some research suggests that women experience higher rates of sexual violence than men, and women are disproportionately sexually abused at the hands of prison staff.⁷² These staff-perpetrated assaults exploit the entrenched power imbalance that exists between those who work in prison and individuals who are incarcerated; they add even more complicated barriers to accessing justice. “Incarcerated victims who dare to report staff sexual abuse have been less likely to receive legal relief, and far more likely to suffer further abuse,

Risk Through the Lens of Childhood Harm, 28 VIOLENCE AGAINST WOMEN 2466 (2022); Jude Kelman et al., *How Does a History of Trauma Affect the Experience of Imprisonment for Individuals in Women’s Prisons: A Qualitative Exploration*, WOMEN & CRIM. JUST. 1 (2022).

69. OWEN, *supra* note 65.

70. *Bars to Justice*, *supra* note 36.

71. Gina Fedock et al., *Incarcerated Women’s Experiences of Staff-Perpetrated Rape: Racial Disparities and Justice Gaps in Institutional Responses*, 36 J. INTERPERSONAL VIOLENCE 8668 (2021).

72. Systematically assessing multiple studies on sexual victimization in prison by sex, the authors found that women in prison experienced sexual violence at 58% higher rates than men and experienced significantly higher rates of staff sexual misconduct than men. Francisco Caravaca-Sánchez et al., *The Prevalence of Prison-Based Physical and Sexual Victimization in Males and Females: A Systematic Review and Meta-Analysis*, 24 TRAUMA, VIOLENCE & ABUSE 3476 (2023); *see also* BECK, *supra* note 23. While at significant risk of experiencing sexual violence during incarceration, women are not the only at-risk group in prison. *See, e.g.*, Claire C. Barlow & Alexander D. Klein, *Taking the Prison Rape Elimination Act Seriously: Setting Clear Standards for Identifying and Protecting Vulnerable Prisoners From Sexual Violence in Confinement*, 19 U. ST. THOMAS L.J. 255, 260 (2023) (“Transgender inmates are arguably the most at-risk population for experiencing sexual violence.”). Some recent data suggests that men in prison are experiencing high rates of staff sexual misconduct, however, this study only focused on substantiated (administratively proved) cases and therefore misses the many cases that are not proved, not reported, or awaiting investigation so it only tells part of the story. EMILY D. BUEHLER, BUREAU OF JUST. STAT., SEXUAL VICTIMIZATION REPORTED BY ADULT CORRECTIONAL AUTHORITIES, 2016–2018. (2021), <https://bjs.ojp.gov/content/pub/pdf/svraca1618.pdf>.

unjustified security classification increases with attendant losses of privileges, solitary confinement, inter-facility transfers, and other adverse action.”⁷³ Of course, sexual violence perpetrated between or among incarcerated individuals themselves is harmful, but it lacks the same kind of systemic imbalance of power that exists when prison staff are the perpetrators.

The harm inflicted in women’s prisons differs from the crisis affecting men in that incarcerated women experience sexual abuse nearly exclusively at the hands of male correctional officers and staff. It thus mirrors the gender subordinating nature of sexual abuse and violence in the world outside of prisons even while it also thrives on the power dynamics constructed by prisons.⁷⁴

This reality is exacerbated by the fact that women enter prison with extensive trauma histories and face barriers to reporting and finding resources within the prison.⁷⁵ “In some ways, the sexual abuse experienced by female prisoners is more repugnant from a legal and policy standpoint, as the abusers are often actors of the state, usually male prison officials.”⁷⁶ Staff sexual misconduct is an example of a gendered form of state-perpetrated violence that causes distinct harm to justice-involved women.

Perhaps the most obvious way to eliminate state-perpetrated violence against those in carceral settings is the elimination of the

73. Erin Daly et al., *Women’s Dignity, Women’s Prisons: Combatting Sexual Abuse in America’s Prisons*, 26 CUNY L. REV. 260, 265 (2023).

74. Condon, *supra* note 64, at 363. Female corrections officers also perpetrate sexual violence. Lauren A. Teichner, *Unusual Suspects: Recognizing and Responding to Female Staff Perpetrators of Sexual Misconduct in U.S. Prisons*, 14 MICH. J. GENDER & L. 259, 288 (2008) (“Determining the exact types and percentages of punitive measures taken against female staff perpetrators (including arrest, referral for prosecution, transfer, and discharge) is a problematic task because the related statistics are intertwined with those available for male staff perpetrators.”).

75. This focus is in no way meant to deny the existence of sexual violence perpetrated between justice-involved individuals generally or against men specifically, and we acknowledge that these issues remain a significant problem in carceral settings.

76. Cheryl Bell et al., *Rape and Sexual Misconduct in the Prison System: Analyzing America’s Most “Open” Secret*, 18 YALE L. & POL’Y REV. 195, 202 (1999).

prisons altogether. We acknowledge that there are many scholars and activists, including feminist scholars, who are deeply immersed in work to abolish the carceral state.⁷⁷ We, too, recognize and criticize the systemic racism, sexism, and other problems that are interconnected with and stem from incarceration.⁷⁸ Indeed, the constant perpetuation of sexual violence within prisons is itself enough to argue for abolition. According to one scholar, the elimination of prisons should prioritize female prisons, but the reasons informing this argument justify abolition across the board.⁷⁹

While this critical abolition work unfolds, however, our concerns center on those justice-involved individuals who are dealing with the lived experience of sexual violence during incarceration today. So long as prisons continue to exist, we must do our part to advocate for better policies and practices to protect those within who experience violence or the threat of violence every single day.

77. Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156 (2015); see Rachel E. Barkow, *Promise or Peril?: The Political Path of Prison Abolition in America*, 58 WAKE FOREST L. REV. 245, 256 (2023) (assessing “the likely political and policy consequences of an abolitionist framing”); see also Thomas Ward Frampton, *The Dangerous Few: Taking Seriously Prison Abolition and Its Skeptics*, 135 HARV. L. REV. 2013 (2022); Sandeep Singh Dhaliwal, *Investing in Abolition*, 112 GEO. L. J. 1, 3 (2023); MAYA SCHENWR & VICTORIA LAW, PRISON BY ANY OTHER NAME: THE HARMFUL CONSEQUENCES OF POPULAR REFORM (2021); LEIGH GOODMARK, IMPERFECT VICTIMS: CRIMINALIZED SURVIVORS AND THE PROMISE OF ABOLITION FEMINISM (2023). Although the abolitionist movement has gained traction in recent years, we recognize the early work of those who decades earlier called out the racist and sexist problems of the carceral state. See, e.g., ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? (2003).

78. See, e.g., MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2012).

79. Closing female prisons is also a pragmatic first step toward ending the sexual victimization of all prisoners through the abolition of all prisons. The same arguments for female prison abolition apply to prisons as a whole [N]o prisoner deserves to be victimized, sexually or otherwise, for the sake of punishment.

David W. Frank, *Abandoned: Abolishing Female Prisons to Prevent Sexual Abuse and Herald an End to Incarceration*, 29 BERKELEY J. GENDER, L. & JUST. 1, 6 (2014).

B. Prison Rape Elimination Act (PREA): A Brief History

To address the sexual violence occurring in prisons, legal advocates have only in recent decades turned to the courts.⁸⁰ “In the early 1960s, courts developed a hands-off doctrine regarding prison issues. Allegations of inhumane confinement conditions were left to legislators.”⁸¹ Today, however, such claims are typically litigated through 42 U.S.C. § 1983, based on the Eighth Amendment (although this is not the only option).⁸² In 1994, the U.S. Supreme Court clarified in *Farmer v. Brennan* that sexual assault in prison “is simply not ‘part of the penalty that criminal offenders pay for their offenses against society.’”⁸³ The Court held that a prison official may, in fact, be liable under the Eighth Amendment for sexual assault if the prisoner has shown that they are “incarcerated under conditions posing a substantial risk of serious harm” and a prison official was deliberately indifferent by knowing of and disregarding (or failing to take measures to abate) a significant risk to the safety of those who are incarcerated.⁸⁴ The Court dismissed the use of an objective standard, instead finding that the official must have had a subjective awareness of the risk.⁸⁵ Despite the Court’s holding, some still push forth with an argument for an objective standard.⁸⁶

80. See Amy Laderberg, Note, *The “Dirty Little Secret”: Why Class Actions Have Emerged as the Only Viable Option for Women Inmates Attempting to Satisfy the Subjective Prong of the Eighth Amendment in Suits for Custodial Sexual Abuse*, 40 WM. & MARY L. REV. 323 (1998).

81. Stacy Lancaster Cozad, Note, *Cruel But Not So Unusual: Farmer v. Brennan and the Devolving Standards of Decency*, 23 PEPP. L. REV. 175, 188 (1995).

82. For a discussion of litigation of sexual harm in prison, see Arkles, *supra* note 29; see also *Promise Amid Peril*, *supra* note 31, at 1601.

83. *Farmer v. Brennan*, 511 U.S. 825, 834, 837 (1994) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)).

84. *Id.*

85. *Id.* at 829.

86. See Michele C. Nielsen, *Beyond PREA: An Interdisciplinary Framework for Evaluating Sexual Violence in Prisons*, 64 UCLA L. REV. 230 (2017).

The current doctrine allows for prisons to create objectively unreasonable conditions, such as a systemic failure to provide emergency medical attention or to prevent rape, as long as the officials can defend their subjective lack of awareness of the conditions, rendering the abuses outside of the ambit of the court’s conceptualization of punishment.

Two years after *Farmer*, prisoners' rights litigation was further curbed by the passage of the Prisoner Litigation Reform Act ("PLRA").⁸⁷ "Upon its passage, the PLRA brought sweeping changes to the procedural requirements and remedies available to prisoners trying to remediate unconstitutional conditions in prisons and jails."⁸⁸ The PLRA ultimately created significant barriers to bringing a claim for violation of rights, including sexual abuse in carceral settings.⁸⁹ Specifically, the PLRA required justice-involved individuals to exhaust their administrative remedies before they could pursue a claim in federal court.⁹⁰

PREA was passed in 2003 and signaled a commitment to understand, prevent, and address prison rape in U.S. correctional facilities and set forth an ambitious "zero tolerance" standard for rape in prisons.⁹¹ PREA appeared to be geared for success by requiring, among other things, that all prisons be subjected to audits and designating a full-time "PREA Coordinator" to oversee implementation and adherence.⁹² Additionally, PREA declared all sexual contact occurring between prison staff and prisoners to be

Id. at 279.

87. Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997(e).

88. Allison M. Freedman, *Rethinking the PLRA: The Resiliency of Injunctive Practice and Why It's Not Enough*, 32 STAN. L. & POL'Y REV. 317, 329 (2021) ("The changes were primarily divided into two categories: (1) those aimed at individual inmate suits, meant to address the alleged burden on courts from frivolous prisoner litigation; and (2) those pertaining to prospective relief . . .").

89. Christopher E. Smith, *The Prison Reform Litigation Era: Book-Length Studies and Lingering Research Issues*, 83 PRISON J. 337 (2003); *see also* Bell v. Wolfish, 441 U.S. 520, 562 (1979) (referring to the Court's caution in warning courts against becoming "enmeshed in the minutiae of prison operations"). For a discussion advocating reforms to the PLRA to address sexual harm, *see* Hannah Belitz, *A Right Without a Remedy: Sexual Abuse in Prison and the Prison Litigation Reform Act*, 53 HARV. C.R.-C.L. L. REV. 291, 298 (2018).

90. *See* 42 U.S.C. § 1997e(a) (2012); 42 U.S.C. §§ 15601–09 (2006) (current version at 34 U.S.C. § 30301).

91. Interestingly, the PREA was "originally less ambitiously titled the Prison Rape Reduction Act, before former President George W. Bush signed it into law in 2003." Frank, *supra* note 79, at 11.

92. PREA Standards, NAT'L PREA RES. CTR., §§ 115.11, 115.401; BRENDA V. SMITH & MELISSA C. LOOMIS, SEXUAL ABUSE IN CUSTODY: A CASE LAW SURVEY (2013), <https://www.ojp.gov/ncjrs/virtual-library/abstracts/sexual-abuse-custody-case-law-survey> [hereinafter SEXUAL ABUSE IN CUSTODY CASE LAW SURVEY].

illegal, “even if it would be considered consensual outside the system,”⁹³ in recognition of the significant power imbalance that exists between justice-involved individuals and staff.⁹⁴ PREA had the makings of a law that could have a real impact. Its key provisions included identifying vulnerable populations such as juveniles,⁹⁵ improved responses like forensic medical examinations, access to outside confidential support and reporting options, timely investigations,⁹⁶ formalized training for both employees and incarcerated people,⁹⁷ and improved medical and mental care.⁹⁸ Additionally, PREA mandated national data collection and review, incentivizing prisons and jails to comply with these standards lest they risk losing federal funding.⁹⁹

PREA created a National Prison Rape Elimination Commission (“NPREC”), which was tasked with researching the prevalence of prison rape and addressing the goals of PREA.¹⁰⁰ Specifically, the NPREC was to “carry out a comprehensive legal and factual study of the penological, physical, mental, medical, social, and economic impacts of prison rape in the United States” and recommend to the attorney general national standards to prevent, identify, and address prison rape.¹⁰¹ Six years later, in June of 2009, the NPREC published an initial report that identified problem areas and suggestions for

93. Glenn Thrush, *Justice Dept. Considers Early Release for Female Inmates Sexually Abused Behind Bars*, N.Y. TIMES, Dec. 13, 2022, at A17. Most states have passed laws prohibiting consent as a defense to staff-sexual misconduct in prisons. For a discussion of the state laws, see NIC/WCL PROJECT ON ADDRESSING PRISON RAPE, *Fifty-State Survey of Criminal Laws Prohibiting Sexual Abuse of Individuals in Custody* (Aug. 1, 2009), <https://www.prearesourcecenter.org/sites/default/files/library/50statesurveyofssmlawfinal2009update.pdf> [hereinafter *Fifty-State Survey*].

94. *Fifty-State Survey*, *supra* note 93.

95. 28 C.F.R. §§ 115.11–18 (2012).

96. *Id.* §§ 115.1–22, 51–54, 71.

97. *Id.* §§ 115.31–35.

98. *Id.* §§ 115.81–83.

99. *Id.* §§ 115.86–89.

100. 34 U.S.C. § 30306 (2003).

101. 28 C.F.R. § 115 (2012). For an in-depth discussion of the standards development process, see *Promise Amid Peril*, *supra* note 31, at 1604.

improvement based on the data they had collected, as well as input from experts, including justice-involved individuals.¹⁰²

In 2012, after almost a decade since the passage of PREA and three years spent reviewing the existing data from the NPREC, the United States Department of Justice concluded its work and issued national standards¹⁰³ “for preventing, detecting[,] and responding to sexual abuse of people in prisons, jails, juvenile detention, community residential facilities, and lockups.”¹⁰⁴ The PREA Standards were informed by a broad array of evidence gathered by researchers and experts.¹⁰⁵ These standards, which include four sets of regulations (focused on adult prisons and jails, lockups, community confinement facilities, and juvenile facilities), “offer[ed] protections for inmates in federal, state, and[,] county facilities—public or private—across the country.”¹⁰⁶ The range of issues addressed in the PREA Standards was extensive.¹⁰⁷

The PREA Standards took immediate effect, but only in federal prisons. States subsequently had to certify compliance or risk losing five percent of their federal funding.¹⁰⁸ However, some state-specific

102. NAT’L PRISON RAPE ELIMINATION COMM’N, PRISON RAPE ELIMINATION COMM’N REP. (2009) [hereinafter PREA COMMISSION REPORT 2009]. This report was issued three years after the conclusion of the NPREC study.

103. 28 C.F.R. § 115 (2012). For a breakdown of how the standards can be used by justice-involved individuals, see BRENDA SMITH, AN END TO SILENCE: INMATE’S HANDBOOK ON IDENTIFYING AND ADDRESSING SEXUAL ABUSE, (3d ed. 2014), https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1028&context=fasch_rpt [hereinafter AN END TO SILENCE: INMATE HANDBOOK].

104. AN END TO SILENCE: INMATE HANDBOOK, *supra* note 103, at 5.

105. PREA COMMISSION REPORT 2009, *supra* note 102.

106. AN END TO SILENCE: INMATE HANDBOOK, *supra* note 103, at 5.

107. The category headings of the Standards include the following: Prevention Planning, Responsive Planning, Training and Education, Screening for Risk of Sexual Victimization and Abusiveness, Reporting, Official Response Following an Inmate Report, Investigations, Discipline, Medical and Mental Care, Data Collection and Review, and Auditing and Corrective Action. See 28 C.F.R. § 115 (2012).

108. A State whose Governor does not certify full compliance with the standards is subject to the loss of five percent of any Department of Justice grant funds that it would otherwise receive for prison purposes, unless the Governor submits an assurance that such five percent will be used only for the purpose of enabling the State to achieve and certify full compliance with the standards in future years. 28 C.F.R. § 115 (2012). For commentary on the rule’s efficacy, see Giovanna Shay, *PREA’s Peril*, 7 NE. U. L.J. 21, 23 (2015) (“As David Kaiser and Lovisa Stannow

standards did not go into full effect until much later.¹⁰⁹ The “standards require staff training, inmate training, reporting options for prisoners, availability of mental and medical health resources, cross-gender supervision policies, and general oversight of compliance with PREA Standards.”¹¹⁰ All correctional agencies must also employ a PREA Coordinator to oversee compliance efforts.¹¹¹

PREA and the federal regulations mandate that correctional facilities must show they have policies to address sexual abuse.¹¹² These policies are intended to help identify and prevent sexual assault, improve reporting and safety, address retaliation, provide better information and transparency in the process of investigation, and provide justice-involved individuals with access to physical and mental health care. To help identify and prevent assault, the policies bar cross-gender supervision and pat-down searches, strip searches, and cross-gender viewing restroom use (except in exigent circumstances).¹¹³ Additionally, facilities must provide incarcerated individuals with PREA training during intake and assess their vulnerability to victimization, which should then shape their housing and programming.¹¹⁴ When sexual abuse occurs, the standards seek to

warned in 2012 shortly after the DOJ PREA regulations were issued, the threatened loss of funding is simply too weak a compliance mechanism to create much incentive for some governors to implement the regulations. Moreover, as Kaiser and Stannow pointed out, many local jails do not receive much federal funding, so the possible loss of federal grants is not much of a threat.”).

109. For example, “[t]he standard on minimum staffing ratios in secure juvenile facilities (115.313(c)) does not go into effect until October 1, 2017, unless the facility is already obligated by law, regulation, or judicial consent decree to maintain the minimum staffing ratios set forth in that standard.” *FAQ: What Are the PREA Standards and When Are They Effective?*, NAT’L PREA RES. CTR. (June 3, 2015), <https://www.prearesourcecenter.org/frequently-asked-questions/what-are-prea-standards-and-when-are-they-effective>.

110. *Promise Amid Peril*, *supra* note 31, at 1603.

111. 28 C.F.R. §§ 115.11, 115.111, 115.211, 115.311 (2012).

112. *Id.* § 115.11–98 (2012); Frank, *supra* note 79, at 12.

113. “[B]an on cross-gender pat-down searches of female inmates in adult prisons and jails and in community confinement facilities, absent exigent circumstances.” 28 C.F.R. § 115.15(b) (2012).

114. 28 C.F.R. § 115.41–42. These also restrict the use of “protective custody,” which is, in practice, the same as punitive segregation. “According to the PREA Standards, even when facilities choose to use protective custody, it can only be for a

improve the process of reporting¹¹⁵ and generally promote safety.¹¹⁶ Additionally, PREA sought to improve internal investigations of abuse.¹¹⁷ Required audits of facilities were an essential mechanism for enforcement and oversight but did not comply with PREA and risked losing some federal funding.¹¹⁸

PREA has been studied extensively by various researchers since its inception twenty years ago. A lack of consensus regarding PREA's potential reach and effectiveness in reducing prison rape is evidenced by the wide range of words used as descriptors of the legislation, such as "peril," "promise," "sword," and "shield," sometimes used by the same or in the same article.¹¹⁹ A rich literature has been written on the successes and failures of PREA, as well as hopes for the future.¹²⁰ In the following sections, we explore some of the positive and negative evaluations of PREA and conclude with an overview of the findings from a 2022 Senate report that powerfully illustrates the ongoing sexual violence being perpetrated specifically against women by staff in carceral settings.

short period of time, generally less [sic] than 30 days." AN END TO SILENCE: INMATE HANDBOOK, *supra* note 103, at 25 (citing 28 C.F.R. § 115.43).

115. For example, they should have access to multiple reporting mechanisms (e.g., written grievances, hotlines) and external reporting mechanisms; they can have a third party report an incident; there is no time limit on reporting. 28 C.F.R. § 115.51.

116. For example, access to outside confidential support services should be provided. Additionally, there are steps to avoid retaliation, and they should receive medical and mental health care following their report and on an ongoing basis. 28 C.F.R. § 115.53.

117. Agencies must provide inmates with the outcomes of allegations (e.g., substantiated, unsubstantiated, unfounded); facilities must discipline staff who commit abuse. AN END TO SILENCE: INMATE HANDBOOK, *supra* note 103, at 14, 26. *See generally* Prison Rape Elimination Act National Standards, 28 C.F.R. § 115 (2012).

118. 28 C.F.R. §§ 115.401–405, 501 (2012).

119. *See, e.g.,* Giovanna Shay, *PREA's Elusive Promise: Can DOJ Regulations Protect LGBT Incarcerated People?*, 15 LOY. J. PUB. INT. L. 343, 355 (2014); *PREA's Peril*, *supra* note 108; *Promise Amid Peril*, *supra* note 31, at 1601; Sage Martin, *The Prison Rape Elimination Act: Sword or Shield?*, 56 TULSA L. REV. 283, 284 (2021).

120. *PREA's Elusive Promise: Can DOJ Regulations Protect LGBT Incarcerated People?*, *supra* note 119; *PREA's Peril*, *supra* note 108; *Promise Amid Peril*, *supra* note 31, at 1601; Martin, *supra* note 119.

C. Reflections on the Impact of PREA

The passage of PREA was largely celebrated, especially considering the broad, unanimous, bipartisan support the law enjoyed from the outset.¹²¹ “The passage of PREA has provided reformers with more than optimism. It provides a roadmap for future efforts to transform prison conditions through legislative intervention.”¹²² Indeed, PREA has led to some improvements in the epidemic of prison rape, and it included sweeping federal mandates that were largely unprecedented in the U.S. However, the discussion of the overall “success” of PREA beyond the initial celebration of its passage is limited. Critiques of the legislation are vast and continue to grow year after year.¹²³ The following section provides an overview of the legal promise of PREA and discussion of the extent of its realization, as well as the limitations that keep it from having a profound impact.

121. Prison Rape Elimination Act of 2003, Pub. L. No. 108-79, 117 Stat. 972 (codified as amended at 34 U.S.C. §§ 30301–30309 (2022)).

122. Robert A. Schuhmann & Eric J. Wodahl, *Prison Reform Through Federal Legislative Intervention: The Case of the Prison Rape Elimination Act*, 22 CRIM. JUST. POL’Y REV. 111, 112 (2011).

123. Scholars in gender, ethnic, and sexuality studies have been generally critical of PREA while those in the realm of women’s studies (particularly women’s sexuality) criticize PREA as “another example of the capillary power of the adult male prison system to spread its policies to lower institutions of social control.” Lisa Pasko, *Setting the Record “Straight”: Girls, Sexuality, and the Juvenile Correctional System*, 37 SOC. JUST. 7, 20 (2010). PREA “contradicts how friendships among women and girls in general take place through verbal and physical affection. Research on women and prison has shown that sexuality and intimacy are complicated in prison and that consensual sexual relationships, the creation of a pseudo-family, and emotional dyads among inmates are common phenomena. See also Clare Sears, *Introduction: Sexuality, Criminalization, and Social Control*, 37 SOC. JUST. 1 (2010). LGTBQ+ scholars criticize PREA as heteronormative and failing to fully understand the queer experience of incarceration. Giovanna Shay & J. Kelly Strader, “*Queer (In)Justice*”: *Mapping New Gay (Scholarly) Agendas*, 102 J. CRIM. L. & CRIMINOLOGY 171, 190–91 (2012). See also Megan Coker, *Common Sense about Common Decency: Promoting a New Standard for Guard-on-Inmate Sexual Abuse under the Eighth Amendment*, 100 VA. L. REV. 437 (2014); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); Maureen Brocco, *Facing the Facts: The Guarantee Against Cruel and Unusual Punishment in Light of PLRA, Iqbal, and PREA*, 16 J. GENDER, RACE AND JUST. 917 (2013).

1. The Legal Promise of PREA

Outside the closed prison system, victims of sexual violence have various vehicles, both civil and criminal, through which they can seek legal redress. From its inception, many lawyers and legal scholars hoped PREA could serve as a means for victims of sexual violence *within* carceral settings to bring civil lawsuits against their attackers and win meaningful remedies that would not only address their individual harm but serve to prevent prison rape in the future.¹²⁴ To some, in light of the broader context of the U.S. Supreme Court stepping back from protecting incarcerated people's rights, PREA marked an optimistic step in the right direction.¹²⁵

As mentioned, PREA helped support “new articulations of the standard of care for preventing, investigating, and addressing sexual abuse in custody.”¹²⁶ PREA does not go so far as to create a private cause of action, but it does effectively transform best practices into standards that have found strength in their enforcement.¹²⁷ For example, youth housed with adults are particularly vulnerable to abuse. The standard set forth in PREA highlighted this reality and required the gathering of data on abuse suffered by youth; PREA's passage “elevated youth imprisonment as a target for reform.”¹²⁸ Additionally, building on the research that was facilitated by PREA, the enactment of mandatory reporting laws has emerged as a potentially useful way

124. See David K. Ries, *Duty-to-Protect Claims by Inmates After the Prison Rape Elimination Act*, 13 J.L. & POL'Y 915 (2005); Julie Samia Mair et al., *New Hope for Victims of Prison Sexual Assault*, 31 J.L. MED. & ETHICS 602 (2003); Will A. Smith, *Civil Liability for Sexual Assault in Prison: A Challenge to the Deliberate Indifference Standard*, 34 CUMB. L. REV. 289 (2004); James E. Robertson, *Compassionate Conservatism and Prison Rape: The Prison Rape Elimination Act of 2003*, 30 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 1 (2004).

125. Schuhmann & Wodahl, *supra* note 122, at 112; *PREA Implementation and Issues*, *supra* note 63; *Promise Amid Peril*, *supra* note 31.

126. *Promise Amid Peril*, *supra* note 31, at 1600; SEXUAL ABUSE IN CUSTODY CASE LAW SURVEY, *supra* note 92.

127. These include, for example “(1) youthful inmates; (2) limits to cross-gender viewing and searches; (3) evidence protocol and forensic medical examinations; (4) inmate reporting; and (5) inmate access to outside confidential support services.” *Promise Amid Peril*, *supra* note 31, at 1610.

128. *Promise Amid Peril*, *supra* note 31, at 1612.

to combat the “code of silence” that allowed rape to thrive in prison settings.¹²⁹

In assessing the legal trajectory of claims for sexual abuse in prisons since PREA’s passage, Professor Brenda Smith, one of the authors of the 2009 PREA Commission Report and an expert on the dynamics of prison rape, suggests that PREA did successfully create opportunities for holding correctional authorities accountable for prison rape.¹³⁰ Central to this argument is that incarcerated individuals have brought successful claims for cross-gender supervision and sexual abuse in custody.¹³¹ This reality is observed in case law.¹³² PREA brought attention to the complexity of sexual abuse, identified vulnerable populations (e.g., youth), and ultimately helped create evidence and other tools to support claims of sexual assault in

129. This publication addresses the ‘code of silence’ that prevents correctional officers from reporting abuse[] and provides recommendations for combatting this familiar problem Adult prisons and jails must instruct staff to ‘report immediately and according to agency policy any knowledge, suspicion, or information they receive regarding an incident of sexual abuse or sexual harassment.’ Juvenile agencies have the same reporting duties as adult prisons or jails with regard to reporting suspicions of sexual abuse. Furthermore, juvenile facilities must also comply with state mandatory child abuse reporting laws.

Brenda V. Smith et al., *Legal Responses to Sexual Violence in Custody: Using Existing State Mandatory Reporting Statutes to Improve Disclosure of Sexual Violence in Correctional Settings*, 1, 9, 11 (2012), <https://www.prearesourcecenter.org/sites/default/files/library/legalresponsetosexualviolenceincustody-usingexistingstatemandatoryreportingstatuestoimprovedisclosur.pdf>.

130. For a breakdown of this, see SEXUAL ABUSE IN CUSTODY CASE LAW SURVEY, *supra* note 92.

131. *Id.* at 1. For an exhaustive case survey up until 2013 on cross-gender searches, see BRENDA V. SMITH & MELISSA C. LOOMIS, CROSS-GENDER SEARCHES: A CASE LAW SURVEY (2013), https://www.prearesourcecenter.org/sites/default/files/library/crossgendersearchescaselawsurvey_0.pdf.

132. *See, e.g., Crawford v. Cuomo*, 796 F.3d 252, 254 (2d Cir. 2015). In *Crawford*, the Second Circuit reversed and remanded a lower court opinion denying relief to prisoners who were sexually abused by a corrections officer. The court noted, “[m]oreover, we recognize that sexual abuse of prisoners, once passively accepted by society, deeply offends today’s standards of decency.” *Id.* at 254; *see also* SEXUAL ABUSE IN CUSTODY CASE LAW SURVEY, *supra* note 92.

litigation. PREA allowed for the annual collection of Bureau of Justice Statistics (“BJS”) data, which is integral to “shining a light on sexual abuse in custody.”¹³³

Next, one of the strongest arguments for PREA helping incarcerated people find justice is growing evidence that it helped bolster cruel and unusual punishment claims brought under the Eighth Amendment.¹³⁴ PREA has accomplished this in two ways: (1) by clarifying evolving standards of decency to help meet the objective requirement of Eighth Amendment analyses and (2) by providing evidence to meet the subjective standard required.¹³⁵ Professor Smith convincingly argues that a strength of PREA is that it has helped legal advocates gather the necessary evidence to make constitutional and other claims on behalf of prisoners.¹³⁶ Namely, PREA-related data can be useful in discovery for litigation; for example, there are a number of cases where plaintiffs successfully relied on PREA-related data (e.g., the testimony of PREA Coordinators, responses during a public comment period, audit data, and standards) to show knowledge of correctional officials to bolster Eighth Amendment claims.¹³⁷ “The PREA standards created a map of where to look for persuasive evidence of correctional authorities’ failure to comply with known standards and practices that increased safety for people in custody.”¹³⁸ Also, admissions that agencies made during notice and comment periods of the regulatory process that formed the PREA Standards have been helpful in bolstering claims that the agencies are not meeting the necessary standards.¹³⁹

PREA has extended into other areas of the law. PREA has had an impact on criminal prosecution of sexual abuse in prison; in addition

133. *Promise Amid Peril*, *supra* note 31, at 1605. “On May 17, 2012, after nine years of data collection and review, the United States Department of Justice (DOJ) issued national standards for preventing, detecting and responding to sexual abuse of people in prisons, jails, juvenile detention, community residential facilities and lockups.” *AN END TO SILENCE: INMATE HANDBOOK*, *supra* note 103, at 5.

134. *Promise Amid Peril*, *supra* note 31.

135. *Id.*; see also Arkles, *supra* note 29, at 821–26.

136. *Promise Amid Peril*, *supra* note 31.

137. *Id.* at 1608.

138. *Id.*

139. For a discussion of the benefits and drawbacks of using agency statements for this purpose, see *Promise Amid Peril*, *supra* note 31, at 1605–10.

to being against federal prison policy, all fifty states have criminalized staff sexual assault of incarcerated people.¹⁴⁰ PREA can also be a valuable source for courts to consider in Fourth Amendment claims.¹⁴¹ The Fourth Amendment has been severely curtailed in correctional settings, but justice-involved individuals do have some expectation of bodily privacy while incarcerated.¹⁴² Some have explored the extent to which PREA has helped change the culture by exploring perceptions of incarcerated people¹⁴³ and staff, with mixed results.¹⁴⁴ Finally, PREA can assist specific vulnerable populations in prison, such as those who identify as transgender.¹⁴⁵ Despite these positive steps

140. SEXUAL ABUSE IN CUSTODY CASE LAW SURVEY, *supra* note 92; *see also* Brenda V. Smith & Jaime M. Yarussi, *Prosecuting Sexual Violence in Correctional Settings: Examining Prosecutors' Perceptions*, 3 CRIM. L. BRIEF 19, 22–23 (2008).

141. *Promise Amid Peril*, *supra* note 31, at 1630.

142. *See* Turner v. Safely, 482 U.S. 78 (1987) (finding that correctional agencies can infringe on prisoners' First and Fourteenth Amendment rights as long as that restriction is rationally related to a legitimate penological objective); Bell v. Wolfish, 441 U.S. 520 (1979) (adopting a similar standard for pre-trial detainees on a Fifth Amendment Due Process claim).

143. The strengths associated with PREA implementation included overall climate improvement, increased awareness, and more support for victims, while weaknesses included staffing issues, reporting barriers, and PREA not being taken seriously or perceived as essential. Hayden P. Smith, *Correctional Officer and Inmate Perceptions of the Prison Rape Elimination Act (PREA): A Thematic Analysis*, 44 J. CRIME & JUST. 213 (2021); *see also* Richard Ledet et al., *Carceral Safety in a Post-PREA Era: An Examination of Perceptual Indicators of Safety Among Incarcerated Persons in Four Southeast Prisons*, 26 PUNISHMENT & SOC'Y 3 (2023).

144. "Rather than seeing themselves as central to eliminating prison sexual misconduct/violence, staff see PREA as interfering with their 'real' custody/control work. This misalignment has major implications for the productive implementation and use of PREA and the broader shift to administrative rather than legal processes for institutional reform." Danielle S. Rudes et al., *Sex Logics: Negotiating the Prison Rape Elimination Act (PREA) Against Its Administrative, Safety, and Cultural Burdens*, 23 PUNISHMENT & SOC'Y 241 (2021).

145. "We find that approximately half of the states in the USA have published policies consistent with PREA, but several maintain policies regarding transgender inmates that are in direct conflict with federal law. Recommendations for compliance are provided." Michelle L. Malkin & Christina DeJong, *Protections for Transgender Inmates Under PREA: A Comparison of State Correctional Policies in the United States*, 16 SEXUALITY RSCH & SOC. POL'Y 393 (2019); *see also* APRIL CARRILLO, QUEERING CRIMINOLOGY IN THEORY AND PRAXIS 70 (Carrie Buist & Lindsay Kahle Semprevivo, eds. 2022). For a broader discussion of PREA as policy, *see* Hayden P.

forward, the 2022 Senate report, *Sexual Abuse of Female Inmates in Federal Prisons*,¹⁴⁶ reveals that even in states that have reached full compliance with PREA, sexual abuse is still occurring at shockingly high rates, creating cause for concern.¹⁴⁷

2. Critiques of PREA

Ten years after PREA's passage, Professor Michael Singer mused, "[a]t the present day, prison rape is still an American institution."¹⁴⁸ Despite some of the positive steps forward, "[i]n the nearly two decades since the PREA was adopted, not much has changed. Prisoners, especially vulnerable prisoners such as transgender inmates, remain at a high risk of sexual victimization within local, state, and federal prisons."¹⁴⁹ PREA enjoyed bipartisan support and passed unanimously in both houses of Congress.¹⁵⁰ However, this swiftness likely came at a cost and resulted in certain

Smith, *Evaluating the Implementation of the Prison Rape Elimination Act (PREA): A "Lessons Learned" Approach*, 83 EVALUATION & PROGRAM PLAN 101855 (2020).

146. REP. ON SEXUAL ABUSE OF FEMALE INMATES IN FED. PRISONS, *supra* note 25.

147. A full exploration of the positive legal trajectory of PREA is incomplete, as some states (Arkansas and Utah) have not even provided any assurance that they will reach full compliance with PREA. "Arkansas is one of two states, along with Utah, that as of 2017 has not provided an assurance or certification to the DOJ that it will reach full compliance with PREA." Conner Thompson, *Civil Rights Law—Out of the Shadows: The Case for Arkansas to Achieve Full Compliance with the Prison Rape Elimination Act*, 43 U. ARK. LITTLE ROCK L. REV. 65, 66–67 (2021). The argument from Arkansas for non-compliance is that terms of a settlement from 1997 mandates equal employment opportunities for female correctional staff and compliance with PREA would conflict with those terms.

148. MICHAEL SINGER, PRISON RAPE: AN AMERICAN INSTITUTION? 141 (2013) ("[a] mere profession of zero tolerance is not enough to deal with an entrenched institution").

149. Claire C. Barlow & Alexander D. Klein, *Taking the Prison Rape Elimination Act Seriously: Setting Clear Standards for Identifying and Protecting Vulnerable Prisoners from Sexual Violence in Confinement*, 19 U. ST. THOMAS L.J. 255, 257 (2023); *see also* Carla Aveledo, *Ten Years Later, PREA Does Not Live Up to Its Goal: Amending the Statute to Reduce Discriminatory Violence Against Transgender Prisoners*, 27 ROGER WILLIAMS U. L. REV. 89 (2022).

150. Prison Rape Elimination Act of 2003, Pub. L. No. 108–79, 117 Stat. 972 (codified as amended at 34 U.S.C. §§ 30301–30309 (2022)).

significant concessions—most obviously the explicit exclusion of a private right of action.¹⁵¹ Attorney Emma Bruder emphasizes these omissions stating that “[t]he two most notable compromises were the removal of the Act’s ability to create a private cause of action and the abandonment of any explicit protection of the Eighth Amendment right against cruel and unusual punishment, which together ‘effectively eliminated the PREA’s metaphorical legal teeth.’”¹⁵² The impact of these omissions is far-reaching. The following section explores some of these major criticisms of PREA.

Despite the mechanisms and promise for addressing prison rape through the judiciary that the commentators on PREA identified, the practical reality is more muted. PREA has struggled to find footing in the courts, primarily due to the lack of a private right of action embedded in the legislation, which would have given prisoners an explicit right to sue. For some attorneys, this exclusion pretty much set PREA up for failure from the beginning.

[E]ven though Congress—through the PREA—clearly established a “zero-tolerance policy” for prison rape and expressly stated that sexual assault inside prison walls is a violation of the Eighth Amendment, what is glaringly absent from the PREA is an independent cause of action. So, what appears to be a commitment from the federal government to a “zero-tolerance policy” for prison rape is, in reality, a pipe dream.¹⁵³

The ongoing exclusion of a private right of action has not been without a fight. Attorneys have tried, but failed, to convince courts to interpret

151. “PREA does not provide a private cause of action or affirmative defense for prisoners to seek justice for harm committed.” Thompson, *supra* note 147 (citing *Hendrickson v. Schuster*, No. 16-CV-05057, 2018 WL 1597711, at *12 (W.D. Ark. Apr. 2, 2018) (discussing the standard to determine a private right of action in federal courts, the court stated “[T]here is no private right of action under PREA for failure to investigate a sexual assault claim.”); see *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001).

152. Emma L. Bruder, *Making Justice Available for Victims of Sexual Misconduct Within the Prison System*, 29 CARDOZO J. EQUAL RTS. & SOC. JUST. 411, 447 (2023).

153. Barlow & Klein, *supra* note 149, at 263.

PREA in this way. “[E]very single federal circuit court to consider the issue has rejected any attempt to invoke the PREA or National Standards to plead a direct cause of action.”¹⁵⁴ No doubt attorneys will continue their efforts, but at this point, absent congressional action, it is unlikely—if not impossible—that the courts will recognize a private right of action.

Congress should amend the Prison Rape Elimination Act to include a private cause of action, enabling incarcerated persons, as private individuals, to seek and obtain judicial remedies for violations of the PREA, against both their perpetrators and the facilities in which they are held, who may fraudulently claim to comply with the PREA’s standards.¹⁵⁵

Although many attorneys and scholars do not accept the exclusion of a private right of action as a permanent feature, there is little indication this will change. We return to this idea in Part Four of this Article.

In addition to the critical omission of a private right of action from PREA, a handful of other critiques illustrate further limitations of the law. On a macro level, some have focused on PREA’s failure to address the root of the problem, arguing that it addresses only the symptoms.¹⁵⁶ Rather than get at the systemic dysfunction that allows prison rape to proliferate or focus on preventative efforts, PREA focuses on the problem after it has occurred.¹⁵⁷ Additionally, PREA may create unintended consequences; for example, PREA has been “weaponized” by both staff and other inmates through false allegations or by use of PREA as a heteronormative tool to target LGBTQ+ relationships in prison.¹⁵⁸ The work being done that advocates for the

154. *Id.* at 264.

155. Bruder, *supra* note 152, at 438.

156. Jerita L. DeBaux, *Prison Rape: Have We Done Enough? A Deep Look into the Adequacy of the Prison Rape Elimination Act*, 50 HOW. L.J. 203, 204 (2006).

157. “Although it appears that the Act is Congress’s good faith effort to eliminate prison rape, it is an inadequate remedy because it focuses primarily on the symptoms of prison rape and does not sufficiently eliminate the causes.” *Id.* at 204.

158. Creaig Dunton et al., *The Unintended Effects of the Prison Rape Elimination Act (PREA) in a Maximum-Security Prison for Women: Weaponization, Bullying, and Compulsory Heterosexuality*, CRIME & DELINQUENCY 1, 12 (2024).

abolition of prisons further illustrates the systemic dysfunction of the prison system.

The reach of PREA is also limited by design, as the law focuses exclusively on prisons and jails (formal custodial carceral settings) and excludes most community-based corrections.¹⁵⁹ Most of those under correctional supervision in the U.S. are on probation and parole, which are part of this broader category of “community corrections.”¹⁶⁰ The exclusion of those settings that oversee individuals who are on probation and parole from PREA’s reach creates a gap in protection for the majority of individuals who are under carceral control and subjected to some form of community supervision, thus creating vulnerability to assault upon release.¹⁶¹

The research also suggests that some of the same issues that PREA attempted to prevent or address still linger in significant ways. For example, before the implementation of PREA, there were low substantiation rates of reports of sexual abuse inside prison and, relatedly, low prosecution rates of staff who sexually assaulted prisoners.¹⁶² Some research suggests that while reports and

159. Notably, despite this particular exclusion, immigration detention centers (which are not criminal in nature) are governed by PREA. See JAIME M. YARUSSI & BRENDA V. SMITH, THE PRISON RAPE ELIMINATION ACT OF 2003: THE IMPACT OF NATIONAL PREA STANDARDS ON COMMUNITY CORRECTIONS (2013), <https://s3.amazonaws.com/static.nicic.gov/Library/027641.pdf>.

160. “3.7 million people in the U.S. are under probation and parole (collectively known as ‘community supervision’). That’s nearly twice the number of people incarcerated in prisons and jails combined.” *Probation and Parole*, PRISON POL’Y INST. (2023), https://prisonpolicy.org/probation_parole.html. Community “supervision” or “corrections” also include halfway houses and treatment facilities. 28 C.F.R. § 115.5.

161. For example, some women described how they were targeted close to the time at which they were supposed to be released and sexual abuse either continued or began upon re-entry/parole. Fedock, *supra* note 71; Kathleen Darcy, *Bringing the Outside in: Organizational Collaboration in Sexual Misconduct Investigations under the Prison Rape Elimination Act*, 41 WOMEN’S RTS. L. REP. 144 (2019).

162. Despite that fact that most incidents of sexual abuse constitute a crime in all 50 States and under Federal law, very few perpetrators of sexual abuse in correctional settings are prosecuted. Only a fraction of cases are referred to prosecutors, and the Commission repeatedly heard testimony that prosecutors decline most of these cases. Undoubtedly, some investigations do not produce evidence capable of supporting a successful prosecution. But other dynamics may be at play: some prosecutors may not view incarcerated

investigations of sexual misconduct have increased, the rate of substantiation (successful allegations) remains extremely low, perhaps due to confusion or reliance on criminal justice agencies, which continue to under-prosecute these claims.¹⁶³ Instead, increasing numbers of investigations languish in “pending” status, sometimes for years.¹⁶⁴ The promulgation of the PREA Standards is a considerable positive step and grounds for hope that sexual abuse will eventually be substantially reduced in carceral settings. On the other hand, compliance with the national standards is largely voluntary, many correctional authorities are indifferent, the courts currently offer little protection against sexual abuse in incarceration, and the general society is not greatly concerned.¹⁶⁵ It is possible to be hopeful, but there is only limited ground for optimism.

The limitations highlighted herein reflect some of the significant shortcomings of PREA. While it is unrealistic to expect one law to eliminate the problem of rape in prison, it is hard to ignore that this was PREA’s central mission.

D. Prison Rape in Contemporary Context

The criticisms of PREA outlined in the preceding section reflect the overarching sentiment that the legislation has been largely ineffective. An undeniable indication that PREA is not meeting its mandate of “zero tolerance” for sexual assault in prison came from a Senate committee report published in late 2022.¹⁶⁶ In April of 2022, the Senate Permanent Subcommittee on Investigations initiated an inquiry to learn more about the state of sexual violence perpetrated against female prisoners in the custody of the Federal Bureau of Prisons

individuals as members of the community and as deserving of their services as any other victim of crime.

PREA COMMISSION REPORT 2009, *supra* note 102, at 13.

163. Darcy, *supra* note 161, at 153; BUEHLER, *supra* note 72, at 3.

164. Chandra Bozelko, *Rates of Prison Rape Remain a Mystery*, FLA. TIMES-UNION (Mar. 14, 2019, 12:01 AM), <https://www.jacksonville.com/story/opinion/columns/2019/03/14/bozelko-rates-of-prison-rape-remain-mystery/5719568007>.

165. SINGER, *supra* note 148, at 147.

166. REP. ON SEXUAL ABUSE OF FEMALE INMATES IN FED. PRISONS, *supra* note 25, at 7.

(“BOP”). The investigation included document review and interviews with leaders in the BOP, whistleblowers, and survivors of sexual abuse; it ultimately led to the publication of a report released in December of 2022 entitled *Sexual Abuse of Female Inmates in Federal Prisons*.¹⁶⁷

Although PREA was not designed to focus on justice-involved women specifically, as we have noted throughout this Article, this subset of the incarcerated population is especially vulnerable to and at risk of experiencing sexual violence both within and outside of prison. While incarcerated women, advocates, academics, and others have long been aware that sexual abuse against women continues to persist in carceral settings, the *Sexual Abuse of Female Inmates in Federal Prisons* report brought renewed national attention to the problem and specifically called out the reality that women are more likely than men to have experienced sexual violence before entering prison and more likely to be victimized during incarceration.¹⁶⁸ The report is significant not only for its in-depth analysis of sexual abuse in U.S. federal prisons but its exclusive focus on *female* victims.¹⁶⁹ Despite the increased presence of women in prison, research on their unique experiences in these settings is lacking. Indeed, “the vast majority of recent scholarship on American mass incarceration focuses almost exclusively on affected low-income men of color.”¹⁷⁰

The conclusions outlined in the *Sexual Abuse of Female Inmates in Federal Prisons* report were shocking, and the report culminated in four major conclusions.¹⁷¹ First, and perhaps most damning, was its overarching conclusion that the BOP was unsuccessful in

167. *Id.*

168. *Id.* at 4, 6.

169. *Id.* at 1.

170. Beall, *supra* note 19, at 4.

171. REP. ON SEXUAL ABUSE OF FEMALE INMATES IN FED. PRISONS, *supra* note 25, at 4–5. The report focused exclusively on the sexual abuse of *female* inmates by prison staff, and this Article employs the same focus. Early research from the PREA commission report identified that justice-involved women are uniquely vulnerable to sexual violence at the hands of prison staff. Women remain at disproportionate risk of sexual violence, despite representing a very small percent of the overall prison population. However, the presence of women in prison is increasing exponentially due in part to law and policy under the war on drugs and “tough on crime” movements. PREA COMMISSION REPORT 2009, *supra* note 102, at 44.

implementing PREA.¹⁷² Specifically, the report called out that “[BOP] failed to prevent, detect, and stop recurring sexual abuse in at least four federal prisons, including abuse by senior prison officials.”¹⁷³ Second, the investigation confirmed that BOP staff had sexually abused women in *two-thirds* of federal prisons over the past decade.¹⁷⁴ Third, the management failures of the BOP directly allowed ongoing sexual abuse by staff against incarcerated women to persist.¹⁷⁵ And finally, the policies of the BOP Office of Internal Affairs were identified as “seriously flawed.”¹⁷⁶ A backlog of over 8,000 sexual abuse cases is illustrative as but one example of the failures. Further, the audits required by PREA to ensure compliance were ineffective; in some prisons deemed fully compliant with PREA, sexual abuse raged on.¹⁷⁷ The report ultimately flagged system-wide shortcomings and affirmed that there is significant work left to be done to address this problem. Its conclusion sums up the significant failures:

BOP failed to detect or prevent sexual abuse of incarcerated women by male BOP employees. The agency’s poor implementation of the audit program and reporting mechanisms required by PREA allowed serious, repeated sexual abuse in at least four facilities to go undetected. BOP’s internal affairs practices have failed to hold employees accountable, and multiple admitted sexual abusers were not criminally prosecuted as a result. Further, for a decade, BOP failed to respond to this abuse or implement agency-wide reforms.¹⁷⁸

The report also signaled a renewed priority from the federal government to treat sexual violence in prison as a national priority. The evidence of PREA’s failure, as reflected in the report, is vast. Given

172. REP. ON SEXUAL ABUSE OF FEMALE INMATES IN FED. PRISONS, *supra* note 25, at 4 (“BOP has failed to successfully implement [PREA].”).

173. *Id.* at 1.

174. *Id.* at 4.

175. *Id.*

176. *Id.*

177. REP. ON SEXUAL ABUSE OF FEMALE INMATES IN FED. PRISONS, *supra* note 25, at 4.

178. *Id.* at 30.

challenges with data collection and statistics surrounding sexual violence generally, we suspect this finding likely just scratches the surface and does not encompass the full extent of the problem.

The report also illustrated, through the review of *Garrity* interviews that were compelled by the BOP Office of Internal Affairs, the kinds of sexual abuse being perpetrated by prison staff.¹⁷⁹ For example, one correctional officer reported, “I have had a large number of sexual encounters with inmates when I was an officer at FCC Coleman.”¹⁸⁰ He continued, “I would touch and squeeze breasts regularly.”¹⁸¹ Another officer admitted having sexual relations with two inmates who worked under him in the landscape department, adding, “[t]he three of us had sex together while they were FCC Coleman inmates and I was a Coleman staff member.”¹⁸² Other examples were highlighted by the report in which criminal prosecution was sought, and sanctions were ultimately opposed. In these and other examples, the officers were spared criminal prosecutions because of the protection extended to them by being compelled to testify as a condition of their employment.¹⁸³

The report also sheds light on older cases. For example, [i]n 1996, three women were brought to a male housing unit at an adjacent facility where BOP officers opened their cell doors allowing male inmates to rape them. The United States settled in 1998, and BOP promised “to adopt and implement certain policies and procedures designed to reduce the risk to female prisoners of sexual assaults.”¹⁸⁴

179. *Id.*; *Garrity v. New Jersey*, 385 U.S. 493 (1967). The report also flagged the officers stating that they had been strategically using these *Garrity* interviews to shield themselves from litigation. For a full discussion of this practice, see REP. ON SEXUAL ABUSE OF FEMALE INMATES IN FEDERAL PRISONS, *supra* note 25.

180. REP. ON SEXUAL ABUSE OF FEMALE INMATES IN FEDERAL PRISONS, *supra* note 25.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* at 18 (quoting *Lucas v. White*, No. 96-CV-2905-TEH (N.D. Cal. 1997)).

Unfortunately, as evidenced by the report, these same dynamics that existed decades ago continue today.

The information contained within the report informs our concern that even with the revelation of the current state of prison rape, nothing will change. This concern is substantiated in part by the testimony of the Director of the BOP, Colette Peters, in conjunction with the Senate Subcommittee's investigation.¹⁸⁵ Director Peters gave extensive testimony in which she focused repeatedly on the need to *enhance* the current practices.¹⁸⁶ For example, Peters advocated to enhance prevention of sexual misconduct, enhance reporting of sexual misconduct, enhance investigations of employees who are accused of sexual misconduct, enhance accountability for sexual misconduct perpetrated by employees (prosecution), and enhance accountability for sexual misconduct perpetrated by employees (employee discipline).¹⁸⁷ While "enhancing" these existing practices makes sense, it also begs the question whether the existing practices themselves are perhaps insufficient to address the problem of sexual abuse in prison. Indeed, Elizabeth Reid, one of the co-founders of the Post Prison Community Collaborative Project at the University of Washington, observed,

On the surface, PREA looks terrific; it appears to be a sincere effort to prevent sexual abuse. But it's always what's under the surface that matters, isn't it? And under the cloak of PREA, things have not changed. There are still guards forcing themselves on prisoners. There are still guards making sexual remarks to prisoners. And there are still those in Administration who allow sham investigations to take place, ultimately finding in favor of their staff.¹⁸⁸

185. *Oversight on the Federal Bureau of Prisons, Before the Comm. on the Judiciary*, U.S. S. (2022) (statement of Colette S. Peters, Dir., Fed. Bureau of Prisons), <https://www.judiciary.senate.gov/imo/media/doc/Testimony%20-%20Peters%20-%202022-09-29.pdf>.

186. *Id.*

187. *Id.* at 3.

188. Elizabeth A. Reid, *The Prison Rape Elimination Act (PREA) and the Importance of Litigation in Its Enforcement: Holding Guards Who Rape Accountable*, 122 YALE L.J. 2084, 2086 (2013).

Perhaps it is time to explore what it looks like to mobilize a public health approach to prison rape as an epidemic.

III. A PUBLIC HEALTH RESPONSE TO PRISON RAPE

Congress firmly positioned the problem of prison rape within a public health framework by casting it as an epidemic. A public health problem necessitates a public health response. This section considers the tenets of public health and explores various kinds of public health problems, including those that have risen to the level of epidemics. We are specifically interested in how a public health framework *could* address sexual violence in carceral settings and in the following section assess the penultimate question of whether PREA in fact mounted a successful public health response.

A. Tenets of a Public Health Response

From the inception of PREA in 2003, law and policymakers have referred to prison rape by labeling it an epidemic, which is typically associated with disease and requires mobilizing public health resources and organizations. What does it actually mean for a *social problem* to be deemed an epidemic? An epidemic, as defined by the Centers for Disease Control (“CDC”), occurs when there is “an increase, often sudden, in the number of cases of a disease above what is normally expected in that population in that [geographical] area.”¹⁸⁹ The CDC’s definition of epidemic refers to the presence of disease, but epidemics (and pandemics and endemics) are not limited to disease alone.¹⁹⁰ “Epidemics can refer to a disease or other specific health-related behavior (e.g., smoking) with rates that are clearly above the

189. *Lesson 1: Introduction to Epidemiology, Section 11: Epidemic Disease Occurrence*, CTRS. FOR DISEASE CONTROL & PREVENTION ARCHIVE (2012), https://archive.cdc.gov/www_cdc_gov/csels/dsepd/ss1978/lesson1/section11.html.

190. Yellow fever, smallpox, measles, and polio are prime examples of epidemics. *Epidemic, Endemic, Pandemic: What are the Differences?*, COLUM. MAILMAN SCH. PUB. HEALTH (2021), <https://www.publichealth.columbia.edu/news/epidemic-endemic-pandemic-what-are-differences>.

expected occurrence in a community or region.”¹⁹¹ Increasingly, the term “epidemic” has been extended to encompass and describe adverse nonmedical events that negatively “affects a large number of persons or objects and propagates like a disease, such as crack cocaine or computer viruses.”¹⁹² Epidemics have historically been firmly situated in a public health framework.

The term “public health” is defined by the CDC as focusing on the health, safety, and well-being of entire populations.¹⁹³ While this definition is broad, one of the unique attributes of public health is the attempt to create the “[m]aximum benefit for the largest number of people.”¹⁹⁴ The foundation of public health is multidisciplinary, and as such, “[i]t relies on knowledge from a broad range of disciplines including medicine, epidemiology, sociology, psychology,

191. *Id.*

192. Paul M.V. Martin & Estelle Martin-Granel, *2,500-year Evolution of the Term Epidemic*, 12 EMERGING INFECTIOUS DISEASES 976, 979 (2006). Some other examples of non-medical issues to which a public health approach has been mounted include human trafficking and child maltreatment. *See also* MAKINI CHISOLM-STRAKER & HANNI STOKLOSA, HUMAN TRAFFICKING IS A PUBLIC HEALTH ISSUE (2017); *Human Trafficking Is a Public Health Issue*, UNITED WAY (Sept. 13, 2023), <https://www.unitedway.org/news/human-trafficking-is-a-public-health-issue>; James Lukefahr, *Preventing Child Abuse*, UNIV. TEX. MED. BRANCH (2008), https://www.utmb.edu/pedi_ed/CoreV2/Abuse/page_25.htm.

193. *The Public Health Approach to Violence Prevention*, CTRS. FOR DISEASE CONTROL & PREVENTION (2022), <https://www.cdc.gov/violence-prevention/about/about-the-public-health-approach-to-violence-prevention.html>.

Public health was defined by renowned Yale scientist, Charles-Edward A. Winslow in 1920:

Public Health is the science and the art of preventing disease, prolonging life, and promoting physical health and efficiency through organized community efforts for the sanitation of the environment, the control of community infections, the education of the individual in principles of personal hygiene, the organization of medical and nursing services for the early diagnosis and preventive treatment of disease, and the development of the social machinery which will ensure to every individual in the community a standard of living adequate for the maintenance of health.

Charles-Edward A. Winslow, *The Untilled Fields of Public Health*, 51 SCI. 23–33 (1920). More modern definitions have since emerged. For a comprehensive discussion, see Lawrence O. Gostin, *Public Health, Ethics, and Human Rights: A Tribute to the Late Jonathan Mann*, 29 J.L. MED. & ETHICS 121 (2001).

194. *The Public Health Approach to Violence Prevention*, *supra* note 193.

criminology, education, and economics.”¹⁹⁵ The history of public health extends incredibly far back in time, and while an extensive study of that history is well beyond the scope of this Article, we find persuasive some of the historical lessons.

All societies must face the realities of disease and death and develop concepts and methods to manage them. These strategies evolved from scientific knowledge and trial and error, but are associated with cultural and societal conditions, beliefs and practices that are important in determining health status and curative and preventive interventions to improve health.¹⁹⁶

Broadly speaking, central to a public health response is ongoing surveillance, typically relying on continued testing and contact tracing to identify, define, and monitor the spread of a disease.¹⁹⁷ The CDC sets forth four steps to mount a public health response (see Figure 1). This multidisciplinary approach relies on scientific evidence to guide responses to the issue.¹⁹⁸ A public health response is also dependent on systems and infrastructure coordination.¹⁹⁹ Examples related to curbing the spread of disease include mobilizing laboratory systems, workforce, supplies, and mechanisms to communicate results, which necessitates social and financial support outside of health systems (e.g., paid sick days, debt relief).²⁰⁰ The term “public health” typically calls to mind programs aimed at preventing the spread of infectious diseases such as polio, syphilis, or avian flu. However, violence is also

195. *Id.*

196. THEODORE TULCHINSKY & ELENA VARAVIKOVA, *THE NEW PUBLIC HEALTH* 1 (2014).

197. *The Public Health Approach to Violence Prevention*, *supra* note 193.

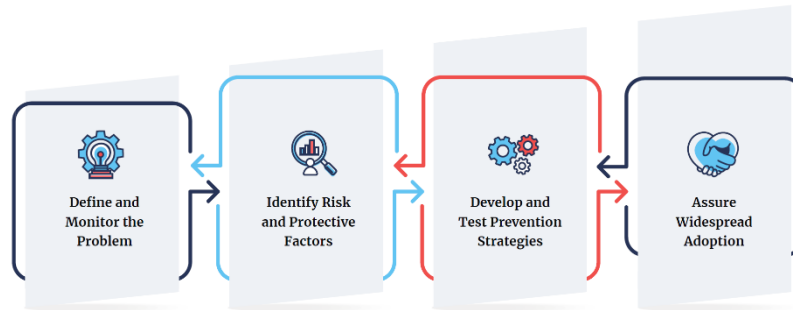
198. “A public health perspective focuses on prevention through health promotion and relies on science to identify and evaluate effective preventive strategies.” Kathleen C. Basile, *Implications of Public Health for Policy on Sexual Violence*, 989 ANNALS N.Y. ACAD. SCI. 446 (2003).

199. Haldane et al., *supra* note 47.

200. *Id.*

“infectious” in a culture that seems to encourage, or at least to tolerate it.²⁰¹

Figure 1: Public Health Response²⁰²



Today, it is not novel to think expansively about the overall reach of public health. Because public health focuses on protecting populations’ health and safety, a public health approach has also been considered well-suited to address and prevent violence generally.²⁰³ As early as 1996, the World Health Organization identified violence as a worldwide public health problem and initiated a public health response.²⁰⁴ Professors Tulchinsky and Varavikova emphasize, “[t]he

201. Joan C. Chrisler & Sheila Ferguson, *Violence against Women as a Public Health Issue*, 1087 ANNALS N.Y. ACAD. SCI. 235 (2006).

202. *The Public Health Approach to Violence Prevention*, *supra* note 193.

203. The focus of public health is on the health, safety, and well-being of entire populations. A unique aspect of the approach is that it strives to provide the maximum benefit for the largest number of people. Public health draws on a science base that is multi-disciplinary. It relies on knowledge from a broad range of disciplines including medicine, epidemiology, sociology, psychology, criminology, education, and economics. This broad knowledge base has allowed the field of public health to respond successfully to a range of health conditions across the globe.

NSN Values Orientation 3: *Public Health and Human Rights*, NAT’L SURVIVOR NETWORK (Feb. 22, 2022), <https://nationalsurvivornetwork.org/orientation3>.

204. As public health efforts to understand and prevent violence gained momentum in the United States, they garnered attention abroad. Violence was placed on the international agenda in 1996 when the World Health Assembly adopted Resolution WHA49.25, which declared violence ‘a leading worldwide public health problem.’ The resolution requested the WHO to initiate public health activities to: (1) document and characterize the burden of violence, (2) assess the

toll of violence, often overlooked as a public health problem, cannot be overstated.”²⁰⁵ In addition, there is precedent for considering public health with other frameworks to address social problems.²⁰⁶

Sexual violence specifically is often conceptualized within a criminal justice framework, but increasingly, there are calls (within and outside the U.S.) to situate the response within a public health framework instead.²⁰⁷ “Although not routinely characterized this way, the sheer prevalence of rape, combined with its health consequences, make rape a quintessential public health issue.”²⁰⁸ In framing it as a public health issue, the focus is shifted from dealing with problems on an individual level and instead “examines trends in health, illness, and injury to understand their causes and develop and implement interventions to address them. It is accepted that the government will use its coercive powers to affect behaviors of individuals that are injurious to the health and well-being of others.”²⁰⁹ There is precedent to consider sexual violence in prisons using this framework, as well.

effectiveness of programs, with particular attention to women and children and community-based initiatives, and (3) promote activities to tackle the problem at the international and country level.

Linda L. Dahlberg & James Mercy, *History of Violence as a Public Health Problem*, 11 AM. MED. ASS’N J. ETHICS 167 (2009).

205. TULCHINSKY & VARAVIKOVA, *supra* note 196, at 29.

206. See, e.g., MAKINI CHISOLM-STRAKER & HANNI STOKLOSA, HUMAN TRAFFICKING IS A PUBLIC HEALTH ISSUE (Makini Chrisolm-Straker & Hanni Stoklosa eds., 2017); *Human Trafficking is a Public Health Issue*, UNITED WAY (Sept. 13, 2023), <https://www.unitedway.org/news/human-trafficking-is-a-public-health-issue>.

207. Dahlberg & Mercy, *supra* note 204.

Much of how we think of prevention, accountability, and justice in our culture is influenced by our reliance on carceral strategies Some survivors do not mind carceral systems or services, or are not as significantly impacted by them, or are actively grateful for the opportunity to participate in the prosecution of their trafficker. But for other survivors, carceral systems are sources of harm, are frightening or traumatic, or put them or their families at risk of additional harm. It is important for us to have comprehensive services that are not tied to involvement in carceral and criminal legal systems for those survivors who do not wish to engage those systems.

NSN Values Orientation, *supra* note 203.

208. Allen, *supra* note 36, at 1040.

209. *Id.* at 1042.

The characterization of prison rape as a public health issue occurred almost two decades ago.²¹⁰ Beyond the more obvious health-related concerns experienced by those in carceral settings, including the spread of diseases like AIDS/HIV, sexually transmitted infections (STIs), hepatitis (Hep) B, Hep C, and latent tuberculosis (TB) that can derive from sexual assault,²¹¹ there are other more expansive impacts of prison rape. Professor McGuire notes, “[w]hile the human suffering inflicted upon the victims themselves is reason enough for our society to take strong action to reduce prison rape, the reality is that prison rape also has a very real and very dangerous direct impact on the public far beyond the prison walls.”²¹² Specifically, criminologists suggest that male victims of rape in prison are “far more violent and antisocial than when they went inside. Little work has been done to research the brutalization effect of prison rape on women specifically, although there is reason to believe it makes women violent and dangerous as well.”²¹³ The reality is that most incarcerated people will eventually leave prison and return to their lives in society. At that juncture, the insular problem of rape in the closed prison system is foisted upon the broader culture, illustrating yet again the importance of effective prevention and appropriate response strategies.

B. Did PREA Successfully Mount a Public Health Response?

Although PREA did not explicitly rely on a public health framework or specifically call out public health strategies, epidemic language has been intertwined with PREA from its inception. As such, we were curious whether the response outlined in the legislation aligned with the best practices for addressing public health issues. We begin our inquiry by first asking whether PREA, as designed, successfully addressed prison rape as a matter of public health. A public health response must match the magnitude and characteristics of the problem that is identified. As exemplified in Figure 1, the CDC defines four specific strategies to mount a successful public health

210. M. Dyan McGuire, *Impact of Prison Rape on Public Health*, 3 CALIFORNIAN J. HEALTH PROMOTION 72, 72 (2005) (“One of the most significant threats to the health of incarcerated persons is prison rape.”).

211. *Id.* at 75.

212. *Id.* at 76.

213. *Id.* (internal citation omitted).

response. The first strategy is to define and monitor the problem, the second is to identify risk and protective factors, the third is to develop and test prevention efforts, and the fourth is to assure widespread adoption.²¹⁴ We explore the typical public health response, engaging with the question whether PREA and its progeny followed this well-established protocol.²¹⁵

Arguably, PREA successfully met the first two mandates of a public health response: define and monitor the problem and identify risk and protective factors. In terms of monitoring, a significant contribution of PREA is that it has improved knowledge of incidences of rape in prison through widespread data collection activities that did not previously exist.²¹⁶ Section Four of PREA mandates that the BJS collect data on the incidence of prison sexual violence in federal, state, and local facilities.²¹⁷ This data collection began in 2005, two years after PREA's passage, and was considered an "important tool for behavioral change."²¹⁸ Systematically gathering information on incidences of prison rape paved the way for some significant changes. First, this meant that BJS had to develop standard definitions for sexual violence in carceral settings when previously definitions across states and facilities varied greatly.²¹⁹ Second, it involved gathering data from incarcerated people directly.²²⁰ Finally, the data collection activities

214. *The Public Health Approach to Violence Prevention*, *supra* note 193.

215. *Id.*

216. See 34 U.S.C. § 30303 (2003). For discussion of BJS and NIC, see Sarah K. Wake, *Not Part of the Penalty: The Prison Rape Elimination Act of 2003*, 32 J. LEGIS. 220 (2005).

217. 34 U.S.C. § 30303 (2003).

The Bureau of Justice Statistics of the Department of Justice (in this section referred to as the "Bureau") shall carry out, for each calendar year, a comprehensive statistical review and analysis of the incidence and effects of prison rape. The statistical review and analysis shall include, but not be limited to the identification of the common characteristics of—(A) both victims and perpetrators of prison rape; and (B) prisons and prison systems with a high incidence of prison rape.

Id.

218. *PREA Implementation and Issues*, *supra* note 63, at 11.

219. *Id.* at 12.

220. "Inmates reported sexual violence rates of 4.5% per 1,000 inmates compared to 2.91% reported by correctional authorities for 2006." *PREA*

paved the way for additional funded research from the National Institute of Justice and the Bureau of Justice Assistance, which helped assess tools and instruments, identify risk factors, explore the impact of victimization, and more.²²¹

Next, through reliance on recommendations from experts in the *National PREA Rape Commission Report*, PREA assessed both risk and protective factors across carceral settings, including the foundation of the PREA Standards published in 2012, which drew attention to particularly vulnerable groups.²²² The NPREC dedicated an entire chapter to the topic: “Unequal Risk: Vulnerability and Victimization.”²²³ The *National PREA Rape Commission Report* noted, “[W]e have many, many special needs populations in our jails and prisons [T]hey’re going to need a different kind of attention than someone who is not fragile.”²²⁴ The *National PREA Commission Report* specifically identified populations at particular risk as those who are “[y]oung, [s]mall, and [n]aïve;” those with physical or developmental disabilities; those in the LGBTQ+ community and those who are gender non-conforming; those on parole; and those in immigration detention centers.²²⁵ As early as 2009, members of the LGBTQ+ community were identified at particular risk,²²⁶ and attention has only grown from vulnerability to victimization since then.²²⁷ To protect vulnerable groups, the *National PREA Commission Report* recommended classification and education upon entrance to prison.²²⁸

Implementation and Issues, *supra* note 63, at 12. Unsurprisingly, the results that were published in 2007 were higher than the rates reported by correctional authorities.

221. *Id.*

222. These risks and protective factors included: weaknesses in investigation, risks for retaliation and ways to avoid that, and identified vulnerable populations. *Id.*

223. *Id.*

224. *Id.*

225. *See generally* PREA COMMISSION REPORT 2009, *supra* note 102.

226. “[E]very day, the lives and the physical integrity of lesbian, gay, bisexual, and transgender people are at stake within our prison systems.” *Id.* at 73.

227. LGBTQ folx are victimized by both staff and other incarcerated people at much higher rates than heterosexual people. Graph titled *In Prison, Lesbian, Gay, Bisexual, and Other Non-Straight People Are Sexually Victimized at Much Higher Rates Than Straight People*, PRISON POLICY INITIATIVE (2021), https://www.prisonpolicy.org/graphs/lgbtq_sexual_victimization_prison.html.

228. Screening and classification systems, when used consistently, can help identify vulnerable individuals so that facilities can plan housing and services to lessen

Prisons appear to have adopted those recommendations, at least on paper.²²⁹ As discussed above, some critical law and policy changes have occurred based on the *National PREA Commission Report*, regulations, and resulting research.²³⁰

Prevention is the third prong of a public health response. It is less clear how PREA meets this prong, although the original legislation did in fact carve out a specific section focused on prevention.²³¹ One example of preventative efforts was the mandate for prison staff training and education.²³² For example, staff are tasked with assessing a person's risk of sexual assault upon their intake to prison.²³³ Another pivotal recommendation of the PREA Commission regarding prevention was to ensure external accountability, which arguably incentivizes prisons to change practices that contribute to abuse. Perhaps the most viable option for accountability was the requirement of regular prison audits.²³⁴ Despite the promise of PREA audits operating as oversight and compliance mechanisms, the Senate Committee report concluded that audits did not uncover abuse, thus providing inaccurate and misleading data and obscuring the problem of sexual abuse in prison: "PREA audits during all of the relevant periods for these facilities came back clean: these audits found that FCC Coleman and FCI Dublin were compliant with all PREA standards

the risk of sexual abuse. These systems need refinement, along with many other practices that reduce sexual abuse in correctional facilities. Solutions are being designed and implemented, although much work remains to be done.

PREA COMMISSION REPORT 2009, *supra*, note 102, at 34.

229. 28 C.F.R. § 115.41(a) (2020). *See also* discussion in Aveledo, *supra* note 149, at 89.

230. Another avenue for change that stemmed from the recommendation of experts involved changes to law and policy around youth. For example, as Brenda Smith details, "[t]he standards [that] also accelerated movements to remove youth from adult prisons and jails." *Promise Amid Peril*, *supra* note 31, at 1614.

231. 34 U.S.C. § 30304 (2003).

232. *Promise Amid Peril*, *supra* note 31, at 1602–03; *see* AN END TO SILENCE: INMATE HANDBOOK, *supra* note 103, at 5.

233. Valerie M. Gonsalves et al., *Staff Perceptions of Risk for Prison Rape Perpetration and Victimization*, 92 PRISON J. 253, 265 (2012).

234. *See generally* 34 U.S.C. § 30307 (2003).

before, during, and after the multiple, documented instances of sexual abuse.”²³⁵

While the notion of external oversight vis-a-vis routine prison audits as a method of prevention is sound, the very structure of the PREA audit requirement is flawed. Professor Brenda Smith identified other perception-based barriers to implementation. She describes a serious barrier that exists: “auditors will not question practice or the sufficiency of a facility’s compliance with the standards as long as apparently compliant policies are in place.”²³⁶ She further maintains that the flaw is inherent in how the audits are conducted, namely, by their insular nature (i.e., prisons pay auditors directly) and lack of knowledge to adequately conduct a review. For example, Smith asserts that, because auditors are “without the expertise or perspective to question long-standing practice within corrections because they come from those same systems, [the PREA audit] has not produced the accountability or spurred the change necessary to prevent the kind of systemic abuse I’ve spent my career working to end.”²³⁷ The audit requirement, in concept, was full of promise to reveal what is happening in the closed prison context. Unfortunately, as applied, the audits fall short of the goal of providing the much sought-after external accountability. Even Judge Walton, who chaired the Prison Rape Elimination Commission, recently emphasized the shortcomings: “DOJ must ensure that audits of the PREA standards return reliable results, which may mean rethinking the structure of the audit.”²³⁸ This lack of accountability must be addressed if PREA is going to have any hope of successfully reducing rape in prison.

235. REP. ON SEXUAL ABUSE OF FEMALE INMATES IN FED. PRISONS, *supra* note 25.

236. *Testimony for the U.S. S. Permanent Subcomm. on Investigations Before the U.S. S. Comm. on Homeland Sec. and Governmental Affairs*, 117th Cong. 4 (2022), (statement of Brenda V. Smith), <https://www.hsgac.senate.gov/wp-content/uploads/imo/media/doc/Smith%20Testimony2.pdf> [hereinafter *Smith Testimony 2022*].

237. *Id.* at 6.

238. Reggie B. Walton, *Opinion: Sexual Assault Should Never Be Part of a Prison Term*, CNN (Sept. 17, 2023, 6:24 PM), <https://www.cnn.com/2023/09/17/opinions/prison-rape-20-years-prea-reforms-judge-walton>.

The final requirement of a public health response demands that relevant measures be widely adopted.²³⁹ The PREA standards have been adopted widely, at least in theory: all federal prisons today have laws and policies that reflect PREA's existence.²⁴⁰ However, a more significant problem relates to the extent to which the evidence gleaned from identification, monitoring, and evidence-based risk and protective factors has been properly *implemented*.²⁴¹ This failure is made more noticeable, especially by the findings of the blistering 2022 Senate Committee Report.²⁴² In particular, implementation appears to be hampered by staff perceptions and interpretations.²⁴³ For example, when staff perform classification of inmate risk of victimization upon intake, research shows this classification is plagued with biases, which undercuts the efficacy of this standard.²⁴⁴ What we learned from the

239. *The Public Health Approach to Violence Prevention*, *supra* note 193.

240. *See FAQ: What Are the PREA Standards and When Are They Effective?*, *supra* note 109.

241. Supporting this, Professor Smith notes, “[W]e know that while the PREA standards outline a successful approach to creating sexually safe institutions, staff and agencies too often do not follow them” *Smith Testimony 2022*, *supra* note 236, at 3.

242. The Subcommittee determined that PREA audits of FCC Coleman and FCI Dublin failed to detect the culture of BOP employees sexually abusing female detainees at those facilities before, during, and after abuse occurred. The Subcommittee also found that BOP does not systematically analyze complaint data to detect potentially problematic employees or institutions. Finally, BOP has accrued a backlog of approximately 8,000 cases and does not report case closure rates in a way that would indicate its progress in clearing the backlog.

REP. ON SEXUAL ABUSE OF FEMALE INMATES IN FED. PRISONS, *supra* note 25, at 17.

243. Research exploring perceptions of correctional staff and incarcerated people found that both groups agreed that PREA is often not taken seriously. Gonsalves, *supra* note 233; *see also* David Struckman-Johnson et al., *A Pre-PREA Survey of Inmate and Correctional Staff Opinions on How to Prevent Prison Sexual Assault*, 93 PRISON J. 429 (2013).

244. Gonsalves, *supra* note 233. The authors looked at correctional staff making decisions for classification based on risk of victimization. First, few justice-involved individuals were given medium or high risk of victimization. Second, they found that staff held different perspectives of risk for men versus women and differed in their corresponding classifications. The impact of administrative considerations played an important role. For example, overcrowding might mean staff is less likely

2022 Senate Committee Report, instead, is that despite the success in gathering data, the BOP is not systematically using this data to assess trends and guide evidence-based strategies reflecting those data.

On a broader level, the closed nature of the carceral setting makes it challenging to easily ascertain knowledge about how and to what extent the implementation of reforms has occurred. This is not a novel conclusion and is one we have written about extensively: prison is a quintessential example of what is known as a closed institutional system.²⁴⁵ Social scientist Erving Goffman initially described places like prisons as “total institutions,” places where people both live and work and where they are cut off or isolated for prolonged amounts of time from the broader community.²⁴⁶ Prisons and other closed systems have a unique structure that lacks day-to-day influence and oversight from external actors. We have previously described prison like a “silo, isolated from the outside world and other closed systems.”²⁴⁷ As a result, what happens within is separate from the outside world and lacks transparency. “The public often has no idea about the inner workings of such a system.”²⁴⁸ Therefore, the closed nature of prisons may prevent the implementation of a true public health response or at least keep hidden what is happening or the effectiveness of implementation. So, perhaps merging the public health approach with one that incorporates baseline humane treatment and external oversight is necessary to move the mandates of PREA from just words into action. We propose that the missing link is to incorporate a human rights approach in conjunction with a true public health approach.

IV. MERGING HUMAN RIGHTS AND PUBLIC HEALTH TO ADDRESS PRISON RAPE

We were first inspired to explore a public health response because Congress explicitly identified prison rape as an epidemic in the

to classify justice-involved individuals as high risk because they must be isolated, and they don't have the staff or space.

245. See *Sexual Violence as an Occupational Hazard*, *supra* note 56, at 890.

246. Erving Goffman, *The Characteristics of Total Institutions*, SYMP. ON PREVENTATIVE & SOC. PSYCH. 15–17 (1957), reprinted in ORG. AND SOC'Y 312, 314 (1961).

247. *Sexual Violence as an Occupational Hazard*, *supra* note 56, at 890.

248. *Id.*

text of the PREA legislation. This was a logical consideration, especially against the backdrop of how sexual violence in the broader community has been described and addressed in a public health context. As evidenced through the discussion in Part Three, extrapolating this generality into the specific context of rape that occurs within prison makes some measure of sense. But is a true public health framework enough?

Even if PREA were to be reconceptualized in response to the epidemic it has been characterized as and subsequently modeled in alignment with a true public health framework, we are concerned about the inherent limitations of the response. Other scholars agree that the public health response carries certain limitations, particularly for a problem of this magnitude.²⁴⁹

[T]he public health approach on its own cannot sufficiently prevent violence on a large scale. The underlying determinants of interpersonal violence, for the most part, lie beyond the reach of the health sector Public health professionals can identify risk factors and interventions, but they still must rely on multisectoral collaboration to implement interventions that will have the greatest impact.²⁵⁰

If public health alone is insufficient to combat a widespread problem like sexual violence in carceral settings, what other options exist?

Looking at its historical origins, PREA was born from research conducted by human rights organizations that brought the problem of prison rape out from behind closed doors and into public view.²⁵¹ But PREA did not, by logical extension, evolve into legislation aligned with a true human rights framework. Twenty years after the passage of PREA, Judge Reggie B. Walton, chair of the NPREC, recalled,

249. See, e.g., Alison Phinney & Sarah de Hovre, *Integrating Human Rights and Public Health to Prevent Interpersonal Violence*, 6 HEALTH & HUM. RTS. 64 (2003).

250. *Id.* at 74–75.

251. “Human rights organizations like HRW and Stop Prisoner Rape (SPR) were critical in defining the contours of PREA.” *PREA Implementation and Issues*, *supra* note 63, at 11.

[t]he Prison Rape Elimination Act was never only about protecting people from sexual abuse in an environment where it is often impossible to protect oneself. It was also about affirming the essential dignity and fundamental human rights of incarcerated people.²⁵²

Returning to those roots may prove fruitful. We are not the first to call for human rights to be used in U.S. prisons to curb the problem of sexual violence, and yet those previous calls have generally not been heeded.²⁵³ In his article on PREA and human rights, Attorney Gallo muses, “PREA still has the potential to be the human rights milestone that it was once meant to be.”²⁵⁴ We appreciate this optimism but also recognize the pitfalls of relying solely on the human rights framework, much like we do for a public health response.

Public health, like human rights, is likely an integral part of the solution but also not enough to simply stand on its own. Merging approaches is a better path forward and is grounded in precedent. Renowned physician Jonathan Mann “viewed human rights as the conscience of public health.”²⁵⁵ He believed that “[t]he field of public health is not solely a scientific pursuit, but should be imbued with the values of ethics and human rights.”²⁵⁶ How the problem is framed drives the creation of solutions. So, moving forward, we put forth a modest suggestion for reform that is grounded in reframing the epidemic of prison rape. We rely on existing blueprints that have been

252. Walton, *supra* note 238.

253. In 1993, “HRW and the American Civil Liberties Union (ACLU), a civil rights organization, worked together to issue a report on the United States’ compliance with the ICCPR, urging enforcement of the ICCPR’s provisions in U.S. courts with respect to prison conditions.” LaBelle, *supra* note 57, at 95. Additionally, attorney Deborah Labelle discussed in 2008 that while there were calls for human rights standards to govern how prisoners were treated in settings such as the Abu Ghraib prison in Iraq, the same condemnation did not apply to the behavior of correctional officials against incarcerated people in our own prisons. She urged that we “bring human rights home” to the world of U.S. detention. *Id.* at 82.

254. Gallo, *supra* note 62, at 6.

255. Lawrence O. Gostin, *Public Health, Ethics, and Human Rights: A Tribute to the Late Jonathan Mann*, 29 J.L. MED. & ETHICS 121, 126 (2001).

256. *Id.* (identifying additional work that needs to be done to make the merger effective).

used to address other public health crises and apply them to the context of prison rape.

We are the first scholars to propose the marriage of public health and human rights to address the problem of sexual violence in carceral settings specifically. “The early insights of the public health movement inspired a commitment among people trained in the health sciences similar to how the human rights movement inspired a commitment among those trained in the legal sciences.”²⁵⁷ Building on this historic work and that which has followed in the intervening years, we find compelling aspects to both movements that give us hope for eradicating this epidemic.

As Professors Phinney and de Hovre opine about the approach to violence generally,

[a]lthough, taken separately, neither approach is sufficient to effect large-scale violence prevention, together they can make significant progress against interpersonal violence[;] [b]y deliberately integrating the two approaches to focus on addressing cross-cutting risk factors, the movement to stop interpersonal violence could gain powerful momentum.²⁵⁸

We note an example illustrating this point from a juvenile detention center in Wayne County, Michigan, that was dealing with overcrowding in its population of residents, a lack of staffing to properly run the facility, and serious allegations of sexual assault.²⁵⁹ In response, the county declared a public health emergency and subsequently “[d]edicated \$10 million toward addressing the facility’s needs and has worked with the Wayne County Circuit Court and the state to reduce the population, increase staffing, expand placements, spread the kids out and start offering mental health treatment, among

257. Stephen P. Marks, *The Evolving Field of Health and Human Rights: Issues and Methods*, 30 J.L. MED. & ETHICS 739, 741 (2002).

258. Phinney & de Hovre, *supra* note 249, at 75.

259. Kara Berg, *Wayne County Ends Public Health Emergency at Juvenile Jail After Cutting Crowding*, DETROIT NEWS (June 5, 2023, 1:07 PM), <https://www.detroitnews.com/story/news/local/wayne-county/2023/06/05/wayne-county-ends-public-health-emergency-at-juvenile-jail/70288454007>.

other improvements.”²⁶⁰ In this instance, county officials responded rapidly with a multi-faceted approach—and it worked.

Other researchers have expressed concern about relying solely on public health to address critical social issues and have looked to this very merger in other contexts. Perhaps no public health emergency is quite as memorable in recent history as the COVID-19 pandemic. The world learned a lot from this crisis that literally affected every corner of the globe, beginning in early 2020 and continuing to the present day. It is widely understood that a swift public health response was crafted to attack the spread of the virus, but nonetheless, at least 3.4 million lives have been lost as of 2024.²⁶¹ For those who live in places like the U.S., we see few reminders of the pandemic anymore. Despite a perception of success with the acute crisis now behind us, the public health response to COVID-19 fell short in many respects. “[H]uman rights were too often neglected or violated in public health prevention, preparedness[,] and response in nearly every country in the world.”²⁶² While some nations have enjoyed relative success in combating the virus, others lag far behind.

Fifteen months after the World Health Organization gave emergency authorization to the first Covid-19 vaccine, huge disparities in vaccine access remain globally. While some people are receiving third and even fourth doses of vaccines, more than 85 percent of people living in low-income countries are still waiting for their first dose.²⁶³

260. *Id.*

261. *The True Death Toll of COVID-19: Estimating Global Excess Mortality*, WORLD HEALTH ORG. (May 20, 2021), <https://www.who.int/data/stories/the-true-death-toll-of-covid-19-estimating-global-excess-mortality>. Experts agree that the actual number of deaths is far higher. *Id.*

262. *Principles and Guidelines on Human Rights & Public Health Emergencies*, UNITED NATIONS HUM. RTS. OFF. HIGH COMM’R 1, 3 (May 20, 2023), <https://www.ohchr.org/sites/default/files/documents/new-york/events/hr75-future-generations/PGs-on-Human-Rights-and-Public-Health-Emergencies-26-June-2023.pdf>.

263. Akshaya Kumar, *Two Years On, What Has Covid-19 Taught Us?*, HUM. RTS. WATCH (Mar. 11, 2022, 12:00 AM),

These shortcomings may not be as discernible at home in the U.S., but a global examination reveals severe and ongoing threats to the health and well-being of individuals in an array of contexts.

The limitations of a pure public health response captured the attention of a broad coalition of jurists, academics, and practitioners, not just in the field of public health but also those who work on human rights. These experts came together in response to the extraordinary difficulties presented by COVID-19 to “clarify the principles and obligations of human rights in the context of public health emergencies.”²⁶⁴ They collaborated and ultimately crafted a publication entitled *Principles and Guidelines on Human Rights and Public Health Emergencies* (“the Principles”).²⁶⁵ These *Principles* were explicitly created in response to COVID-19, but their applicability extends much further.²⁶⁶ Here, we argue that the *Principles* may well help guide the future of addressing not just the spread of viruses in the future but also the epidemic of prison rape. The *Principles* define a public health emergency as:

a newly emergent situation or the intensification in scope and/or scale of an existing situation involving an illness or medical condition, which – irrespective of origin or source – poses or could pose an urgent and significant risk to human life, health, or the basic functioning of society, and/or substantially impact the enjoyment or exercise of human rights in one or more States.²⁶⁷

<https://www.hrw.org/news/2022/03/11/two-years-what-has-covid-19-taught-us> (addressing a number of responses that could have been improved to better protect human rights in the face of the pandemic).

264. *Principles and Guidelines on Human Rights & Public Health Emergencies*, *supra* note 262, at 3.

265. *Id.*

266. *Id.* (“The Principles draw upon lessons gathered from past epidemics and pandemics, including Cholera, Dengue, Ebola, HIV and Zika, where inadequate adherence to effective public health policies and human rights obligations led to disastrous outcomes.”).

267. *Id.* at 7.

The *Principles* were created primarily based on knowledge from other disease-focused epidemics and pandemics. However, as discussed earlier in Part Three, public health is broadly construed to include both medical and nonmedical issues. And while the authors perhaps did not contemplate the same application of the *Principles* as we do here, they nonetheless “take a broad view of what might constitute a ‘public health emergency,’ recognizing that while such crises may vary in scope and in nature, safeguarding human rights remains not only a legal obligation, but vital to an effective public health response.”²⁶⁸ Therefore, we are persuaded that they may provide a useful guide for contemplating a path forward.

A fulsome discussion of the myriad ways the *Principles* might help guide the trajectory of addressing the problem of prison rape and extensive mapping of the criteria is well beyond the scope of this Article.²⁶⁹ Nevertheless, we hope that others will contemplate such an undertaking in the future. Here, however, we highlight two examples that illustrate the power of the intersection of public health and human rights that might catalyze reform.

One of the most glaring criticisms of PREA is its failure to codify a private right of action.²⁷⁰ While victims of sexual violence *may* have the opportunity to pursue civil redress through claims under the Eighth Amendment, these are fraught with limitations stemming in part from judicially imposed obstacles to limit frivolous lawsuits from prisoners. The PLRA further mutes the ability of justice-involved individuals to seek civil redress.²⁷¹ When someone in the open society experiences sexual victimization, they have myriad civil remedies available to them. The lack of those same remedies for justice-involved individuals reflects a perspective that being raped is simply part of the sentence imposed on them. This sentiment is at odds with a democratic society. The *Principles* squarely address this issue in Section II

268. *Id.* at 3.

269. The *Principles* “Overarching Human Rights Principles and Obligations” include: (1) Universal enjoyment of human rights; (2) International solidarity; (3) Rule of law; (4) Equality and non-discrimination; (5) Human rights duties relating to non-State actors; (6) Transparency and access to information; (7) Meaningful and effective participation; (8) Accountability and access to justice for those harmed by human rights violations and abuses. *Id.* at 8–12.

270. See discussion *supra* Section II.C.2.

271. See, e.g., Belitz, *supra* note 89.

(Overarching Human Rights Principles and Obligations): “States must, individually and collectively, guarantee access to effective remedies and full reparation for victims and survivors of human rights violations and abuses committed by State and non-State actors”²⁷² Section II outlines a range of remedies and makes clear that “States must ensure that: judicial remedies are always available for gross human rights violations; and reparation include, as appropriate, provision of services, recognition of benefits and entitlements, compensation, guarantees of non-repetition, rehabilitation, restitution”²⁷³ Indeed, the addition of a private right of action for prisoners who are sexually abused in carceral settings is supported by these provisions outlined in the *Principles*.

The Principles also speak to what to do when States take measures “that result in a limitation to human rights,” requiring that they are “temporary, for a legitimate and specific health purpose, and have strict regard for the principles of legality, necessity, proportionality, and non-discrimination.”²⁷⁴ In carceral settings, when victims report sexual abuse, they are often immediately placed in solitary confinement under the guise of “protection,” a measure that is directly at odds with this mandate.²⁷⁵

There are many examples of how public health and human rights have been used together to address a range of social problems, although we are the first to consider this merger in the context of prison rape.²⁷⁶

272. *Principles and Guidelines on Human Rights & Public Health Emergencies*, *supra* note 262, at 11.

273. *Id.*

274. *Id.* at 17.

275. *See, e.g.*, REP. ON SEXUAL ABUSE OF FEMALE INMATES IN FED. PRISONS, *supra* note 25.

276. A public health response “should be grounded in a protection of human rights with proactive and ongoing community engagement and risk communication.” Haldane et al., *supra* note 47, at 1.

Consideration must be given to equitable representation, whereby those who are often silenced or not given a voice because of their political status (e.g., unregistered migrants) or societal status (e.g., women, LGBTQ+) must be included and represented in debates. Consultation must take place without fear of stigmatization or prosecution, which might prove challenging in many countries. Importantly, these spaces must be accessible, and governments must ensure communication channels are available.

“Rather than being at odds, the public health and the human rights approaches to interpersonal violence are similar and complementary. They share a common aim of improving human well-being by reducing the prevalence of violence.”²⁷⁷ Merging these frameworks in the context of prison rape could help move beyond the “endless epidemic.”

V. CONCLUSION

PREA’s mandates, while well-intended, have fallen short in addressing the epidemic of prison rape. Some of the same exact issues that were identified as contributing to widespread sexual violence in prison before PREA was passed in 2003 persist over twenty years later. The same solutions put forth at the time the law and its related standards were promulgated are still being cited as the right solutions today. Our analysis indicates that there is no reason to think these solutions alone will function to adequately protect victims of sexual violence now if they have not done so over the last two decades. In the twenty years since PREA was enacted, there have been incremental steps forward, but the high hopes for massive reform accompanying its passage have long since been muted. The recent *Sexual Abuse of Female Inmates* report, in addition to the flood of cases in the courts and stories reported by the media, demonstrates that prison rape remains a serious, epidemic-level issue for all justice-involved individuals who are incarcerated in U.S. prisons and jails.²⁷⁸

We urge consideration of a more intentional, well-defined public health-human rights response to end, or at least seriously curtail, the prison rape epidemic. A true public health and human rights framework would likely be grounded in the abolition of prisons as they currently exist in the U.S.; however, if we have learned anything from the lessons of the passage of PREA, it is that change (especially in carceral settings) is slow-moving. While it is tempting to advocate for systemic change vis-a-vis prison abolition, we are concerned with the practical reality that sexual violence will continue unabated inside the closed prison system every single day. Our proposal—to merge public health and human rights frameworks—is not at odds with abolitionist

Id. at 2; see also Phinney & de Hovre, *supra* note 249, at 64.

277. Phinney & de Hovre, *supra* note 249, at 64.

278. REP. ON SEXUAL ABUSE OF FEMALE INMATES IN FED. PRISONS, *supra* note 25.

ideas but exists alongside them and provides hope for justice-involved women today as the abolitionist debate continues. We laud the work being done to consider abolition of the carceral state for all its flaws—systemic racism, sexism, abuse, and beyond—but we cannot abandon the individuals who are incarcerated at the present time and forced to endure sexual violence at the hands of the state. Any proposals for change must be grounded in the lived experience of individuals who experience abuse. Recent events offer hope: the tone of disbelief emanating from the *Sexual Abuse of Female Inmates* report, a return to prison-based issues in the *National Plan to End Gender-Based Violence*, and increased media coverage on abuses occurring across the nation's prisons.²⁷⁹ The time is right to merge public health and human rights frameworks in order to finally end the epidemic of prison rape.

279. *Id.*; U.S. NATIONAL PLAN TO END GENDER-BASED VIOLENCE: STRATEGIES FOR ACTION, *supra* note 51.